UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

Case No. 11-61072-Civ. Zloch

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AMERICAN PRECIOUS METALS, LLC, a Florida limited liability company,

HARRY R. TANNER, **JR.,** individually and as an owner, officer, and managing member of AMERICAN PRECIOUS METALS, LLC,

ANDREA TANNER, individually and as an owner, officer, and managing member of AMERICAN PRECIOUS METALS, LLC, and

SAM J. GOLDMAN, a/k/a SAMMY JOE GOLDMAN, individually and as an owner or manager of AMERICAN PRECIOUS METALS, LLC.

Defendants.

PLAINTIFF FEDERAL TRADE COMMISSION'S RESPONSE IN OPPOSITION TO DEFENDANT SAM GOLDMAN'S MOTION TO DISMISS AMENDED COMPLAINT

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I. INTRODUCTION

Plaintiff Federal Trade Commission ("FTC") opposes Defendant Sam Goldman's motion to dismiss (Dkt. 202) which, like the virtually identical motion filed by Defendant Andrea Tanner (Dkt. 190), is predicated on the FTC's purported failure to satisfy the requirements of Fed. R. Civ. P. 9(b), or alternatively of Rule 8(a). There is no controlling precedent requiring the FTC to plead its claims like a fraud under Rule 9(b), and because the Plaintiff's pleadings satisfy both Rule 8(a) and Rule 9(b), the motions to dismiss should be denied.

II. PROCEDURAL BACKGROUND

Plaintiff filed its amended complaint on October 11, 2011, alleging that Defendants American Precious Metals, LLC ("APM"), Harry Tanner, Andrea Tanner, and Sam Goldman violated Section 5 of the Federal Trade Commission Act and the Telemarketing Sales Rule[1] while selling precious metals. (Dkt. 155). Defendants Andrea Tanner and Sam Goldman each responded to the Plaintiff's amended complaint with Fed. R. Civ. P. 12(b)(6) motions to dismiss. With the exception of a few short sentences, Defendants' motions are identical. (Dkts. 190, 202). Accordingly, Plaintiff's responses to the two motions are substantially similar.

III. ARGUMENT

A. The FTC's Claims Are Not Required to Be Plead With Particularity

Like Ms. Tanner's motion, Defendant Goldman begins his motion to dismiss by urging the Court to apply the heightened pleading requirements of Fed. R. Civ. P. 9(b) to the Plaintiff's complaint. However, there is no controlling precedent requiring claims arising under the FTC Act or TSR adhere to Rule 9(b). In fact, other courts have, for sound public policy reasons, determined that Rule 9(b) should not apply to the FTC's regulatory enforcement action.

1. The FTC's Claims Are Dissimilar to Fraud Claims

The majority of courts examining the issue of whether Rule 9(b) should be applied to the FTC's claims have held that it should not.[2] These courts have properly noted that the FTC's

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[1] ("FTC Act") 15 U.S.C. ¶ 45(a) and ("TSR") 16 C.F.R. Part 310.

[2] *See FTC v. Freecom Comm., Inc.*, 401 F.3d 1192, 1204 n. 7 (10th Cir. 2005); *FTC v. Innovative Mktg., Inc.*, 654 F. Supp. 2d 378, 388-89 (D. Md. 2009); *FTC v. Medical Billers Network, Inc.*, 543 F. Supp. 2d 283, 314 (S.D.N.Y. 2008); *FTC v. Nat'l Testing Servs., LLC*, No. 3:05-0613, 2005 U.S. Dist. LEXIS 46485, at *4-5 (M.D. Tenn. Aug. 18, 2005); *FTC v.*

claims are not for fraud and that its statutory mandate to deter deception is wholly distinct from a fraud action. Courts in this district have used similar reasoning to reject the applicability of Rule 9(b) to claims brought under state laws that are comparable to the FTC Act.

Section 5 and TSR violations are not grounded in fraud and do not require the same proof as a claim of fraud. A Section 5 violation is proven if the FTC shows that a defendant made a material representation or omission that is likely to mislead consumers acting reasonably.[3] To establish a TSR violation, the FTC must show that a seller or telemarketer, directly or by implication, misrepresented or failed to disclose, clearly and conspicuously and before a consumer pays, certain categories of material information.[4] Neither claim requires scienter or reliance – both of which must be proven to establish fraud.[5]

