

1 ANN BIRMINGHAM SCHEEL
Acting United States Attorney
2 District of Arizona
TONY WEST
3 Assistant Attorney General
MAAME EWUSI-MENSAH FRIMPONG
4 Acting Deputy Assistant Attorney General
MICHAEL L. BLUME
5 Director, Consumer Protection Branch
KENNETH L. JOST
6 Deputy Director, Consumer Protection Branch
JESSICA R. GUNDER
7 Trial Attorney, Consumer Protection Branch
Missouri Bar # 60156
8 United States Department of Justice
Liberty Square Building - Room 6400 South
9 450 Fifth Street, NW
Washington, DC 20001
10 Telephone: (202) 532-4719
Facsimile: (202) 514-8742
11 E-Mail: jessica.r.gunder@usdoj.gov
Attorneys for the United States

12
13 UNITED STATES DISTRICT COURT
14 DISTRICT OF ARIZONA
15

16 UNITED STATES OF AMERICA,

17 Plaintiff,

18 v.

19 BUSINESS RECOVERY SERVICES, LLC
a limited liability company, and,

20 BRIAN HESSLER
21 individually, and as owner, officer,
or manager of Business Recovery
22 Services, LLC,

23 Defendants.

No. 2:11CV00390 JAT

Response in Opposition to
Defendants' Motion to Dismiss
for Failure to State a Claim Under
Rule 12(b)(6)

24
25 Defendants' motion is untimely and should be denied as Defendants' Answer was
26 filed over ten months ago. If the Court does consider this untimely motion, it should be
27 rejected as Defendants' arguments are meritless.
28

ARGUMENT

I. This Motion is Untimely and Should be Dismissed

Motions under Rule 12(b)(6) “must be made before pleading if a responsive pleading is allowed.” Fed. R. Civ. P. 12(b); see also Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 954 (9th Cir. 2004). As the Ninth Circuit has noted, “[a] fundamental tenet of the Federal Rules of Civil Procedure is that certain defenses under Fed. R. Civ. P. 12 must be raised at the first available opportunity or, if they are not, they are forever waived.” American Ass’n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1106 (9th Cir. 2000). An answer to a complaint is a responsive pleading. See Fed. R. Civ. P. 7(a)(2).

Defendants filed an Answer to the Complaint in this matter on March 28, 2011 [doc. #16]. Relief under Fed. R. Civ. P. 12(b)(6) is therefore foreclosed.

II. This Motion Also Fails on the Merits

Untimely motions to dismiss are sometimes treated as a motion for judgment on the pleadings. Aldabe v. Aldabe, 616 F.2d 1089, 1093 (9th Cir. 1980); Elvig, 375 F.3d at 954. “A judgment on the pleadings is properly granted when, taking all the allegations in the pleadings as true, [a] party is entitled to judgment as a matter of law.” Lyon v. Chase Bank USA, N.A., 656 F.3d 877, 883 (9th Cir. 2011) (quoting Dunlap v. Credit Prot. Ass’n, L.P., 419 F.3d 1011, 1012 n.1 (9th Cir. 2005); Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001)). If the Court elects to convert Defendants’ untimely motion to dismiss into a judgment on the pleadings, the motion should be denied on the merits.

A. The Court Must Consider the Complaint in Its Entirety when Evaluating a Motion to Dismiss for Failure to State a Claim.

Defendants assert that all three counts of the Complaint are conclusory and fail to state claims upon which relief can be granted. To support this argument, Defendants ask that the Court ignore all but three of the paragraphs of the Complaint - paragraphs 19, 21, and 25 - which Defendants state do not contain sufficient factual detail.

Defendants’ proposition that the Court should not consider the remaining 29

1 paragraphs of the Complaint should be rejected outright. It is well established that “[c]ourts
2 must consider the complaint in its entirety, as well as other sources courts ordinarily examine
3 when ruling on Rule 12(b)(6) motions to dismiss[.]” Dunn v. Castro, 621 F.3d 1196, 1205
4 n.6 (quoting Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007));
5 Magulta v. Samples, 375 F.3d 1269, 1274-75 (11th Cir. 2004) (when reviewing a motion to
6 dismiss for failure to state a claim, courts should read the complaint in its entirety); 5 Wright
7 & Miller, Federal Practice and Procedure § 1286 (3d ed. 2004); 5B Wright & Miller, Federal
8 Practice and Procedure § 1357 (3d ed. 2004).

