UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

Case No. 11-61072-Civ. Zloch

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AMERICAN PRECIOUS METALS, LLC,
a Florida limited liability company,

HARRY R. TANNER, **JR.,** individually and as an owner, officer, and managing member of AMERICAN PRECIOUS METALS, LLC,

ANDREA TANNER, individually and as an owner, officer, and managing member of AMERICAN PRECIOUS METALS, LLC, and

SAM J. GOLDMAN, a/k/a SAMMY JOE GOLDMAN, individually and as an owner or manager of AMERICAN PRECIOUS METALS, LLC.

Defendants.

PLAINTIFF FEDERAL TRADE COMMISSION'S RESPONSE IN OPPOSITION TO DEFENDANT ANDREA TANNER'S MOTION TO DISMISS AMENDED COMPLAINT

INDEX OF AUTHORITIES

FEDERAL CASES

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) 10

Atwater v. Nat'l. Football League Players Ass'n., 2007 U.S. Dist. LEXIS 23371, at *15 (N.D. Ga. Mar. 29, 2007) 5

Barys ex rel United States v. Vitas Healthcare Corp., 298 Fed. App'x. 893, 897 (11th Cir. 2008) 6

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2006) 10

Twombly, 550 U.S. at 570 10

Brooks v. Blue Cross and Blue Shield of Florida, Inc., 116 F.3d 1364, 1371 (11th Cir. 1997) 6

Bruss Co. v. K & S Brokerage, Inc., No. 91-c-1561, 1991 U.S. Dist. LEXIS 17515, at *9 (N.D. Ill. Nov. 22, 1991) 8

Cf. Moore v. Kayport Package Express, 885 F.2d 531, 540 (9th Cir. 1989) 8

Florida v. Tenet Healthcare Corp., 420 F. Supp. 2d 1288, 1310 (S.D. Fla. 2005) 4

Tenet Healthcare, 420 F. Supp. 2d at 1310 4

FTC v. Amy Travel Servs., Inc., 875 F.2d 564, 573 (7th Cir. 1989) 8

FTC v. Atlantex Assocs., No. 87-0045, 1987 U.S. Dist. LEXIS 10911, at * 25 (S.D. Fla. Nov. 25, 1987), *aff'd,* 872 F.2d 966 (11th Cir. 1989) 8

FTC v. Cantkier, No. 09-00894, 2011 U.S. Dist. LEXIS 21076 (D.C. Mar. 3, 2011) 4

Cantkier, 2011 U.S. Dist. LEXIS 21076, at *22 4

FTC v. Communidyne Inc., No. 93-6043, 1993 U.S. Dist. LEXIS 18708, at *4-5 (E.D. Ill. Jan. 5, 1994) 2

Communidyne, 1993 U.S. Dist. LEXIS 18708, at *3-5 3

FTC v. Freecom Comm., Inc., 401 F.3d 1192, 1204 n. 7 (10th Cir. 2005) 2

Freecom, 401 F.3d at 1204 n.7 3

FTC v. Gem Merchandising Corp., 875 F.3d 466, 470 (11th Cir. 1996) 7

FTC v. Innovative Mktg., Inc., 654 F. Supp. 2d 378, 388-89 (D. Md. 2009) 2

Innovative Mktg., 654 F. Supp. 2d at 388-89 3

FTC v. Ivy Capital, Inc., No. 2:11-cv-283, 2011 U.S. Dist. LEXIS 57035
(Nev. May 25, 2011) 4

Ivy Capital, 2011 U.S. Dist. LEXIS 57035, at *9 5

Ivy Capital, 2011 U.S. Dist. LEXIS 57035, at *13 6, 8-9

Ivy Capital, 2011 U.S. Dist. LEXIS 57035, at *16-17 9

FTC v. Jordan Ashley, No. 93-2257, 1994 U.S. Dist. LEXIS 7494, at *9
(S.D. Fla. Apr. 5, 1994) 3, 8

FTC v. Lights of America, Inc., No. 10-1333, 2010 U.S. Dist. LEXIS 137088
(C.D. Cal. Dec. 17, 2011) 4

Lights of America, 2010 U.S. Dist. LEXIS 137088, at *12-13 5

FTC v. Medical Billers Network, Inc., 543 F. Supp. 2d 283, 314 (S.D.N.Y. 2008) 2

FTC v. Nat'l Testing Servs., LLC, No. 3:05-0613, 2005 U.S. Dist. LEXIS 46485,
at *4-5 (M.D. Tenn. Aug. 18, 2005) 2