The distinction between Section 5 and fraud claims was noted by the only circuit court to address this issue to date. In *FTC v. Freecom*, the U.S. Court of Appeals for the Tenth Circuit observed, "[a] § 5 claim simply is not a claim of fraud as that term is commonly understood or as contemplated by Rule 9(b) . . . Unlike the elements of common law fraud, the FTC need not prove scienter, reliance, or injury to establish a § 5 violation."[6] This difference is notable in the Eleventh Circuit, where courts have rejected claims that proof of scienter or "intent" is required to impose liability under Section 5.[7] Other courts have cited similar reasons for refusing to apply

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Skybiz.com, No. 01-396, 2001 U.S. Dist. LEXIS 26314, at *11 (N.D. Ok. Aug. 2, 2001); *FTC v. Communidyne Inc*., No. 93-6043, 1993 U.S. Dist. LEXIS 18708, at *4-5 (E.D. Ill. Jan. 5, 1994).

[3] *FTC v. Peoples Credit First*, LLC, 244 Fed. Appx. 942, 944 (11th Cir. 2007) (following *FTC v. Tashman*, 318 F.3d 1273,1277 (11th Cir. 2003)).

[4] 16 C.F.R. § 310.3.

[5] A fraud claim involves a false representation of a material fact, made with knowledge of its falsity and an intent to deceive, and upon which an action is taken in justifiable reliance. 37 AM. JUR. 2D FRAUD AND DECEIT § 23 (2010).

[6] *Freecom*, 401 F.3d at 1204 n.7 (internal citations omitted).

[7] *See FTC v. USA Fin'l, LLC*, No. 10-12152, 2011 U.S. App. LEXIS 3774, at *7 n. 2 (11th Cir. Feb. 25, 2011); *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1368 (11th Cir. 1988); *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1270 (S.D. Fla. 2007) (citing *FTC v. Jordan Ashley*, No. 93-2257, 1994 U.S. Dist. LEXIS 7494, at *9 (S.D. Fla. Apr. 5, 1994)); *FTC v. Windward Mktg., Ltd.*, No. 96-615, 1997 U.S. Dist. LEXIS 17114, at *28-29 (N.D. Ga. Sept. 30,

Rule 9(b) to FTC claims[8] or have otherwise relied on the Tenth Circuit decision.[9]

The Tenth Circuit also encapsulated the core differences between FTC and fraud actions – and the sound policy reason against imposing Rule 9(b)'s requirements upon the FTC:

> [An FTC action is] not a private or common law fraud action designed to remedy a singular harm, but a government action brought to deter deceptive acts and practices aimed at the public and to obtain redress on behalf of a large class of third-party consumers who purchased defendants' products and services over an extended period of time.[10]

The *Freecom* court is correct: the FTC seeks to enjoin law violations and to remedy harm inflicted upon the public by deceptive business practices. The FTC's claims rest upon business practices, over time, and as related by a large class of third-party consumers – and not upon one incident of misrepresentation or omission. Thus, the FTC should not be required, in all of its enforcement actions, to plead with particularity each specific incidence in which a defendant employed deceptive practices.

For this reason, public policy strongly disfavors treating consumer protection claims like fraud actions, as courts in this district have implicitly recognized when refusing to apply Rule 9(b) to claims arising under Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA")[11] – an act comparable to the FTC Act.[12] "FDUTPA was enacted to provide remedies for conduct outside the reach of traditional common law torts such as fraud, and therefore, 'the plaintiff need

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1997); *FTC v. Wolf*, No. 94-8119, 1996 U.S. Dist. LEXIS 1760, at *14 (S.D. Fla. Jan. 30, 1996).

[8] *Nat'l Testing Servs*., 2005 U.S. Dist. LEXIS 46485, at *4-5; *Communidyne*, 1993 U.S. Dist. LEXIS 18708, at *3-5 (holding that a claim under Section 5 is not a claim of fraud or mistake subject to Rule 9(b) because it has no scienter or reliance requirement).

[9] *Innovative Mktg*., 654 F. Supp. 2d at 388-89.

[10] *Freecom*, 401 F.3d at 1204 n. 7*; see Nat'l Testing*, 2005 U.S. Dist. LEXIS 46485, at * 4-5.

[11] *Kenneth F. Hackett & Assocs. v. GE Capital Info. Tech*., 744 F. Supp.2d 1305, n.4 (S.D. Fla. 2010); *Galstaldi v. Sunvest Cmtys. USA, LLC*, 637 F. Supp.2d 1045, 1058 (S.D. Fla. 2008); *Florida v. Tenet Healthcare Corp*., 420 F. Supp.2d 1288, 1310 (S.D. Fla. 2005).

