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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AMG Services, Inc., et al.,

Defendants, and

Park 269 LLC, et al.,

Relief Defendants.

Case No.: 2:12-cv-536

JOINT MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT

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I. INTRODUCTION

The Defendants[1] respectfully submit, by and through undersigned counsel, their Joint Memorandum of Points and Authorities in support of their Motion to Dismiss the Complaint for Failure to State a Claim for Relief Under Rule 12(b)(6).

As will be discussed below, one of the fundamental problems with the Federal Trade Commission's Complaint is that it fails to allege sufficient facts to support its claims of violations of the Federal Trade Commission Act ("FTC Act"), the Truth in Lending Act ("TILA") or the Electronic Funds Transfer Act ("EFTA"). Instead, the Complaint focuses in great length on matters irrelevant to any of these claims—the business relationships between the Tribal Lending Defendants and the other defendants, and the outside activities of the other defendants. The FTC spends little effort to support its actual legal claims—devoting no more than three paragraphs to each count. The court's attention should not be diverted by this transparent attempt to steer attention from the real issues in this case.

Moreover, while the FTC apparently is attempting to insinuate that there is something wrong with the Tribal Lending Defendants working with non-Indian individuals and companies with subject matter expertise in lending, this should be rejected out of hand. In working with non-Indians to develop and operate an online short-term lending business, the Tribal Lending Defendants are pursuing the very type of tribal economic development strategy that is strongly encouraged by Congress. In 2000, Congress passed the Native American Business Development, Trade Promotion, and Tourism Act (the "NABDA"), 25 U.S.C. § 4301, "to revitalize Native

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[1] Defendants Red Cedar Services, Inc. dba 500 FastCash ("Red Cedar"), SFS, Inc. dba OneClickCash ("SFS"), and Miami Nations Enterprises, dba Tribal Financial Services, dba Ameriloan, UnitedCashLoans, USFastCash ("MNE") are online short-term lending businesses wholly owned and operated by federally recognized Indian tribes (together, Red Cedar, SFS, and MNE are sometimes collectively referred to herein as the "Tribal Lending Defendants"). AMG Services, Inc. ("AMG") is a shared services provider that provides employee staffing and related services to the Tribal Lending Defendants and is also wholly-owned and operated by a federally-recognized Indian tribe (AMG and the Tribal Lending Defendants are sometimes herein collectively referred to as the "Tribal Defendants").

American economies, to promote private investment, and to promote long-range sustained economic growth." Glenda K. Harnad, *Power of Federal and State Governments in Matters Involving Indians*, 41 Am. Jur. 2d Indians; Native Americans § 37 (2012); 25 U.S.C. § 4301(b). In passing the NABDA, Congress explicitly recognized that "Native Americans suffer higher rates of unemployment, poverty, poor health, substandard housing and associated social ills than those of any other group in the United States," and that "the capacity of Indian tribes to build strong tribal governments and vigorous economies is hindered by the inability of Indian tribes to engage communities that surround Indian lands and outside investors in economic activities on Indian lands." 25 U.S.C. §§ 4301(a)(7), (a)(8). Congress therefore decreed that the "United States has an obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination, and economic self-sufficiency among Indian tribes," and that "the economic success and material well-being of Native American communities depends on the combined efforts of the Federal Government, tribal governments, ***the private sector, and individuals***." *Id*. at § 4301(a)(6), (a)(10) (emphasis added). Congress further declared that "the twin goals of economic self-sufficiency and political self-determination for Native Americans can best be served by making available to address the challenges faced by those groups—(A) ***the resources of the private market***; (B) adequate capital; and (C) ***technical expertise***." *Id*. at § 4301(a)(12) (emphasis added).

Plaintiff's attempt to impugn the Tribal Lending Defendants for working with non-Indians to obtain capital and technical expertise by labeling these business activities as a "common enterprise" directly contravenes congressional policies designed to promote the very type of tribal economic development activity at issue here. Indeed, courts in the States of Colorado and California have recently rejected claims similar to the "common enterprise" allegations in the FTC's

Complaint, finding that two of the Tribal Lending Defendants[2] are arms of their respective Tribes, and that their lending activities are consistent with the Congressional policies such as those set forth in NABDA.[3]

[2] The Tribal Lending Defendants that were parties to these Colorado and California cases are SFS, Inc., an arm of the Santee Sioux Nation, and Miami Nation Enterprises ("MNE"), an arm of the Miami Tribe of Oklahoma.

