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13 FEDERAL TRADE COMMISSION

14 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

15
16 **FEDERAL TRADE
COMMISSION,**

17 Plaintiff,

Case No. SACV10-01333 JVS
(MLGx)

18 v.

19 **LIGHTS OF AMERICA, INC., ET
20 AL.,**

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS AMENDED
COMPLAINT; SUPPORTING
MEMORANDUM AND
21 AUTHORITIES**

22 Defendants.

23 Hearing Date: March 21, 2011
Time: 1:30 p.m.
Judge: Hon. James V. Selna

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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- I. INTRODUCTION 1
- II. LEGAL STANDARD 2
 - A. Allegations Regarding Authority to Control and Knowledge Are Governed By Rule 8(a). 3
 - B. The Legal Standard For a Motion To Dismiss.4
- III. ARGUMENT5
 - A. The Vakils Are Individually Liabile for Injunctive Relief 5
 - B. The Vakils Are Liabile Under the FTC Act for Equitable Monetary Relief.....10
 - 1. The Vakils Knew About The Misrepresentations.11
 - 2. At A Minimum, The Vakils Were Recklessly Indifferent. 13
 - 3. The Vakils Concede Knowledge As of July 2009. 14
 - C. The FTC Has Alleged Sufficient, Particularized Facts To Plausibly Assert A Claim Against LOA And The Vakils After August 2009.15
- IV. CONCLUSION18

TABLE OF AUTHORITIES

CASES

al-Kidd v. Ashcroft, 580 F.3d 949, 977 (9th Cir. 2009)4, 6, 14

Ashcroft v. Iqbal, __ U.S. __, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) 3, 4

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955,
167 L. Ed. 2d 929 (2007)..... 4, 5, 14, 16

Broam v. Bogan, 320 F.3d 1023 (9th Cir. 2003)17

FTC v. American Standard Credit Sys., Inc., 874 F. Supp. 1080
(C.D. Cal. 1994)10

FTC v. Amy Travel Service, 875 F.2d 564 (7th Cir. 1989)6

FTC v. Benning, Case No. C 09-03814 RS, 2010 WL 2605178
(N.D. Cal. June 28, 2010).....3, 6

FTC v. Dinamica Financiera, LLC, No. CV-09-03554, 2010 U.S. Dist.
LEXIS 88000 (C.D. Cal. Aug. 19, 2010) 6, 7

FTC v. Pantron I Corp., 33 F.3d 1088 (9th Cir. 1994)2

FTC v. Publishing Clearing House, 104 F.3d 1168 (9th Cir. 1997) 6, 7, 10

FTC v. Stefanchik, 559 F.3d 924 (9th Cir. 2009) 5

Moore v. Kayport Package Exp., Inc., 885 F.2d 531(9th Cir. 1989)3

Neubronner v. Milliken, 6 F. 3d 666 (9th Cir. 1993)15

Starr v. Baca, __ F.3d __, 2011 WL 477094 (9th Cir. Feb. 11, 2011)..... *passim*

TYR Sport Inc. v. Warnaco Swimwear Inc., 679 F. Supp. 2d 1120
(C.D. Cal. 2009)4, 8, 12, 15

Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981 (9th Cir. 2009)4

FEDERAL RULES OF CIVIL PROCEDURE

FED. R. CIV. P. 8(a).....3, 4

FED. R. CIV. P. 9(b)2, 3, 13

FED. R. CIV. P. 12(b)(6)15

1 I. INTRODUCTION

2 Defendants Usman Vakil’s and Farooq Vakil’s (collectively, the “Vakils”)
3 contention that this Court should dismiss the Federal Trade Commission’s
4 (“FTC”) complaint against them for deceptive practices is without legal or factual
5 merit. The Motion to Dismiss Amended Complaint (“Motion”) is simply an
6 attempt to force the FTC to prove its case in the process of defending against the
7 Motion. Accordingly, this Court should deny the Motion.

8 The claims against the Vakils are not complex. They are liable for both
9 injunctive and monetary relief based on their false or unsubstantiated claims about
10 two central characteristics of their company’s LED lamps – how bright they burn
11 (light output) and how long they last (lifetime). The sole issue before the Court is
12 whether the FTC stated a claim for relief against the Vakils. The FTC’s Amended
13 Complaint does so.

