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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Jose Division

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

SWISH MARKETING, INC., a corporation,

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

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

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

Defendants.

Case No. C09-03814 RS

Hearing Date: January 13, 2010
Hearing Time: 9:30 a.m.
Courtroom: 4, 5th Floor

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO STRIKE

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I. INTRODUCTION

The moving defendants ask this Court to buck well-settled precedent and clear congressional intent, and hold that all references in the Federal Trade Commission's ("FTC" or "Commission") Complaint (Dkt. #1) to monetary relief are "redundant, immaterial, impertinent, or scandalous," and thus should be stricken pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. The moving defendants' motion to strike (Dkt. #34) is nothing more than a feeble attempt to challenge well-settled law—the availability of monetary relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b) (2006). First, the moving defendants fail to satisfy the requirements of Rule 12(f). Second, even if the Court were inclined to entertain their core argument at this preliminary stage, the moving defendants premise their position on inapposite cases, incomplete legislative history, and hyperbole. Courts—including the Ninth Circuit—have long read Section 13(b)'s grant to issue injunctions as an authorization for courts to award the full range of equitable relief, including disgorgement of ill-gotten gains and other equitable monetary relief. *See, e.g.*, *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111–13 (9th Cir. 1982); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1315 (8th Cir. 1991); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572 (7th Cir. 1989); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1433–34 (11th Cir. 1984); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718–19 (5th Cir. 1982). The moving defendants argue that this Court should ignore these long-standing precedents, basing their position solely on cases that address questions irrelevant to the FTC Act. For these reasons, the Court should deny the moving defendants' motion to strike.

II. ISSUE TO BE DECIDED

The Court must decide whether the moving defendants have satisfied the strict requirements under Rule 12(f) of the Federal Rules of Civil Procedure to have stricken from the FTC's Complaint, brought pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b) (2006), for violations of Section 5 of the FTC Act, 15 U.S.C. § 45 (2006), all

references to monetary relief, which the Ninth Circuit has long held to be a remedy that a district court may authorize pursuant to Section 13(b) of the FTC Act.

III. RELEVANT FACTS

In its Complaint, the FTC alleges that the defendants have violated Section 5 of the FTC Act, 15 U.S.C. § 45 (2006), in connection with the advertisement and sale of financial services over the Internet. As set forth in the Complaint, the defendants operated websites offering "payday loans" (*i.e.*, short-term, high-interest loans), which failed to adequately disclose to consumers that they would also be charged for a separate financial service—a prepaid debit card, which was sold by another entity, VirtualWorks, LLC. *See* Complaint ¶¶ 12–21. Consumers were unaware that the bank account information they had provided on their loan applications was transferred by the defendants to VirtualWorks, and used to debit consumers' bank accounts to pay for the debit cards. *See id.* ¶¶ 23–25. VirtualWorks and the defendants collaborated in presenting the challenged prepaid debit card offers. *See id.* ¶ 22. The defendants, *inter alia*, displayed the offers on websites they operated, controlled the manner in which the advertisements appeared, and earned money based on the number of consumers who "signed up" for the offers. *See id.*

Consistent with long-standing legal precedent, the FTC's Complaint seeks monetary and other equitable relief to remedy the defendants' unlawful acts. The moving defendants, Swish Marketing, Inc., Matthew Patterson, and Jason Strober (hereinafter, "Defendants"), now move to strike from the Complaint all references to monetary relief, pursuant to Rule 12(f).

IV. ARGUMENT

A. Defendants fail to satisfy the requirements of Rule 12(f).

1. The FTC's ability to seek monetary relief under Section 13(b) is not a "spurious" or "frivolous" legal issue.

Defendants' motion should be denied because they have improperly used Rule 12(f) to attack well-settled case law. Rule 12(f) defines a narrow category of material that

a party may move to strike from a pleading: "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Rule 12(f) motions are generally disfavored, and they should be denied "unless it is clear that the matter to be stricken can have no possible bearing upon the subject matter of the litigation." *Naton v. Bank of Cal.*, 72 F.R.D. 550, 552 n.4 (N.D. Cal. 1976).