[3] Indeed, the District Court for the City and County of Denver, Colorado recently held that Tribal Lending Defendants SFS and MNE, "have evolved in precisely the manner that Congress has intended for Indian businesses to evolve." Amended Order, *Colorado v. Cash Advance, et al.*, Case No. 05CV1143 (District Court for the City and Cnty. of Denver, Colo., Feb. 18, 2012), Req. for Judicial Notice Ex. A at 21. Similarly, with regard to SFS and MNE, the Superior Court for the County of Los Angeles, California recently held that "federal policies intended to promote Indian tribal autonomy are furthered by extension of [tribal sovereign] immunity to the business entities." Rulings/Orders, *California v. Ameriloan, et al.*, Case No. BC373536 (Superior Court of the State of Cal. for the Cnty. of L.A., May 10, 2012), Req. for Judicial Notice Ex. B at 14.

II. STANDARD OF REVIEW

Dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted may be based either on the lack of a "cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). While the Federal Rules of Civil Procedure do not require detailed factual allegations, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted) (brackets in original), and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" cannot survive dismissal. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). Moreover, the court need not "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988, *opinion amended on denial of rehearing*, 275 F.3d 1187 (9th Cir. 2001) (citation omitted). "Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Id.*

In addition, where the plaintiff's claims sound in fraud, the plaintiff must meet a higher pleading standard under Federal Rule of Civil Procedure 9(b). "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). The Ninth Circuit has interpreted Rule 9(b) to mean that "the pleader must state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1392-93 (9th Cir. 1988); *see also Cafasso, U.S. ex rel. v. General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (holding that to comply with Rule 9(b), the Complaint "must identify 'the who, what, when, where, and how of the misconduct charged.'") (citation omitted). "When an entire complaint, or an entire claim within a complaint, is grounded in fraud and its allegations fail to satisfy the heightened pleading requirements of Rule 9(b), a district court may dismiss the complaint or claim." *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir. 2003). A complaint or any claim therein

should be dismissed *without leave to amend* if the deficiencies of the complaint cannot be cured by amendment. *See Doe v. United States (In re Doe)*, 58 F.3d 494, 497 (9th Cir. 1995).

III. ARGUMENT

It is undisputed that the undersigned Tribal Defendants are arms of the federally recognized Miami, Modoc, and Santee Sioux Indian Tribes. Indeed, the FTC acknowledges in its Complaint that each of these Tribal Defendants is an entity chartered pursuant to the laws of its respective Tribes. *See* Compl. ¶¶ 6-9. The FTC's Complaint, however, entirely fails to recognize the implications of this classification. Because these Tribal Defendants are arms of federally-recognized Indian tribes, they are not "persons, partnerships, or corporations" as defined under the FTC Act, and the FTC therefore has no authority to pursue claims against them under the Act. The FTC's Section 5(a) claims (Counts One and Two) must be dismissed for this reason.

Even if the FTC did have authority to bring Section 5(a) claims against these Defendants, Counts One and Two of the Complaint nonetheless must be dismissed under 12(b)(6). The FTC's conclusory pleading of these claims, which does not even plead all of the necessary elements of a Section 5(a) violation, fails to satisfy either the general *Iqbal/Twombly* pleading standards or the heightened pleading requirement of Federal Rule of Civil Procedure 9(b) applicable because these claims sound in fraud.

The remainder of the FTC's Complaint fares no better. The FTC's claim under the Truth in Lending Act and Regulation Z (Count Three) must be dismissed for two independent reasons. First, the FTC lacks authority to prosecute TILA and Regulation Z claims in Federal Court against any defendant because TILA clearly requires that the FTC must, instead, provide notice and use the administrative adjudication procedures provided in its organic statute. Second, the FTC pleading of this claim again relies solely on unsupported conclusions and thus also fall far short of the *Iqbal/Twombly* pleading standard. Third, the FTC's claim under the Electronic Funds Transfer Act (EFTA)(Count Four), 15 U.S.C. § 1693k(1), and 12 C.F.R. § 1005.10(e) ("Regulation E") must be

dismissed because it, once again, fails to satisfy the *Iqbal/Twombly* pleading standard since it relies on no more than unsupported conclusory statements.