14 In their Motion, the Vakils’ argument as to why the FTC has not stated a
15 plausible claim for relief is segregated based upon two different periods of time:
16 claims related to conduct prior to July 2009 and after. For the time period prior to
17 July 2009, the Vakils have not contended that the FTC failed to allege sufficient
18 facts to state a claim against LOA for its deceptive acts and practices in promoting
19 its LED lamps. Therefore, the question presented by their Motion for that time
20 period is whether the FTC has alleged sufficient facts to plausibly state claims that
21 the Vakils: (1) are liable for injunctive relief because they had the authority to
22 control LOA’s activities; and (2) are liable for restitution because they knew or
23 should have known of LOA’s deceptive practices.

24 After July 2009, the Vakils contest whether the FTC has adequately stated
25 its case with regard to LED lamp sales. But they do not dispute that as of July
26 2009, the Vakils had both authority to control and knowledge. The FTC has
27 alleged sufficient facts, stated with particularity and viewed in the light most
28

1 favorable to the FTC, evidencing LOA's deceptive practices continued after July
2 2009.

3 Ultimately, the FTC's allegations in the Amended Complaint both give the
4 Vakils fair notice of the Commission's claims against them, and are sufficiently
5 plausible to give rise to an entitlement to relief. Therefore, the Vakils motion
6 should be denied.

7 II. LEGAL STANDARD

8 This Court previously held that the FTC's claims "sound in fraud," and
9 therefore, the FTC's complaint must be plead with particularity under Rule 9(b).
10 FED. R. CIV. P. 9(b). Although the FTC continues to contend that Rule 9(b) does
11 not apply to cases brought under Section 5 of the FTC Act,¹ the Amended
12 Complaint meets Rule 9(b).² That is, the FTC has specifically alleged the
13 circumstances constituting the fraud: the who (LOA and the Vakils), what
14 (misrepresentations regarding watt equivalency, lumen output, and lifetime on
15 products sold to consumers), where and when (on product packaging and
16 brochures sold from February 2008 on), and why (no substantiation for its claims
17 about two central characteristics of their product). Indeed, the Vakils have not
18 contended that the FTC failed to allege sufficient facts, stated with particularity, to
19 state a claim against LOA for promoting its LED lamps before July 2009.³

21 ¹ The FTC argued that a Section 5 claim is not a fraud claim, does not sound
22 in fraud, and requiring Rule 9(b) pleading would rewrite Section 5 and undermine
23 its statutory purpose.

24 ² An act or practice is deceptive under Section 5 if: (a) there is a
25 representation, omission or practice; (b) which is likely to mislead consumers
26 acting reasonably under the circumstances; and (c) is material to the consumer.
FTC v. Pantron I Corp., 33 F.3d 1088, 1095 (9th Cir. 1994).

27 ³ The Vakils appear to argue, however, that the FTC has not alleged
28 sufficient facts that LOA sold LED lamps after the end of July 2009. The FTC
disagrees with this assertion for the reasons stated *infra* pp. 15-17.

1 Having pled its case against LOA with ample particularity to state a claim for
2 corporate liability, the Vakils now challenge whether the FTC adequately pled its
3 claims against them for individual liability. In particular, the Vakils argue that the
4 FTC has not alleged sufficient facts to demonstrate they had the authority to
5 control the corporation and knew or should have known about its deceptive
6 practices.

7 A. Allegations Regarding Authority to Control and Knowledge Are
8 Governed By Rule 8(a).

9 Rule 9(b) applies only to the FTC's allegations regarding the circumstances
10 constituting the fraud. Allegations related to an individual's ability to control the
11 corporation's misrepresentations do not fall under Rule 9(b), but rather, Rule 8(a).
12 *FTC v. Benning*, Case No. C 09-03814 RS, 2010 WL 2605178, at *4 (N.D. Cal.
13 June 28, 2010) (ruling in accord with *Moore* that "[a]uthority to control' does not
14 necessarily contemplate participation in the underlying fraud and the notice
15 pleading requirements of Rule 8(a)(2) adequately govern this element."); *see also*
16 *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir. 1989).⁴
17 Moreover, Rule 9(b) specifically states that "[m]alice, intent, knowledge, and
18 other conditions of a person's mind may be alleged generally." FED. R. CIV. P.
19 9(b). Therefore, the FTC's allegations related to the Vakils' knowledge of LOA's
20 misrepresentations also do not fall under Rule 9's heightened pleading standards.
21 *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1954, 173 L. Ed. 2d 868 (2009)
22 (Rule 9 permits allegations relating to knowledge to be pled generally under Rule
23 8);⁵ *Benning*, 2010 WL 2605178, at *4.

24 _____
25 ⁴ Even if Rule 9 applied to allegations relating to authority to control, the
26 FTC's Amended Complaint meets that standard.

