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8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT OF NEVADA**
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11 FEDERAL TRADE COMMISSION,

12 Plaintiff,

13 vs.

14 AMG SEVICES, INC., et al.

15 Defendants and

16 PARK 269 LLC, et al.

17 Relief Defendants.
18

Case No.: 2:12-cv-0536-GMN-VCF

**TROY LITTLEAXE'S MOTION
TO DISMISS COMPLAINT**

19 Defendant Troy LittleAxe hereby files his Motion to Dismiss Complaint. LittleAxe
20 makes this motion based on the following Points and Authorities and oral argument to be
21 presented at hearing, if permitted. He also joins in the motions to dismiss filed by the other
22 defendants to the extent they are consistent with this Motion.

23 LittleAxe requests the Court to enter an order dismissing all the claims of the Complaint
24 for failure to state a claim pursuant to Rule 12 (b)(6).
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POINTS AND AUTHORITIES

The Complaint's allegations against LittleAxe and sixteen other "Defendants"

The Complaint fails to distinguish between the acts of the seventeen corporate and individual defendants. As such, the Complaint fails to sufficiently state with plausibility or particularity the FTC's claims sounding in fraud or otherwise. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' require more than labels and conclusions"); *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949-50 (2009) (the court is to "disregard '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements'"); and *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir.2003)(complaint must allege the "who," "what," "when," "where," "and "how").

The only specific allegations of the Complaint against LittleAxe are as follows:

22. Defendant Troy L. LittleAxe is the registered agent of Red Cedar Services, Inc., and the administrator of the website www.500fastcash.com. He is a signatory on the Red Cedar Services bank account. At all times material to this complaint, acting alone or in concert with others, he has formulated, directed, controlled, had the authority to control, or participated in the acts and practices of all the corporate defendants including the acts and practices set forth in this complaint. Troy LittleAxe, in connection with the matter alleged herein, transacts or has transacted business in this district and throughout the United States.

* * *

25. . . . Defendants Scott A. Tucker, Blaine A. Tucker, Timothy J. Muir, Don E. Brady, Robert D. Campbell, and Troy L. LittleAxe have formulated, directed, controlled, had the authority to control, had knowledge of, or participated in the acts and practices of the Corporate Defendants that constitute the common enterprise.

These factual allegations actually permit the Court to infer "obvious alternative explanation[s]," which suggest lawful conduct rather than the unlawful conduct the FTC would ask the Court to infer. See *Iqbal*, 129 S.Ct. at 1951-52 (quoting *Twombly*, 550 U.S. at 567).

All of the other allegations against LittleAxe are only as specific as being against the "Defendants", of which there are seventeen. For example, supposedly all seventeen "Defendants" talked to an unnamed consumer on September 7, 2010, according to paragraph 35 of the Complaint. The Complaint's allegations against LittleAxe as acting in lockstep with

sixteen other Defendants at all relevant times over a ten-year period (§27: “[s]ince at least 2002”) are conclusory, absurd and implausible.

STATEMENT OF THE LAW

I. The Complaint’s states only conclusory and implausible allegations against LittleAxe.

Conclusory, implausible allegations in a complaint are insufficient to state a cause of action. *Twombly*; *Iqbal*, *supra*; *Alvarez v. Chevron Corp.*, 656 F.3d 925, 930-31 (9th Cir. 2011) (“We disregard threadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *Id.*) *See also Hall v. Schumacher*, 2011 WL 1073177, *2 (D. Nev. Mar. 21, 2011). Federal Rule of Civil Procedure 12(b)(6) “mandates that a court dismiss a cause of action that fails to state a claim upon which relief can be granted.” *Corbo v. Laessig*, 2012 WL 1068271, *2 (D. Nev. Mar. 28, 2012). The Complaint’s allegations that LittleAxe did all the same things as sixteen other parties for ten years is conclusory and implausible and fail to state a cause of action.

Paragraph 25 similarly fails to allege facts to plausibly or sufficiently identify a common enterprise. The Complaint identifies no facts to show the required factors to find a common enterprise. *E.g.*, *FTC v. network Serv. Depot, Inc.*, 617 F.2d 1127, 1143 (9th Cir. 2010); *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 993, 1011 (N. D. Ind. 200), *aff’d* 312 F.3d 259 (7th Cir. 2002); *FTC v. John Beck Amazing Profits, LLC*, 2009 U.S. Dist LEXIS 130923 at *40 (C.D. Cal. Nov. 17, 2009); *FTC v. J.K. Publ’ns, Inc.*, 99 F. Supp. 2d 1176, 1202 (C. D. Cal. 2000). In *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047-48 (9th Cir. 2008), the court affirmed the dismissal of a similarly conclusory antitrust claim. In explaining that legal conclusions masquerading as facts are not taken as true, the Ninth Circuit concluded that the plaintiffs “pleaded only ultimate facts, such as conspiracy, and legal conclusions. They failed to plead the necessary evidentiary facts to support those conclusions.” *Id.* *See also Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1034 (9th Cir. 2010) (“Legal conclusions are not to be taken as true “merely because they are cast in the form of factual allegations.”” *Id.*, quoting *Paulsen v. CNF, Inc.*, 559 F.3d 1061, 1071 (9th Cir. 2009)). This Court “need not, and does not, accord an

1 assumption of truthfulness to legal conclusions that are not supported by factual allegations in
 2 the Complaint.” *Colony Cove Properties, LLC v. City Of Carson*, 640 F.3d 948, 957 (9th Cir.
 3 2011). The FTC’s “conclusory assertions of authority – untethered to virtually any supportive
 4 facts – do not support an inference of [any individual defendant’s] involvement.” *FTC. v. Swish*
 5 *Mktg.*, 2010 WL 653486, **4-5 (N.D. Cal. Feb. 22, 2010) (granting motion to dismiss by
 6 individual defendant where FTC offered only conclusory allegations of control).