Nat'l Testing Servs., 2005 U.S. Dist. LEXIS 46485, at *4-5 3

FTC v. Nat'l Urological Group, Inc., 645 F. Supp.2d 1167, 1206-07 (N.D. Ga. 2008),
aff'd, 2009 U.S. App. LEXIS 27388 (11th Cir. Dec. 15, 2009) 7

FTC v. Peoples Credit First, LLC, 244 Fed. Appx. 942, 944 (11th Cir. 2007) 2

FTC v. Skybiz.com, No. 01-396, 2001 U.S. Dist. LEXIS 26314, at *11
(N.D. Ok. Aug. 2, 2001) 2

FTC v. Swish Mktg., No. 09-03814, 2010 U.S. Dist. LEXIS 15016 (N.D. Cal. Feb. 22, 2010) 4

Swish Mktg., 2010 U.S. Dist. LEXIS 15016, at *10 5

FTC v. Tashman, 318 F.3d 1273, 1277 (11th Cir. 2003) 2

FTC v. Transnet Wireless Corp., 506 F. Supp. 2d 1247, 1270 (S.D. Fla. 2007) 3

Transnet Wireless, 506 F. Supp. 2d at 1270 8

FTC v. USA Fin'l., LLC, No. 10-12152, 2011 U.S. App. LEXIS 3774, at *7 n. 2 (11th Cir. Feb. 25, 2011) 3

FTC v. U.S.A. Financial, LLC, 415 Fed. Appx. 970, 974 (11th Cir. 2011) 7

FTC v. Wellness Support Network, Inc., No. 10-04879, 2011 U.S. Dist. LEXIS 36453, at *28 (N.D. Cal. Apr. 4, 2011) 9

Wellness Support, 2011 U.S. Dist. LEXIS 36453, at *27 n. 2 9

FTC v. Wilcox, 926 F. Supp. 1091, 1104 (S.D. Fla. 1995) 8

FTC v. Windward Mktg., Ltd., No. 96-615, 1997 U.S. Dist. LEXIS 17114, at *28-29 (N.D. Ga. Sept. 30, 1997) 3

FTC v. Wolf, No. 94-8119, 1996 U.S. Dist. LEXIS 1760, at *14 (S.D. Fla. Jan. 30, 1996) 3

Galstaldi v. Sunvest Cmtys. USA, LLC, 637 F. Supp. 2d 1045, 1058 (S.D. Fla. 2008) 3

General Cigar Company, Inc. v. CR Carriers, Inc., 948 F. Supp. 1030, 1037-38 (M.D. Ala. 1996) 8

Grills v. Philip Morris USA, Inc., 645 F. Supp. 2d 1107, 1122 n. 25 (M.D. Fla. 2009) 8

Jemison v. Mitchell, No. 09-15635, 2010 U.S. App. LEXIS 10905 (11th Cir. May 27, 2010) 10

Kenneth F. Hackett & Assocs. v. GE Capital Info. Tech., 744 F. Supp. 2d 1305, n. 4 (S.D. Fla. 2010) 3

Hackett & Assocs., 744 F. Supp. 2d at 1312 3

Kingdom Ins. Group, LLC v. Cutler and Assocs., No. 7:10-85, 2011 U.S. Dist. LEXIS 57816, at *12 n. 1, (M.D. Ga. May 31, 2011) 5

Orkin Exterminating Co. v. FTC, 849 F.2d 1354, 1368 (11th Cir. 1988) 3

Peters v. Amoco Oil Co., 57 F. Supp. 2d 1268, 1277 (M.D. Ala. 1999) 8

Silva v. Bieluch, 351 F.3d 1045, 1048 (11th Cir. 2003) 10

Speaker v. U.S. Dept. of Health and Human Servcs., 623 F.3d 1371, 1379 (11th Cir. 2010) 7