27 ⁵ The Court's evaluation of whether the facts in *Iqbal* supported a claim for
28 individual liability differs from this case because the issue there was not whether
the individuals had *knowledge* of the discriminatory policy but whether they acted

1 B. The Legal Standard For a Motion To Dismiss.

2 The legal analysis under Rule 8(a) is well established and requires a two
3 step inquiry. First, courts must accept all well-pleaded factual allegations as true.
4 *Iqbal*, 129 S. Ct. at 1949. Courts must also construe those factual allegations in
5 the light most favorable to the plaintiff. *Zucco Partners, LLC v. Digimarc Corp.*,
6 552 F.3d 981, 989 (9th Cir. 2009); *TYR Sport Inc. v. Warnaco Swimwear Inc.*, 679
7 F. Supp. 2d 1120, 1128 (C.D. Cal. 2009). Second, courts must determine whether
8 the factual allegations “plausibly give rise to an entitlement of relief.” *Iqbal*, 129
9 S. Ct. at 1949-50. A claim “has facial plausibility when the plaintiff pleads factual
10 content that allows the court to draw the reasonable inference that the defendant is
11 liable for the misconduct alleged.” *Id.* at 1949.

12 In conducting this two-step analysis, courts should consider the context of
13 the case and draw upon their judicial experience and common sense. *Id.* at 1950.
14 However, courts should not examine the probability of success of the claim as part
15 of its analysis.⁶ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct.
16 1955, 167 L. Ed. 2d 929 (2007); *Starr v. Baca*, ___ F.3d ___, 2011 WL 477094, at
17 *14 (9th Cir. Feb. 11, 2011) (noting the “question is not truth or even probability”
18 of proof by the evidence later discovered); *see also al-Kidd v. Ashcroft*, 580 F.3d
19 949, 977 (9th Cir. 2009), *cert. granted in part*, ___ U.S. ___, 131 S. Ct. 415, 178 L.
20 Ed. 2d 321 (2010) (“*Twombly* and *Iqbal* do not require that the complaint include
21 all facts necessary to carry the plaintiff’s burden.”).

22
23
24 *because of a constitutionally protected characteristic.* 129 S. Ct. 1948-49. Here,
25 the FTC alleges facts in support of the correct legal standard under the FTC Act.

26 ⁶ When the *Twombly* Court examined plaintiff’s factual allegations regarding
27 whether the parties formed an agreement, it stated that the analysis “simply calls
28 for enough fact to raise a reasonable expectation that discovery will reveal
evidence of illegal agreement.” 550 U.S. at 556.

1 As explained in *Starr*, the purpose of these pleading standards is twofold.
2 Complaints must be “sufficiently detailed to give fair notice to the opposing party
3 of the nature of the claim so that the party may effectively defend against it.”
4 *Starr*, 2011 WL 477094, at *14; *Twombly*, 550 U.S. at 555 n.3. Additionally, “the
5 allegations must be sufficiently plausible that it is not unfair to require the
6 opposing party to be subjected to the expense of discovery.” *Starr*, 2011 WL
7 477094, at *14. Thus, the FTC must allege facts that, taken as true and with all
8 reasonable inferences in the FTC’s favor, plausibly show, but need not *prove*, that
9 the FTC may be entitled to relief against the Vakils for injunctive relief and
10 restitution such that further discovery is warranted. The FTC’s allegations in the
11 Amended Complaint more than achieve both purposes.

12 III. ARGUMENT

13 The Amended Complaint contains abundant factual allegations to allow the
14 Court to draw the reasonable inference that the Vakils are individually liable for
15 the corporation’s deceptive practices. Under the FTC Act, once the Court finds a
16 corporation made false or unsubstantiated claims, certain individuals may then be
17 held liable for both injunctive relief and restitution, and each has its own separate
18 legal standard.⁷ The Vakils conflate these two standards, misstate the elements
19 needed to meet each of them, and then incorrectly claim that the FTC’s complaint
20 fails to allege sufficient facts to support those claims.

21 A. The Vakils Are Individually Liable for Injunctive Relief.

22 To establish individual liability for injunctive relief, the individual must
23 have *either* had the authority to control the activities at issue *or* participated
24

25 ⁷ The critical difference between the cases cited herein for the governing
26 liability standards and the posture of this case is the parties in those cases engaged
27 in discovery. Whereas, here, significantly more information likely exists in LOA’s
28 files than what it produced in response to the CID, not to mention the information
the FTC may obtain through depositions of key employees.