A. Plaintiff's Complaint Fails to State a Claim for Relief Under FTC Act Section 5(a)

Counts One and Two in the Complaint purport to allege a violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). These claims must be dismissed for two independent reasons. First, the FTC lacks authority to prosecute Section 5(a) claims against these Tribal Defendants. The FTC maintains authority to prosecute such actions only against "persons, partnerships, or corporations" as defined by the FTC Act. 15 U.S.C. § 45(a)(2). The Tribal Defendants are none of these. Second, even if the FTC did have authority to prosecute Section 5(a) claims against these defendants, the Complaint's mere conclusory allegations fall far short of either the general *Iqbal/Twombly* pleading standards or the applicable heightened pleading requirements under Federal Rule of Civil Procedure 9(b).

1. Plaintiff lacks authority to prosecute Section 5(a) claims against these Defendants

The FTC's ability to prosecute claims is limited to the authority that Congress has conferred upon it by the Federal Trade Commission Act. *See F.T.C. v. Western Meat Co.*, 272 U.S. 554, 559 (1926); *F.T.C. v. Sinclair Refining Co.*, 261 U.S. 463, 475 (1923). Although the FTC is "empowered . . . to prevent persons, partnerships, or corporations . . . from using . . . unfair or deceptive acts or practices in or affecting commerce," the FTC does not have authority to prosecute its claims against these Defendant tribal entities because they are not "persons, partnerships, or corporations" under the FTC Act. 15 U.S.C. § 45(a)(2).

First, none of these Defendants is a "person" for purposes of the FTC Act. It is undisputed that the Defendants are arms of the federally recognized Miami, Modoc, and Santee Sioux Indian Tribes. *See* Compl. ¶¶ 6-9. Sovereign Indian tribes (and, by extension, subdivisions and instrumentalities thereof)—as distinguished from individual tribal members—are treated as sovereign entities and presumed not to be "persons" under any federal statutes absent an

"affirmative showing of statutory intent to the contrary," *Inyo Cnty., Cal. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 709 (2003) (holding that there is "'long-standing interpretive presumption that "person" does not include the sovereign,' a presumption that 'may be disregarded only upon some affirmative showing of statutory intent to the contrary'") (citation omitted). The FTC Act does not designate these sovereign Indian tribes as "persons" within the meaning of the Act and there is nothing in the FTC Act that even remotely suggests that there is any intent to include Indian tribes within the definition of "persons" for purposes of the FTC Act. Indeed, Indian tribes are not even referenced within the Act, and, unlike similar statutes (e.g., TILA), the FTC act does not include governmental agencies or their subdivisions in the definition of persons covered by the Act. *See, e.g.*, 15 U.S.C. § 1602(d). Consequently, Indian tribal entities that are arms of their respective tribal governments[4] cannot be considered persons for the purposes of the FTC Act. This is particularly the case since this Court must construe any ambiguity in favor of the Indian tribes. *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 174 (1973).

Second, none of these Defendants is a "partnership" under the FTC Act (and the FTC does not so allege). The FTC Act does not define the term "partnership," and there is no federal common law definition of "partnership." Consequently, the term "partnership" must be defined using the laws governing the Defendants. *See Williams v. Lee*, 358 U.S. 217, 220 (1959) (Indian tribes have inherent right to "make their own laws and be ruled by them"). In this case, the Miami, Modoc, and Santee Sioux Tribes have each enacted Business Partnership Ordinances, each of which define a

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[4] As noted above, courts in Colorado and California have held that two of the Tribal Lending Defendants, SFS and MNE, are arms of their respective tribal governments. Req. for Judicial Notice Exs. A, B. The other Tribal Lending Defendants were not parties to these cases, but the same analysis would undoubtedly result in the same conclusion with regard to AMG Services, Inc. and Red Cedar Services, Inc. Indeed, the Colorado Court discussed how "MNE and SFS terminated their Service Agreements with Tucker's entities in September 2008, and replaced Tucker's entities with operating corporations that are themselves wholly-owned tribal entities," i.e., AMG Services, Inc. Amended Order, *Cash Advance*, Req. for Judicial Notice Ex. A at 21.

