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1 understood or as contemplated by Rule 9(b).” FTC v. Freecom Communications, Inc., 401  
2 F.3d 1192, 1204 n.7 (10th Cir. 2005). This is consistent with both the elements and purpose  
3 of these FTC actions being distinguishable from common law fraud claims. In an action  
4 under the FTC Act, it need only be shown that a defendant engaged in a material  
5 misrepresentation or omission that was likely to mislead reasonable consumers. FTC v.  
6 Peoples Credit First, LLC, 244 F.App’x. 942, 944 (11th Cir. 2007) (citing FTC v. Tashman,  
7 318 F.3d 1273, 1277 (11th Cir. 2003)). This is further reinforced by the fact that FTC  
8 enforcement actions serve a public purpose. As the Tenth Circuit discussed in Freecom  
9 Communications with respect to FTC enforcement actions:

10 [They are] not a private or common law fraud action designed to remedy a  
11 singular harm, but a government action brought to deter deceptive acts and  
12 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.

13 401 F.3d at 1204 n.7 (citing FTC v. Security Rare Coin & Bullion Corp., 931 F.3d 1312,  
14 1316 (8th Cir. 1991)). Consequently, courts have repeatedly declined to extend Rule 9(b) to  
15 § 45(a) actions. Freecom Communications, 401 F.3d at 1204 n.7 (rejecting the application of  
16 Rule 9(b) and explaining that “[u]nlike the elements of common law fraud, the FTC need not  
17 prove scienter, reliance, or injury to establish a § 5 violation.”); FTC v. Amy Travel Serv.,  
18 Inc., 875 F.2d 564, 574 (7th Cir. 1989) (“We find that imposing a requirement that the FTC  
19 prove subjective intent to defraud on the part of the defendants would be inconsistent with  
20 the policies behind the [FTC Act] and place too great a burden on the FTC.”); FTC v.  
21 Innovative Mktg., Inc., 654 F. Supp. 2d 378, 388 (D. Md. 2009) (“Defendant seems to argue  
22 for a pleading standard akin to the particularity requirement for claims of fraud under Fed. R.  
23 Civ. P. 9(b) – a heightened standard that does not apply [to 15 U.S.C. § 45(a)] claims under  
24 the FTC Act.”); FTC v. Nat’l Testing Serv., LLC, 2005 WL 2000634, at \*5 (M.D. Tenn.  
25 Aug. 18, 2005) (“Because the primary purpose of [15 U.S.C. § 45(a)] is to protect the  
26 consumer public rather than to punish the wrong-doer, the intent to deceive the consumer is  
27 not an element of the [15 U.S.C. § 45(a)] violation.”); FTC v. Skybiz.com, Inc., 2001 WL

1 1673649, at \* 4 (N.D. Okla. Aug. 2, 2001) (“A claim under [15 U.S.C. § 45(a)] of the FTC  
2 Act is not a claim of fraud or mistake, so Rule 9(b) does not apply.”) (quoting FTC v.  
3 Communityne, 1993 WL 558754, at \*2 (N.D. Ill. Dec. 3, 1993); see also FTC v. Patriot  
4 Alcohol Testers, Inc., 798 F. Supp. 851, 855 (D. Mass. 1992) (stating that lack of intent and  
5 good faith are not defenses to a 15 U.S.C. § 45(a) action).

6 Claims that “are not ‘grounded in fraud’” are not subject to Rule 9(b). Knollenberg v.  
7 Harmonic, Inc., 152 F.App’x 674, 683-84 (9th Cir. 2005) (citing In Re Daou Systems, Inc.,  
8 411 F.3d 1006, 1027-28 (9th Cir. 2005)). The elements of fraud are: (1) a misstatement or  
9 omission; (2) of material fact; (3) made with the intent to defraud; (4) on which the plaintiff  
10 relied; and (5) which proximately caused the plaintiff’s injury. These elements have little  
11 overlap with what must be shown in an action under the FTC Act: “first there is a  
12 representation, omission, or practice that, second, is likely to mislead consumers acting  
13 reasonably under the circumstances, and third, the representation, omission, or practice is  
14 material.” FTC v. Stefanichik, 559 F.3d 924, 928 (9th Cir. 2009) (internal citations omitted).  
15 Plaintiff’s claims under the FTC Act and TSR are easily distinguished from fraud and are  
16 therefore not subject to Rule 9(b).

