

UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

SEAN CANTKIER et al.,

Defendants

Case No.1:09-cv-00894-CKK

PLAINTIFF'S OPPOSITION TO DEFENDANT SCOT LADY'S MOTION TO DISMISS

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1..
II.	THE640 0.0000 cm 1.00000 0.00000 0.00000 1.00000 0.0000 0.0000 cm 1.00000 0.00000 0.	

TABLE OF AUTHORITIES

CASES

Alpharma, Inc. v Pennfield Oil Co.  
2008 U.S. Dist. EXIS 44178 (D. Neb. June 4, 2008)..... 3

Ashcroft v. Iqbal  
129 S. Ct. 1937 (2009)..... 9, 10

Bell Atlantic Corp. v. Twombly,  
550 U.S. 544 (2007)..... 10, 11

Davis v. Mikasey  
2009 U.S. Dist. LEXIS 106460 (D.D.C. Nov. 16, 2009)..... 10

FTC v. Accuserch, Inc,  
570 F.3d 1187 (10th Cir. 2009)..... 14

FTC v. Affordable Media, LLC,  
179 F.3d 1228 (9th Cir. 19

FTC v. Medical Billers Network, Inc.  
 543 F. Supp. 2d 283 (S.D.N.Y. 2008)..... 3.

FTC v. Nat'l Testing Svcs., LLC,  
 2005 U.S. Dist. EXIS 46485 (M.D. Tenn. Aug 8, 2005)..... 3, 4

FTC v. Pantron I Corp.  
 33 F.3d 1088 (9th Cir. 1994), cert. denied, 514 U.S. 1083 (1995)..... 4, 11

FTC v. Publ'g Clearing House, Inc.  
 104 F.3d 1168 (9th Cir. 1997)..... 5.

FTC v. Sec. Rare Coin & Bullion Corp.,  
 931 F.2d 1312 (8th Cir. 1991)..... 4.

FTC v. Skybiz.com Inc.,  
 2001 U.S. Dist. LEXIS 26314 (N.D. Okla. Aug. 2, 2001)..... 3

FTC v. SlimAmerica  
 77 F. Supp. 2d 1263 (S.D. Fla. 1999). .... 5, 11

FTC v. World Travel Vacation Brokers,  
 861 F.2d 1020 (7th Cir. 1988)..... 5, 11

Ferron v. Search Cactus LLC,  
 2007 U.S. Dist. EXIS 44473 (S.D. Ohio June 19, 2007).....

Gilmore v. First Am. Title Ins. Co.  
 2009 U.S. Dist. EXIS 82783 (E.D. Mich. Sep. 11, 2009)..... 3

In re Int'l Harvest Co.,  
 104 F.T.C. 949 (1984)..... 15

Kearns v. Ford Motor Co.  
 567 F.3d 1120 (9th Cir. 2009)..... 2.

Kraft, Inc. v. FTC,  
 970 F.2d 3117 (9th Cir. 1992), cert. denied, 507 U.S. 909 (1993)..... 11

Kreidler v. Pixler  
 2006 U.S. Dist. LEXIS 88702 (W.D. Wash. Dec. 7, 2006)..... 3

Pelman v McDonald's Corp,  
 396 F.3d 508 (2d Cir. 2005)..... 3.

Phillips v. Bureau of Prisons 591 F.2d 966 (D.C. Cir. 1979).....	6.
In re Polaroid ERISA Litigation 362 F. Supp. 2d 461 (S.D.N.Y. 2005).....	12
Renovatron Int'l Corp. v. FTC, 884 F.2d 1489 (1st Cir. 1989).....	5, 11
Swierkiewicz v. Sona N.A., 534 U.S. 506 (2002).....	2.
In re Thompson Medical Co., 104 F.T.C. 648 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987).....	11.
United States ex rel. Williams v. Martin-Baker Aircraft Co. 389 F.3d 1251 (D.C. Cir. 2004).....	5.
Vernon v. West Communs. Int'l, Inc. 643 F. Supp. 2d 1256 (W.D. Wash. 2009).....	3.
Vess v. Ciba-Geigy Corp., 317 F.3d 1097 (9th Cir. 2003).....	2.
Western Assocs. Ltd. Pshp. v. Market Square Assocs., 235 F.3d 629 (D.C. Cir. 2001).....	5.
Witherspoon v. Philip Morris, Inc.	

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Fed. R. Civ. P. 8(a). . . . . 1..

Fed. R. Civ. P. 9(b). . . . . 1, 2

140 Cong. Rec. H 6006 (July 21, 1994).. . . . . 14

37 AM JUR 2D FRAUD AND DECEIT § 23 (2010).. . . . . 4.

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<sup>1</sup> This is Lady's second motion to dismiss. The first motion (Dkt. # 59) was denied as moot with leave to refile after the Court granted the FTC's motion to file its Second Amended Complaint. (See Dkt. #92 at 3.)