7 The Complaint fails to allege sufficient facts to state a claim against LittleAxe for any of
 8 the four labeled counts of deceptive acts and practices under Section 5 of the FTC Act, *F.T.C. v.*
 9 *Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009), deceptive collection practices under the Fair Debt
 10 Collection Practices Act, violations of the Truth in Lending Act and Regulation Z by a creditor,
 11 e.g., 15 U.S.C. § 1607(e)(1),(4) (jurisdiction of FTC), and *Goodwin v. Executive Trustee*
 12 *Services, LLC*, 680 F. Supp. 2d 1244, 1253 (D. Nev. 2010) (lending claims dismissed for failure
 13 to allege supporting facts), and the Electronic Funds Transfer Act and Regulation E.

14 **II. The Complaint fails to state allegations sounding in fraud with particularity.**

15 Under the clear weight of authority in the Ninth Circuit, these claims “sound” in fraud
 16 because the FTC “‘allege[s] a unified course of fraudulent conduct and rel[ies] entirely on that
 17 course of conduct as the basis of [the] claim.’” *FTC v. Lights of Am., Inc.*, 760 F. Supp. 2d 848,
 18 851-54 (C.D. Cal. 2010) (alterations in original). Rule 9(b) governs such claims, which must be
 19 pled with particularity. “Fraud allegations may damage a defendant’s reputation regardless of
 20 the cause of action in which they appear, and they are therefore properly subject to Rule 9(b) in
 21 every case.” *Vess*, 317 F.3d at 1103-04. The particularity requirements are rigorously enforced
 22 in multi-defendant cases because they ensure that each individual defendant receives “‘notice of
 23 the particular misconduct ... so that [he] can defend against the charge and not just deny that [he
 24 has] done anything wrong.’” *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 558-59 (9th Cir.
 25 2010) (internal citations omitted) (explaining why consumer deception claims must be pleaded
 26 with particularity).

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1 The Court should apply Rule 9(b) to protect LittleAxe from the FTC's outrageous resort
2 to impermissible character attacks.

3 Here the FTC takes the unique position that it has no burden to prove fraud, as it calls
4 LittleAxe and the other sixteen defendants names, "fraudsters," in its argument heading D on
5 pages ii and 18 of the FTC's reply in support of motion for preliminary injunction filed on or
6 about May 14, 2012. Rule 9(b) helps protect against such abuses of highly improper, outrageous
7 character attacks by the FTC in suggesting fraudulent tendencies of LittleAxe along with all the
8 defendants. *E.g., Vess*, 317 F.3d at 1103-04. *See also* FRE 404. The FTC's position of attacking
9 the character of LittleAxe and all the defendants is made more egregious by the extensive,
10 repeated arguments by the FTC on pages 22-25 in the same May 14 reply brief that the FTC has
11 no intention of trying to prove fraud. So the FTC openly admits that it wants to insinuate wide-
12 ranging fraud without proving any fraud whatsoever.

13 The FTC recognizes the lack of substance to its allegations against LittleAxe and others,
14 including the supposed common enterprise. Since the FTC has insufficient facts upon which to
15 base its claims, the FTC chooses to lump the defendants all together, including LittleAxe, and
16 impermissibly attack the defendants' character.

17 "Rule 9(b) does not allow a complaint to merely lump multiple defendants together but
18 requires plaintiffs to differentiate their allegations when suing more than one defendant and
19 inform each defendant separately of the allegations surrounding his alleged participation in the
20 fraud." *U.S. v. Corinthian Colleges*, 655 F.3d 984, 997-98 (9th Cir. 2011). A plaintiff cannot
21 simply "lump multiple defendants together" in the allegations of the complaint but must, at a
22 minimum, identify each defendant's role in the alleged fraud. *Destfino v. Reiswig*, 630 F.3d 952,
23 958 (9th Cir. 2011); *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007). The FTC
24 "lumps multiple Defendants together without differentiating between them or the allegations
25 against them." *See Goodwin v. Executive Trustee Services, LLC*, 680 F. Supp. 2d 1244, 1254 (D.
26 Nev. 2010); *Lights of America*, 760 F. Supp. 2d at 854.

27 Dismissal is therefore required because the FTC Act claims fail "to allege the 'who, what,
28 when, where, and how'" of the alleged deception under Section 5. *Lights of Am., Inc.*, 760 F.

1 Supp. 2d at 854; *see also* WMCV Phase 3, 750 F. Supp. 2d at 1188 (same); *Nevada ex rel. Hager*
2 *v. Countrywide Home Loans Servicing*, 812 F. Supp. 2d 1211, 1218-19 (D. Nev. 2011) (“The
3 TAC does not identify which particular Defendant did what, when, where, or how. As such,
4 Defendants can only deny that they did anything wrong over a five-year time span.”). Here the
5 Complaint is less sufficient, as it spans ten years without specifying the acts of LittleAxe or
6 differentiating them from any of the other defendants.

7 The FTC fails to meet the requirements of plausibility and particularity. The Court must
8 dismiss the Complaint for failure to state claim under the controlling law cited above.

9 **CONCLUSION**

10 LittleAxe requests the Court to enter an order dismissing the Complaint for failure to
11 state a claim pursuant to Rule 12 (b)(6).

12 DATED this 25th day of May, 2012.

13 PAUL C. RAY, CHTD.

14 /s/ Paul C. Ray

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Troy LittleAxe's Motion to Dismiss Complaint was submitted electronically for filing and/or service with the United States District Court for the District of Nevada on the 25th day of May, 2012. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:

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