Thomas v. Pentagon Fed. Credit Union, 393 Fed. Appx. 635 (11th Cir. 2010) 5

Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1202 (11th Cir. 2001) 5

FEDERAL STATUTES

Section 5 of the Federal Trade Commission Act, 15 U.S.C. ¶ 45(a) 1-7

Telemarketing Sales Rule, 16 C.F.R. Part 310 1-2, 6-7

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 8(a) 1, 9-10

Fed. R. Civ. P. 9(b) 1-5, 7-10

OTHER

37 AM. JUR. 2D FRAUD AND DECEIT § 23 (2010) 2

Fla. Stat. §§ 501.201 4

Fla. Stat. § 608.402(20) 9

Fla. Stat. § 608.422(2)(a) 9

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 1

III. ARGUMENT 1

A. The FTC's Claims Are Not Required to be Plead With Particularity 1

1. The FTC's Claims Are Dissimilar to Fraud Claims 2

2. The Cases Upon Which Defendant Relies Are Not Controlling or Persuasive 4

B. The FTC's Amended Complaint Meets the Standards of Fed. R. Civ. P. 9(b) 5

1. Plaintiff's Amended Complaint is Pled With Particularity 5

2. The Amended Complaint Properly Sets Forth Defendant's Liability 7

3. Other Courts Deemed Similarly-Pled Complaints to Satisfy Rule 9(b) 9

IV. CONCLUSION 10

I. INTRODUCTION

Plaintiff Federal Trade Commission ("FTC") opposes Defendant Andrea Tanner's motion to dismiss, which is predicated on the FTC's purported failure to satisfy the requirements of Fed. R. Civ. P. 9(b), or alternatively of Rule 8(a). (Dkt. 190). There is no controlling precedent requiring the FTC to plead its claims like a fraud case under Rule 9(b), and the authority cited by Defendant is not persuasive. Plaintiff's pleading satisfies both Rule 8(a) and Rule 9(b), and Defendant's motion should be denied.

II. BACKGROUND

Plaintiff filed its amended complaint on October 11, 2011, alleging that Defendants American Precious Metals, LLC ("APM"), Harry Tanner, Andrea Tanner, and Sam Goldman violated Section 5 of the Federal Trade Commission Act and the Telemarketing Sales Rule[1] while selling precious metals. (Dkt. 155). The amended complaint fully described the conduct at issue and how it violated the law: Plaintiff described Defendants' collective operation of boiler rooms from which telemarketers used deception to lure consumers into purchasing precious metal as investments. (Dkt. 155 ¶¶ 11-32). The FTC itemized the deceptive practices and alleged that APM telemarketers misrepresented that the investments were safe and lucrative and failed to adequately disclose associated costs and risks. (Dkt. 155 ¶¶ 13-15, 17-18, 20-23).

The FTC also provided facts in its amended to complaint to justify entry of a permanent injunction against the individual defendants. (Dkt. 155 ¶¶ 7-9). For example, Defendant Andrea Tanner was an officer, managing member, and one of the persons responsible for management of APM. She controlled, had authority to control, or participated in the acts giving rise to the Plaintiff's complaint. (Dkt. 155 ¶ 8). For these reasons, a permanent injunction is proper and Defendant's motion to dismiss should be denied.[2] (Dkt. 190).

III. ARGUMENT

A. The FTC's Claims Are Not Required to Be Plead With Particularity

Defendant urges the Court to adopt the heightened pleading requirements of Fed. R. Civ.

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[1] ("FTC Act") 15 U.S.C. ¶ 45(a) and ("TSR") 16 C.F.R. Part 310.

[2] Defendant Sam J. Goldman filed a separate, nearly-identical motion to dismiss. (Dkt. 202).

P. 9(b) and to require the FTC to plead its claims with particularity. However, there is no controlling precedent requiring claims arising under the FTC Act or TSR adhere to Rule 9(b), and other courts, for sound public policy reasons, have determined that they should not.

1. The FTC's Claims Are Dissimilar to Fraud Claims

While the applicability of Rule 9(b) to the FTC's Section 5 and TSR claims appears not to have been previously decided by the Eleventh Circuit or this district, the majority of courts that have examined the issue have held that Rule 9(b) does not apply.[3] These courts have generally observed that the FTC's claims are not for fraud and that the FTC's statutory mandate to deter deception is dissimilar to a fraud action. Indeed, courts in this district have reached similar determinations concerning claims brought under comparable state laws.