<sup>2</sup> Lady asserts that the FTC filed its Second Amended Complaint "in an attempt to bolster its complaint and avoid dismissal of this action." (Mot. Dismiss at 1-2.) On the contrary, the FTC filed the Second Amended Complaint as an a

Lady, however, misapplies the relevant case law to the allegations contained in the FTC's complaint. An allegation of deception under Section 5 of the FTC Act is not a claim of fraud. Neither Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), nor the Second Amended Complaint mention "fraud," and the elements of a Section 5 action under a deception theory are



F.3d 1192, 1204 n.7 (10th Cir. 2005); see also *FTC v. Innovative Mktg, Inc.*, 654 F. Supp. 2d 378, 388 (

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<sup>3</sup> Similarly, courts have not applied Rule 9(b) to cases brought under other statutes that, like the FTC Act, prohibit a broad range of deceptive practices when a plaintiff has alleged only the elements of deception as the basis for its claim. See, e.g., *Pelman v. McDonald's Corp.*, 396 F.3d 508, 511-12 (2d Cir. 2005) (regarding deceptive trade practices under the New York Consumer Protection Act); *Gilmore v. First Am. Title Ins. Co.*, 2009 U.S. Dist. EXIS 82783, at \*8-16 (E.D. Mich. Sep. 11, 2009) (regarding Washington Consumer Protection Act and substantially similar laws of several other states, which prohibit deceptive acts or practices); *Vernon v. West Comms. Int'l, Inc.*, 643 F. Supp. 2d 1256, 1264-65 (W.D. Wash. 2009) (regarding Washington and Minnesota consumer protection claims, which prohibit deceptive practices); *Alpharma, Inc. v. Pennfield Oil Co.*, 2008 U.S. Dist. EXIS 44178, at \*4-5 (D. Ne June 4, 2008) (regarding Nebraska Uniform Deceptive Trade Practices Act, which prohibits deceptive trade practices); *Ferron v. Search Cactus, LLC*, 2007 U.S. Dist. EXIS 44473, at \*11-12 (S.D. Ohio June 19, 2007) (regarding Ohio Consumer Sales Practices Act, which prohibits deceptive consumer sales practices); *Kreidler v. Pixler*, 2006 U.S. Dist. EXIS 88702, at \*36-37 (W.D. Wash. Dec. 7, 2006) (regarding Washington Consumer Protection Act). But see *Witherspoon v. Philip Morris, Inc.*, 964 F. Supp. 455, 463-64 (D.C. 1997) (applying Rule 9(b) to the District of Columbia Consumer Protection Procedures Act, which prohibits misrepresentations and omissions of material facts which tend to mislead)

<sup>4</sup> Lady's sole response to the lone case in which courts have specifically held that Rule 9(b) does not apply to the FTC Act is to complain, without any explanation, that those decisions "have their genesis in the unpublished — and unreasoned — perfunctory opinion" in *Communitdyne* (Def. Mot. Dismiss at 7.) As discussed below, however, these decisions are well-founded because, unlike fraud, the FTC need not prove intent, reliance, or injury to establish a violation of the FTC Act.

violation, the FTC need only show that a defendant made a material representation or omission that is likely to mislead consumers, acting reasonably under the circumstances, to their detriment. See, e.g., *FTC v. Partron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994), cert. denied, 514 U.S. 1083 (1995). By contrast, the traditional elements of fraud include “a false representation; in reference to a material fact; made with knowledge of its falsity; with the intent to deceive and on which an action is taken in justifiable reliance upon the representation.” 37 AM JUR 2D FRAUD AND DECEIT § 23 (2010). In some fraud cases, plaintiffs also are required to show “resulting damage or injury proximately resulting from the representation and action.” *Id.*

Courts that have examined this issue have held that, unlike fraud, the FTC need not prove intent, reliance, or injury to establish a violation of Section 5. See *Feece v. ...*, 4013d 1

fraud cases to establish a violation of the TE Act. See, e.g., *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997) (proof of intent to defraud not required); *FTC v. Figgie Int'l*, 994 F.2d 595, 606 (9th Cir. 1993) (unlike common law fraud, proof of subjective reliance by each individual consumer not required); *FTC v. World Travel Vacation Brokers*, 861 F.2d 1020, 1029 (9th Cir. 1988) (FTC need not prove that misrepresentations were made with an intent to defraud or deceive or were made in bad faith); *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1495 (1st Cir. 1989) (proof of "a willful, knowing or deliberate act" not required); *FTC v. Five-Star Auto Club*

Prison, 591 F.2d 966, 969 (D.C. Cir. 1979) (“when passing on a motion attacking the legal efficacy of the plaintiff’s statement of his claim, the court may properly look beyond the complaint only to items in the record of the case or to matters of general public record.”).

