

**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**

Plaintiff, the Federal Trade Commission (“FTC”), hereby submits its opposition to defendant Scot Lady’s Motion to Dismiss. Lady’s entire argument is premised on the FTC’s supposed failure to allege facts to meet the standard set forth in Section 5(n) of the FTC Act. 15 U.S.C. § 45(n). That standard, however, applies only when the FTC charges unfairness. In this case, the FTC has charged that Lady’s practices were deceptive; thus Section 5(n) has no application to this case. Because the FTC’s Amended Complaint does state a claim upon which relief may granted, Lady’s motion should be denied.

**I. LEGAL STANDARD FOR A MOTION TO DISMISS**

To survive a motion to dismiss, a complaint need only allege “enough facts to state a claim for relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In evaluating a Rule 12(b)(6) motion, the court is “obligated to construe the factual allegations in the complaint in the light most favorable to the plaintiff, including reasonable inferences derived from the factual allegations.” *Davis v. Mukasey*, 2009 U.S. Dist. LEXIS

106460, \*6 (D.D.C. Nov. 16, 2009). Accordingly, the following factual allegations, among others, must be accepted as true:

- Lady, acting alone or in concert with others, has directed, controlled, or participated in the acts or practices set forth in the Amended Complaint;
- Lady transacts or has transacted business in the District of Columbia and throughout the United States;
- Lady purchased preferred placement for his advertisements on the search results pages provided by search engines, including [www.google.com](http://www.google.com);
- Lady created ads within the search engines' specified formats that appeared to be search results that identify federal homeowner relief or financial stability programs and included as titles domain names or other identifying terms of such programs;
- Lady's advertisements directed consumers, who are attempting to obtain information about federal homeowner relief or financial stability programs, to commercial websites marketing purported mortgage loan modification or foreclosure relief services; and
- Lady is not part of or affiliated with the United States government, the Making Home Affordable program, [www.makinghomeaffordable.gov](http://www.makinghomeaffordable.gov), [www.financialstability.gov](http://www.financialstability.gov), or any federal homeowner relief or financial stability program.

A motion to dismiss is not a motion for summary judgment and, therefore, the FTC need not demonstrate that the allegations contained in its Amended Complaint are, in fact, true.

Accepting the above allegations as true, relief can be granted against Lady for violations of

Section 5 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45. Accordingly, his motion should be denied.

**II. THE FTC STATES A CLAIM UPON WHICH RELIEF MAY BE GRANTED UNDER SECTION 5 OF THE FTC ACT**

Lady devotes the entirety 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 4 (emphasis in original)), and that such injury “cannot be reasonably avoidable by consumers themselves,” (*id.* at 6), 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 to competition.” *See also FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1193 (10th Cir. 2009).

Here, the FTC has charged Lady with engaging in *deceptive* acts and practices. (Am. Compl. ¶ 35.) An act or practice is deceptive under Section 5(a) if it involves a material representation or omission that is likely to mislead consumers, acting reasonably under the circumstances, to their detriment. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994), *cert. denied* 514 U.S. 1083 (1995); *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992), *cert.*

*denied* 507 U.S. 909 (1993); *Southwest Sunsites v. FTC*, 785 F.2d 1431, 1435 (9th Cir. 1986). Express and deliberate claims are presumed material. *FTC v. SlimAmerica*, 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999); *FTC v. Wilcox*, 926 F. Supp. 1091, 1098 (S.D. Fla. 1995); *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., FTC v. World Travel Vacation Brokers*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1495 (1st Cir. 1989); *FTC v. Five-Star Auto Club*, 97 F. Supp. 2d 502, 526 (S.D.N.Y. 2000).

Assuming the factual allegations of the Amended Complaint as true, Lady has violated Section 5(a) of the FTC Act by falsely representing an affiliation with the United States government. In particular, Lady's use of ad titles such as "Makinghomeaffordable.gov," "Financial Stability.gov," "Fha Gov," "wwwhud.gov," "www.995hope.org," and "www.hopenow.com/" (*see* Pl. Suppl. Mem. Supp. Mot. Prelim. Inj. Ex. 2 at 14-15 ¶ 34), expressly represents affiliation with program websites operated by the Departments of the Treasury and Housing and Urban Development and the HOPE NOW Alliance (a government endorsed consortium of lenders, service providers, and other participants in the mortgage lending industry). Numerous courts and the FTC have found misrepresentations of government affiliation to be deceptive and therefore to violate the FTC Act. *See, e.g., Slough v. FTC*, 396 F.2d 870 (5th Cir.), *cert. denied*, 393 U.S. 980 (1968); *United States Ass'n of Credit Bureaus, Inc. v. FTC*, 299 F.2d 220 (7th Cir. 1962); *United States Navy Weekly, Inc. v. FTC*, 207 F.2d 17 (D.C. Cir. 1953); *Bennett v. FTC*, 200 F.2d 362, 363 (D.C. Cir. 1952).