"partnership" as "an association of two or more persons to carry on as co-owners of a business for profit formed and existing in compliance with and subject to the limitations and requirements of the Ordinance." *See Miami Tribe of Oklahoma Business Partnership Ordinance, § 1.2.5.; Santee Sioux Nation Business Partnership Ordinance, Chapter 1 § 2(D); Modoc Tribe of Oklahoma Business Partnership Ordinance, § 1.2.5.*[5] Under each Tribe's Business Partnership Ordinance, a partnership cannot be formed with an entity wholly owned by the tribe absent a written partnership agreement. No such written agreement exists for any of these Defendants. Thus, as a matter of law, none of these Defendants is a "partnership" over which the FTC could have authority.

Third, none of these Defendants is a "corporation" as defined in the FTC Act. The FTC Act defines "corporation" narrowly, in pertinent part as "any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44. On its face, this definition does not include tribal governmental subdivisions or sovereign entities such as defendants. Moreover, the Tribal Defendants are not "organized to carry on business for [their] own profit or that of [their] members," 15 U.S.C. § 44, but are separate sovereigns. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). And the Complaint does not allege differently. Of course, while the Tribes require funding to support their governments, they are not "organized" for "profit" and their income is used exclusively for essential tribal governmental programs and services such as housing, education, early childhood development, and elder care, and to further the congressional policies of promoting tribal economic development and self-sufficiency. *See, e.g.*, 25 U.S.C. § 4301(b). And, there are no allegations in the Complaint to the contrary. As in *Community Blood Bank of the Kansas City Area, Inc. v. F.T.C.*, 405 F.2d 1011, 1019 (8th Cir. 1969), where the Court found that nonprofit

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[5] The existence of these applicable ordinances is not in dispute and the court can take judicial notice of these ordinances under Federal Rule of Evidence 201 in ruling on this 12(b)(6) motion. *See Holder v. Holder*, 305 F.3d 854, 866 (9th Cir. 2002); *Mack v. South Bay Beer Distribs. Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). A motion for judicial notice of these documents is submitted concurrently with this document. *See* Req. for Judicial Notice and Exs. C, D, E.

corporations were not "corporations" within the FTC's jurisdiction because the profits realized by such corporations were "devoted exclusively to the charitable purposes of the corporation," here, the Tribal Lending Defendants stand outside of the FTC's jurisdiction because they are operated for the public benefit and profits are devoted solely to the *governmental purposes* of their respective Indian tribal governments.

The FTC Act Section 5(a) claims against the Tribal Defendants must therefore be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

2. Plaintiff fails to sufficiently allege a violation of Section 5(a)

Even if the FTC did have authority to bring Section 5(a) claims against these Defendants, Counts One and Two of the Complaint must be dismissed because these Section 5(a) claims fail to satisfy either the general *Iqbal/Twombly* pleading standards or the applicable heightened pleading requirements under Federal Rule of Civil Procedure 9(b).

a. *Iqbal/Twombly*

The FTC's Section 5(a) counts cannot satisfy the *Iqbal/Twombly* pleading standards and require dismissal. Under *Iqbal* /*Twombly*, a Plaintiff must do more than provide "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," *Iqbal*, 129 S. Ct. at 1949. And, to establish a violation of FTC Act Section 5(a), for "deceptive acts," the FTC must plead and prove that "**first,** there is a representation, omission, or practice that, **second,** is likely to mislead consumers acting reasonably under the circumstances, **and third,** the representation, omission, or practice is material." *F.T.C. v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009) (citation omitted) (emphasis added).[6] Plaintiff's Complaint falls far short of the pleading requirements.

[6] Deceptions are material if they "are likely to cause injury to a reasonable relying consumer" rather than just "deceptions that a consumer might have considered important, whether or not there was reliance." *Southwest Sunsites, Inc. v. F.T.C.*, 785 F.2d 1431, 1436 (9th Cir. 1986).