[12] FDUTPA, Fla. Stat. §§ 501.201 *et seq*., requires proof of a deceptive act or unfair practice, causation, and actual damages. *Hackett & Assocs*., 744 F. Supp.2d at 1312.

not prove the elements of fraud to sustain an action under the statute.'"[13] Because the FTC is also not required to prove fraud for its claims, the Court should similarly refuse to apply Rule 9(b).

2. The Cases Upon Which Defendant Relies are Not Controlling or Persuasive

Defendant relies on four decisions to support his argument that Rule 9(b) applies to FTC Act and TSR claims.[14] Two of the cases do not stand for the proposition asserted by Defendant: In fact, these courts actually declined to rule that Rule 9(b) applies.[15] The other two decisions are based upon well-established pleading requirements in the Ninth Circuit, not the Eleventh Circuit.

Defendant places undue reliance upon two district cases from the Ninth Circuit: *Lights of America* and *Ivy Capital.* Defendant's argument ignores the difference in precedential authority upon which the decisions rest. Both courts determined that Rule 9(b) should apply to the FTC's claims because, in their view, the claims were similar to negligent misrepresentation claims. Because it is well-established in the Ninth Circuit that negligent misrepresentation claims must meet Rule 9(b)'s particularity standards, the courts similarly applied Rule 9(b) to the FTC's claims.[16] The Eleventh Circuit, however, has not required negligent misrepresentation

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[13] *Tenet Healthcare*, 420 F. Supp.2d at 1310.

[14] *FTC v. Ivy Capital, Inc*., No. 2:11-cv-283, 2011 U.S. Dist. LEXIS 57035 (Nev. May 25, 2011); *FTC v. Cantkier*, No. 09-00894, 2011 U.S. Dist. LEXIS 21076 (D.C. Mar. 3, 2011); *FTC v. Lights of America, Inc*., No. 10-1333, 2010 U.S. Dist. LEXIS 137088 (C.D. Cal. Dec. 17, 2011); and *FTC v. Swish Mktg.*, No. 09-03814, 2010 U.S. Dist. LEXIS 15016 (N.D. Cal. Feb. 22, 2010).

[15] In *Cantkier*, the court stated, "[T]he Court does not need to rule on the applicability of Rule 9(b) . . . because, even assuming *arguendo* that Rule 9(b) applies, the FTC's allegations have been pled with sufficient particularity." *Cantkier*, 2011 U.S. Dist. LEXIS 21076, at *22. In *Swish Marketing*, the court held, "The general applicability of Rule 9(b) to section 5 actions is a real prospect . . . however, in this particular context, the outcome for [defendant] Benning's motion does not turn on that question." *Swish Mktg*., 2010 U.S. Dist. LEXIS 15016, at *10.

[16] *Lights of America*, 2010 U.S. Dist. LEXIS 137088, at *12-13 (quoting *Neilson v. Union Bank of Cal*., 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003)). *See also Ivy Capital*, 2011 U.S. Dist. LEXIS 57035, at *9.

claims to meet Rule 9(b).[17] Therefore, the rationale for holding that the FTC's claims should meet Rule 9(b) is absent.

B. The FTC's Amended Complaint Meets the Standards of Fed. R. Civ. P. 9(b)

Plaintiff asserts that Fed. R. Civ. P. 9(b) does not and should not apply to the FTC's consumer protection claims. Nonetheless, even if the Court were to adopt the heightened pleading requirements, Plaintiff's amended complaint would meet them. Indeed, Plaintiff's pleading satisfies Rule 9(b) and the more relaxed Rule 8(a) because it is pled with particularity, properly sets forth defendants' liability, and is similar to complaints deemed by other courts to satisfy Rule 9(b)'s standards.

1. Plaintiff's Amended Complaint is Pled With Particularity

Fed. R. Civ. P. 9(b) states that, when "alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." In the Eleventh Circuit, a claim satisfies Rule 9(b) if it sets forth:

> (1) precisely what statements were made in what documents or oral representations or what omissions were made, and
>
> (2) the time and place of each such statement and persons responsible for making (or, in the case of omissions, not making) same, and
>
> (3) the content of such statements and the manner in which they misled the plaintiff, and
>
> (4) what the defendants obtained as a consequence of the fraud.[18]

These standards may be relaxed when the facts are within the perpetrator's knowledge.[19]

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[17] "At this time, the Eleventh Circuit does not require heightened pleading for a claim of negligent misrepresentation." *Kingdom Ins. Group, LLC v. Cutler and Assocs*., No. 7:10-85, 2011 U.S. Dist. LEXIS 57816, at *12 n. 1, (M.D. Ga. May 31, 2011) (citing *Atwater v. Nat'l Football League Players Ass'n*, 2007 U.S. Dist. LEXIS 23371, at *15 (N.D. Ga. Mar. 29, 2007)).