Section 5 and TSR violations are not grounded in fraud and do not require the same proof. To establish a Section 5 violation, the FTC must show that a defendant made a material representation or omission that is likely to mislead consumers acting reasonably.[4] To establish a TSR violation, the FTC must show that a seller or telemarketer, directly or by implication, misrepresented or failed to disclose, clearly and conspicuously and before a consumer pays, certain categories of material information.[5] Neither claim requires scienter or reliance. By contrast, fraud requires proof of a false representation of a material fact, made with knowledge of its falsity and an intent to deceive, and upon which an action is taken in justifiable reliance.[6]

This distinction between Section 5 and fraud claims was noted by the U.S. Court of Appeals for the Tenth Circuit – the only circuit court to comment on the issue: "A § 5 claim

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[3] *See FTC v. Freecom Comm., Inc.*, 401 F.3d 1192, 1204 n. 7 (10th Cir. 2005); *FTC v. Innovative Mktg., Inc.*, 654 F. Supp. 2d 378, 388-89 (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*, No. 3:05-0613, 2005 U.S. Dist. LEXIS 46485, at *4-5 (M.D. Tenn. Aug. 18, 2005); *FTC v. Skybiz.com*, No. 01-396, 2001 U.S. Dist. LEXIS 26314, at *11 (N.D. Ok. Aug. 2, 2001); *FTC v. Communidyne Inc.*, No. 93-6043, 1993 U.S. Dist. LEXIS 18708, at *4-5 (E.D. Ill. Jan. 5, 1994).

[4] *FTC v. Peoples Credit First*, LLC, 244 Fed. Appx. 942, 944 (11th Cir. 2007) (following *FTC v. Tashman*, 318 F.3d 1273,1277 (11th Cir. 2003)).

[5] 16 C.F.R. § 310.3.

[6] 37 AM. JUR. 2D FRAUD AND DECEIT § 23 (2010).

simply is not a claim of fraud as that term is commonly understood or as contemplated by Rule 9(b) . . . Unlike the elements of common law fraud, the FTC need not prove scienter, reliance, or injury to establish a § 5 violation."[7] This distinction is particularly relevant in the Eleventh Circuit, where courts have rejected claims that proof of scienter or "intent" is required to impose liability under Section 5.[8] Other courts have cited similar reasons for refusing to apply Rule 9(b) to FTC claims[9] or have otherwise relied on the Tenth Circuit decision.[10]

The Tenth Circuit encapsulated the core differences between FTC and fraud actions and the sound policy reason against imposing Rule 9(b)'s requirements upon the FTC:

> [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 who purchased defendants' products and services over an extended period of time.[11]

The FTC seeks to enjoin law violations and to remedy harm inflicted upon the public by a business permeated by deception. The FTC's claims rest upon business practices over time, and not upon one incident of misrepresentation or omission. Public policy disfavors treating consumer protection claims like a fraud action, as courts in this district have implicitly recognized when refusing to apply Rule 9(b) to claims arising under Florida's Deceptive and

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[7] *Freecom*, 401 F.3d at 1204 n.7 (internal citations omitted).

[8] *See FTC v. USA Fin'l, LLC*, No. 10-12152, 2011 U.S. App. LEXIS 3774, at *7 n. 2 (11th Cir. Feb. 25, 2011); *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1368 (11th Cir. 1988); *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1270 (S.D. Fla. 2007) (citing *FTC v. Jordan Ashley*, No. 93-2257, 1994 U.S. Dist. LEXIS 7494, at *9 (S.D. Fla. Apr. 5, 1994)); *FTC v. Windward Mktg., Ltd.*, No. 96-615, 1997 U.S. Dist. LEXIS 17114, at *28-29 (N.D. Ga. Sept. 30, 1997); *FTC v. Wolf*, No. 94-8119, 1996 U.S. Dist. LEXIS 1760, at *14 (S.D. Fla. Jan. 30, 1996).

[9] *Nat'l Testing Servs*., 2005 U.S. Dist. LEXIS 46485, at *4-5; *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).

[10] *Innovative Mktg*., 654 F. Supp. 2d at 388-89.

[11] *Freecom*, 401 F.3d at 1204 n. 7*; see Nat'l Testing*, 2005 U.S. Dist. LEXIS 46485, at * 4-5.

Unfair Trade Practices Act ("FDUTPA")[12] – an act comparable to the FTC Act.[13] "FDUTPA was enacted to provide remedies for conduct outside the reach of traditional common law torts such as fraud, and therefore, 'the plaintiff need not prove the elements of fraud to sustain an action under the statute.'"[14] The FTC is also not required to prove fraud to prevail in its cases, and therefore the Court should similarly refuse to impose Rule 9(b) requirements.

