

United States District Court  
For the Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**\*E-Filed 02/22/2010\***

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

FEDERAL TRADE COMMISSION,

**No. C 09-03814 RS**

Plaintiff,

**ORDER GRANTING MOTION TO  
DISMISS WITH LEAVE TO AMEND  
AND DENYING MOTION TO STRIKE**

v.

SWISH MARKETING, MARK BENNING,  
et al.,

Defendants.

I. INTRODUCTION

Defendant Mark Benning moves to dismiss the FTC’s Complaint pursuant to Rules 8(a)(2), 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure. Defendant Swish Marketing (“Swish”) argues this Court is not authorized under section 13(b) of the FTC Act, 15 U.S.C. § 53(b) (1994), to award restitution and moves to strike from the Complaint any reference to ancillary monetary relief.

As to his motion to dismiss, Benning contends that the FTC’s allegations “sound in fraud” and therefore must be pleaded with particularity under Rule 9(b). In the alternative, Benning claims that the FTC’s pleadings do not even comprise a “short and plain statement . . . showing the pleader is entitled to relief” as required by Rule 8(a)(2) and should be dismissed on that separate basis. Because the Commission’s averments that Benning participated in and had knowledge of Swish Marketing’s material omissions and misrepresentations satisfy neither Rule 8(a)(2) nor 9(b),

1 defendant Benning's motion to dismiss must be granted with leave to amend. As to Swish's motion  
2 to strike, to grant it this Court would have to ignore an on-point holding from the Ninth Circuit. In  
3 *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982), the Court reasoned that Congress vested  
4 the district court with equitable jurisdiction under section 13(b) to award full relief, including  
5 restitution. Swish's argument, while interesting and well-presented, does not warrant abandonment  
6 by this Court of binding Circuit precedent. The motion to strike therefore must be denied.

7  
8 II. RELEVANT FACTS

9 The Federal Trade Commission ("FTC" or "Commission") alleges that Swish and three of its  
10 officers violated section 5 of the FTC Act, 15 U.S.C. § 45 (2006), in connection with the  
11 advertisement and sale of financial services over the Internet. Between at least September of 2006  
12 and 2007, Swish operated websites that offered short-term, high-interest loans. The FTC describes  
13 how Swish failed to disclose to consumers that, when they applied for a loan advertised on one of  
14 Swish's websites, they sometimes also unwittingly agreed to purchase a pre-paid debit card sold by  
15 a marketing affiliate, VirtualWorks, LLC. According to the Complaint, Swish transferred bank  
16 account information released by consumers to facilitate their loans directly to VirtualWorks. That  
17 entity then used the information to deduct sufficient funds to "pay" for the debit cards.

18 The FTC insists that Swish and VirtualWorks collaborated in the debit card scheme: Swish  
19 hosted the websites that advertised the loans, had some control over presentation and accessibility to  
20 the public, and earned money each time a consumer accepted the debit card offer. Swish admits it  
21 displayed the advertisements on its websites but counters that VirtualWorks prepared all text  
22 relating to the debit card offer and denies any monetary remuneration directly from consumers.

23 III. DISCUSSION

24 A. Federal Rule of Civil Procedure 9(b).

25 Federal Rule of Civil Procedure 9(b) provides that "[i]n allegations of fraud or mistake, a  
26 party must state with particularity the circumstances constituting fraud or mistake." To satisfy the  
27 rule, a plaintiff must allege the "who, what, where, when, and how" of the charged misconduct.  
28

1 *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997). In other words, “the circumstances  
2 constituting the alleged fraud must be specific enough to give defendants notice of the particular  
3 misconduct so that they can defend against the charge and not just deny that they have done  
4 anything wrong.” *Vess v. Ciba-Geigy Corp. U.S.A.*, 317 F.3d 1097, 1106 (9th Cir. 2003). By  
5 contrast, “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged  
6 generally.” Fed. R. Civ. Pro. 9(b). Where the complaint alleges corporate fraud but ascribes  
7 liability to individuals, “the allegations should include the misrepresentations themselves with  
8 particularity and, where possible, the roles of the individual defendants in the misrepresentations.”  
9 *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989).