The purpose of a legitimate motion to strike is to avoid wasting time and money litigating "spurious" or "frivolous" issues. *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds*, 510 U.S. 517 (1994) (quoting *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983)); *see SEC v. Keating*, Fed. Sec. L. Rep. (CCH) ¶ 96,906 (C.D. Cal. 1992). Accordingly, courts are "very reluctant" to resolve "disputed or substantial" legal issues in such motions. *McArdle v. AT&T Mobility LLC*, 2009 U.S. Dist. LEXIS 89231, at *24–25 (N.D. Cal. Sept. 14, 2009) (citation omitted). Disputed or substantial legal issues are "properly . . . determinable only after discovery and a hearing on the merits." *Id.* at *25 (citation omitted).

In flagrant disregard of the Rule 12(f) standards, Defendants seek to strike material from the Complaint that even they concede is firmly anchored in three decades of legal bedrock. *See* Motion to Strike at 18; *see also infra* Section IV.B.1. Defendants cannot establish that this material constitutes the "spurious" or "frivolous" matter that the Rule contemplates. *See Fogerty*, 984 F.2d at 1527; *Keating*, Fed. Sec. L. Rep. (CCH) ¶ 96,906. Indeed, not surprisingly, Defendants omit from their motion any discussion whatsoever of the Rule 12(f) standard. An attempt to overturn binding legal precedent necessarily implicates the very type of "substantial" and "disputed" legal issue that cannot be stricken under Rule 12(f). *See McArdle*, 2009 U.S. Dist. LEXIS 89231, at *24–25.

2. Defendants will not be prejudiced by preserving the portions of the Complaint they seek to strike.

Defendants' failure to demonstrate prejudice is, by itself, sufficient reason to deny their motion. Because Rule 12(f) motions are disfavored, courts typically require a showing of prejudice to the moving party. *See Townshend v. Rockwell Int'l Corp.*,

2000-1 Trade Cas. (CCH) ¶ 72,890, at 87,631 (N.D. Cal. 2000). The Ninth Circuit has held that prejudice may arise from, *inter alia*, allegations that would cause the moving party "undue burden." *Fogerty*, 984 F.2d at 1528.

Defendants will not be prejudiced if the Court denies their motion. In particular, any effort they expend conducting discovery or otherwise litigating monetary relief—a remedy that is available here pursuant to well-settled law—cannot be considered undue.

In sum, Defendants should not be allowed to cavalierly disregard the requirements for invoking the protections of Rule 12(f). They will have an opportunity in the usual rhythm of litigation to challenge the FTC's long-standing ability to seek monetary relief for injured consumers pursuant to Section 13(b) of the FTC Act.

B. Defendants' argument that the FTC is not authorized to obtain monetary relief under Section 13(b) is meritless.[1]

Not only do Defendants fail to satisfy the requirements mandated by Rule 12(f), but they ask this Court to break with well-established precedent and declare—as no court has ever done—that a district court lacks authority to order equitable monetary relief under Section 13(b) of the FTC Act. Indeed, Defendants concede this is the case. Motion to Strike at 18. They simply brush aside the principles of precedent and *stare decisis*, and assert, without support, that the courts' analysis was flawed. *See id.* As set forth below, however, it is Defendants' analysis that is flawed.