2. The Cases Upon Which Defendant Relies are Not Controlling or Persuasive

Defendant relies upon four decisions for holding that Rule 9(b) applies.[15] Defendant's argument is misconstrued and the decisions are contrary to the competing authority cited above. As explained below, two decisions cited by Defendant expressly declined to rule on Rule 9(b), while the other two decisions were based upon well-established Ninth Circuit pleading requirements have not been required by the Eleventh Circuit.

First, Defendant incorrectly cites to *Cantkier* and *Swish Marketing* as holding that Rule 9(b)'s heightened pleading requirements apply.[16] But in *Cantkier*, the court stated "[t]he Court does not need to rule on the applicability of Rule 9(b) . . . because, even assuming *arguendo* that Rule 9(b) applies, the FTC's allegations have been pled with sufficient particularity."[17] Likewise, in *Swish Marketing*, the court held, "[t]he general applicability of Rule 9(b) to section 5 actions is a real prospect . . . however, in this particular context, the outcome for [defendant's]

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[12] *Kenneth F. Hackett & Assocs. v. GE Capital Info. Tech.*, 744 F. Supp.2d 1305, n.4 (S.D. Fla. 2010); *Galstaldi v. Sunvest Cmtys. USA, LLC*, 637 F. Supp.2d 1045, 1058 (S.D. Fla. 2008); *Florida v. Tenet Healthcare Corp.*, 420 F. Supp.2d 1288, 1310 (S.D. Fla. 2005).

[13] FDUTPA, Fla. Stat. §§ 501.201 *et seq.*, requires proof of a deceptive act or unfair practice, causation, and actual damages. *Hackett & Assocs.*, 744 F. Supp.2d at 1312.

[14] *Tenet Healthcare*, 420 F. Supp.2d at 1310.

[15] *FTC v. Ivy Capital, Inc.*, No. 2:11-cv-283, 2011 U.S. Dist. LEXIS 57035 (Nev. May 25, 2011); *FTC v. Cantkier*, No. 09-00894, 2011 U.S. Dist. LEXIS 21076 (D.C. Mar. 3, 2011); *FTC v. Lights of America, Inc.*, No. 10-1333, 2010 U.S. Dist. LEXIS 137088 (C.D. Cal. Dec. 17, 2011); and *FTC v. Swish Mktg.*, No. 09-03814, 2010 U.S. Dist. LEXIS 15016 (N.D. Cal. Feb. 22, 2010).

[16] *Defendant Andrea Tanner's Motion to Dismiss First Amended Complaint*, Dkt. 190, pp. 4-5.

[17] *Cantkier*, 2011 U.S. Dist. LEXIS 21076, at *22.

motion does not turn on that question."[18] Neither case stands for the proposition asserted by Defendant.

Second, Defendant places undue reliance upon two district cases from the Ninth Circuit: *Lights of America* and *Ivy Capital.* Defendant correctly cites the holding of these cases, but ignores the difference in precedential authority upon which the decisions rest. Both courts based their decisions upon perceived similarities between FTC Act and negligent misrepresentation claims. Because it was well-established in the Ninth Circuit that negligent misrepresentation claims must meet Rule 9(b)'s particularity standards, the courts held that the FTC Act violations should also satisfy Rule 9(b).[19] However, the Eleventh Circuit does not require claims of negligent misrepresentation to meet Rule 9(b).[20] Therefore, there is no legal underpinning for holding that the FTC's claims should meet Rule 9(b).

B. The FTC's Amended Complaint Meets the Standards of Fed. R. Civ. P. 9(b)

Plaintiff asserts that Fed. R. Civ. P. 9(b) does not apply. Nonetheless, even if the Court were to adopt such requirements, Plaintiff's complaint satisfies Rule 9(b) and the more relaxed Rule 8(a). The amended complaint is pled with particularity, properly sets forth Defendants' liability, and is similar to complaints deemed by other courts to satisfy Rule 9(b)'s standards.

1. Plaintiff's Amended Complaint is Pled With Particularity

Fed. R. Civ. P. 9(b) states that, when "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." In the Eleventh Circuit, a claim satisfies Rule 9(b) if it sets forth:

> (1) precisely what statements were made in what documents or oral representations or what omissions were made, and

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[18] *Swish Mktg*., 2010 U.S. Dist. LEXIS 15016, at *10.

[19] *Lights of America*, 2010 U.S. Dist. LEXIS 137088, at *12-13 (quoting *Neilson v. Union Bank of Cal*., 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003)). *See also Ivy Capital*, 2011 U.S. Dist. LEXIS 57035, at *9.