Lady's misrepresentations cause consumers seeking legitimate information and free housing counseling available to them from government-sponsored websites to receive instead marketing pitches by for-profit companies. As a result, consumers may be denied the tools available on the legitimate government websites to help them determine if they are eligible for the government refinancing or loan modification programs, determine whether their mortgage servicer is participating in the programs, prepare the information needed by their lenders, and locate free HUD-approved housing counselors.<sup>1</sup> Even if consumers come to realize that Lady is not associated with or part of the United States government, his initial misrepresentations are still actionable. It is well established that "[t]he Federal Trade Act is violated if [a seller] induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract." *Resort Car Rental System, Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975) (citing *Exposition Press, Inc. v. FTC*, 295 F.2d 869 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962)); *FTC v. City West Advantage, Inc.*, 2008 U.S. Dist. LEXIS 71608, at \*7 (D. Nev. Jul. 22, 2008); *FTC v. Medical Billers Network, Inc.*, 543 F. Supp. 2d 283, 304 (S.D.N.Y. 2008).

Once a court determines that a defendant has violated Section 5 of the FTC Act, Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), confers full equitable powers on the court, including entering a permanent injunction, ordering restitution and/or disgorgement of ill-gotten gains. *See, e.g., FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 468-70 (11th Cir. 1996).<sup>2</sup> To obtain

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<sup>1</sup> The FTC need not prove reliance by each consumer misled by Lady. *SlimAmerica.*, 77 F. Supp. 2d at 1275. "Requiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer redress actions and frustrate the statutory goals of [Section 13(b)]." *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994) (citations omitted).

<sup>2</sup> Lady has challenged the FTC's ability to obtain monetary relief in a separate motion to  
(continued...)

an injunction against an individual, the FTC must show that the individual either had the authority to control the unlawful activities or participated directly in them. *See FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1234 (9th Cir. 1999); *Gem Merchandising*, 87 F.3d at 470; *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 573-74 (7th Cir.), *cert. denied*, 493 U.S. 954 (1989). An individual may be held liable for monetary redress for corporate practices if the individual had, or should have had, knowledge or awareness of the corporate defendants' misrepresentations. *Affordable Media*, 179 F.3d at 1231; *Gem Merchandising*, 87 F.3d at 470; *Amy Travel*, 875 F.2d at 574. This knowledge element, however, need not rise to the level of subjective intent to defraud consumers. *Affordable Media*, 179 F.3d at 1234; *Amy Travel*, 875 F.2d 574. Instead, the FTC need only demonstrate that the individual had actual knowledge or material misrepresentations, reckless indifference to the truth or falsity of such representations, or an awareness of a high probability of fraud coupled with the intentional avoidance of the truth. *Affordable Media*, 179 F.2d at 1234; *Amy Travel*, 875 F.2d at 574.

Again, for purposes of a motion to dismiss, the Court must accept as true the FTC's allegations that Lady directed, controlled, or participated in the violative conduct. Thus, were the FTC to prove all of its allegations, Lady would be liable for both injunctive and monetary relief for violating Section 5 of the FTC Act. Accordingly, the FTC's Amended Complaint does state a claim upon which may be granted, and Lady's motion to dismiss should be denied.

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<sup>2</sup>(...continued)  
strike. (*See* Def. Mot. Strike, Dkt. #58.) The FTC's opposition to that motion, filed concurrently with this opposition, discusses at length the legal basis supporting the FTC's ability to obtain such relief.

**III. CONCLUSION**

Accepting the FTC's allegations as true, Lady's misrepresentations of government affiliation violate Section 5 of the FTC Act. Thus, the FTC's Amended Complaint does state a claim upon which relief may be granted. Accordingly, for the reasons set forth herein, the FTC respectfully requests that the Court deny Lady's motion to dismiss.

Dated: December 24, 2009

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

Undersigned counsel certifies that on December 24, 2009, **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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