[18] *Ziemba v. Cascade Int'l, Inc*., 256 F.3d 1194, 1202 (11th Cir. 2001) (relying on *Brooks v. Blue Cross and Blue Shield of Florida, Inc*., 116 F.3d 1364, 1371 (11th Cir. 1997)); *Thomas v. Pentagon Fed. Credit Union*, 393 Fed. Appx. 635 (11th Cir. 2010).

[19] *Barys ex rel United States v. Vitas Healthcare Corp*., 298 Fed. App'x. 893, 897 (11th Cir. 2008). *See also Ivy Capital*, 2011 U.S. Dist. LEXIS 57035, at *13.

Plaintiff's complaint meets these heightened pleading requirements, as described in *Ziemba v. Cascade*.[20] The amended complaint alleges that, since at least June 2007, Defendants and their salespersons verbally misrepresented profit and risk and failed to adequately disclose costs and risks while telemarketing leveraged precious metals to consumers nationwide. (Dkt. 155 ¶¶ 11-15, 17-18, 20-23). Specifically, Defendants falsely told consumers that precious metal prices were "poised to skyrocket" or would reach a particular price within a short time period. (Dkt. 155 ¶ 13). Defendants assured consumers that precious metals prices were going to continue to rise, and that consumers who purchased precious metals would earn high profits in a short time period. (Dkt. 155 ¶ 14). Defendants provided consumers with misleading hypothetical examples of profits and gave false assurances that precious metals were low-risk investments. (Dkt. 155 ¶¶ 15-17). Defendants falsely informed consumers that they only dealt in tangible, physical metal. (Dkt. 155 ¶¶ 18-19). Defendants falsely represented that consumers were likely to earn high or substantial profits in a short time period and with low or minimal risk, contrary to the FTC Act and TSR. (Dkt. 155 ¶¶ 35-36, 47, 51). Defendants also failed to clearly disclose the total costs of the precious metals and the risks of equity calls. (Dkt. 155 ¶¶ 20-23, 25-27).

Plaintiff's amended complaint also described the misleading nature of the Defendants' misrepresentations and omissions, and the resulting injury caused to consumers. (Dkt. 155 ¶¶ 29-32, 53). As stated in Plaintiff's amended complaint, consumers were not likely to earn high profits, nor were the precious metals low-risk investments. (Dkt. 155 ¶ 36). Consumers were required to pay significant fees, commissions, and interest, which negatively affected their ability to break even or profit on the investments. (Dkt. 155 ¶ 29). Worse, consumers were subject to equity calls that required them to pay additional money or liquidate the investments at a loss. (Dkt. 155 ¶ 31).

Plaintiff's amended complaint fully detailed, with sufficient particularity to advise Defendant of the specific claims against him, the acts and practices that form the basis of the FTC's complaint. At this posture, all factual allegations contained in the complaint must be accepted as true and construed in the light most favorable to Plaintiff.[21] The only question

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[20] *Ziemba v. Cascade Int'l*, 256 F.3d at 1202.

[21] *Speaker v. U.S. Dept. of Health and Human Servcs*., 623 F.3d 1371, 1379 (11th Cir. 2010).

before the Court is whether the FTC's claims are too conclusory or devoid of a factual basis. As explained above, they are not.

2. The Amended Complaint Properly Sets Forth Defendant's Liability

Defendant Sam Goldman appears to believe that the FTC is required to prove or allege that he *personally* made the deceptive sales solicitations or committed the unlawful acts at issue. However, he is mistaken. In fact, the Plaintiff's amended complaint sufficiently pleads the necessary facts to warrant the issuance of a permanent injunction against him and to hold him individually liable for the corporate violations of law – even if the Court were to apply Rule 9(b).