9 Defendants’ provide no legal support for the proposition that these three paragraphs
10 should be pulled out of the Complaint and examined independently. Plaintiff’s decision to
11 add subheadings which enumerate and delineate the separate counts was done as a
12 convenience to Defendants and the Court, and does not limit the factual averments in the
13 Complaint to only what is included under each individual subheading. The Court must
14 consider the Complaint as a whole. Id.

15 Consideration of the Complaint as a whole demonstrates that it meets the requirements
16 established under the Federal Rules. “[A] complaint must contain sufficient factual matter . .
17 . to ‘state a claim for relief that is plausible on its face.’” Ashcroft v. Iqbal, 129 S.Ct. 1937,
18 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). This
19 standard is met where “the plaintiff pleads factual content that allows the court to draw the
20 reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 129 S.Ct.
21 at 1949 (citing Twombly, 550 U.S. at 556). Here, the Complaint presents a detailed
22 recitation of Plaintiffs’ assertions that more than satisfies the pleading requirements. A
23 review of the entire Complaint demonstrates that the Complaint in no way relies upon mere
24 legal conclusions but contains a detailed factual account of Defendants’ illegal practices
25 which establish their liability for the violations of both the FTC Act and Telemarketing Sales
26 Rule.

1 **B. Counts II and III Do Not Need to Meet the Pleading Requirements**
2 **Enumerated in Fed. R. Civ. P. 9(b)**

3 Defendants' contention that Counts II and III are subject to the heightened pleading
4 requirements of Fed. R. Civ. P. 9(b) is incorrect. Rule 9(b) requires that fraud be plead with
5 particularity, but neither of these counts plead fraud. Rather, Plaintiff pleads in Count II that
6 Defendants have violated Section 310.3(a)(2)(iii) of the Telemarketing Sales Rule by
7 "misrepresenting . . . material aspects . . . of the goods that are the subject of their sales
8 offer[.]" Similarly, Count III does not plead fraud, but instead asserts that Defendants
9 violated the FTC act by making misleading or unsubstantiated representations "in connection
10 with the advertising, marketing, promotion, offering for sale, or sale of recovery goods and
11 services."

12 The Federal Rules require that "in alleging a fraud or mistake, a party must state with
13 particularity the circumstances constituting the fraud or mistake. Malice, intent, knowledge,
14 and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). The
15 purposes of Rule 9(b) are to provide the defendant with sufficient notice of the basis for the
16 plaintiff's claim, to protect the defendant against frivolous suits, to eliminate fraud actions
17 where all of the facts are learned only after discovery, and to safeguard the defendant's
18 reputation. *See generally* 5A Arthur R. Miller and Mary Kay Kane, Fed. Prac. & Proc. Civ. §
19 1296 (3d ed. 2004). In the Ninth Circuit, Rule 9(b) is properly applied to fraud claims,
20 securities fraud claims, and civil RICO claims based on fraud, but generally not to negligent
21 misrepresentation or other non-fraud causes of action. *See Concha v. London*, 62 F.3d 1493,
22 1502 (9th Cir. 1995); *Miller v. IBM*, 138 F.App'x 12, 16-17 (9th Cir. 2005). Rule 9(b) is
23 simply not applicable in cases where a complaint "does not allege fraud or mistake." *Concha*,
24 62 F.3d at 1503. Only those claims that require an essential showing of fraud must meet the
25 higher standard of Rule 9(b).