10 In the Ninth Circuit, Rule 9(b) applies where a complaint “sounds” or is “grounded” in  
11 fraud. *Vess*, 317 F.3d at 1103. This is true where a complaint alleges fraud as an essential element  
12 of the claim for relief or where fraud is *not* a necessary element but the plaintiff alleges what  
13 amounts to fraudulent conduct. *Id.* at 1103-04 (noting that a complaint sounds in fraud where a  
14 plaintiff alleges a “unified” course of fraudulent conduct or, instead, alleges some fraudulent and  
15 some non-fraudulent conduct; in the latter case, Rule 9(b) applies only to the fraudulent conduct).  
16 While the standard is somewhat difficult to apply, the rationale behind it rests on the preference for  
17 substance over form: where a complaint alleges conduct which in effect amounts to fraud,  
18 defendants are entitled for policy reasons to the enhanced reliability and notice that accompany  
19 more detailed pleadings. *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001).

20 Section 5(a) of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting  
21 commerce.” 15 U.S.C. § 45 (2006). The FTC argues its Complaint is not subject to Rule 9(b)  
22 because “[a] claim that the defendants violated section 5 by engaging in ‘deceptive acts and  
23 practices’ is not a claim of fraud.” Fraud, the Commission correctly points out, is not a necessary  
24 element under the Act. The Commission further asserts that allegations must actually “add up” or  
25 “amount,” element by element, to fraud to satisfy the “sounding” standard.

26 The Commission relies on cases within this Circuit applying Rule 9(b) in the context of the  
27 Securities Exchange Act. *See, e.g., In re Charles Schwab*, 257 F.R.D. 534, 545 (N.D. Cal. 2009).

28

1 Typically, these cases involved fact patterns where a complaint relied on the same facts to prove a  
2 violation of section 10(b) (where fraud is a necessary element) and section 11 (where fraud is not).  
3 *See, e.g., In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1404-05 (9th Cir. 1996); *In re Daou Sys., Inc.*,  
4 411 F.3d 1006, 1027 (9th Cir. 2005). The facts, then, did not merely “sound” in fraud; they  
5 comprised it. When courts in the securities context have not applied Rule 9(b) to section 11  
6 allegations, the rationale has been that the section holds defendants strictly liable for even innocent  
7 or negligent material misrepresentations. Thus, where the SEC *alleges* only an innocent or  
8 negligent act, it need not plead with particularity facts that have no resemblance to fraud. *See*  
9 *Charles Schwab*, 257 F.R.D. at 545 (finding 9(b) inapplicable to “pure” section 11 claim).

10 By contrast, courts in this circuit have required heightened pleading even where a plaintiff  
11 neither needed to prove nor alleged all elements of common law fraud. *See, e.g., Asis Internet*  
12 *Services v. Subscriberbase, Inc.*, No. 09-3503, slip op. at \*3 (N.D. Cal. Dec. 04, 2009)  
13 (acknowledging that plaintiffs could not make out all elements of common law fraud but requiring  
14 that they satisfy Rule 9(b)’s heightened requirements where allegations under California’s False  
15 Advertising Law were nonetheless “grounded in fraud”); *In re Actimmune Mktg.*, No. 08-02376, slip  
16 op. at \*8 (N.D. Cal. Nov. 6, 2009) (finding that even though plaintiff’s fraudulent business practices  
17 claim under the UCL did not require a showing of actual fraud, it still “sounded” in it). Similarly,  
18 the D.C. Circuit in *United States of America ex rel. Totten v. Bombardier Corporation*, 286 F.3d  
19 542, 551-52 (D.C. Cir. 2002) termed the distinction, for Rule 9(b) purposes, between a fraudulent  
20 claim and a false one “hairsplitting.” Where the False Claims Act, 31 U.S.C. § 3729, made both  
21 claims actionable but required proof of scienter only for the former, the plaintiff argued Rule 9(b)  
22 did not apply. The Court disagreed:

23  
24 The difference between the two claims is simply the degree of scienter involved.  
25 But this difference is entirely insignificant in the context of Rule 9(b)’s pleading  
26 requirements. Indeed, the rule specifically allows allegations of intent,  
27 knowledge, and other condition[s] of the mind to be averred generally. In  
28 contrast, the circumstances that must be pleaded with specificity are matters such  
as the time, place, and contents of the *false* representations, such representations  
being the *element* of fraud about which the rule is chiefly concerned.