In the Eleventh Circuit, the basis for holding an individual liable for corporate violations is clear. Once corporate liability is established, an individual may be held liable for FTC Act or TSR violations where: (a) the individual *either* participated directly in *or* had the authority to control the deceptive acts or practices, and (b) had some knowledge of the wrongful acts or practices.[22] "Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy . . . ."[23] The FTC is not required to show an intent to defraud[24] or that Defendant had actual knowledge of the misrepresentations – reckless indifference or an awareness of a high probability of fraud coupled with an intentional avoidance of the truth will suffice.[25]

Accordingly, Plaintiff is not required to allege specific acts of deception committed by each individual defendant. Indeed, as acknowledged in the authority cited by Defendant, even in *fraud* cases – which this case is not – a party may satisfy Rule 9(b) merely by stating the role of

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[22] *FTC v. USA Fin'l, LLC*, 415 Fed. Appx. 970, 974 (11th Cir. 2011) (*citing FTC v. Gem Merch., Corp.*, 875 F.3d 466, 470 (11th Cir. 1996)); *FTC v. Nat'l Urological Group, Inc*., 645 F. Supp.2d 1167, 1206-07 (N.D. Ga. 2008), *aff'd*, 2009 U.S. App. LEXIS 27388 (11th Cir. Dec. 15, 2009).

[23] *FTC v. Wilcox*, 926 F. Supp. 1091, 1104 (S.D. Fla. 1995) (quoting *FTC v. Amy Travel Servs., Inc*., 875 F.2d 564, 573 (7th Cir. 1989)).

[24] *Transnet Wireless,* 506 F. Supp. 2d at 1270 (citing *FTC v. Jordan Ashley, Inc.*, No. 93-2257, 1994 U.S. Dist. LEXIS 7494, at *9 (S.D. Fla. Apr. 5, 1994)).

[25] *FTC v. Atlantex Assocs*., No. 87-0045, 1987 U.S. Dist. LEXIS 10911, at * 25 (S.D. Fla. Nov. 25, 1987), *aff'd,* 872 F.2d 966 (11th Cir. 1989); *FTC v. Wolf,* No. 94-8119, 1994 U.S. Dist. LEXIS 1760, at *24 (S.D. Fla. Jan. 30, 1996).

each individual defendant.[26] "[A]lleged fraudulent acts need not be attributed to certain defendants if the 'complaint sufficiently describes the acts and provides defendants with sufficient information to answer the allegations.'"[27] This holds true because courts have recognized[28] that "there are circumstances under which 'a plaintiff may not be able to plead the precise role of each defendant when a group of defendants has acted in concert to cause the complained of injury.'"[29]

As made clear from Plaintiff's amended complaint, Defendant Sam Goldman is subject to a permanent injunction because of his control of APM and its deceptive business practices – not because of any statement or deceptive omission that he personally made. Plaintiff has properly pled sufficient facts upon which to base such liability. Mr. Goldman was an owner or manager of APM. He directed, controlled, or had the authority to control, or participated in the acts and practices giving rise to Plaintiff's complaint. Indeed, Mr. Goldman was responsible for hiring, firing, and supervising APM's telemarketing staff and overseeing the company's day-to-day operations. (Dkt. 155 ¶ 9). Given the serious and substantial law violations described in Plaintiff's complaint, which were committed individuals hired and supervised by Mr. Goldman, Plaintiff's claims and factual assertions are more than sufficient, whether or not Rule 9(b) applies, to assert a valid claim against Defendant Goldman.

3. Other Courts Deemed Similarly-Pled Complaints to Satisfy Rule 9(b)

Plaintiff's complaint is similar to, or more specific than, those deemed by other courts to satisfy Rule 9(b) and by implication the more relaxed standards of Rule 8(a). *Ivy Capital* and

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[26] *Ivy Capital*, 2011 U.S. Dist. LEXIS 57035, at *13 (citing *Cf. Moore v. Kayport Package Express*, 885 F.2d 531, 540 (9th Cir. 1989) ("[a] complaint need only include the roles of individual defendants in corporate fraud cases where possible because such situations make it difficult to attribute particular conduct to each defendant")).

[27] *General Cigar Company, Inc. v. CR Carriers, Inc.*, 948 F. Supp. 1030, 1037-38 (M.D. Ala. 1996) (quoting *Bruss Co. v. K & S Brokerage, Inc.*, No. 91-c-1561, 1991 U.S. Dist. LEXIS 17515, at *9 (N.D. Ill. Nov. 22, 1991)).

[28] Because *Twombly* was not a fraud case, the court's pre-*Twombly* analysis of Rule 9(b) continues to apply. *See Grills v. Philip Morris USA, Inc.*, 645 F. Supp. 2d 1107, 1122 n. 25 (M.D. Fla. 2009).

[29] *Peters v. Amoco Oil Co.*, 57 F. Supp. 2d 1268, 1277 (M.D. Ala. 1999) (quoting *Jackson v. First Fed. Sav.*, 709 F. Supp. 863, 878 (E.D. Ark. 1988)).