Count One of the Plaintiff's Complaint, alleging a Section 5(a) for "Deceptive Acts and Practices," states *in its entirety*:

> 47. In numerous instances in connection with the marketing or offering of payday loans, Defendants have represented, directly or indirectly, expressly or by implication, that:
>
> a. Defendants will automatically withdraw the full amount owed, including applicable fees, from a consumer's bank account on a single date; and
>
> b. A consumer's total of payments will be equal to the amount financed plus a stated finance charge.
>
> 48. In truth and in fact, in numerous instances where Defendants have made the representations discussed in paragraph 47 above:
>
> a. Defendants have not automatically withdrawn the full amount owed from the consumer's bank account on a single date; and
>
> b. The consumer's total of payments has been greater than the amount financed plus the stated finance charge.
>
> 49. Therefore, Defendants' representations are false and misleading and constitute deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

Compl. ¶¶ 47-49. Count Two of the Plaintiff's Complaint, alleging a Section 5(a) for "Deceptive Collection Practices" states *in its entirety*:

> 50. In numerous instances, in connection with collecting loans from consumers, Defendants have represented to consumers, expressly or by implication, that:
>
> a. Consumers can be arrested, prosecuted, or imprisoned for failing to pay Defendants; and
>
> b. If consumers do not pay Defendants, Defendants will file lawsuits against consumers.
>
> 51. In truth and in fact, in numerous instances where Defendants have made the representations discussed in paragraph 50 above:
>
> a. Consumers could not be arrested, prosecuted, or imprisoned for failing to pay Defendants; and
>
> b. Defendants do not file lawsuits against consumers who do not pay Defendants.
>
> 52. Defendants' representations are false and misleading and constitute deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

Compl. ¶¶ 50-52. That is it.

In both Counts One and Two, the FTC *only* even attempts to plead the first element required under Section 5(a)—and it does so only in the vaguest terms, referring to "numerous instances" of allegedly misrepresentative statements, without providing any specifics regarding what was said by whom or the context in which it was said. It then assumes a violation of the statute from the mere existence of these statements without ever pleading the other two necessary elements. *See* Compl. ¶¶ 47-52. Specifically, the Complaint neither pleads that: (1) these identified statements would likely mislead a reasonable consumer; or (2) a reasonable consumer would materially rely on such misrepresentations to their detriment in light of sum total of the defendants' communications to them—completely disregarding that *both* elements are also required to state a claim under Section 5(a). Nor does the Complaint contain any factual averments on which such allegations could be based. This conclusory level of pleading, which does not even plead all of the elements, falls far short of what is required under *Iqbal/Twombly*. The FTC's Section 5(a) counts must therefore be dismissed.[7]

b. Rule 9(b)

Though it is unnecessary for the Court to reach this issue because Plaintiff cannot meet the traditional pleading requirements as discussed above, Plaintiff's FTC Act counts must also be dismissed for the additional (and independent) reason that Plaintiff failed to plead those counts with sufficient particularity under the heightened Federal Rule of Civil Procedure 9(b) pleading standard.

Federal Rule 9(b) imposes a heightened fact pleading standard upon claims that "sound in fraud." *Vess*, 317 F.3d at 1103. A claim "sound[s] in fraud" —and thus triggers the requirements of 9(b)— where the plaintiff "allege[s] a unified course of fraudulent conduct," *id*., irrespective of whether the plaintiff uses the word "fraud" or whether the underlying statute requires the level of scienter of a fraud claim. In fact, a claim of mere misrepresentation, such as that here, requires the

[7] Moreover, because the Plaintiff has failed to adequately plead a violation under TILA or EFTA, as discussed *infra*, these violations could not serve as the operative facts for the FTC Act claims.

same specific pleading. *See id.* at 1108 ("the pleading requirements of Rule 9(b) cannot be evaded simply by avoiding the use of that magic word"); *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 552 (D.C. Cir. 2002) (rejecting the attempted "hairsplitting distinction" between "fraudulent" and "false" claims and holding that the lesser degree of scienter required by the underlying statute "is entirely insignificant in the context of Rule 9(b)'s pleading requirements"); *see also Neilson v. Union Bank of California, N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) (recognizing that it is "well-established in the Ninth Circuit that both claims for fraud and negligent misrepresentation must meet Rule 9(b)'s particularity requirements" even though claims for negligent misrepresentation require a lower degree of scienter).

