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1 **INTRODUCTION**

2 On October 28, 2010, the Federal Trade Commission sued Wellness
3 Support Network, Inc., and two of its officers for deceptively advertising their
4 “WSN Diabetic Pack” and “WSN Insulin Resistance Pack” dietary supplement
5 products. As illustrated in the Federal Trade Commission's complaint and
6 exhibits, the defendants use dramatic consumer testimonials, references to
7 “studies” and “clinical trials,” references to the Nobel Prize, and descriptions of
8 the products’ “breakthrough” benefits to market these products to persons
9 suffering from very serious diseases – diabetes and insulin resistance. Among
10 other things, the complaint alleges that defendants claim that their products
11 effectively treat and prevent diabetes, and reverse insulin resistance. The
12 Federal Trade Commission has charged that these claims, among others, are
13 false or were not substantiated at the time they were made, and therefore violate
14 the Federal Trade Commission Act.

15 Wellness Support Network, Inc. (“WS
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FACTS AND OVERVIEW OF FTC LAW

The FTC’s complaint alleges that since 2004 defendants have engaged in unlawful conduct in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, in connection with the advertisement and sale of two dietary

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1 to control the deceptive practices. *FTC v. Publ’g Clearing House, Inc.*, 104 F.3d
2 1168, 1170 (9th Cir. 1997). The complaint alleges that Robert and Robyn Held
3 personally participated in the false or unsubstantiated advertising of products for
4 WSN. While such actual participation would alone be sufficient for injunctive
5 relief, the complaint also alleges that the Helds had the authority to control the
6 deceptive practices of the corporation by virtue of their roles in a closely-held
7 company. An individual’s status as a corporate officer and authority to sign
8 documents on behalf of the corporate defendant can be sufficient to demonstrate
9 the requisite control. *Publ’g Clearing House*, 104 F.3d at 1170-71. “Authority
10 to control the company can be evidenced by active involvement in business
11 affairs and the making of corporate policy, including assuming the duties of a
12 corporate officer.” *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir.
13 1989).

14 The complaint also seeks such relief as the Court finds necessary to
15 redress injury to consumers. WSN is liable for consumer restitution if the FTC
16 can prove it violated the FTC Act. To obtain such relief from an individual for
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1 627 (9th Cir. 1997)). If liability for corporate fraud is alleged against individual
2 defendants, “the allegations should include the misrepresentations themselves
3 with particularity and, where possible, the roles of the individual defendants in
4 the misrepresentations.” *See id.* at *4-5 (quoting *Moore v. Kayport Package*
5 *Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989)); *see also Swartz v. KPMG*
6 *LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (Rule 9(b) requires a plaintiff to provide
7 “an account of the time, place, and specific content of the false representations
8 as well as the identities of the parties to the misrepresentations.”). As described
9 below, the complaint amply meets these standards.

10 **a. The complaint satisfies the pleading standards of Rule 9(b) with**
11 **respect to the corporate defendant and its misrepresentations.**

12 In *Benning*, the Court held that the FTC’s original complaint “effectively
13 establish[ed] the ‘who, what, where and how’ contemplated by Rule 9(b),” and
14 thereby met the pleading standards under Rule 9(b) for a violation of Section 5
15 of the FTC Act by the corporate defendants. *Benning*, 2010 U.S. Dist. LEXIS
16 64030 at *13. The same is true here as to WSN. For example, for the “where”
17 of the deception, the complaint quotes from, and attaches, specific web pages
18 WSN used to disseminate its false or unsubstantiated claims. *See Complaint*
19 (Dkt. #1), ¶¶ 20-21. The complaint also alleges that WSN advertised, marketed,
20 distributed, or sold its products throughout the United States. *Id.* at ¶ 6. As for
21 “how” the claims were made, the complaint provides quotes from WSN’s web
22 pages, including consumer testimonials (*e.g.*, “I don’t take insulin anymore!” *Id.*
23 at ¶ 20, quoting Exhibit B); repeated references to the Nobel Prize (*Complaint* at
24 ¶¶ 20-21, *see also* Exhibit A, pp. 1, 2, and 3; Exhibit B, pp. 2 and 3; and Exhibit
25 C, pp. 1, 2, and 3); terms such as “breakthrough” (*Complaint* at ¶¶ 20-21,
26 Exhibit A, p.1, Exhibit B, p. 1, Exhibit C, p. 1); and references to “studies” and
27 “clinical trials” (*Complaint* at ¶¶ 20-21; Exhibit A, pp. 1, 2, 3, and 7; Exhibit B,
28 pp. 1, 3, and 8; Exhibit C, pp. 1, 3, and 7). The complaint addresses the “what”

1 in a thorough explanation of the two dietary supplements at issue here. *See id.* at
2 ¶¶ 10-19. For the “who,” the complaint describes both the corporate and
3 individual defendants, *id.* at ¶¶ 6-8, 10, 16, and alleges that defendants “created,
4 prepared, disseminated, or caused to be disseminated advertisements and other
5 marketing materials” such as Exhibits A-C. *Id.* at ¶¶ 20-21. The complaint also
6 lays out the claims that arise from defendants’ ads, and states that those claims
7 are false or unsubstantiated. *Id.* at ¶¶ 24-27. In addition, the complaint
8 identifies when the various misrepresentations occurred. *Id.* at ¶¶ 10, 16, 20,
9 and 21.