1           *Id.* (citations and internal quotation marks omitted) (emphases in original). Here, the  
2 Commission’s burden of proof resembles one for common law fraud except that it need not  
3 demonstrate Benning’s subjective intent to defraud. *FTC v. Publishing Clearing House, Inc.*, 104  
4 F.3d 1168, 1171 (9th Cir. 1996). To establish individual liability under the Act, the FTC must  
5 prove: (1) misrepresentations or omissions; (2) of material fact; (3) of a kind usually relied upon by  
6 reasonably prudent persons; (4) that consumer injury resulted; and (5) that the individual  
7 participated directly in the acts or practices or had authority to control them. *Id.* at 1170; *FTC v.*  
8 *Amy Travel Service, Inc.*, 875 F.2d 564, 573 (7th Cir. 1989). To recover restitution from an  
9 individual, the FTC must also prove “knowledge that the corporation or one of its agents engaged in  
10 dishonest or fraudulent conduct.” *Publishing Clearing House*, 104 F.3d at 1171 (noting an  
11 individual had “knowledge” where he was actually aware of “material representations, was  
12 recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high  
13 probability of fraud along with an intentional avoidance of the truth”).

14           As Rule 9(b) particularity is not focused on intent, it would be anomalous to suggest that a  
15 section 5 claim is free from Rule 9(b)’s heightened pleading requirement because the FTC need not  
16 prove scienter here. The gravamen of the Complaint is that Swish and its agents—motivated by the  
17 potential to profit—hoodwinked unwitting loan applicants by inducing payment for a \$50 debit card  
18 they neither wanted nor considered. The general applicability of Rule 9(b) to section 5 actions is a  
19 real prospect. As noted below, however, in this particular context, the outcome for Benning’s  
20 motion does not turn on that question. Whether or not a section 5 violation “sounds” in fraud, the  
21 Commission’s allegations against Benning in particular fail to meet the general pleading standard  
22 contained in Federal Rule of Civil Procedure 8(a)(2).

23 **B. Federal Rule of Civil Procedure 8(a)(2).**

24  
25           To state a claim for relief, Rule 8(a)(2) demands that a pleading include a “short and plain  
26 statement of the claim showing that the pleader is entitled to relief.” The Supreme Court has  
27 instructed that this mandate does not require “detailed factual allegations,” but “demands more than  
28

1 an unadorned, the-defendant-harmed-me accusation” or “naked assertion[s] devoid of further factual  
2 enhancement.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (internal quotation marks omitted).  
3 “A pleading that offers ‘labels and conclusions’ or a ‘formulaic recitation of the elements of a cause  
4 of action will not do.’” *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).  
5 Accordingly, dismissal under Rule 12(b)(6) is appropriate where a complaint lacks “sufficient facts  
6 to support a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097,  
7 1104 (9th Cir. 2008). When considering a motion to dismiss, a court accepts a plaintiff’s factual  
8 allegations as true and construes the complaint in the light most favorable to the plaintiff. *Jenkins v.*  
9 *McKeithen*, 395 U.S. 411, 421 (1969). This tenet does not apply, however, to bare legal  
10 conclusions. *Twombly*, 550 U.S. at 555 (“Threadbare recitals of the elements of a cause of action,  
11 supported by mere conclusory statements, do not suffice.”). Even where the plaintiff alleges  
12 something more than a bare legal conclusion, *Twombly* requires a statement of a plausible claim for  
13 relief. *Id.* at 544. Weighing a claim’s plausibility is ordinarily a task well-suited to the district court  
14 but, where the well-pleaded facts do not permit the court to infer more than a mere *possibility* of  
15 misconduct, the complaint has not shown the pleader is entitled to relief. *Iqbal*, 129 S. Ct. at 1950.

16 Benning argues the Complaint—insofar as it implicates him—satisfies neither *Twombly*’s  
17 requirement of something more than “threadbare” recitations of elements and legal conclusions nor  
18 its demand for a plausible claim for relief. As to *Twombly*’s first principle, the only time Benning’s  
19 name is expressly mentioned in the Complaint, it is to allege:

20  
21 Defendant Mark Benning was at all times material to this Complaint the CEO for  
22 Defendant Swish. At all times material to this Complaint, acting alone or in concert  
23 with others, he has formulated, directed, controlled, had the authority to control, or  
24 participated in the acts and practices of Swish, including the acts and practices set  
25 forth in this Complaint. Defendant Benning resides in this district and, in connection  
26 with the matters alleged herein, transacts or has transacted business in this district  
27 and throughout the United States.

28 The FTC uses this exact language to describe the actions of defendants Matthew Patterson and Jason  
Strober. Throughout the Complaint, the FTC does describe in considerable detail the websites

1 operated by Swish, the relationship between Swish and VirtualWorks, and the circumstances behind  
2 the material omission and misrepresentations that comprise Counts I and II. The “factual”  
3 allegations alleged against Benning, by contrast, are cursory at best.