[20] "At this time, the Eleventh Circuit does not require heightened pleading for a claim of negligent misrepresentation." *Kingdom Ins. Group, LLC v. Cutler and Assocs*., No. 7:10-85, 2011 U.S. Dist. LEXIS 57816, at *12 n. 1, (M.D. Ga. May 31, 2011) (citing *Atwater v. Nat'l Football League Players Ass'n*, 2007 U.S. Dist. LEXIS 23371, at *15 (N.D. Ga. Mar. 29, 2007)).

> (2) the time and place of each such statement and persons responsible for making (or, in the case of omissions, not making) same, and
>
> (3) the content of such statements and the manner in which they misled the plaintiff, and
>
> (4) what the defendants obtained as a consequence of the fraud.[21]

These standards may be relaxed when the facts are within the perpetrator's knowledge.[22]

Plaintiff's complaint meets these heightened pleading requirements. The complaint alleged: (1) the precise misrepresentations and deceptive omissions at issue; (2) the time, place, and persons responsible for the statements or omissions; (3) the content and misleading nature of the statements or omissions; and (4) the injury caused by Defendants. Plaintiff's amended complaint alleged that, since at least June 2007, Defendants and their salespersons verbally misrepresented profit and risk, and failed to adequately disclose costs and risks while telemarketing leveraged precious metals to consumers nationwide. (Dkt. 155 ¶¶ 11-15, 17-18, 20-23). Specifically, Defendants falsely told consumers that precious metal prices were "poised to skyrocket" or would reach a particular price within a short time period. (Dkt. 155 ¶ 13). Defendants assured consumers that precious metals prices were going to continue to rise, and that consumers who purchased precious metals would earn high profits in a short time period. (Dkt. 155 ¶ 14). Defendants provided consumers with misleading hypothetical examples of profits and gave false assurances that precious metals were low-risk investments. (Dkt. 155 ¶¶ 15-17). Defendants falsely informed consumers that they only dealt in tangible, physical metal. (Dkt. 155 ¶¶ 18-19). Defendants falsely represented that consumers were likely to earn high or substantial profits in a short time period and with low or minimal risk, in violation of the FTC Act and TSR. (Dkt. 155 ¶¶ 35-36, 47, 51). Defendants also failed to clearly disclose the total costs of the precious metals and the risks of equity calls. (Dkt. 155 ¶¶ 20-23, 25-27).

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[21] *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) (relying on *Brooks v. Blue Cross and Blue Shield of Florida, Inc.*, 116 F.3d 1364, 1371 (11th Cir. 1997)); *Thomas v. Pentagon Fed. Credit Union*, 393 Fed. Appx. 635 (11th Cir. 2010).

[22] *Barys ex rel United States v. Vitas Healthcare Corp.*, 298 Fed. App'x. 893, 897 (11th Cir. 2008). *See also Ivy Capital*, 2011 U.S. Dist. LEXIS 57035, at *13.

Plaintiff's amended complaint also described the misleading nature of the Defendants' misrepresentations and omissions, and the resulting injury caused to consumers. (Dkt. 155 ¶¶ 29-32, 53). Plaintiff's amended complaint states that consumers were not likely to earn high profits, nor were the precious metals low-risk investments. (Dkt. 155 ¶ 36). Consumers were required to pay significant fees, commissions, and interest, which negatively affected their ability to break even or profit on the investments. (Dkt. 155 ¶ 29). Worse, consumers were subject to equity calls that required them to pay additional money or liquidate the investments at a loss. (Dkt. 155 ¶ 31).

In sum, contrary to Defendant's arguments, Plaintiff's amended complaint fully detailed, with sufficient particularity, the specific misrepresentations and omissions that form the basis of the FTC's claims. All factual allegations contained in the complaint must be accepted as true and construed in the light most favorable to Plaintiff.[23]

2. The Amended Complaint Properly Sets Forth Defendant's Liability

Defendant's motion to dismiss is based upon Plaintiff's alleged failure to identify specific wrongdoing committed by her. Defendant appears to believe that the FTC is required to aver that she *personally* made the deceptive sales solicitations or committed the unlawful acts at issue. Once again, Defendant is incorrect. Plaintiff's amended complaint sufficiently pleads the necessary facts to warrant issuance of a permanent injunction against Defendant and to hold her individually liable – even if the Court were to apply Rule 9(b).