1. Granting Defendants' motion would require this Court to disregard binding legal precedent.

Section 13(b) authorizes the FTC to bring suit in a U.S. district court to enjoin violations of the FTC Act, and authorizes the district court to grant a temporary restraining order or a preliminary injunction. 15 U.S.C. § 53(b) (2006). The second

[1] The FTC responds to Defendants' argument here only to provide sufficient assurance to the Court that the FTC's authority to obtain monetary relief under Section 13(b) is a well-settled and correctly decided legal principle.

proviso of Section 13(b) provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." *Id.*

Relying on Supreme Court authority discussed below, courts have held that Section 13(b) grants the FTC access to the full range of a district court's equitable powers, including the ability to obtain monetary relief. *See, e.g.*, *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111–13 (9th Cir. 1982); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1315 (8th Cir. 1991); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1433–34 (11th Cir. 1984); *FTC v. Southwest Sunsites, Inc*., 665 F.2d 711, 718–19 (5th Cir. 1982); *see also FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994) (relying on *Singer*); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572 (7th Cir. 1989) (relying on cases in other circuits); *FTC v. Sage Seminars*, 1995 U.S. Dist. LEXIS 21043, at *23 (N.D. Cal. Nov. 2, 1995) (holding a "district court has the authority under the FTC Act to enter an order preserving the defendants' assets; this authority derives from the court's equitable authority to order consumer redress").

Defendants argue, however, that another provision of the FTC Act, Section 19, 15 U.S.C. § 57b (2006), circumscribes the FTC's access to the full range of equitable remedies under Section 13(b). Motion to Strike at 10–12. This argument, however, runs counter to the plain text of the statute, congressional intent, and the conclusion reached by every court of appeals that has addressed this issue. Section 19 authorizes the FTC to seek specific remedies in federal court after obtaining a cease-and-desist order through its administrative process.[2] 15 U.S.C. § 57b. In enacting Section 19, Congress sought to *expand* the Commission's remedial authority when it brought administrative enforcement actions, not to *contract* its authority when it challenged illegal conduct directly in district court. Indeed, Section 19 states explicitly: "Remedies provided in this section are in

[2] The FTC typically uses its administrative enforcement authority in cases involving violations of the antitrust laws, and in complex consumer protection cases. The FTC typically pursues cases, such as the present one, that involve straightforward deceptive or unfair conduct in district court.

addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law." 15 U.S.C. § 57b(e).

More than 27 years ago, the Ninth Circuit was presented with precisely the same argument that Defendants now vainly attempt to resurrect. The court firmly rejected the argument, based in part on the language of Section 19(e) cited above. *Singer*, 668 F.2d at 1113 ("Thus, there is no necessary or inescapable inference, or, indeed, any inference, that Congress intended to restrict the broad equitable jurisdiction apparently granted to the district court by § 13(b)."); *see also Sec. Rare Coin*, 931 F.2d at 1315 (same).

2. *Porter* and *Mitchell* authorize a district court to grant monetary relief under Section 13(b) of the FTC Act.

Singer, as well as other decisions authorizing equitable monetary relief under Section 13(b), relies on *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), and *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288 (1960), in support of a district court's broad discretion to fashion appropriate equitable remedies to violations of the FTC Act. *See, e.g.*, *Singer*, 668 F.2d at 1111–13. In *Porter*, the Supreme Court held that when a district court's equitable jurisdiction is invoked, all the inherent equitable powers of the district court are available for the proper and complete exercise of that jurisdiction, unless a statute—by clear and valid legislative command or by necessary and inescapable inference—restricts the district court's equitable powers. 328 U.S. at 397–98. The Court further held that when the public interest is involved, these equitable powers assume an even broader and more flexible character than when only a private controversy is presented. *Id.* at 398. Specifically, the Supreme Court ruled in *Porter* that a district court could order restitution pursuant to the Emergency Price Control Act of 1942, which authorizes a permanent or temporary injunction, restraining order, or other order. *Id.* at 403.

The Court expanded this holding in *Mitchell*, and found that a district court could order reimbursement for lost wages caused by a violation of the Fair Labor Standards

Act, which authorizes courts to restrain violations but does not contain the "or other order" language found in the *Porter* statute.[3] *See* 361 U.S. at 289–96 ("When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes.").

