

**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

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I. INTRODUCTION

Plaintiff, the Federal Trade Commission (“FTC”), hereby submits its opposition to defendant Scot Lady’s Motion to Dismiss.¹ Lady’s argument is premised on three faulty arguments: that the FTC has not plead fraud with particularity under Federal Rule of Civil Procedure 9(b), that the FTC has not plead sufficient detail under Federal Rule of Civil Procedure 8(a), and that the FTC has not alleged facts to meet the standard set forth in Section 5(n) of the FTC Act, 15 U.S.C. § 45(n). First, the FTC’s Second Amended Complaint need not comply with Rule 9(b) because it does not allege that Lady engaged in fraud, nor must the FTC show fraud to prove the alleged violations of the FTC Act. Second, the FTC’s complaint contains more than sufficient detail to meet the liberal pleading requirements of Rule 8, even after *Twombly* and *Iqbal*. Finally, Section 5(n) of the FTC Act 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.² Accordingly, because the FTC’s Second Amended Complaint does state a claim upon which relief may granted, Lady’s motion should be denied.

II. THE FTC’S SECOND AMENDED COMPLAINT IS NOT GOVERNED BY FEDERAL RULE OF CIVIL PROCEDURE 9(b)

In his motion, Lady argues that the FTC’s complaint must comply with Rule 9(b) because allegations of deception under the FTC Act are claims of fraud. (Def. Mot. Dismiss at 5-7.)

¹ 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.)

² Lady asserts that the FTC filed its Second Amended Complaint “in an attempt to bolster its complaint and avoid dismissal of this action.” (Def. Mot. Dismiss at 1-2.) On the contrary, the FTC filed the Second Amended Complaint as an appropriate exercise of its statutory mandate to protect consumers, especially those seeking mortgage relief assistance from the government during this financial crisis.

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 not synonymous with those of fraud. Therefore, Rule 9(b) does not apply. Even if the Rule did apply, however, the Second Amended Complaint satisfies the pleading standards of that Rule.

A. Rule 9(b) Does Not Apply to Allegations of Violations of Section 5 of the FTC Act

Rule 9(b) states that "[i]n 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." Fed. R. Civ. P. 9(b). By its terms, Rule 9(b) applies to causes of action based upon fraud (*i.e.*, causes of action where fraud is an essential element of the claim). *Id*; see *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003). It also applies if a complaint alleges fraud or alleges facts that necessarily constitute fraud. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (citing *Vess*, 317 F.3d at 1105). Although Rule 9(b) applies to such averments of fraud, the Supreme Court has declined to extend Rule 9(b) to other causes of action. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002) ("Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake. This Court, however, has declined to extend such exceptions to other contexts.").

A claim that Lady violated Section 5 of the FTC Act by engaging in "deceptive acts and practices" is not a claim of fraud. As Lady herself acknowledges (Def. Mot. Dismiss at 6-7), courts consistently have held that a Section 5 claim "is not a claim of fraud as that term is commonly understood or as contemplated by Rule 9(b)." *FTC v. Freecom Communs., Inc.*, 405

F.3d 1192, 1204 n.7 (10th Cir. 2005); *see also* *FTC v. Innovative Mktg, Inc.*, 654 F. Supp. 2d 378, 388 (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*, 2005 U.S. Dist. LEXIS 46485, at *4-5 (M.D. Tenn. Aug. 18, 2005); *FTC v. Skybiz.com, Inc.*, 2001 U.S. Dist. LEXIS 26314, at *11 (N.D. Okla. Aug. 2, 2001); *FTC v. Communidyne, Inc.*, 1993 U.S. Dist. LEXIS 18708, at *3-5 (N.D. Ill. Dec. 3, 1993).³ Lady does not point to a single case, in this district or anywhere else, in which a court faced with this question has held otherwise.⁴

In examining this issue, courts have highlighted how a cause of action for deception under Section 5 of the FTC Act differs from that of fraud. To establish a Section 5 deception

³ 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. LEXIS 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. Qwest Communs. 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. LEXIS 44178, at *4-5 (D. Neb. June 4, 2008) (regarding Nebraska Uniform Deceptive Trade Practices Act, which prohibits deceptive trade practices); *Ferron v. Search Cactus, LLC*, 2007 U.S. Dist. LEXIS 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. LEXIS 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.D.C. 1997) (applying Rule 9(b) to the District of Columbia Consumer Protection Procedures Act, which prohibits misrepresentations and omissions of material fact which tended to mislead).

⁴ Lady's sole response to the long line of cases 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 *Communidyne*. (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. Pantron 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 Freecom*, 401 F.3d at 1204 n.7 (“Unlike the elements of common law fraud, the FTC need not prove scienter, reliance, or injury to establish a § 5 violation.”); *Nat’l Testing Servs.*, 2005 U.S. Dist. LEXIS 46485, at *4-5 (holding that Rule 9(b) does not apply to Section 5 claims because neither intent to deceive, proof of consumer reliance, nor proof of consumer injury are necessary elements of Section 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).