1 directly in the acts or practices. *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir.
2 2009); *FTC v. Publishing Clearing House*, 104 F.3d 1168, 1170 (9th Cir. 1997);
3 *FTC v. Dinamica Financiera, LLC*, No. CV-09-03554, 2010 U.S. Dist. LEXIS
4 88000, at *40 (C.D. Cal. Aug. 19, 2010).⁸ Pleading “authority to control” does
5 not require the FTC to allege participation in the fraud.⁹ *Benning*, 2010 U.S. Dist.
6 LEXIS 64030, at *15.

7 Authority to control the company can be demonstrated by “active
8 involvement in business affairs and the making of corporate policy, including
9 assuming the duties of a corporate officer.” *Publishing Clearing House*, 104 F.3d
10 at 1170; *Dinamica Financiera*, 2010 U.S. Dist. LEXIS 88000, at *40 (“An
11 individual’s status as a corporate officer and/or the authority of that individual to
12 sign documents on behalf of a corporate defendant is sufficient to show the
13 requisite control”); *FTC v. Amy Travel Serv.*, 875 F.2d 564, 573-74 (7th Cir.
14 1989).¹⁰ The internal communications cited in the Amended Complaint show the
15 Vakils were engaged corporate officers who were aware of their company’s LED
16 activities and were accessible to LOA’s employees. Using these communications
17 and other information, the FTC alleges sufficient facts to show not only is it
18 “plausible” that the Vakils had the authority to control LOA, but that they actually
19 exercised that authority.
20

21
22 ⁸ Defendants erroneously state that the FTC must allege that the Vakils
23 “actively participated in or knew and controlled” the deceptive acts and practices
24 of LOA. Motion, at 1.

25 ⁹ Thus, the Vakils’ claims that the FTC failed to allege that they created,
26 reviewed, or approved the LED product materials at issue are irrelevant.

27 ¹⁰ Notably, these opinions were decisions on the merits and were reached
28 after the parties had conducted discovery. The FTC does not need to prove its
allegations in the complaint, but only allege facts that *plausibly* establish the
Vakils’ liability. *See generally al-Kidd*, 580 F.3d at 977.

1 The Vakils are the sole owners of LOA, high ranking corporate officers,
2 and senior management executives – thereby holding all the corporate levers for
3 asserting control over a company. Amended Complaint (hereinafter “Amd.
4 Cplt.”) ¶¶ 8-9, 54, & 69. Specifically, the FTC has pled that Usman Vakil
5 founded the company in 1978, has been a senior executive since that time, is
6 currently LOA’s President and Chairman of the Board, and owns 51% of the
7 company. *Id.* ¶ 8. Farooq Vakil has been a Senior Executive with LOA since at
8 least 1993, is currently LOA’s Executive Vice President and Secretary, and owns
9 49% of LOA. *Id.* ¶ 9. In addition, Usman Vakil has signed documents on behalf
10 of LOA, as evidenced by the September 2008 letter he sent to DOE on LOA’s
11 behalf regarding testing performed on LOA’s bulbs. *Id.* ¶ 57. Like Usman Vakil,
12 Farooq Vakil communicated with DOE on LOA’s behalf. *Id.* ¶¶ 72 & 81. These
13 allegations alone are sufficient to establish the Vakils “plausibly” had authority to
14 control. *Publishing Clearing House*, 104 F.3d at 1170; *Dinamica*, 2010 U.S. Dist.
15 LEXIS 88000, at *40.

16 The Amended Complaint, however, includes additional factual allegations
17 that, viewed in the light most favorably to the FTC, more than plausibly show the
18 Vakils’ authority to control LOA’s practices. The Vakils were not disconnected
19 owners or Board members, but individuals actively involved in LOA’s activities.
20 For example, the FTC alleged that in April of 2008, [REDACTED]

21 [REDACTED] Amd. Cplt. ¶
22 70.¹¹ In addition, Farooq Vakil [REDACTED]

23 [REDACTED] *Id.* ¶¶ 72 &

24 74. Farooq Vakil also communicated [REDACTED]

25 [REDACTED]

26
27 ¹¹ Although the Vakils motion argues that the email did not describe a
28 planned distribution, LOA’s Answer to the Amended Complaint admits this
allegation. LOA Answer ¶ 70.

1 [REDACTED] *Id.* ¶ 79. Further, Farooq Vakil emailed

2 [REDACTED]
3 [REDACTED] *Id.* ¶73. Viewing these
4 facts in the light most favorable to the FTC, the only reasonable inference is that
5 the [REDACTED] show the Vakils’ authority to control the business. Moreover, the
6 Vakils’ own argument – that they did in fact take control upon learning of DOE’s
7 concerns with their labeling claims – demonstrates their authority to control the
8 business. Motion, at 20.