4       Next, even were this Court to accept the Complaint’s allegations as well-pleaded, Benning  
5 argues it still fails to state a plausible claim for relief. As *Twombly* explains, “[a] claim has facial  
6 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable  
7 inference that the defendant is liable for the misconduct alleged.” 550 U.S. at 556. At the same  
8 time, “[w]here a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it  
9 ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Iqbal*, 129 S.  
10 Ct. at 1949 (*quoting Twombly*, 550 U.S. at 556-57). The FTC argues Benning’s position as CEO of  
11 Swish Marketing makes his involvement in the debit card scheme plausible. For support, the  
12 Commission cites to *FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1996),  
13 where the Ninth Circuit reviewed the summary judgment of a section 5 violation for deceptive  
14 telemarketing. After reciting the elements for individual liability detailed in the foregoing section—  
15 proof of corporate liability, plus direct participation in the deceptive acts or authority to control them  
16 and some knowledge that the corporation or its agents engaged in deceptive or fraudulent conduct—  
17 the Court paused to explain the “authority to control” phrase.

18       The Court reasoned that “[the defendant’s] assumption of the role of president of [the  
19 corporation] and her authority to sign documents on behalf of the corporation demonstrate that she  
20 had the requisite control.” *Id.* The Commission argues that Benning’s status as CEO, standing  
21 alone, plausibly demonstrates his control over the company (and warrants the inference of  
22 involvement in the deception). The Commission ignores that substantial facts were before the  
23 Circuit in *Publishing Clearing House* detailing the defendant’s relationship not only to the  
24 corporation but also to its telemarketing scheme. *Id.* at 1171 (“[Her] activities included obtaining  
25 and signing PCH’s business license and signing the fund-raising agreement between PCH and [a  
26 fraudulent charity whose] application to conduct charitable solicitation identified [her] as the person  
27  
28

1 in ‘direct charge of conducting the solicitation.’”).<sup>1</sup> The Commission’s conclusory assertions of  
2 authority—untethered to virtually any supportive facts—do not support an inference of Benning’s  
3 involvement.

4 As to knowledge, the Commission insists that paragraph twenty-four of its Complaint makes  
5 Benning’s knowledge plausible: “Consumers filed complaints with VirtualWorks, Defendants, the  
6 Better Business Bureau, law enforcement agencies, banks and payday lenders during this period.”  
7 Additional facts such as the number of consumers who complained directly to Benning, or the size  
8 and structure of Swish reflecting senior management involvement might render any amended  
9 complaint adequate. As *Amy Travel* explained, “the degree of participation in business affairs is  
10 probative of knowledge.” 875 F.2d at 574. In any event, as currently constituted the complaint  
11 presents virtually no facts to tie Benning to the debit card scheme or to suggest his knowledge  
12 moves from the conceivable to the plausible. In light of the Commission’s broad investigatory  
13 power and its ability to obtain discovery prior to the commencement of this litigation, requiring it to  
14 advance some factual connection between Benning and the alleged deceptive acts should not  
15 represent an unreasonable or impractical expectation.

16 C. Ancillary Monetary Relief.

17  
18 Federal Rule of Civil Procedure 12(f) provides that a “court may order stricken from any  
19 pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.”  
20 “[T]he function of a [Rule] 12(f) motion to strike is to avoid the expenditure of time and money that  
21 must arise from litigating spurious issues by dispensing with those issues prior to trial . . . .” *Sidney-*

22  
23 <sup>1</sup> See, e.g., *FTC v. Freecom Commc’ns, Inc.*, 401 F.3d 1192, 1205 (10th Cir. 2005) (finding  
24 individual defendant liable where evidence of frequent meeting attendance, final control over all  
25 senior hiring and marketing campaigns, and status as controlling shareholder of a closely held  
26 corporation supported inference of authority to control corporate defendant); *Amy Travel*, 875 F.2d  
27 at 575 (finding “clear” evidence of defendants’ authority and involvement where they “were the  
28 principal shareholders and officers of the corporations,” “created the businesses, opened new ones,  
wrote telemarketing scripts, and hired personnel” and “controlled the financial affairs of the  
companies and reviewed the sales reports and other information”); *FTC v. Innovative Mktg., Inc.*,  
654 F. Supp. 2d 378, 387 (D. Md. 2009) (accepting FTC’s pleadings against individual where  
complaint “specifically allege[d]” CEO “personally handled” finances and the \$3.3 million spent on  
fraudulent advertising was directly traceable to his personal credit card).