Applying the reasoning of *Porter* and *Mitchell* to the FTC Act, courts consistently have held that they are able to grant monetary relief under Section 13(b) of the Act. *See, e.g.*, *Singer*, 668 F.2d at 1111–13. *Porter* and *Mitchell* have been invoked and relied on repeatedly for the past half-century, and continue to represent valid law in this regard. As recently as 2001, the Supreme Court relied on *Porter* as authority for the proposition that "when district courts are properly acting as courts of equity, they have discretion [to fashion remedies] unless a statute clearly provides otherwise. . . . Such discretion is displaced only by a 'clear and valid legislative command.'" *United States v. Oakland Cannabis Buyers Coop.*, 532 U.S. 483, 496 (2001) (quoting *Porter*, 328 U.S. at 398).

3. *Meghrig* and *Philip Morris* do not limit a district court's authority to grant monetary relief under Section 13(b).

Defendants invoke the Supreme Court's decision in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), and a subsequent D.C. Circuit case, *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190 (D.C. Cir. 2005), in a futile attempt to limit the application of *Porter* to the FTC Act. *See* Motion to Strike at 19–21. Defendants' argument is untenable. In *Meghrig*, the Court undertook a painstaking analysis of two environmental statutes, poles apart from the FTC Act, where it was clear that Congress itself wanted to decide the question of how to allocate costs associated with the cleanup of toxic waste. The first statute (RCRA) was intended to protect the environment and public health from

[3] Defendants appear to argue that because, unlike the statute in *Porter*, Section 13(b) does not contain the phrase, "or other order," it would be inappropriate to imply equitable power under Section 13(b). *See* Motion to Strike at 23. This argument fails under *Mitchell*. *See* 361 U.S. at 289–96.

toxic harm, and contained no provision regarding compensation for prior cleanup costs, and the second (CERCLA) was designed to ensure the prompt cleanup of toxic waste and to impose the cleanup costs on the responsible party, and did provide specific compensation remedies. 516 U.S. at 483–88. The Court found that compensation was available only through CERCLA and that, given the remedial structure, any other interpretation would be "irrational." *Id.*

Defendants try in vain to argue that just as the Court in *Meghrig* read CERCLA to limit the remedies under RCRA, Section 19 should be read to limit the remedies available under Section 13(b). They argue essentially that, had Congress wanted to authorize specific monetary remedies under Section 13(b), it would have done so explicitly, as it did in Section 19. *See* Motion to Strike at 19–21.

Meghrig, however, does not affect the continuing validity of *Porter* and *Mitchell*, and does not implicate the district court's authority to order monetary equitable relief under Section 13(b) of the FTC Act. To the contrary, several circuit courts have rejected Defendants' assertion that *Meghrig* necessarily limits the district court's inherent equitable authority in enforcing statutes like the FTC Act. For example, in *United States v. Rx Depot, Inc.*, 438 F.3d 1052 (10th Cir. 2006), the Tenth Circuit explained that, "rather than overruling or limiting *Porter*'s . . . general rule that a grant of equity jurisdiction enables courts to order any form of equitable relief, *Meghrig* merely demonstrates that a statute's particular characteristics may preclude application of the rule." 438 F.3d at 1057. Indeed, in *Rx Depot*, the court found that disgorgement was available under the Food, Drug, and Cosmetic Act ("FDCA"), whose statutory grant enables a district court to "restrain violations." *See* 438 F.3d at 1058–63. *See also United States v. Lane Labs-USA, Inc.*, 427 F.3d 219 (3d Cir. 2005) (holding that disgorgement is available under the FDCA, and distinguishing *Meghrig* because (1) it was not a government enforcement action, in which a court's equitable powers "assume an even broader and more flexible character," (quoting *Porter*, 328 U.S. at 398); and (2) it involved a statute, unlike the FDCA, whose text specifically limited the district court's

equitable power); *AT&T Broadband v. Tech Communs., Inc.*, 381 F.3d 1309 (11th Cir. 2004) (relying on *Porter*, post-*Meghrig*, to hold that the district court could order equitable remedies pursuant to a general statutory grant); *United States v. Cinergy Corp.*, 582 F. Supp. 2d 1055 (S.D. Ind. 2008) (same).[4]