9 To illustrate Farooq Vakil’s authority to control, the FTC references an
10 [REDACTED]
11 [REDACTED]. Amd. Cplt. ¶ 72. The Vakils have
12 attached this [REDACTED] as an exhibit to their Motion and argue the FTC has
13 misconstrued its content and meaning.¹² Yet, this [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24
25 ¹² This Court may consider this [REDACTED] in ruling on the Motion because its
26 authenticity is not contested by the parties. *See, e.g., TYR Sport*, 679 F. Supp. 2d at
27 1128 (noting the Court may consider material beyond the pleadings when ruling on
28 a motion to dismiss if the material is either attached to the complaint or material
upon which the complaint relies, so long as its authenticity is not contested).

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]

6 Motion, Ex. D (emphasis in original).¹³ Significantly, Farooq Vakil states [REDACTED]

7 [REDACTED]

8 [REDACTED] Motion, Ex. D (emphasis in original). [REDACTED]

9 [REDACTED]

10 [REDACTED] *Id.* [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED] Motion, at 5. The factual allegations in the Amended Complaint,
15 therefore, demonstrate that it is not only plausible that Farooq Vakil had the
16 authority to control LOA's practices, but a near certainty.

17 Likewise, viewing the FTC's allegations in the light most favorable to it,
18 Usman Vakil both had the authority to control and exercised control over LOA's
19 LED practices. As discussed above, the FTC alleged that LOA's response to a
20 September 2008 letter from DOE regarding testing performed on the company's
21 LED lamps came from Usman Vakil. Amd. Cplt. ¶ 57. Prior to that, in April
22 2008, [REDACTED]

23 [REDACTED] *Id.* ¶ 55. In addition, [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 _____

27 ¹³ SSL is an acronym for Solid State Lighting - the category of light
28 products that LOA's LEDs fall under.

1 [REDACTED]

2 [REDACTED] *Id.* ¶ 59. [REDACTED]

3 [REDACTED] *Id.* ¶ 61. [REDACTED]

4 [REDACTED]

5 Motion, Ex. J.

6 Thus, the FTC’s allegations, taken as true and with all reasonable inferences
7 in its favor, plausibly show that both Vakils not only had the authority to control
8 LOA, but exercised it.

9 B. The Vakils Are Liable Under the FTC Act for Equitable Monetary
10 Relief.

11 The FTC also has alleged sufficient facts to more than plausibly assert a
12 claim against the Vakils for restitution. To hold an individual liable for
13 restitution, the Commission must meet the injunctive relief standard discussed
14 above and also show that the individual “‘had knowledge that the corporation or
15 one of its agents engaged in dishonest or fraudulent conduct.’” *Publishing*
16 *Clearing House*, 104 F.3d at 1171 (quoting *FTC v. American Standard Credit*
17 *Sys., Inc.*, 874 F. Supp. 1080, 1089 (C.D. Cal. 1994)). Knowledge can be shown
18 by: (1) actual knowledge of material misrepresentations, (2) reckless indifference
19 to the truth or falsity of a misrepresentation, or (3) awareness of a high probability
20 of fraud along with an intentional avoidance of the truth. *Publishing Clearing*
21 *House*, 104 F.3d at 1171. The FTC need not allege the Vakils actually intended to
22 defraud consumers. *Id.* Nor must the FTC *prove its case* through allegations in
23 the Amended Complaint to survive a motion to dismiss. *Starr*, 2011 WL 477094,
24 at *14. Rather, the facts alleged in the Amended Complaint must, and in fact do,
25 assert a *plausible* claim that the Vakils had actual knowledge of the
26 misrepresentations or were at least recklessly indifferent to their truth or falsity.

1 1. The Vakils Knew About The Misrepresentations.

2 The factual allegations in the Amended Complaint allow the Court to draw
3 the “reasonable inference” that the Vakils had actual knowledge of the company’s
4 practices. In particular, the FTC alleges that Usman Vakil founded the company
5 in 1978 and served as a high ranking executive since that time, and that Farooq
6 Vakil served as a senior executive since 1993. Amd. Cplt. ¶¶ 8, 9, 54 & 69. The
7 Vakils are LOA’s sole owners. *Id.* ¶¶ 8-9. The internal communications
8 involving the Vakils show they were active managers.¹⁴ *Id.* ¶¶ 59, 61, 66, 70-77,
9 79, & 81.