1 *Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). Properly executed, a motion to  
2 strike streamlines a judge’s inquiry by focusing his or her attention only on the “real issues in the  
3 case.” *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1528 (9th Cir. 1993), *rev’d on other grounds*, 510  
4 U.S. 517 (1994). It eliminates from consideration that which “can have no possible bearing on the  
5 subject matter of the litigation.”<sup>2</sup> *Naton v. Bank of California*, 72 F.R.D. 550, 552 n.4 (N.D. Cal.  
6 1976).

7 The FTC seeks a permanent injunction under the Act’s section 13(b), 15 U.S.C. § 53(b)  
8 (1994), and restitution ancillary to this equitable relief. Swish argues that a district court does not  
9 have authority to order restitution under a statute that expressly provides only for a preliminary or  
10 permanent injunction and moves to strike from the Complaint any reference to monetary relief.  
11 Swish buoys its argument that section 13(b) does not contemplate restitution by reference to another  
12 section under the Act that does. Section 19 grants a district court jurisdiction to craft a broad  
13 equitable remedy in one of two circumstances: (1) a defendant violates any Commission rule and  
14 engages in an unfair or deceptive practice that also violates section 5; or (2) a defendant engages in  
15 any unfair or deceptive practice in violation of a Commission cease-and-desist order and the  
16 Commission satisfies the Court that a reasonable person under the circumstances would perceive the  
17 practice as unfair or deceptive. 15 U.S.C. § 57b(a) (1975). The section then outlines the available  
18 remedies:

19 (b) Nature of relief available

20 The court in an action under subsection (a) of this section shall have jurisdiction to  
21 grant such relief as the court finds necessary to redress injury to consumers or other  
22 persons, partnerships, and corporations resulting from the rule violation or the unfair  
23 or deceptive act or practice, as the case may be. Such relief may include, but shall

24 <sup>2</sup> The parties agree that this Court’s ability to fashion an equitable remedy under section 13(b) is a  
25 “real” issue. Swish reasons that *should* the Court agree that 13(b) does not contemplate monetary  
26 relief, the motion to strike would indeed “narrow” the inquiry to whether a permanent injunction is  
27 warranted. The Commission insists that Swish’s request exceeds the scope of Rule 12(f). The  
28 Commission calls Swish’s claim “substantive,” “disputed” and contrary to “three decades of legal  
bedrock.” *See McArdle v. AT&T Mobility, LLC*, No. 09-1117, 2009 U.S. Dist. LEXIS 89231, at  
\*24-25 (N.D. Cal. Sept. 14, 2009) (courts are reluctant to determine disputed or substantial issues of  
law on a motion to strike affirmative defense).

1 not be limited to, rescission or reformation of contracts, the refund of money or  
2 return of property, the payment of damages, and public notification respecting the  
3 rule violation or the unfair or deceptive act or practice, as the case may be; except  
4 that nothing in this subsection is intended to authorize the imposition of any  
5 exemplary or punitive damages.

6 Extrapolating from the differences between these two sections, Swish argues that sections 13  
7 and 19 comprise a complete and “elaborate regulatory scheme” whereby section 13 provides only  
8 interim relief until the Commission has sufficient time, first, to complete either the rulemaking or  
9 adjudication required by section 19 and, second, to seek a remedy in district court for continuing  
10 violations. Where a district court grants a permanent injunction with an ancillary award for  
11 restitution or disgorgement, Swish suggests, it takes an impermissible shortcut.

12 In *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982), the Ninth Circuit reviewed a  
13 district court’s preliminary injunction order on the grounds that its award of an accompanying asset  
14 freeze was not expressly authorized under the FTC Act. The Court reasoned that there were two  
15 jurisdictional bases on which to ground the injunction: sections 13(b) and 19. The Court first  
16 likened the asset freeze to the “old equitable remedy” of rescission. *Id.* at 1112. “Because the  
17 authority to issue a preliminary injunction rests upon the authority to give final relief,” the Court  
18 reasoned, “the authority to freeze assets by a preliminary injunction must rest upon the authority to  
19 give a form of final relief—[rescission of contract and restitution]—to which the asset freeze is an  
20 appropriate provisional remedy.” *Id.* The Court further noted that section 13(b) gave the  
21 Commission power to fashion complete equitable relief.