Wellness Support – cases relied upon by Defendant – provide guidance for evaluating the sufficiency of Plaintiff's claims. (Attachments A and B). In both cases, defendants sought dismissal of the FTC's claims, which described defendants' acts and practices collectively without attributing any particular act to an individual defendant. In *Ivy Capital*, the court applied Rule 9(b), but recognized that a relaxed standard was appropriate where "it may be difficult for the plaintiff to identify the specific actions that a corporate officer took in causing the harm."[30] The *Ivy Capital* court held that the FTC met its burden by alleging that the individuals "formulated, directed, controlled, had the authority to control, or participated in the acts and practices" and outlining his or her involvement with the corporate defendants.[31]

In *Wellness Support*, the court dismissed the FTC's claims against one defendant who was alleged only to have been an officer of the defendant corporation and to have "formulated, directed, controlled, had authority to control, or participated" in the deceptive acts.[32] But the court found the FTC's claims against the other defendant sufficient because the FTC alleged that, in addition to being an officer and having controlled or participated in the acts, he was the *owner* of the closely-held corporation.[33]

The FTC's claims against Defendant Sam Goldman are similar to, or more detailed than, the factual allegations that the *Ivy Capital* and *Wellness Support* courts deemed satisfy Rule 9(b).[34] The FTC alleged that Mr. Goldman was an owner or manager; that he personally was responsible for hiring, firing, and supervising APM's telemarketing staff; and that he directed, controlled, had the authority to control, or participated in the law violations.[35] (Dkt. 155 ¶ 9).

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[30] *Ivy Capital*, 2011 U.S. Dist. LEXIS 57035, at *13.

[31] *Ivy Capital*, 2011 U.S. Dist. LEXIS 57035, at *16-17. *See* Attachment A ¶¶ 28-35.

[32] *FTC v. Wellness Support Network, Inc.*, No. 10-04879, 2011 U.S. Dist. LEXIS 36453, at *28 (N.D. Cal. Apr. 4, 2011).

[33] *Wellness Support*, 2011 U.S. Dist. LEXIS 36453, at *27. The court further bolstered its decision by noting that exhibits attached to the FTC's complaint showed that some of the deceptive statements were attributable to the defendant. *Id.* *See* Attachment B ¶¶ 7-8.

[34] *Compare* Attachment A ¶¶ 28-35 and Attachment B ¶¶ 7-8 to Dkt. 155 ¶ 8.

[35] Indeed, there is significant evidence of Defendant's participation and control over APM, some of which was received into evidence by the Court at the December 13, 2011 hearing on

These facts evidence his control not just of APM, but of the very business practices upon which Plaintiff's complaint is based. Accordingly, the claims are sufficient to justify issuance of a permanent injunction against Mr. Goldman and for holding him individually liable for the corporate violations described in Plaintiff's complaint.

IV. Conclusion

Dismissal of Plaintiff's claims is not warranted. There is no controlling authority requiring Plaintiff to plead its statutory enforcement action as a fraud under Fed. R. Civ. P. 9(b). Moreover, even if such a requirement were imposed, Plaintiff's complaint satisfies Rule 9(b) and the lesser Rule 8(a) requirements. Plaintiff squarely meets the standard set by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, which states that a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face."[36]

Under *Twombly*, dismissal of a complaint is only warranted where a plaintiff fails to "nudge their claims across the line from conceivable to plausible."[37] Because Plaintiff has satisfied the pleading requirements of this district and has properly stated a claim upon which relief can be granted, Defendant's motion to dismiss should be denied.

Respectfully submitted,

Dated: January 3, 2012

/s/ Dama J. Brown
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Plaintiff's motion for a preliminary injunction against Defendant Goldman. Accordingly, should this Court determine that Plaintiff's claims are insufficient, the FTC respectfully asks that the Court grant an opportunity to amend the pleadings. *See Silva v. Bieluch*, 351 F.3d 1045, 1048 (11th Cir. 2003); *Jemison v. Mitchell*, No. 09-15635, 2010 U.S. App. LEXIS 10905 (11th Cir. May 27, 2010).

[36] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2006). *See also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'")

[37] *Twombly*, 550 U.S. at 570.

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, the foregoing motion was filed with the Clerk of the Southern District of Florida using the CM/ECF system, which will send notice of electronic filing to all counsel or parties of record on the Service List below.

Date: January 3, 2012

/s/ Dama J. Brown
DAMA J. BROWN

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