The basis for holding an individual liable for corporate violations of the FTC Act is clear. In the Eleventh Circuit, once corporate liability is established, an individual may be held liable for FTC Act or TSR violations where: (a) the individual *either* participated directly in *or* had the authority to control the deceptive acts or practices, and (b) had some knowledge of the wrongful acts or practices.[24] "Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate

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[23] *Speaker v. U.S. Dept. of Health and Human Servcs.*, 623 F.3d 1371, 1379 (11th Cir. 2010).

[24] *FTC v. USA Fin'l, LLC*, 415 Fed. Appx. 970, 974 (11th Cir. 2011) (*citing FTC v. Gem Merch., Corp.*, 875 F.3d 466, 470 (11th Cir. 1996)); *FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp.2d 1167, 1206-07 (N.D. Ga. 2008), *aff'd*, 2009 U.S. App. LEXIS 27388 (11th Cir. Dec. 15, 2009).

officer."[25] The FTC is not required to show an intent to defraud[26] or that Defendant had actual knowledge of the misrepresentations – reckless indifference or an awareness of a high probability of fraud coupled with an intentional avoidance of the truth will suffice.[27]

Plaintiff is not required to enumerate specific acts committed by each individual defendant. Indeed, as acknowledged in the authority cited by Defendant, even in *fraud* cases – which this case is not – a party may satisfy Rule 9(b) merely by stating the role of each individual defendant.[28] "[A]lleged fraudulent acts need not be attributed to certain defendants if the 'complaint sufficiently describes the acts and provides defendants with sufficient information to answer the allegations.'"[29] This holds true because courts have recognized[30] that "there are circumstances under which 'a plaintiff may not be able to plead the precise role of each defendant when a group of defendants has acted in concert to cause the complained of injury.'"[31]

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[25] *FTC v. Wilcox*, 926 F. Supp. 1091, 1104 (S.D. Fla. 1995) (quoting *FTC v. Amy Travel Servs., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989)).

[26] *Transnet Wireless,* 506 F. Supp. 2d at 1270 (citing *FTC v. Jordan Ashley*, *Inc.*, No. 93-2257, 1994 U.S. Dist. LEXIS 7494, at *9 (S.D. Fla. Apr. 5, 1994)).

[27] *FTC v. Atlantex Assocs*., No. 87-0045, 1987 U.S. Dist. LEXIS 10911, at * 25 (S.D. Fla. Nov. 25, 1987), *aff'd,* 872 F.2d 966 (11th Cir. 1989); *FTC v. Wolf,* No. 94-8119, 1994 U.S. Dist. LEXIS 1760, at *24 (S.D. Fla. Jan. 30, 1996).

[28] *Ivy Capital*, 2011 U.S. Dist. LEXIS 57035, at *13 (citing *Cf. Moore v. Kayport Package Express*, 885 F.2d 531, 540 (9th Cir. 1989) ("[a] complaint need only include the roles of individual defendants in corporate fraud cases where possible because such situations make it difficult to attribute particular conduct to each defendant")).

[29] *General Cigar Company, Inc. v. CR Carriers, Inc*., 948 F. Supp. 1030, 1037-38 (M.D. Ala. 1996) (quoting *Bruss Co. v. K & S Brokerage, Inc*., No. 91-c-1561, 1991 U.S. Dist. LEXIS 17515, at *9 (N.D. Ill. Nov. 22, 1991)).

[30] Because *Twombly* was not a fraud case, the court's pre-*Twombly* analysis of Rule 9(b) continues to apply. *See Grills v. Philip Morris USA, Inc*., 645 F. Supp. 2d 1107, 1122 n. 25 (M.D. Fla. 2009).

[31] *Peters v. Amoco Oil Co*., 57 F. Supp. 2d 1268, 1277 (M.D. Ala. 1999) (quoting *Jackson v. First Fed. Sav*., 709 F. Supp. 863, 878 (E.D. Ark. 1988)).

Plaintiff has alleged that Defendant Andrea Tanner was an officer, managing member,[32] and one of the persons responsible for management of APM, and that she directed, controlled, had the authority to control, or participated in the acts and practices giving rise to the Plaintiff's claims. (Dkt. 155 § 8). These factual allegations are sufficient, whether or not Rule 9(b) applies, to assert a valid claim against Ms. Tanner for her role in the deceptive scheme.