22 In *Singer*, the court relied heavily on two Supreme Court decisions interpreting a district  
23 court’s remedial power when sitting in equity. In *Porter v. Warner Holding Co.*, 328 U.S. 395  
24 (1946), a case reviewing an injunctive provision in the Price Control Act (“EPCA”),<sup>3</sup> the Court held  
25 that when Congress invokes the district court’s equitable jurisdiction in a statute, “all the inherent

26 <sup>3</sup> *Porter* analyzed a court’s power under the EPCA, 50 U.S.C. § 925(a) (1942), to order restitution of  
27 rents collected in excess of permissible maximums. 328 U.S. at 396. The Act provided that the  
28 Administrator could, where any person “has engaged in or is about to engage in” a violation of the  
Act, “make application to the appropriate court for an order enjoining such acts or practices, or for  
an order enforcing compliance with such provision . . . [and] a permanent or temporary injunction,  
restraining order, or other order shall be granted without bond.” § 925(a) (emphasis added).

1 equitable powers of the district court are available for the proper and complete exercise of that  
2 jurisdiction.” *Id.* at 398. Moreover, where the statute serves the public interest, “those equitable  
3 powers assume an even broader and more flexible character . . . .” *Id.* If the public interest would  
4 be so served, the district court “may act so as to adjust and reconcile competing claims and so as to  
5 accord full justice to all the real parties in interest,” and “may go beyond the matters immediately  
6 underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief  
7 may be necessary . . . .” *Id.*

8 Comprehensive equitable power resides in the district court, *Porter* reasoned, absent “a clear  
9 and valid legislative command.” *Id.* Indeed, “[u]nless a statute in so many words, or by necessary  
10 and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that  
11 jurisdiction is to be recognized and applied.” *Id.* More than a decade later, the Court in *Mitchell v.*  
12 *Robert De Mario Jewelry, Inc.*, 361 U.S. 288 (1960), pushed *Porter*’s analysis further. When  
13 interpreting the Fair Labor Standards Act (“FLSA”),<sup>4</sup> the Court theorized that Congress acts against  
14 the backdrop of the district court’s equitable power: “[w]hen Congress entrusts to an equity court  
15 the enforcement of prohibitions contained in a regulatory enactment, it . . . act[s] cognizant of the  
16 historic power of equity to provide complete relief in the light of statutory purposes.” *Id.* at 291-92.

17 In *Singer*, the Court reviewed a district court’s ability to order restitution under section  
18 13(b), applied the instructions from *Porter* and *Mitchell*, and declared: “We hold that Congress,  
19 when it gave the district court authority to grant a permanent injunction . . . also gave the district  
20 court authority to grant any ancillary relief to accomplish complete justice because it did not limit  
21 that traditional equitable power explicitly or by necessary and inescapable inference.” *Singer*, 668  
22 F.2d at 1113. *Singer* rejected Swish’s argument that section 19, which explicitly vests the district  
23 court with power to award restitution, restricts the injunctive relief provided in section 13(b). The  
24

---

25 <sup>4</sup> The challenged section gave district courts jurisdiction “for cause shown, to restrain violations of  
26 section 15, Provided, That no court shall have jurisdiction, in any action brought by the Secretary of  
27 Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or  
28 unpaid overtime compensation or an equal amount as liquidated damages . . . .” 29 U.S.C. § 217  
(1938). *Mitchell* also insisted that the applicability of the *Porter* principle was “not to be denied . . .  
because . . . having set forth the governing inquiry, [*Porter*] went on to find in the language of the  
statute affirmative confirmation of the power to order reimbursement.” *Mitchell*, 361 U.S. at 291.

1 Court cited section 19’s savings clause: “Remedies provided in this section are in addition to, and  
2 not in lieu of, any other remedy or right of action provided by State or Federal law.” *Id.*

3 Swish asks this Court to limit the applicability of *Singer*; the defendants characterize  
4 *Singer*’s 13(b) analysis as dicta and argue that this Court need not follow it here. It is this particular  
5 portion of *Singer*’s analysis, though, that the Ninth Circuit has cited with favor—and to which  
6 district courts have loyally adhered—for nearly three decades. *See, e.g., FTC v. Pantron I Corp.*, 33  
7 F.3d 1088, 1102 (9th Cir. 1994) (citing *Singer* for the proposition that a district court may award  
8 monetary relief under section 13(b)); *FTC v. Silueta Distribs., Inc.*, No. 93-4141, 1995 WL 215313,  
9 at \*7-8 (N.D. Cal. Feb. 24, 1995) (citing both *Singer* and *Pantron I* and ordering disgorgement  
10 under section 13(b)). This Court is not free to parse or limit *Singer* unless and until so directed by  
11 governing appellate authority.