10 As owners and active managers of a lighting company for well over fifteen
11 years, every reasonable inference, not to mention common sense, leads to the
12 conclusion that the Vakils were abundantly aware that light output and lifetime are
13 two of the central characteristics that are used to market LOA’s products,
14 including LED lamps. Indeed, these characteristics were so important that in
15 2000, LOA sued Consumers Union after its Consumer Reports magazine stated
16 that LOA’s compact fluorescent lightbulbs (its then-new technology) did not
17 “provide as much light, nor do they last as long as the package claims.”¹⁵ Amd.
18 Cplt. ¶ 87 (quoting LOA’s complaint against Consumers Union). It, therefore, is
19 more than reasonable to infer the Vakils were aware of the claims for its most
20 recent new technology, LED lamps.

21
22
23 ¹⁴ This is unsurprising given that LED lamps were LOA’s new product line,
24 generated sales in excess of ██████████ in a year and a half, Amd. Cplt. ¶ 13, and
25 were being sold to large, national retailers (*e.g.*, Costco and Walmart), Amd. Cplt.
¶ 11.

26 ¹⁵ Although the lawsuit was brought by LOA, it would defy logic for the
27 company to have sued the publisher of a major national consumer magazine
28 without the knowledge and approval of the Vakils – its two owners and senior
officers, one of whom is also Chairman of the Board.

1 These facts alone are enough to infer knowledge. Nevertheless, the FTC
2 alleges even more facts to corroborate this inference. In particular, in September
3 2008, Usman Vakil received the results of tests that the DOE conducted on LOA's
4 LED lamps, and those results "showed that the watt equivalency representations
5 that appeared on the lamps' packaging and in the product brochures were false or
6 unsubstantiated." Amd. Cplt. ¶ 56. The FTC's presumptively true allegations
7 show that as of September 2008, Usman Vakil had actual knowledge of the fact
8 that the watt equivalency claims for these LED lamps were false or
9 unsubstantiated. The FTC further alleges that the Defendants continued to make
10 these false and unsubstantiated claims after receiving the DOE tests results. *Id.* ¶¶
11 30 & 58.

12 Relying on documents attached to its Motion, the Vakils again claim that
13 the FTC's allegations mischaracterize the substance of the document. In
14 particular, they argue the test reports did not to put the Vakils on notice of LOA's
15 claims. However, once again, the documents themselves demonstrate the FTC's
16 allegations are correct:¹⁶

- 17 • The DOE test results include pictures of the LED bulb packaging and
18 identify the watt equivalency claims made on those packages for the
19 models tested (e.g., "Replaces 45 Watts"). *See* Motion, Ex. C,
20 FTC01090-1, FTC01105-6, FTC01129-30; Amd. Cplt. ¶ 16;
- 21 • The report includes lumen output results for each of the tested
22 models. Motion, Ex. C (FTC01094, FTC01110, FTC01134); Amd.
23 Cplt. ¶ 25.a-c.
- 24 • Looking at the report, the disparity between the claim on the package
25 and the tested lumen output is dramatic (e.g., tested lumen output less
26

27 ¹⁶ The Court may review those documents to determine if that is the case.
28 *See, e.g., TYR Sport*, 679 F. Supp. 2d at 1128.

1 than one-half of the claimed output in all instances). Amd. Cplt. ¶
2 25.a.c.

3 If notice of the results compared to LOA's claims were not enough, the FTC
4 alleges that DOE invited Usman Vakil to comment on the results. Amd. Cplt. ¶
5 24. In his response, Usman Vakil did not contest the test results. *Id.* ¶ 57. All of
6 this was evident to Farooq Vakil as well because he received a copy of LOA's
7 response to this report and also received notice that DOE tested the company's
8 products. *Id.* ¶ 71. Thus, the allegations in the Amended Complaint plausibly
9 show the Vakils were actually aware of LOA's misrepresentations.

10 2. At A Minimum, The Vakils Were Recklessly Indifferent.

11 Even assuming, *arguendo*, the Vakils did not have actual knowledge of the
12 misrepresentations on LOA's LED packaging, the FTC has alleged ample facts to
13 plausibly show that the Vakils were recklessly indifferent to the truth or falsity of
14 the representations.¹⁷ From the FTC's factual allegations, the Court can draw the
15 reasonable inference that as the CEO and Executive Vice President of the
16 company, Usman and Farooq Vakil acted with reckless indifference if they failed
17 to read DOE's report on tests conducted of their company's products. They were
18 aware that the DOE planned to publish the test results, Amd. Cplt. ¶ 24; Motion,
19 at 5. Given their prior lawsuit with Consumers Union over its negative test
20 reports about compact fluorescent light output and lifetime, Amd. Cplt. ¶¶ 85-88,
21 it is inconceivable that the Vakils would have turned a blind eye to a test report
22 from the federal agency tasked with regulating this technology.