Here, the Second Amended Complaint, when taken together with the FTC’s Memorandum in Support of a Preliminary Injunction (Dkt. #16), adequately meets Rule 9(b)’s requirement to state with particularity the circumstances of lady’s deceptive practices.<sup>5</sup> Taken together, the documents plead the following factual allegations:

- The deep contraction in the economy and in the housing market has created devastating consequences for homeowners and communities throughout the country. In response, the federal government has introduced and widely publicized a number of federal homeowner relief and financial stability programs aimed at reviving the United States economy and assisting distressed homeowners whose mortgage loans have become unaffordable. (Second Am. Compl. ¶ 15.)

- The Department of Housing and Urban Development (“HUD”) has designated thousands of HUD-approved non-profit housing counseling agencies to provide assistance to consumers who are at risk of foreclosure or falling behind on their mortgage payments, and established an alliance with the Homeowner Preservation Foundation and the Hope Now Alliance. (Id. ¶ 17.)

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<sup>5</sup> Even if Rule 9(b) is held to apply to allegations of deception under Section 5 of the FTC Act, the Rule only applies to those elements of fraud in common with Section 5. Thus, the FTC is still not required to allege intent, reliance, or injury. See *Wherspoon*, 964 F. Supp. at 464 (noting that even though Rule 9(b) applied to allegations of violations of the District of Columbia Consumer Protection Procedures Act, plaintiff, in being given leave to amend the complaint, was not required to allege intent since intent is not an element of the statute).

- The United States government has announced a federal homeowner relief and financial stability program





1937 (2009) and *Bel Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To survive a motion to dismiss, a complaint need only allege “enough facts to state a claim to relief that is plausible on its face” *Twombly*, 550 U.S. at 570. In deciding a motion to dismiss, the court “must take all factual allegations in the complaint as true” *Iqbal*, 129 S. Ct. at 1949.

While Rule 8 “demands more than an unadorned, the defendant-unlawfully-harmed-me accusation,” it “does not mandate detailed factual allegations.” *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555). A plaintiff need not make a heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face *Twombly*, 550 U.S. at 570. The two-prong test established in *Twombly* requires that: (1) a court not presume the truth of allegations that are merely legal conclusions, and (2) “only a complaint that states a plausible claim for relief survives a motion to dismiss” *Iqbal*, 129 S. Ct. at 1949-50 (citing *Twombly*, 550 U.S. at 555-56). The plausibility standard is not a “probability requirement” and a plaintiff need only “plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S. Ct. at 1949.

Indeed, cases decided in this district after *Iqbal* make clear that a complaint need only allege “enough facts to state a claim for relief that is plausible on its face . . . not to show that the pleader is entitled to relief.” *Davis v. Mukasey* 2009 U.S. Dist. EXIS 106460, \*6 (D.D.C. Nov. 16, 2009) (internal quotations and citations omitted). For, in evaluating a Rule 12(b)(6) motion, the court is “obliged to construe the factual allegations in the complaint in the light most favorable to the plaintiff, including reasonable inferences derived from the actual allegations.” *Id.*



B. The FTC's Detailed Second Amended Complaint Meets Rule 8's Pleading Requirements

The FTC's Second Amended Complaint is more than sufficient to meet the liberal pleading requirements of Rule 8. In order to prevail on its claims that Lady engaged in deceptive acts or practices in violation of Section 5 of the FTC Act, the FTC must establish at trial that there were material representations likely to mislead consumers acting reasonably under the circumstances.<sup>6</sup> *Pantron I*, 33 F.3d at 1095; *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992), cert. denied, 507 U.S. 909 (1993). Express and deliberate claims are presumed material. *Slim America*, 77 F. Supp. 2d at 1272; *In re Thompson Medical Co.*, 104 F.T.C. 648, 788-89 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987). The FTC need not prove that Lady's misrepresentations were made with an intent to defraud or deceive or were made in bad faith. See e.g., *World Travel Vacation Brokers*, 861 F.2d at 1029; *Remoatron*, 884 F.2d at 1495; *Five-Star Auto Club*, 97 F. Supp. 2d at 526.

The FTC's Second Amended Complaint provides more than adequate factual support for this Court to find that the FTC has provided Lady with sufficient notice of the claims against him and to cross "the line between possibility and plausibility of entitlement to relief." See *Twombly*, 550 U.S. at 557. Indeed, Lady admits that the FTC's complaint alleges that the defendants "purchased key words that will cause their links to appear in special, clearly marked, paid advertising areas of popular search engines," that "these paid advertisements include hyperlinks that look like links that could be used by government entities," and that "consumers may confuse these links with government links." (Def. Mot. Dismiss at 1.) Lady further acknowledges that

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<sup>6</sup> As discussed below, the FTC does not need to prove substantial consumer injury that is not reasonably avoidable by consumers themselves.

