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

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

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

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

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

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

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

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

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

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

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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.

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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:

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