23 The LED issue is even worse because, as the FTC alleges, the Defendants
24 had *no* tests for many if not all of its models until as late as December 2008 –

25
26 ¹⁷ The FTC has not alleged voluminous facts concerning what the Vakils
27 knew of LOA's LED business because that kind of "knowledge" is held by the
28 individuals and is the very reason Rule 9(b) permits parties to aver knowledge
generally.

1 several months after disseminating the product claims. Amd. Cplt. ¶ 21. Thus,
2 LOA did not even bother to begin testing in an attempt to support its claims until
3 after their LED lamps were being sold across the country. The failure to conduct
4 any testing is particularly problematic given LOA's earlier lawsuit regarding light
5 output and lifetime claims on its packaging. In sum, given the Vakils' lighting
6 industry experience, the prior CFL litigation, and the DOE test results, it is more
7 than plausible that the failure to have any substantiation of the claims, or failure to
8 review DOE's testing results, was recklessly indifferent.

9 Based on all of the factual allegations discussed above, taken together and
10 viewed in the light most favorable to the FTC, the Amended Complaint contains
11 more than adequate factual support to sufficiently "nudge" its claims for
12 individual liability "across the line from conceivable to plausible." *Twombly*, 550
13 U.S. at 570.¹⁸

14 3. The Vakils Concede Knowledge As of July 2009.

15 Finally, the Vakils do not contest whether the FTC's allegations in the
16 Amended Complaint adequately state a claim against the Vakils after July 2009.
17 In fact, the Vakils apparently concede that they had actual knowledge of LOA's
18 misrepresentations by July 2009 since they have not argued their "lack of
19 knowledge" continued after that time. Specifically, the Vakils claim the July 2009
20 communications cited in the Amended Complaint "reflect the efforts on the part of
21 the Individual Defendants to assure that accurate LED lifetime data was obtained
22 in connection with any further marketing of the company's LED products."
23 Motion, at 20. In other words, the Vakils could not have been more involved and
24

25 ¹⁸ The FTC is not required to allege every possible fact in support of a
26 particular claim in order to defeat a motion to dismiss. *al-Kidd*, 580 F.3d at 977.
27 To do so would eviscerate the purpose of notice pleading, which is to provide the
28 defendant with sufficient notice of the claim so that he is able to adequately defend
against it. *Starr*, 2011 WL 477094, at *14.

1 aware at that time. This admission alone supports the FTC’s allegations and is a
2 basis to deny the Vakils’ Motion – it concedes the Vakils had the ability to control
3 LOA’s product packaging (their positions as executives of the company had not
4 changed in more than fifteen years) and shows they were recklessly indifferent
5 about what those labels said up until the time a government regulator inquired
6 about those claims.

7 C. The FTC Has Alleged Sufficient, Particularized Facts To Plausibly
8 Assert A Claim Against LOA And The Vakils After August 2009.

9 In the Vakils’ final argument, they have, once again, attempted to convince
10 this Court that the FTC must prove its facts as part of defending against the
11 Motion. The Vakils claim that the FTC has not alleged with particularity that
12 LOA sold its LED lamps with false or unsubstantiated claims after July 2009.
13 The Vakils, simply put, are wrong. The FTC alleged ample particularized facts
14 demonstrating the plausibility of LED lamp sales by LOA after July 2009.¹⁹ The
15 Vakils’ assertion that the FTC failed to allege facts “to *establish* that LOA sold
16 any LED products with false or unsubstantiated labels or brochures after July
17 2009” is premature – the FTC need only allege facts, not establish and prove
18 them.²⁰ *TYR Sport*, 679 F. Supp. 2d at 1128; Motion, at 24 (emphasis added).

21 ¹⁹ As this Court previously ruled, the FTC must allege the circumstances
22 constituting the fraud with particularity. The purpose of this standard is to give a
23 party “notice of particular misconduct . . . so that they can defend against the
24 charge and not just deny that they have done anything wrong.” *Neubronner v.*
Milliken, 6 F. 3d 666, 672 (9th Cir. 1993).

25 ²⁰ If the FTC finds no evidence that LOA promoted LED lamps with
26 unsubstantiated claims after July 2009, it is a defense to liability – not a basis for
27 relief on a motion to dismiss. *See, TYR Sport*, 679 F. Supp. 2d at 1128 (“factual
28 challenges have no bearing under Rule 12(b)(6)”); *Starr*, 2011 WL 477094, at *14
 (“question is not truth or even probability” of proof by evidence later discovered).