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activities or participated directly in them. See *FTC v. Afford*

IV. THE FTC DOES NOT NEED TO PROVE THAT LADY'S ACTIONS CAUSED SUBSTANTIAL INJURY TO CONSUMERS THAT IS NOT REASONABLY AVOIDABLE BY CONSUMERS THEMSELVES TO ESTABLISH A VIOLATION OF SECTION 5 OF THE FTC ACT

Lady devotes a substantial portion of his brief to the argument that the FTC has failed to allege that his conduct "causes or is likely to cause substantial injury to consumers," (Def. Mot. Dismiss at 8 (emphasis in original)), and that such injury "cannot be reasonably avoidable by consumers themselves," (id. at 10), citing to Section 5(n) of the FTC Act. Section 5(n) of the FTC Act, 15 U.S.C. § 45(n), however, sets forth the standard for determining whether an act or practice is unfair in violation of Section 5(a) of the FTC Act. Thus, it has no application in this case where the FTC is charging that Lady's conduct was a deceptive act or practice in violation of Section 5(a) of the FTC Act.

Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), declares unlawful acts and practices that are either unfair or deceptive. Section 5(n) of the FTC Act, 15 U.S.C. § 45(n), states that a practice is unfair only when the FTC proves that "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition." See also *FTC v. Acusearch, Inc.*, 570 F.3d 1187, 1193 (10th Cir. 2009).

Section 5(n) was added to the FTC Act by the FTC Act Amendments of 1994. Pub. L. No. 103-312 (1994) The conference report on H.R. 2243, the bill that was ultimately enacted and signed into law, explains:

The amendment is derived from the 1980 policy statement of the [Federal Trade] Commission regarding unfairness, the Commission's 1982 letter on the same subject, and from subsequent interpretations of and applications to specific unfairness proceedings by the Commission.

140 Cong. Rec. H 6006, \*18 (July 21, 1994).

The FTC Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction was appended to a letter that the sitting Commissioners sent on December 17, 1980 to Senators Wendell H. Ford and John C. Danforth, the Chairman and Ranking Minority Member, respectively, of the Consumer Subcommittee of the U.S. Senate Committee on Commerce, Science and Transportation.<sup>9</sup> The purpose of that letter was to explain the FTC's views of the boundaries of its consumer unfairness jurisdiction. The letter explained that the companion FTC statement "discusses the way in which this body of law differs from, and supplements, the prohibition against consumer deception." *Id.* at 1071. It is this statement that formed the basis for Congress' amendment to Section 5 delineating the scope of the Commission's unfairness jurisdiction. In *Int'l Harvester*, the FTC explained:

The Commission's unfairness jurisdiction provisions a *mere* legal basis for action against acts or practices which cause significant injury. This part of our jurisdiction is broader than that involving deception, and the standards for its exercise are correspondingly more stringent. It requires the complete analysis of a practice which maybe harmful to consumers. To put the point another way, unfairness is the set of principles of which deception is a particularly well-established and streamlined subset.

*Id.* at 1060 (emphasis added)

The three-part test that the FTC must meet to establish that an act or practice is unfair is distinct from the FTC's deception analysis. To find a practice deceptive, it need not pass the full cost-benefit analysis required for a determination of unfairness, because there are rarely, if ever, countervailing benefits to deception.

Here, the FTC's complaint expressly charges Lady with engaging in deceptive acts or practices in violation of Section 5 of the FTC Act, not unfair deceptive acts or practices. *Second*

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<sup>9</sup> That letter and policy statement were thereafter appended to the FTC's decision in *Int'l Harvester Co.*, 104 F.T.C. 949, 1070-70184).

Am. Compl. ¶ 38 (count I charging that “Defendants’ representations as set forth in Paragraph 36 of this Complaint are false and misleading and constitute deceptive acts or practices in violation of Section 5(a) of the FTC Act”), ¶ 41 (count II charging that “Lady’s representation as set forth in Paragraph 39 constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act”), ¶ 44 (count III charging that Lady’s representation as set forth in Paragraph 42 constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act”).) As discussed above, the Second Amended Complaint alleges, with more than sufficient specificity, all the necessary facts to establish that Lady engaged in deceptive behavior that violates Section 5 of the FTC Act.

#### V. CONCLUSION

For the reasons set forth herein, the FTC respectfully requests that the Court deny Lady’s motion to dismiss.

Dated: April 15, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel certifies that on April 15, 2010, PLAINTIFF'S OPPOSITION TO DEFENDANT SCOT LADY'S MOTION TO DISMISS was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

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The undersigned counsel further certifies that the documents will be mailed by United States Postal Service to the following non-CM/ECF participants:

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