12 Swish contends that just such intervening authority can be found in *Meghrig v. K.F.C.*  
13 *Western, Inc.*, 516 U.S. 479 (1996). *Meghrig* held that the grant of general equity jurisdiction under  
14 the citizen-suit provision of the Resource Conservation and Recovery Act (“RCRA”) did not  
15 authorize restitution for past toxic cleanup costs.<sup>5</sup> *Id.* at 481. Central to the Court’s holding was its  
16 conclusion that RCRA was not “principally designed to effectuate the cleanup of toxic waste sites or  
17 to compensate those who have attended to the remediation of environmental hazards.” *Meghrig*,  
18 516 U.S. at 483. Instead, RCRA’s primary purpose was to “reduce the generation of hazardous  
19 waste” and to ensure proper treatment of existing waste to minimize present and future harm. *Id.*  
20 Upon a showing that toxic waste presented an “imminent and substantial” hazard, a private party  
21 suing under section 6972(a) could seek only an injunction: (1) ordering a responsible party to “clean  
22 up” the waste; or (2) “restraining” a responsible party from any future RCRA violation. *Id.* at 484-  
23 85. Neither, the Court insisted, included repayment for *past* (*i.e.*, no longer “imminently”  
24 hazardous) cleanups.

25  
26 \_\_\_\_\_  
27 <sup>5</sup> The provision provided that “[t]he district court shall have jurisdiction . . . to restrain any person  
28 . . . who has contributed or who is contributing to the past or present handling . . . of any solid or  
hazardous waste . . . [or] to order such person to take such other action as may be necessary, or both  
. . . .” 42 U.S.C. § 6972(a) (1976).

1 To support its conclusion, *Meghrig* drew a comparison between RCRA’s citizen-suit  
2 provision and its analogue in the Comprehensive Environmental Response, Compensation and  
3 Liability Act (“CERCLA”), an environmental statute aimed at ameliorating, preventing and  
4 *compensating* for harm from hazardous wastes. CERCLA differed from RCRA, the Court reasoned,  
5 in its purpose and the remedies it provided. Specifically, CERCLA’s citizen-suit provision also  
6 tasked Article III courts with remedying violations of CERCLA’s provisions but expressly allowed  
7 “any person [to] seek contribution from any other person who is liable.” 42 U.S.C. § 9613(f)(1).  
8 In language now heavily relied upon by *Swish*, the Court explained: “[w]here Congress has  
9 provided ‘elaborate enforcement provisions’ for remedying the violation of a federal statute, it  
10 cannot be assumed that Congress intended to authorize by implication additional judicial remedies  
11 for private citizens suing under the statute.” *Meghrig*, 516 U.S. at 487-88. “It is an elemental canon  
12 of statutory construction that where a statute expressly provides a particular remedy or remedies, a  
13 court must be chary of reading others into it.” *Id.* at 488.

14 *Meghrig* did not, however, overrule *Porter* and *Mitchell*. Indeed, the Court continues to cite  
15 *Porter* with approval. *See, e.g., United States v. Oakland Cannabis Buyers’ Co-op.*, 532 U.S. 438,  
16 496 (2001) (relying on *Porter* for the proposition that district courts sitting in equity have discretion  
17 to craft a fitting remedy “unless a statute clearly provides otherwise”); *Miller v. French*, 530 U.S.  
18 327, 340-41 (2000) (same). In *United States v. Rx Depot*, 438 F.3d 1052, 1056 (10th Cir. 2006), the  
19 Tenth Circuit characterized RCRA as “a statute that fit into the exceptions recognized by *Porter* and  
20 *Mitchell*” if only because the Court discerned in it a “clear legislative command” precluding  
21 restitution. *Swish* does not dispute that *Porter* and *Mitchell* remain good law but construes from  
22 *Meghrig* a working standard for a “clear legislative command.” Specifically, *Swish* argues that the  
23 *Meghrig* analysis controls where: (1) Congress provides “elaborate enforcement provisions” in a  
24 statutory scheme; and (2) the express statutory remedies it includes are “forward-looking.”

25 In support of the first factor, *Swish* dedicates much of its argument to demonstrating  
26 legislative intent that sections 13(b) and 19 “work *together* as a statutory plan for the protection of  
27 the public.” Because Congress expressly provided for restitution in section 19, *Swish* contends that  
28

1 this Court may not “read” it into section 13(b). *Singer* held, however, that Congress *did not* actually  
2 intend for sections 13(b) and 19 to operate always in tandem. While section 13(b) may provide  
3 temporary relief pending a section 19 action, Congress also expressly provided for permanent relief  
4 in lieu of the more cumbersome administrative processes required by section 19. *Singer*, 668 F.2d  
5 at 1110.