26 Courts have long held that prohibited deceptive practices under Section 5 of the FTC
27 Act, 15 U.S.C. § 45(a), do not amount to "a claim of fraud as that term is commonly
28

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
28

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
6 above, Counts II and III of the instant Complaint nevertheless meet the pleading standards of
7 both Rules 8(a) and Rule 9(b). Even if the Court were to apply Rule 9(b) to Plaintiff's
8 allegations in Counts II and III, Plaintiff has pled these counts with sufficient specificity to
9 survive a motion to dismiss. In order to satisfy the particularity requirement for pleading a
10 fraud claim, a complaint must specify "the who, what, when, where, and how of the
11 misconduct charged . . . [and] what is false or misleading about [the purportedly fraudulent]
12 statement, and why it is false." United States ex rel. Cafasso v. General Dynamics C4
13 Systems, Inc., 637 F.3d 1047, 1055 (9th Cir. 2011) (quoting Ebeid ex rel. United States v.
14 Lungwitz, 616 F.3d 993, 998 (9th Cir. 2010)).¹

15 As a preliminary matter, what constitutes sufficient particularity for the purpose of
16 Rule 9(b) depends upon the facts of a each case. AnchorBank, FSB v. Hofer, 649 F.3d 610,
17 615 (7th Cir. 2011); Williams v. WMX Technologies, Inc., 112 F.3d 175, 178 (5th Cir. 1997).
18 For example, courts typically apply a relaxed 9(b) standard in the False Claims Act context.
19 See, e.g., U.S. ex rel. Tamanaha v. Furukawa America, Inc., 2011 WL 3423788, *2 (9th Cir.
20 Aug. 5, 2011); United States ex rel. Grubbs v. Kanneganti, 565 F.3d 180, 190 (5th Cir.
21 2009). Notably, in Ivy Capital, while the district court applied 9(b)'s requirements to an
22 action under the FTC Act, it found that a relaxed 9(b) standard was appropriate and
23 determined that the FTC's pleadings were satisfactory. 2011 WL 2118626 at *4.

24 _____
25 ¹ Some decisions indicate that a court should hesitate to dismiss a complaint under Rule
26 9(b) "if the court is satisfied (1) that the defendant has been made aware of the particular
27 circumstances for which she will have to prepare a defense at trial, and (2) that plaintiff has
substantial pre-discovery evidence of those facts." See, e.g., Harrison v. Westinghouse Savannah
River Co., 176 F.3d 776, 784 (4th Cir. 1999).

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,
28

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
10 F.R.D. at 333. However, the Complaint adequately informs Defendants of the scope of the
11 illegal conduct by specifying in paragraph 9 that it has taken place “since at least September
12 2008[.]” Finally, the “where” is specified in paragraphs 5, 6, 8, 9, and 10, which explain that
13 Defendants have used the telephones to transact business in Arizona and throughout the United
14 States, and that these representations are made “[d]uring inbound and outbound calls with
15 consumers.”

16 The facts pled in the Complaint specify “the who, what when where, and how of the
17 misconduct charged” and put Defendants on notice of the representations at issue in this case.
18 United States ex rel. Cafasso, 637 F.3d at 1055 (quoting Ebeid ex rel. United States, 616 F.3d
19 at 998). These facts raise the inference beyond a speculative level that Defendants violated
20 Section 310.3(a)(2)(iii) of the Telemarketing Sales Rule by “misrepresenting . . . material
21 aspects . . . of the goods that are the subject of their sales offer” and violated the FTC act by
22 making misleading or unsubstantiated representations “in connection with the advertising,
23 marketing, promotion, offering for sale, or sale of recovery goods and services” as required
24 by Rule 8(a). They also provide sufficient particularity to meet the heightened pleading
25 requirements of Rule 9(b), though that is unnecessary in this case.

1 **D. The FTC Did Not Need to Send a Cease and Desist Order for this Action**
2 **to be Brought.**

3 Defendants assert that Count III of the Complaint should be dismissed because the
4 FTC did not make pre-litigation findings or issue a final cease and desist order before this
5 suit was filed. Defendants' allegations are based upon a complete misreading and
6 misunderstanding of the FTC Act and the Complaint, and accordingly should be rejected.