17 Rule 9(b) is an exception to the traditional liberal pleading requirements, which, “by  
18 its terms, applies only to allegations of fraud or mistake.” Concha, 62 F.3d at 1502. In the  
19 past, the Ninth Circuit has “decline[d] to extend Rule 9 beyond its plain terms” and this logic  
20 should be applied in this case. Id. Defendants’ argument relies upon two cases which swim  
21 against both the crucial distinction between actions under § 45(a) and fraud, and the  
22 overwhelming current of cases discussed above which hold that § 45(a) actions are pled in  
23 accordance with Rule 8(a). The reasoning in FTC v. Ivy Capital, Inc., 2011 WL 2118626 (D.  
24 Nev. May 25, 2011), and FTC v. Lights of America, Inc., 760 F.Supp. 2d 848 (C.D. Cal.  
25 2010), should be rejected for straightforward reasons: § 45(a) violations do not require proof  
26 of scienter, reliance or injury, and lack of intent is not a defense to § 45 actions. Actions  
27 under § 45 are therefore not fraud claims. The two district court decisions that hold  
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1 otherwise ignore the prophylactic consumer protection that distinguishes an FTC Act  
2 violation from a full-blown fraud. Defendants' attempt to impose Rule 9(b)'s heightened  
3 pleading requirements on this Complaint should be rejected.

4 **C. The Complaint is Well-Pled Under Either Rule 8(a) or 9(b)**

5 While the United States need not satisfy Fed. R. Civ. P. 9(b) for the reasons discussed  
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1 Courts have similarly recognized that requiring specific citation to each instance of  
2 fraudulent conduct is impractical where the violative conduct is repeated frequently over a  
3 lengthy period of time. See United States ex rel. Franklin v. Parke-Davis, Div. of Warner-  
4 Lambert Co., 147 F. Supp. 2d 39, 49 (D. Mass. 2001) (where allegations are “complex and  
5 far-reaching, pleading every instance of fraud would be extremely ungainly, if not  
6 impossible”); In re Cardiac Devices Qui Tam Litig., 221 F.R.D. 318, 333 (D. Conn. 2004)  
7 (“[W]here the alleged fraudulent scheme involved numerous transactions that occurred over a  
8 long period of time, courts have found it impractical to require the plaintiff to plead the  
9 specifics with respect to each and every instance of fraudulent conduct.”). Additionally, the  
10 heightened pleading standard for fraud claims is relaxed somewhat where factual information  
11 is peculiarly within defendant’s knowledge or control. E & E Co., Ltd. v. Kam Hing  
12 Enterprises, Inc., 429 F.App’x 632, 633 (9th Cir. 2011) (citing Moore v. Kayport Package  
13 Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989)). As a result, any analysis of the Complaint  
14 in this action under Rule 9(b) would be subject to the relaxed standard that is applied to  
15 claims where evidence “lies within [Defendants’] exclusive possession” and specific citation  
16 to each instance of fraudulent conduct would not be required. Id.; U.S. ex rel. Tamanaha,  
17 2011 WL 3423788 at \*2; (citing United States ex rel. Lee v. SmithKline Beecham, Inc., 245  
18 F.3d 1048, 1052 (9th Cir. 2001)); United States ex rel. Franklin, 147 F. Supp. 2d at 49.