6 Swish makes the apt counter that the procedural protections expressly contemplated in  
7 section 19 are notably absent in section 13(b). Swish contends that when Congress provides for a  
8 monetary remedy, it vests defendants with procedural protection. Only section 19 expressly  
9 contemplates “the refund of money or return of property” and the “payment of damages” and  
10 includes a three-year statute of limitations. 15 U.S.C. § 57b(b) & (d). In *Meghrig*, Justice  
11 O’Connor emphasized that only CERCLA expressly provided for recovery of remediation costs,  
12 contained a statute of limitations, and imposed a reasonability requirement on remediation awards.  
13 *Meghrig*, 516 U.S. at 486 (“If Congress had intended [section] 6972(a) to function as a cost-  
14 recovery mechanism, the absence of these provisions would be striking.”). *Cf. United States v.*  
15 *Phillip Morris*, 396 F.3d 1190, 1200-01 (D.C. Cir. 2005) (refusing to award disgorgement under  
16 civil RICO provision where similar remedy was available in criminal forfeiture provision but  
17 accompanied by proof beyond a reasonable doubt burden and five-year statute of limitations). Even  
18 so, the existence of procedural protections in combination with express monetary remedies  
19 elsewhere in the EPCA did not deter the Court in *Porter*. 328 U.S. at 406.

20 Second, Swish argues that the FTC Act’s language, like RCRA’s, is “forward looking” and  
21 does not contemplate a “backward looking” remedy like disgorgement or restitution. While the  
22 EPCA (reviewed in *Porter*) directed courts to enjoin any person who “*has engaged* in or is about to  
23 engage in” a violation, the FTC Act contemplates the restraining of any person who “is violating or  
24 is about to violate” section 5. Section 13(b) speaks only in the present and future tenses. Although  
25 the appellate courts do not appear to have published guidance on section 13(b) in light of *Meghrig*,  
26 circuit courts that have considered *Meghrig*’s “forward looking” rationale have not consistently  
27 treated it as dispositive. *Compare Rx Depot*, 438 F.3d at 1058 (refusing, even where statute’s  
28

1 language was “forward-looking,” to apply *Meghrig* or to restrict district court’s power to order  
2 restitution under the FDCA); *with Phillip Morris*, 396 F.3d at 1192 (characterizing civil RICO  
3 provision’s grant of equity jurisdiction as “forward-looking” and then applying *Meghrig*).

4 Moreover, *Meghrig* relied on other factors not at issue here. The Court recognized that,  
5 structurally, cleanup costs would have worked as an awkward remedy under RCRA. The statute  
6 prohibited citizen-suits when either the EPA or the State commenced a separate enforcement action.  
7 42 U.S.C. § 6972(b)(2)(B) & (C). If RCRA provided for restitution under its citizen-suit provision,  
8 only those parties whose waste problems were not so severe as to attract the attention of the agency  
9 or government could seek compensation. *Meghrig*, 516 U.S. at 486 (terming this possibility  
10 “wholly irrational”). Second, *Meghrig*’s holding was narrow: Congress did not intend for *private*  
11 citizens to recover past cleanup costs under RCRA’s citizen suit provision. *Porter* instructed that  
12 the district court’s “equitable powers assume an even broader and more flexible character” in  
13 enforcement actions designed to serve the public interest. *Porter*, 328 U.S. at 398. Reasonable  
14 minds may differ as to whether the FTC Act is more analogous to RCRA / CERCLA or to the  
15 EPCA / FLSA. In any event, *Meghrig* does not render *Singer* either unreliable or less binding.

### 16 III. CONCLUSION

17 The FTC’s Complaint fails to establish a factual nexus between Benning and the corporate  
18 defendant’s alleged misrepresentations and omissions and cannot satisfy Rule 8(a)(2)’s requirement  
19 of a “short and plain statement showing that the pleader is entitled to relief.” The defendant’s  
20 motion to dismiss is therefore granted with leave to amend. Next, in light of its reading of *Singer*’s  
21 instruction that a district court sitting in equity has authority to grant ancillary monetary relief under  
22 section 13(b), and the subsequent reliance on *Singer* for this proposition by myriad courts, neither  
23 *Meghrig* nor other binding case authority warrant a refusal by this Court to follow Circuit precedent.  
24 The defendants’ motion to strike therefore is denied.

25  
26 IT IS SO ORDERED.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Dated: 02/22/2010

  
\_\_\_\_\_  
RICHARD SEEBORG  
UNITED STATES DISTRICT JUDGE