To comply with Rule 9(b), the Complaint "must identify 'the who, what, when, where, and how of the misconduct charged . . . .'" *Cafasso*, 637 F.3d at 1055 (citation omitted). This heightened pleading is necessary "to provide defendants with adequate notice to allow them to defend the charge," *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009), "to protect those whose reputation would be harmed as a result of being subject to fraud charges," *id.* and "'to prohibit plaintiffs from unilaterally imposing . . . enormous social and economic costs absent some factual basis.'" *Id.* (citation omitted).

Plaintiff's FTC Act claims sound in fraud. Courts in this Circuit have repeatedly held that FTC Act Section 5(a) claims sound in fraud and thus are subject to Rule 9(b). *See F.T.C. v. Lights of Am., Inc.*, 760 F. Supp. 2d 848, 851-54 (C.D. Cal. 2010); *F.T.C. v. Ivy Capital, Inc.*, No. 2:11-CV-283 JCM (GWF), 2011 WL 2118626, at *3 (D. Nev. May 25, 2011); *see also F.T.C. v. Wellness Support Network, Inc.*, No. C-10-04879 JCS, 2011 WL 1303419 (N.D. Cal. Apr. 4, 2011); *F.T.C. v. Swish Mktg.*, No. C 09-03814 RS, 2010 WL 653486 (N.D. Cal. Feb. 22, 2010). This case is a particularly strong example because the gravamen of Plaintiff's claim is that defendants "[i]n numerous instances" make representations that "are false and misleading," *see* Compl. ¶¶47-52, and this forms the entire basis of Plaintiff's claim under the FTC Act Section 5.

Yet Plaintiff entirely fails to identify "the who, what, when, where, and how" of the misconduct charged. Indeed, they fail to sufficiently allege *any* of the five requirements under 9(b). As previously mentioned, the FTC makes only the vaguest accusations its Section 5(a) claims, referring to "numerous instances" of alleged misrepresentations without providing any specific information about what the precise alleged misrepresentations were, when they were made, where they were made or even whether they were made in person, on the phone, or over email.

For example, the FTC's Complaint alleges that "[i]n numerous instances, in connection with collecting loans from consumers, Defendants have represented to consumers, expressly or by implication, that . . . Consumers can be arrested, prosecuted, or imprisoned for failing to pay Defendants . . . [though] Consumers could not be arrested, prosecuted, or imprisoned for failing to pay Defendants." Compl. ¶¶50-51. The Plaintiff's Complaint, however, does not provide any specific evidence about what was said to consumers regarding arrest, prosecution, or imprisonment, when these alleged misrepresentations were made to consumers, where these misrepresentations were made (or if they were telephonic, from what number they were made), or how these misrepresentations were made (for example by telephone, writing, or in person). Without more specific information, the Defendants entirely lack "adequate notice to allow them to defend the charge," *Kearns*, 567 F.3d at 1125.

In addition to all of these flaws, the FTC also attempts to avoid having to identify *who* engaged in each alleged misrepresentation by lumping all defendants together without detailing each defendant's individual role, a tactic that is directly prohibited by Ninth Circuit law. *See Destfino v. Reiswig*, 630 F.3d 952, 958 (9th Cir. 2011) (Rule 9(b) "does not allow a complaint to . . . lump multiple defendants together;" instead, it requires the plaintiff "to differentiate [its] allegations when suing more than one defendant") (citation omitted); *see also United States v. Corinthian Colleges*, 655 F.3d 984, 998 (9th Cir. 2011) ("The Complaint . . . simply attributes wholesale all of the allegations against Corinthian to the Individual Defendants. Rule 9(b) undoubtedly requires more."). As the other defendants address in more detail in their Motions to Dismiss, which the

Tribal Defendants join, the FTC cannot avoid its obligation to specify the particular acts attributable to each party through its cursory common enterprise pleading. And, even if Plaintiff's failure to differentiate its allegations were permissible, it only addresses *who* performed the actions—it fails to cure the defects in describing the facts of *what* the allegedly unlawful activity was, *when* it occurred, *where* it occurred, and *how*.

Because the FTC's Section 5(a) claims fail to meet the applicable pleading requirements of Rule 9(b), these claims must therefore be dismissed.