One rationale for this conclusion is that 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.” *Freecom*, 401 F.3d at 1204 n.7 (citing *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991)). These decisions are consistent with other courts that similarly have held that the FTC need not prove elements that are traditionally required in a

fraud case to establish a violation of the FTC 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, 605-06 (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 (7th 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*, 97 F. Supp. 2d 502, 526 (S.D.N.Y. 2000) (proof of intent to defraud or deceive not required); *FTC v. SlimAmerica*, 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999) (proof of actual reliance by each individual consumer not required); *FTC v. Kitco of Nev., Inc.*, 612 F.Supp. 1282, 1293 (D. Minn. 1985) (unlike common law fraud, proof of subjective reliance by each individual consumer not required). Thus, Rule 9(b) does not apply here where the FTC has charged Lady with violating Section 5 of the FTC Act.

B. Even If Rule 9(b) Did Apply, the Second Amended Complaint Meets and Exceeds Rule 9's Pleading Standards

Even if Rule 9(b) were deemed to apply to the FTC Act, the Second Amended Complaint more than adequately meets the requirements of the Rule. To satisfy the Rule, a plaintiff must “state the time, place, and content of the false representations, the fact misrepresented and what was retained or given up as a consequence of the fraud[,] . . . and identify individuals allegedly involved in the fraud.” *United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1256 (D.C. Cir. 2004). Moreover, in considering a motion to dismiss, “it is appropriate for the court to look beyond the amended complaint to the record.” *Western Assocs. Ltd. Pshp. v. Market Square Assocs.*, 235 F.3d 629, 634 (D.C. Cir. 2001); *see also Phillips v. Bureau of*

Prisons, 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.⁵ 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.)

⁵ 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 Witherspoon*, 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 federal homeowner relief and financial stability programs that provide free online assistance to consumers. On March 19, 2009, the government launched the website www.makinghomeaffordable.gov to provide consumers with information on these programs. (*Id.* ¶ 18.)
- Lady purchased preferred placement for his advertisements on the search results pages provided by search engines, including www.google.com and www.msn.com. (*Id.* ¶ 20; Pl. Suppl. Mem. Supp. Mot. Prelim. Inj. Ex. 2 at 11 ¶ 24, 14 ¶ 32.)
- 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. (Second Am. Compl. ¶¶ 21-24.) On Microsoft, Lady used ad titles including "Hope for Homeowners Here" (Pl. Suppl. Mem. Supp. Mot. Prelim. Inj. Ex. 2 at 12 ¶ 26) and bid on keywords including "hope for homeowners," "help for homeowners," "hud foreclosure," and "government foreclosure help." (*id.* at 13 ¶ 30.) On Google, Lady bid on keywords "financial stability.gov," "fha.com," "financialsecurity.gov," "hope now alliance," "hope for homeowners," "www.makinghomeaffordable.gov," and "makinghomeaffordable.gov" (*id.* at 18 ¶ 38) and used ad titles "Makinghomeaffordable.gov," "Financial Stability.gov," "Fha Gov," "wwwhud.gov," "www.995hope.org," and "www.hopenow.com/." (*Id.* at 14-15 ¶ 34.)
- Consumers who clicked on Lady's advertisements were directed to his Internet websites that collected marketing leads for mortgage loan modification or foreclosure relief services. The websites required consumers to enter personal identifying and confidential financial information. Lady sold consumers' confidential information as marketing leads to persons who sell mortgage loan modification or foreclosure relief services. (Second Am. Compl.

¶¶ 26, 33.) Lady maintains at least two websites, www.homeownerhelp2009.com and www.helpforhomeowners.org, on which he solicits consumers to enter personal identifying and confidential financial information. (*Id.* ¶ 31.)

- Lady’s websites have made various statements to induce consumers to enter their personal identifying and confidential financial information, which information is sold as marketing leads to purveyors of mortgage loan modification or foreclosure relief services. Statements include, but are not limited to “97% Success Rate,” “Guaranteed Solutions To Lower Your Rate Today!” “We cannot give a percent of the people we help, but the success rate is very, very high with a completely free consultation and a 100% money back guarantee. Meaning if your situation is not helped, you pay absolutely nothing,” and “Over 100,000 people have applied for help at this site with over a TRILLION dollars of mortgage loans! Why? Because we produce results regardless of your current situation.” (*Id.* ¶ 32.)

- The placement of Lady’s search engine advertisements is likely to mislead consumers who are attempting to obtain information about federal homeowner relief or financial stability programs. (*Id.* ¶ 29.)

- Lady is not part of or affiliated with the United States government, the Making Home Affordable program, www.makinghomeaffordable.gov, www.financialstability.gov, or any federal homeowner relief or financial stability program. (*Id.* ¶ 28.)