10 These allegations demonstrate that the complaint satisfies the
11 requirements of Rule 9(b) with respect to the false or unsubstantiated claims
12 themselves and the corporate defendant’s role in making them. Defendants’
13 arguments to the contrary are without merit. They cite no authority whatsoever
14 for their five-part test for sufficiency under Rule 9(b) proffered in their *Motion*
15 *to Dismiss*, *see supra* p. 6, nor is there any. By identifying many of the specific
16 advertisements and representations in those advertisements, and by elucidating
17 the claims that the FTC charges as false or unsubstantiated, the complaint has
18 provided defendants with a detailed road map of their FTC Act violations.

19 Defendants claim to be “in the dark” about a number of points, such as the
20 FTC’s standards for evaluating whether a claim is false, and the level of
21 substantiation required for a claim. *Motion to Dismiss*, n.1 and accompanying
22 text. These are questions of law; Rule 9’s requirements, if they apply at all here,
23 relate to the pleading of facts with particularity. The legal standards relating to
24 the proof required for each element of the FTC’s action need not be pled because
25 they may be readily found in FTC case law and years of published guidance,
26 some of which the FTC developed specifically for the dietary supplement
27 industry. *See, e.g., FTC v. Pantron I Corp.*, 33 F.3d 1088, 1096 (9th Cir. 1994)
28 (to prevail on a Section 12 claim, the FTC may show either that “the express or

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1 Sept. 16, 2009) (same); *FTC v. Medical Billers Network, Inc.*, 543 F. Supp. 2d
2 283, 314 (S.D.N.Y. 2008) (same); *FTC v. Nat'l Testing Servs., LLC*, No.
3 3:05-0613, 2005 U.S. Dist. LEXIS 46485, at *4–5 (M.D. Tenn. Aug. 18, 2005)
4 (same); *FTC v. Skybiz.com, Inc.*, No. 01-CV-396-K(E), 2001 U.S. Dist. LEXIS
5 26314, at *11 (N.D. Okla. Aug. 2, 2001) (same); *FTC v. Communidyne, Inc.*,
6 No. 93 C 6043, 1993 U.S. Dist. LEXIS 18708, at *3–5, 1993-2 Trade Cas.
7 (CCH) ¶ 70,439 (N.D. Ill. Dec. 3, 1993) (same); *cf. FTC v. Benning*, 2010 U.S.
8 Dist. LEXIS 64030, *12-*13, 2010-1 Trade Cas. (CCH) ¶ 77,081 (N.D. Cal.
9 2010) (stating in dicta that Rule 9(b) particularity requirements may apply only
10 to elements of Section 5 claim that “mirror a claim of fraud” and do not extend
11 to “elements of knowledge and authority to control.”).²

12 In examining this issue, courts have highlighted how a cause of action for
13 deception under the FTC Act differs from that of fraud. As set forth above, to
14 establish a Section 5 violation, the FTC need show only that a defendant
15 engaged in a representation or omission that is likely to mislead consumers
16 acting reasonably under the circumstances and that the representation or
17 omission is material. *Pantron I*, 33 F.3d at 1095. By contrast, the traditional
18 elements of fraud include “a false representation; in reference to a material fact;
19 made with knowledge of its falsity; with the intent to deceive; and on which an
20 action is taken in justifiable reliance upon the representation.” 37 AM JUR 2D
21 FRAUD AND DECEIT § 23 (2010). In some fraud cases, plaintiffs also are
22 required to show “resulting damage or injury proximately resulting from the
23 representation and action.” *Id.*

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26 ² At least one court in this Circuit has unambiguously applied Rule 9(b) in an FTC
27 case, however: See *FTC v. Lights of America, Inc.*, 2010 U.S. Dist. LEXIS 137088, *13-*14
28 (C.D. Cal. 2010) (holding Rule 9(b) applies in FTC actions because FTC Act claims are
analogous to negligent misrepresentation). This case is not controlling in this District,
however, and goes against the weight of the aforementioned authorities.

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1 required); *FTC v. SlimAmerica*, 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999)
2 (proof of actual reliance by each individual consumer is not required).

3 In sum, allegations of deception under the FTC Act are not claims of
4 fraud. For this reason, many courts have held that Rule 9(b) does not apply to a
5 cause of action brought under the FTC Act under a deception theory. For the
6 same reason, this Court should deny th

1 unlawfully.

2 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), quoting *Bell Atlantic Corp. v.*
3 *Twombly*, 550 U.S. 544, 556 (2007). Determining whether a complaint states a
4 plausible claim for relief is a matter left to the reviewing court's "judicial
5 experience and common sense." *Iqbal*, 129 S. Ct. at 1950.