19 Here, the Complaint identifies with sufficient particularity the who, the what and the  
20 how, the when, and the where of Defendants’ violative conduct. The “who” is specified as  
21 the Complaint identifies each Defendant and explains their respective roles in the alleged  
22 conduct at the outset, including noting that Brian Hessler “has the authority and  
23 responsibility to prevent or correct unlawful telemarketing practices at BRS, and has  
24 formulated, directed, controlled, or participated in the acts and practices of Defendant BRS.”

25 The Complaint also provides information about the “what” and the “how” by  
26 providing ample notice about what violative conduct occurs at BRS and how it happens. For  
27 example, paragraph 10 of the Complaint states that “Defendants’ telemarketers represent that,  
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1 if the consumers purchase and use a do-it-yourself recovery kit from BRS, the consumers  
2 will recover or are highly likely to recover a substantial portion of monies that the consumers  
3 previously paid to third-party business opportunity and work-at-home ventures.” Paragraph  
4 11 explains that many companies are unable to refund customers, and Paragraph 14 states  
5 that “[i]n numerous instances, consumers who buy and use Defendants’ kits are unable to  
6 recover funds.”

7       As Defendants’ have used these illegal sales practices across numerous transactions  
8 and a long period of time, it is impractical to require the government to specify every  
9 instance of “when” the conduct occurred. See In re Cardiac Devices Qui Tam Litig., 221

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1 Complaint contains a detailed factual account that more than satisfies Fed. R. Civ. P. 8.  
2 Defendants' attempt to have the Court apply the particularity requirements of Fed. R. Civ. P.  
3 9(b) should be rejected, although the Complaint meets that standard as well. Finally, a cease  
4 and desist order is not a prerequisite to an action under Section 45(m)(1)(A). Accordingly,  
5 the United States respectfully requests that the Court deny Defendants' motion.

6 Submitted this 1st day of February, 2012.

7 Of Counsel:

FOR THE UNITED STATES OF AMERICA:

8 HAROLD E. KIRTZ  
9 Attorney  
10 Federal Trade Commission  
11 225 Peachtree Street  
12 Suite 1500  
13 Atlanta, Georgia 30303  
14 (404) 656-1357 (voice)  
15 (404) 656-1379 (fax)  
16 [hkirtz@ftc.gov](mailto:hkirtz@ftc.gov)

ANN BIRMINGHAM SCHEEL  
Acting United States Attorney  
District of Arizona

TONY WEST  
Assistant Attorney General

MAAME EWUSI-MENSAH FRIMPONG  
Acting Deputy Assistant Attorney General

MICHAEL S. BLUME  
Director  
Consumer Protection Branch

KENNETH L. JOST  
Deputy Director  
Consumer Protection Branch

/s/ Jessica R. Gunder  
JESSICA R. GUNDER  
Trial Attorney  
Consumer Protection Branch

**CERTIFICATE OF SERVICE**

I hereby certify that on February 1, 2012, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Michael St. George  
The Law Offices of Michael E. St. George, P.C.  
440 E. Southern Ave.  
Tempe, AZ 85282  
(480) 968-9068  
[stgeorge@stgeorgelaw.com](mailto:stgeorge@stgeorgelaw.com)

Glynn W. Gilcrease  
Gilcrease Law  
440 E. Southern Ave.  
Tempe, AZ 85282  
(480) 897-0990  
[glynn@gilcreaselaw.com](mailto:glynn@gilcreaselaw.com)

Christopher Mahoney  
Duane Morris  
505 9th Street, NW, Suite 1000  
Washington, DC 20004-2166  
[cmahoney@duanemorris.com](mailto:cmahoney@duanemorris.com)

David L. Abney  
Knapp & Roberts  
8777 N. Gainey Center Drive, Suite 181  
Scottsdale, AZ 85258-2106  
[abneymaturin@aol.com](mailto:abneymaturin@aol.com)

*Counsel for Defendants*

/s/ Jessica R. Gunder  
JESSICA R. GUNDER  
Trial Attorney  
Consumer Protection Branch