- In engaging in the practices described above, Lady has represented, directly or indirectly, expressly or by implication, that (a) he operates www.makinghomeaffordable.gov, www.financialstability.gov, or other federal homeowner relief or financial stability programs; and (b) he is the United States government or is affiliated with the United States government. Such representations are material to consumers seeking mortgage relief. In truth and in fact,

Lady (a) does not operate www.makinghomeaffordable.gov, www.financialstability.gov, or other federal homeowner relief or financial stability programs and (b) is not the United States government and is not affiliated with the United States government. Thus, Lady has violated Section 5 of the FTC Act. (*Id.* ¶¶ 36-38.)

- In engaging in the practices described above, Lady has represented, directly or indirectly, expressly or by implication, that he will obtain for consumers mortgage loan modifications, in all or virtually all instances, that will make their mortgage payments substantially more affordable. In truth and in fact, this material representation is false or was not substantiated at the time the representation was made. Thus, Lady has violated Section 5 of the FTC Act. (*Id.* ¶¶ 39-41.)

- In engaging in the practices described above, Lady has represented, directly or indirectly, expressly or by implication, that he has helped over 97% of his clients obtain a mortgage loan modification. In truth and in fact, this material representation is false or was not substantiated at the time the representation was made. Thus, Lady has violated Section 5 of the FTC Act. (*Id.* ¶¶ 42-44.)

In short, the FTC's Second Amended Complaint meets and exceeds the heightened pleading standard set forth in Rule 9(b). Accordingly, Lady's motion to dismiss should be denied.

III. THE ALLEGATIONS IN THE SECOND AMENDED COMPLAINT SATISFY RULE 8(a)

A. Standard for Dismissal under Rule 8(a)

Contrary to Lady's argument, the FTC's Second Amended Complaint more than suffices to meet the liberal pleading requirements of Rule 8 as articulated by *Ashcroft v. Iqbal*, 129 S. Ct.

1937 (2009) and *Bell 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-part 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 “plea[d] 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 . . . and to show that the pleader is entitled to relief.” *Davis v. Mukasey*, 2009 U.S. Dist. LEXIS 106460, *6 (D.D.C. Nov. 16, 2009) (internal quotations and citations omitted). Further, 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.” *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.⁶ *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. *SlimAmerica*, 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; *Removatron*, 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

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

the complaint specifically alleges that he “solicits consumers to provide marketing leads,” “maintains two websites on which he solicits consumers to enter personal identifying and confidential financial information,” and “sells the information obtained from these websites as marketing leads.” (*Id.* at 4.) Finally, Lady admits that the complaint specifically alleges that he “falsely represented that he will obtain for consumers mortgage loan modifications, in all or virtually all instances, that will make their mortgage payments substantially more affordable,” and that “he has helped over 97% of his clients obtain a mortgage loan modification.” (*Id.*) Assuming these factual allegations as true, the FTC has alleged sufficient facts to establish the violations of Section 5 of the FTC Act charged in the complaint.⁷

Not only are the factual allegations sufficient to establish, if proven, that Section 5 has been violated, but also they are more than sufficient to state a claim for injunctive and equitable monetary relief against Lady. Under well settled FTC case law, 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 the authority to enter a permanent injunction, 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).⁸ To obtain an injunction against an individual, the FTC must show that the individual either had the authority to control the unlawful

⁷ Lady appears to be upset that portions of the FTC’s complaint contain allegations referring to Defendants as a group. Rule 8, however, does not require a plaintiff to identify each defendant by name each time the complaint makes an allegation that applies equally to them all. *See In re Polaroid ERISA Litigation*, 362 F. Supp. 2d 461, 471 (S.D.N.Y. 2005).

⁸ Lady has challenged the FTC’s ability to obtain monetary equitable relief in a separate motion to strike. (*See* Def. Mot. Strike, Dkt. #95.) 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.

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.

Here, the Second Amended Complaint specifically alleges that Lady "participated in the acts or practices set forth" in the complaint (Second Am. Compl. ¶ 7), that he "solicits consumers to provide marketing leads for mortgage loan modification or foreclosure relief services through various Internet websites" (*id.* ¶ 30), that he "maintains at least two websites . . . on which he solicits consumers to enter personal identifying and confidential financial information" (*id.* ¶ 31), that his websites "contained statements intended to induce consumers to enter" their confidential information (*id.* ¶ 32), and that he "sells consumers' confidential information, obtained from [his] websites, as marketing leads." (*Id.* ¶ 33.) 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 Second Amended Complaint does state a claim upon which may be granted, and thus Lady's motion to dismiss should be denied.

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 to competition.” *See also FTC v. Accusearch, 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.⁹ 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 ways 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 more general 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 may be 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

⁹ That letter and policy statement were thereafter appended to the FTC's decision in *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1070-76 (1984).

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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Michael A. Thurman
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