6 In their motion to dismiss, the defendants argue that the FTC's complaint
7 has not made a plausible claim against them on the facts alleged. They are
8 wrong; the complaint satisfies the *Iqbal* and *Twombly* standards. The
9 Commission properly alleges the following facts, among others, which must be
10 accepted as true: (1) the defendants marketed and advertised Diabetic Pack and
11 Insulin Resistance Pack, including via websites illustrated by Exhibits A, B, and
12 C to the complaint, (2) defendants' advertising contained representations about
13 Diabetic Pack and Insulin Resistance Pack which were false or were not
14 substantiated at the time they were made; (3) individual defendants Robert and
15 Robyn Held participated in the advertising and marketing of WSN's products;
16 (4) Robert Held was the President and an owner of the corporate defendant,
17 WSN; (5) Robyn Held was an officer of WSN; (6) WSN was a closely held
18 corporation; and (7) the Helds, alone or with others, formulated, directed,
19 controlled, had the authority to control, or participated in the acts and practices
20 of the corporate defendant, including the acts and practices set forth in the
21 complaint.

22 Accepting the above facts as true, the FTC has stated two claims for relief
23 under the FTC Act that are more than merely plausible. In Count I, the FTC
24 alleges that defendants' marketing and advertising, including but not limited to
25 websites containing the pages attached to the complaint as Exhibits A–B, make
26 representations about the Diabetic Pack product which were false or were not
27 substantiated at the time they were made. Similarly, in Count II, the FTC alleges
28 that defendants' marketing and advertising, including but not limited to websites

1 containing the pages attached to the complaint as Exhibit C, contain
2 representations about the Insulin Resistance Pack product which were also false
3 or were not substantiated at the time they were made.

4 The complaint contains sufficient factual content to allow the court to
5 draw the reasonable inference that defendants have acted unlawfully. The
6 complaint states that defendants’ claims are false or were not substantiated at the
7 time they were made. There is robust caselaw and detailed published guidance
8 noting that false or unsubstantiated claims constitute deceptive acts or practices
9 which violate the FTC Act. See, e.g., *FTC v. Direct Mktg. Concepts, Inc.*, 624
10 F.3d 1, 8 (1st Cir. 2010) (“Where the advertisers lack adequate substantiation
11 evidence, they necessarily lack any reasonable basis for their claims. . . . And
12 where the advertisers so lack a reasonable basis, their ads are deceptive as a
13 matter of law.”); *Thompson Med. Co. v. FTC*

1 detailing how the defendants made false or unsubstantiated claims about the
2 dietary supplements on their publicly available websites, the complaint alleges
3 that the Helds participated in the advertising and marketing of those dietary
4 supplements. The complaint also alleges that Robert Held was the president and
5 an owner of WSN, a closely held corporation, and Robyn Held was a WSN
6 officer. They thus not only participated in the unlawful activity but had the
7 authority to control the corporation's violations. If true, such facts are sufficient
8 to find the individual defendants liable for injunctive relief under the FTC Act.
9 *See Publ'g Clearing House*, 104 F.3d at 1170. They also are sufficient to imply
10 that the individual defendants had the requisite participation and "knowledge,"
11 as described above, for them to each be liable for monetary relief under Section
12 5. *Id.*

13 In short, the complaint's factual allegations meet the standards of
14 Rule 8(a) by providing defendants with all the information they need to
15 understand and prepare to defend this lawsuit. In addition, the complaint meets
16 the "plausibility" requirements of *Iqbal* and *Twombly*. When examined through
17 the lens of the court's own "judicial experience and common sense," which
18 *Twombly* encourages the court to use, the facts in the complaint allow the court
19 to draw the reasonable inference that the defendants have acted unlawfully.
20 Taken as true, the facts in the complaint accomplish the following: they illustrate
21 in detail the dramatic health claims defendants have used to sell their diabetes
22 and insulin resistance products; they mark those advertising claims out as false
23 or unsubstantiated at the time they were made; they describe the role the
24 individual defendants played in the broadcasting of those claims; and they
25 describe the positions the individuals held in the closely-held business that made
26 the claims at issue. Because false or unsubstantiated advertising claims are
27 unlawful under the FTC Act, these facts support the legal conclusion that both
28 the corporate and individual defendants have violated the FTC Act and can be

1 held liable for both injunctive and monetary relief.

2 **4. CONCLUSION**

3 The Federal Trade Commission's complaint in this matter fully complies
4 with Rule 8(a) and 9(b) – assuming Rule 9(b) even applies here. For these
5 reasons, the FTC respectfully requests that the Court deny defendants' motion to
6 dismiss.

7
8 Respectfully submitted,

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10 General Counsel

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CERTIFICATE OF SERVICE

This is to certify that on January 14, 2011, I served a true and correct copy of the attached OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT via the electronic filing system for the U.S. District Court for the Northern District of California, and via electronic mail to:

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