7 Section 45(m)(1)(B) of the FTC Act authorizes the Federal Trade Commission to
8 bring lawsuits seeking civil penalties against defendants when the Commission has a prior
9 order against that defendant, and the defendant violates the order. While a cease and desist
10 order must be issued before an action seeking civil penalties can be filed under 15 U.S.C. §
11 45(m)(1)(B), this lawsuit was not filed under Section 45(m)(1)(B). Instead, as is clearly
12 alleged in the Complaint, this lawsuit was brought pursuant to 15 U.S.C. § 45(m)(1)(A).
13 Section 45(m)(1)(A) authorizes the commencement of lawsuits seeking civil penalties against
14 those who knowingly violate rules promulgated under the FTC Act.

15 The language used in FTC Act demonstrates that these provisions are to be read
16 separately:

17 (A) The Commission may commence a civil action to recover a civil penalty in a
18 district court of the United States against any person, partnership, or corporation
19 which violates any rule under this chapter respecting unfair or deceptive acts or
20 practices . . . with actual knowledge or knowledge fairly implied on the basis of
21 objective circumstances that such act is unfair or deceptive and is prohibited by
22 such rule. In such action, such person, partnership, or corporation shall be liable
23 for a civil penalty of not more than \$10,000 for each violation.

24 (B) If the Commission determines in a proceeding under subsection (b) of this
25 section that any act or practice is unfair or deceptive, and issues a final cease and
26 desist order, other than a consent order, with respect to such act or practice, then
27 the Commission may commence a civil action to obtain a civil penalty in a district
28 court of the United States against any person, partnership, or corporation which
29 engages in such act or practice- -

30 (1) after such cease and desist order becomes final . . . , and

31 (2) with actual knowledge that such act or practice is unfair or deceptive
32 and is unlawful under subsection (a)(1) of this section.

33 In such action, such person, partnership, or corporation shall be liable for a civil
34 penalty of not more than \$10,000 for each violation.

35 15 U.S.C. § 45(m)(1). These sections clearly specify alternate scenarios in which the FTC

1 may seek civil penalties. It is especially telling that both provisions specify the penalty that
2 may be imposed and the required mental state, which would be unnecessary if the provisions
3 were intended to be read together.

4 The legislative history reinforces the conclusion that the cease and desist order
5 requirement of Section 45(m)(1)(B) was never intended to be applied to Section (m)(1)(A).
6 Before the Magnuson-Moss Warranty and FTC Improvements Act (“Magnuson-Moss Act”)
7 was passed in 1975, civil penalties were “available for violations of a final cease and desist
8 order; however, they could not be used to directly enforce a substantive rule.” See United
9 States v. J S & A Group, Inc., 547 F.Supp. 20, 21 (D.C. Ill. 1982); see also S. Conf. Rep. 93-
10 1408, 7771-72. The Magnuson-Moss Act provided the FTC with new enforcement
11 mechanisms, including 15 U.S.C. § 45(m)(1)(A). Pub. L. No. 93-637. The new enforcement
12 mechanisms included in the Magnuson-Moss Act allowed the Commission to seek civil
13 penalties in civil actions where no previous cease and desist order had been entered. Id. The
14 Senate Conference Report notes that the statute “provides that the Commission may initiate
15 such actions in two situations[.]” S. Conf. Rep. 93-1408, 7771-72. As a result of the
16 Magnuson-Moss Act, the FTC was able to commence lawsuits seeking civil penalties against
17 those who knowingly violate rules promulgated under the FTC Act, not only against cease
18 and desist order violators.

19 Defendants’ attempt to conflate and confuse these two sections of the FTC Act should
20 be rejected. Section 45(m)(1)(A) contains no requirement that the FTC issue a cease and
21 desist order prior to bringing a suit under that Section, and no such requirement should be
22 imposed.

23 CONCLUSION

24 Defendants’ motion should be rejected as it is untimely and fails to comply with the
25 requirements of Fed. R. Civ. P. 12(b). Nonetheless, if the Court elects to consider the motion
26 as a motion for judgment on the pleadings, the Motion should be denied as the arguments
27 Defendants’ raise are meritless. Analysis of the Complaint as a whole demonstrates that the
28

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

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

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

Christopher Mahoney
Duane Morris
505 9th Street, NW, Suite 1000
Washington, DC 20004-2166
cmahoney@duanemorris.com

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

Counsel for Defendants

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