B. Plaintiff Fails to State a Claim for Relief under TILA and Regulation Z

Plaintiff's third count purports to allege a violation of the Truth in Lending Act (TILA) Sections 121(a) and 128(b)(1), 15 U.S.C. §§ 1631(a) and 1638(b)(1), and Regulation Z sections 1026.17(a), 1026.17(b) and 1026.18, 12 C.F.R. §§ 1026.17(a), 1026.17(b), and 1026.18. This claim must be dismissed for two independent reasons. First, the FTC lacks authority to prosecute TILA and Regulation Z claims in the District Court against any defendant because TILA clearly requires that the FTC must instead provide notice and use the administrative procedures provided. Second, even if the FTC did have authority to bring this federal court action, its mere conclusory allegations, again, fall far short of the *Iqbal/Twombly* pleading standard.

1. Plaintiff lacks authority to Prosecute TILA and Regulation Z claims in Federal Court against any Defendants

The Truth In Lending Act (TILA) is clear as to how the FTC must prosecute claims for alleged violations of the statute or its associated regulations. It states:

> In carrying out its enforcement activities under this section, [the FTC], in cases where an annual percentage rate or finance charge was inaccurately disclosed, *shall notify* the creditor of such disclosure error and is authorized in accordance with the provisions of this subsection to require the creditor to make an adjustment to the account of the person to whom credit was extended . . . . *[A]n adjustment under this subsection may be required by [the FTC] only by*

> *an order issued in accordance with cease and desist procedures provided by [the Federal Trade Commission Act]*.[8]

15 U.S.C. § 1607(e)(1), (e)(4)(A) (emphasis added). In other words, where the FTC believes that a party's loan contract has inaccurately disclosed the annual percentage rate or finance charge of a loan in violation of the statute or regulations, it must provide notice to that party and then use administrative cease and desist procedures to issue an adjustment order. *Id.* This is the FTC's only recourse—the FTC has no authority to bring an action in the District Court for a TILA claim alleging the inaccurate disclosure of an annual percentage rate or finance charge.

Yet in this case, contrary to TILA's unambiguous requirements, that is exactly what the FTC did. Contrary to the express wording of the statute, the FTC did not provide notice and did not utilize administrative cease and desist procedures to issue an adjustment order. The FTC instead operated outside of the scope of its authority and brought an action in District Court.

The court should therefore dismiss this claim under Rule 12(b)(6).[9]

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[8] Section 5(b) of the Federal Trade Commission Act permits the FTC to issue cease and desist orders in an administrative adjudication proceeding, before one of the FTC's own administrative law judges:

> Whenever the Commission shall have reason to believe that [a person] has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, . . . it shall issue and serve upon such [person] a complaint stating its charges in that respect and containing a notice of a hearing . . . . The [person] shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such [person] to *cease and desist* from the violation of the law so charged in said complaint.

15 U.S.C. § 45(b) (emphasis added). *See also* F.T.C. Office of the General Counsel, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, available at http://www.ftc.gov/ogc/brfovrvw.shtm (July 2008) (describing the FTC's administrative enforcement process and the authority of an FTC administrative law judge to "recommend[] . . . entry of an order to cease and desist" from the alleged misconduct).

[9] The court may also appropriately dismiss this claim under 12(b)(1) for lack of subject matter jurisdiction. *See Moe v. United States*, 326 F.3d 1065, 1070 (9th Cir. 2003) (holding that a court lacks jurisdiction over a claim whether the statute in question provides an alternative, exclusive remedy).

2. Plaintiff fails to sufficiently allege a violation of TILA and Regulation Z

Even if the FTC did have authority to prosecute its TILA/Regulation Z claim in the District Court, this claim must be dismissed because it fails to satisfy the *Iqbal/Twombly* pleading standard. Plaintiff's Complaint does no more than simply recite the elements of a violation and then claim the statute and regulation were violated. TILA and Regulation Z require that defendants must disclose "before the credit is extended, the following terms of the loan: the finance charge; the annual percentage rate; the payment schedule; and the total of payments." Pl.'s Mem. in Support of Mot. for Prelim. Inj. at 26; *see* TILA Sections 121(a) and 128(b)(1), 15 U.S.C. §§ 1631(a) and 1638(b)(1); Regulation Z sections 1026.17(a), 1026.17(b) and 1026.18, 12 C.F.R. §§ 1026.17(a), 1026.17(b), and 1026.18. And Regulation Z specifically requires that these "disclosures shall reflect the terms of the *legal obligation* between the parties." 12 C.F.R. § 1026.17(c) (emphasis added). Plaintiff's allegations, on their face, do not plead a violation. The substantive portion of Plaintiff's Complaint alleging violations of TILA and Regulation Z states *in its entirety*:

> 58. In numerous instances, Defendants have violated the requirements of TILA and Regulation Z by failing to disclose in writing before extending credit the following information in a manner reflecting the terms of the legal obligation between the parties: a. the finance charge; b. the annual percentage rate; c. the payment schedule; and d. the total of payments.
>
> 59. Therefore, Defendants' practices set forth in Paragraph 58 of this complaint violate Sections 121 and 128 of TILA, 15 U.S.C. §§ 1631, 1638, and Sections 1026.17 and 1026.18 of Regulation Z, 12 C.F.R. §§ 1026.17 and 1026.18.

Compl. ¶¶ 58, 59. That is it. Plaintiff's TILA and Regulation Z claim nowhere states what it believes the *legal obligation* of the parties to be with regard to any of stated loan terms and how these terms as disclosed by Defendants differ from that *legal obligation*. The Plaintiff's TILA and Regulation Z claim is a prototypical "[t]hreadbare recital of the elements of a cause of action, supported by mere conclusory statements" that cannot survive a motion to dismiss. *Iqbal*, 129 S. Ct. at 1949. The court should therefore dismiss this claim under 12(b)(6).

C. Plaintiff Fails To State a Claim for Relief Under EFTA and Regulation E

Plaintiff's fourth count purports to allege a violation of the Electronic Funds Transfer Act (EFTA), 15 U.S.C. § 1693k(1), and 12 C.F.R. § 1005.10(e) ("Regulation E"). This claim must be dismissed because it, once again, fails to satisfy the *Iqbal/Twombly* pleading standard.

Plaintiff's EFTA and Regulation E claim, like its TILA and Regulation Z claim, does no more than simply attempt to recite the elements of a violation and then claim the statute and regulation were violated. Under the Electronic Funds Transfer Act and its implementing regulations, "[n]o . . . person may condition an extension of credit to a consumer on the consumer's repayment by preauthorized electronic funds transfers." *See* 12 C.F.R. § 1005.10(e) & Suppl. I to Part 1005-Official Interpretations; *see also* 15 U.S.C. § 1693k(1). The substantive portion of Plaintiffs Complaint alleging violations of EFTA and Regulation states *in its entirety*:

> 66. In numerous instances, in connection with offering payday loans to consumers, Defendants have conditioned the extension of credit on recurring preauthorized electronic fund transfers, thereby violating Section 913(1) of EFTA, 15 U.S.C. § 1693k(1), and Section 1005.10(e)(1) of Regulation E, 12 C.F.R § 1005.10(e)(1).

Compl. at ¶ 66. That is it. Plaintiff nowhere provides any information about which of the documents Defendants provide to consumers or what language in such documents it believes *condition* an extension of credit on the consumer's *repayment* by electronic funds.[10] The Plaintiff's "[t]hreadbare recital of the elements of [the EFTA and Regulation E] cause of action, supported by mere conclusory statements" cannot survive a motion to dismiss. *Iqbal*, 129 S. Ct. at 1949. The court should therefore dismiss this claim under 12(b)(6).

The Defendants also join the Motions to Dismiss of each of the additional Defendants to the extent not inconsistent with the material included herein.

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[10] Indeed, read carefully, Plaintiff's Complaint may not even allege a violation of EFTA and Regulation E at all because it nowhere alleges that plaintiff conditions credit on *repayment* by electronic funds transfers.

IV. CONCLUSION

For all of the reasons set forth above, and in the Motions to Dismiss of each of the additional Defendants, the Tribal Defendants respectfully request that the Court dismiss all of the claims alleged in the Complaint, and award the Defendants all further relief to which they may be entitled.

Dated: May 25, 2012

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b), I hereby certify that on the 25th day of May, 2012, service of the foregoing **JOINT MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT** was submitted electronically for filing and/or service with the United States District Court of Nevada. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:

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