Likewise, the particular characteristics of the FTC Act do not preclude application of the general rule in *Porter*. Significantly, as set forth above, *see supra* Section IV.B.1, Section 19 of the FTC Act contains remedy preservation language notably absent from CERCLA, the second *Meghrig* statute. *See also Singer*, 668 F.2d at 1113 (rejecting argument that Section 19 restricts the court's remedial under Section 13(b); *Sec. Rare Coin*, 931 F.2d at 1315 (same). Moreover, Section 13(b) contains a general statutory grant analogous to the FDCA, which the courts in *Rx Depot* and *Lane Labs* found to authorize monetary relief. Finally, unlike *Meghrig*, this case is a government enforcement action, in which a court's equitable powers are even broader and more flexible. Accordingly, Defendants' argument that *Meghrig* limits the remedies available under Section 13(b) fails.

Also unavailing is Defendants' argument, based on *Philip Morris*, that equitable disgorgement cannot be implied in Section 13(b) because the statutory remedies are "forward-looking." *See* Motion to Strike at 21–23. In *Philip Morris*, a divided panel of the D.C. Circuit held that disgorgement was not available for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") because: (1) the specific statutory language "to prevent and restrain" limited courts to ordering forward-looking remedies aimed at preventing future violations of the Act; and (2) the specific statute enumerated a

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[4] Contrary to Defendants' assertion that *Phillip Morris*, decided in 2005, is the most recent decision to apply *Porter* to the question of whether disgorgement can be implied from a general statutory grant, *see* Motion to Strike at 21–22, *Rx Depot* was decided one year later, in 2006. 438 F.3d 1052; *see also United States v. Cinergy Corp.*, 582 F. Supp. 2d 1055 (S.D. Ind. 2008) (also applying *Porter* to imply equitable jurisdiction from a general statutory grant).

series of remedies, which the D.C. Circuit concluded were forward-looking. 396 F.3d at 1198–202.[5]

Defendants' argument fails because, in contrast to RICO, Section 13(b) of the FTC Act contains neither the "prevent and restrain" statutory grant nor the list of remedies that the D.C. Circuit determined to be forward-looking. *See* 15 U.S.C. § 53(b). The Tenth Circuit rejected an argument analogous to Defendants' in *Rx Depot*. The defendants in that case argued that, in light of *Philip Morris*, disgorgement is unavailable under the FDCA. 438 F.3d at 1058–59. The court rejected their argument, reasoning that (1) the statutory grant in the FDCA is analogous to that at issue in *Mitchell*, not in *Philip Morris*; and (2) the FDCA does not enumerate only forward-looking remedies. *Id.* at 1058–61. Indeed, as with the FDCA, courts consistently have found the text of Section 13(b) to be analogous to the provisions at issue in *Porter* and *Mitchell*, and have held that it allows for the award of monetary relief. *See infra* Section IV.B.2.

4. Granting Defendants' motion would require this Court to disregard Congress's ongoing endorsement of the FTC's use of Section 13(b).

As shown above, analysis of the FTC Act itself and relevant case law—including those cases on which Defendants rely—demonstrates that Section 13(b) does in fact authorize the award of monetary relief. This Court, however, need not rely exclusively on this analysis to reach that conclusion: Congress has demonstrated that it is aware and approves of the FTC's exercise of its authority under Section 13(b) to seek monetary relief. This congressional awareness and approval firmly establishes that the current

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[5] The ruling in *Philip Morris* is not final and has an extensive subsequent history. In particular, since then, the district court entered a final judgment, which the D.C. Circuit affirmed in part and vacated in part. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006), *aff'd in part and vacated in part, and remanded*, 566 F.3d 1095 (D.C. Cir. 2009). The D.C. Circuit has stayed the issuance of the mandate in this most recent appeal through February 19, 2010. The court will withhold the mandate if a petition for writ of certiorari is issued. *See Per Curiam Order Granting Motion to Stay Mandate* in *United States v. Philip Morris USA, Inc.* (No. 06-5267) (D.C. Cir. Dec. 11, 2009) (order attached hereto as Exhibit 1).

application of FTC authority under Section 13(b) is consistent with the intent of the legislative branch. When the interpretation of a statute "has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *See United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979); *see also N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) (quoting *Rutherford*); *United States v. Chestman*, 947 F.2d 551, 560 (2d Cir. 1991) (same).