3. Other Courts Deemed Similarly-Pled Complaints to Satisfy Rule 9(b)

Plaintiff's complaint is similar to those deemed by other courts to satisfy Rule 9(b) and, implicitly, the lesser standards of Rule 8(a). *Ivy Capital* and *Wellness Support* – two cases relied upon by Defendant – are instructive for gauging the sufficiency of the Plaintiff's claims. (Attachments A and B). In both cases, defendants sought dismissal of the FTC's claims, which described defendants' practices collectively without attributing any act to an individual defendant. In *Ivy Capital*, the court applied Rule 9(b) but recognized that a relaxed standard was appropriate where "it may be difficult for the plaintiff to identify the specific actions that a corporate officer took in causing the harm."[33] Thus, the *Ivy Capital* court held that the FTC met its burden by alleging that each individual "formulated, directed, controlled, had the authority to control, or participated in the acts and practices" and outlining the individual's involvement with the corporate defendants.[34]

In *Wellness Support*, the court dismissed the FTC's claims against one defendant who was alleged only to have been an officer of the defendant corporation and to have "formulated, directed, controlled, had authority to control, or participated" in the deceptive acts.[35] But the court found the FTC's claims against the other defendant sufficient because the FTC alleged that, in addition to being an officer and having controlled or participated in the acts, he was the

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[32] Unlike an owner or shareholder, a "managing member" is appointed or elected to manage a company. Fla. Stat. § 608.402(20) and § 608.422(2)(a).

[33] *Ivy Capital*, 2011 U.S. Dist. LEXIS 57035, at *13.

[34] *Ivy Capital*, 2011 U.S. Dist. LEXIS 57035, at *16-17. *See* Attachment A ¶¶ 28-35.

[35] *FTC v. Wellness Support Network, Inc.*, No. 10-04879, 2011 U.S. Dist. LEXIS 36453, at *28 (N.D. Cal. Apr. 4, 2011).

owner of the closely-held corporation.[36]

The FTC's allegations against Defendant Andrea Tanner are similar to, or more detailed than, the factual allegations that the *Ivy Capital* and *Wellness Support* courts deemed sufficient under Rule 9(b).[37] In fact, the FTC has alleged that Defendant Andrea Tanner was a officer, managing member, and one of the persons responsible for managing the business.[38] These facts evidence her control of APM, and are sufficient to justify issuance of a permanent injunction holding her individually liable for the corporate violations described in Plaintiff's complaint.

IV. Conclusion

The dismissal of the Plaintiff's claims against Defendant Andrea Tanner is not warranted. There is no controlling authority requiring Plaintiff to plead its statutory enforcement action as a fraud under Fed. R. Civ. P. 9(b). Moreover, even if such a requirement were imposed, Plaintiff's complaint satisfies Rule 9(b), as well as the lesser Rule 8(a) requirements. Plaintiff squarely meets the Supreme Court standard in *Bell Atlantic Corp. v. Twombly*, which states that a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face."[39] Dismissal of a complaint is only warranted where a plaintiff fails to "nudge their claims across the line from conceivable to plausible."[40] Because Plaintiff has satisfied the pleading requirements of this district and has properly stated its claim, Defendant's motion to dismiss should be denied.

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[36] *Wellness Support*, 2011 U.S. Dist. LEXIS 36453, at *27. The court further bolstered its decision by noting that exhibits attached to the FTC's complaint showed that some of the deceptive statements were attributable to the defendant. *Id*. *See also* Attachment B ¶¶ 7-8.

[37] *Compare* Attachment A ¶¶ 28-35 and Attachment B ¶¶ 7-8 to Dkt. 155 ¶ 8.

[38] Indeed, there is significant evidence of Defendant's participation and control over APM. Defendant Andrea Tanner executed contracts, participated in employment decisions, and managed the company's finances. All of these actions are consistent with the role of "manager." Accordingly, should this Court determine that Plaintiff's claims are insufficient, the FTC respectfully asks that the Court grant an opportunity to amend the pleadings. *See Silva v. Bieluch*, 351 F.3d 1045, 1048 (11th Cir. 2003); *Jemison v. Mitchell*, No. 09-15635, 2010 U.S. App. LEXIS 10905 (11th Cir. May 27, 2010).

[39] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2006). *See also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'")

[40] *Twombly*, 550 U.S. at 570.

Respectfully submitted,

Dated: January 3, 2012

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, the foregoing motion was filed with the Clerk of the Southern District of Florida using the CM/ECF system, which will send notice of electronic filing to all counsel or parties of record on the Service List below.

Date: January 3, 2012

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