1 The FTC has plausibly stated its claim providing more than “enough facts
2 to raise a reasonable expectation that discovery will reveal evidence” supporting
3 its allegations regarding LOA’s marketing and sales activities of LED lamps after
4 August 2009. *Starr*, 2011 WL 477094, at *14 (quoting *Twombly*, 550 U.S. at
5 556).

6 The FTC alleged LOA sold LED lamps through August 2009 and that
7 Defendants continued their sales with false or unsubstantiated representations
8 after that date.²¹ Amd. Cplt. ¶¶ 12-13, 31, 39, 60, 63, & 80. Specifically, the FTC
9 alleged that: (a) certain LED lamp models; (b) were sold by LOA to retailers; (c)
10 these lamp models were being sold on the Internet; (d) more than a year after July
11 2009; (e) through multiple retailer websites; (f) that were making the same claims;
12 (g) regarding incandescent watt bulb equivalency and lamp lifetime; (h) that LOA
13 had on packaging and product brochures; (i) that were distributed to retailers
14 throughout the United States. *Id.* ¶¶ 12-13, 16-17, 31, 39, 60, 63, & 80.²²
15 Significantly, the FTC alleged that each of the five LED models identified on
16 retailers’ websites had earned LOA at least [REDACTED] in sales from
17 February 2008 through August 2009. *Id.* ¶¶ 32 & 51. Given their appearance on
18 retailer websites over a year after August 2009, the Court may infer that LOA
19 continued sales of these models after that time. Similarly, since retailer websites
20 made the same claims after August 2009 that LOA made prior to that date, the
21 Court may infer that retailers relied on claims supplied by LOA. Moreover, it is
22 reasonable to expect that discovery will bolster these facts by revealing evidence
23 that the marketing and sale of LOA’s top selling LED lamp models did not cease
24

25 ²¹ Notably, the Vakils ignore the Amended Complaint allegations that LOA
26 sales took place during August 2009 with false or unsubstantiated claims.
27 *See, e.g.*, Amd. Cplt. ¶¶ 12-13, 32, & 38.

28 ²² Moreover, the FTC provided detailed allegations as to why the claims
were false or unsubstantiated. Amd. Cplt. ¶¶ 22-23, 25, 28, 35-36, 41, & 43-48.

1 after August 2009 and that the claims made on retailer websites after July 2009
2 were the result of LOA's false or unsubstantiated watt equivalency and lifetime
3 claims.²³ Accordingly, viewing these facts as true and with all reasonable
4 inferences in the FTC's favor, the FTC has stated a plausible claim for relief
5 against LOA for its deceptive marketing and sale of LED lamps after August
6 2009.

7 If the Court concludes further facts are needed regarding LED lamp sales
8 after July 2009, the FTC respectfully requests leave to amend to add facts
9 regarding the LOA LED lamps the FTC purchased from online retailers in August,
10 2010. *See, Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003) ("Facts
11 raised for the first time in plaintiff's opposition papers should be considered by
12 the court in determining whether to grant leave to amend or dismiss the complaint
13 with or without prejudice."). The packaging on these LED lamps, which
14 Defendants disseminated into the stream of commerce, bear the same false or
15 unsubstantiated lifetime claims for two LOA LED lamp models as alleged in the
16 Amended Complaint.

17 Once this Court determines that the FTC has stated a plausible claim against
18 LOA for its unsubstantiated claims in the marketing, promotion, or sale of LED
19 lamps after July 2009, the rest of the inquiry is simple because the Vakils have
20 conceded both authority to control LOA's marketing and sale of the LED lamps
21 and knowledge of the misrepresentations. Motion, at 20. Unlike the remaining
22 claims at issue in the Motion, here the Vakils contest only whether the FTC has
23 stated a plausible claim that LOA *sold* LED lamps after July 2009 that contained
24 false or unsubstantiated claims. Having shown the Court that it has alleged
25 sufficient facts to plausibly assert this claim, the Vakils' Motion should be denied.

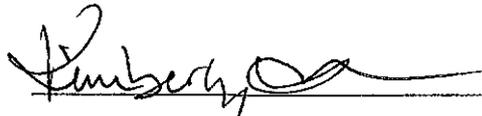
26
27 ²³ LOA's response to the FTC's CID was dated September 22, 2009, and
28 includes correspondence through approximately September 17, 2009. Thus, the
information the FTC obtained from LOA from the CID is limited in time.

1 IV. CONCLUSION

2 For all the foregoing reasons, the FTC respectfully requests that this Court
3 deny the Vakils' Motion.

4 Respectfully submitted,

5
6 Date: March 7, 2011



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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2011, the foregoing document titled
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