When amending the FTC Act in 1994 to facilitate the agency's ability to lay venue and serve process, Congress acknowledged the FTC's authority to obtain monetary relief under 13(b): "Section 13 of the FTC Act authorizes the FTC to file suit to enjoin any violation of the FTC Act. The FTC can go into court ex parte to obtain an order freezing assets, and *is also able to obtain consumer redress*." S. Rep. No. 103-130, at 15–16 (1993) (emphasis added); *see* Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, 108 Stat. 1691, at § 10 (codified as amended at 15 U.S.C. § 53) (expanding venue and service of process provisions). Thus, in amending the statute, Congress not only acknowledged and declined to limit the FTC's ability to obtain equitable monetary relief in federal court, it actually expanded the venue and service of process provisions in Section 13(b) to *facilitate* the agency's ability to do exactly that.

In addition, the FTC routinely testifies before Congress and issues reports, in which it highlights the amount of monetary relief it has obtained through federal court litigation. *See, e.g.*, FTC Chairman William E. Kovacic, *Prepared Statement of the Federal Trade Commission on the Commission's Work to Protect Consumers and to Promote Competition, and on a Bill to Reauthorize the Commission* Before the Committee on Commerce, Science, and Transportation, United States Senate (Apr. 8, 2008) at 9 (testimony available at http://www.ftc.gov/os/testimony/P034101reauth.pdf) ("The Commission has often used Section 13(b) of the FTC Act, particularly, to obtain restitution for consumers in consumer protection cases."); *see also* FTC Chairman

Deborah Platt Majoras, *Prepared Statement of the Federal Trade Commission Before the Subcommittee on Financial Services and General Government of the Committee on Appropriations United States House of Representatives* Before the Subcommittee on Financial Services and General Government of the Committee on Appropriations United States House of Representatives (Feb. 28, 2007) at 2 (testimony available at http://www.ftc.gov/os/2007/02/P040101AppropriationsTestimonyFY2008.pdf) (discussing monetary relief obtained in federal court); FEDERAL TRADE COMMISSION, THE FTC IN 2007: A CHAMPION FOR CONSUMERS AND COMPETITION 31-32 (Apr. 2007) (available at http://www.ftc.gov/os/2007/04/ChairmansReport2007.pdf) (same).[6] Congress has demonstrated its ongoing approval through consistently reauthorizing the FTC and increasing the agency's budget. *See, e.g.*, Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844 (legislation reauthorizing and increasing the budget for the FTC); Revised Continuing Appropriations Resolution, 2007, Pub. L. No. 110-5, 121 Stat. 8 (same); Science, State, Justice, Commerce and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108, 119 Stat. 2290 (same).

In short, Congress understands and endorses the FTC's use of Section 13(b) to obtain monetary relief in federal court actions to enforce the FTC Act. Defendants' argument to the contrary simply exalts fiction over fact.

V. CONCLUSION

Defendants woefully miss the mark in trying to strike, under Rule 12(f), references to monetary relief from the FTC's Complaint. Moreover, the law in the Ninth Circuit is well-established, and there has been no intervening Supreme Court decision or congressional action that suggests, as Defendants argue, that this Circuit would reconsider

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[6] Especially in light of these references to monetary relief under Section 13(b), the fact that the FTC Chairman may also have referred to monetary relief under Section 19 is irrelevant. *See* Motion to Strike at 6.

settled precedent. Accordingly, the FTC respectfully requests this Court to deny Defendants' Motion to Strike.

Respectfully submitted,

DATED: December 16, 2009

/s/ Lisa D. Rosenthal

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