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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

No. C-10-04879 JCS

Plaintiff,

v.

**ORDER DENYING MOTION TO  
DISMISS FIRST AMENDED  
COMPLAINT FILED BY DEFENDANTS  
WELLNESS SUPPORT NETWORK,  
INC., ROBERT HELD AND ROBYN  
HELD [Docket No. 30]**

WELLNESS SUPPORT NETWORK, INC., ET  
AL.,

Defendants.

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**I. INTRODUCTION**

Plaintiff Federal Trade Commission (“FTC”) brings this action for injunctive relief and other remedies under Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b),



1 manufactures; broad application of these standards to Defendants constitutes an impermissible  
2 attempt to circumvent the rulemaking procedures required under the Administrative Procedures Act  
3 (“APA”); 4) the FTC’s standard is an unlawful use of a guidance document to the extent that it is  
4 based on a policy statement; and 5) the Ninth Circuit’s decision in *FTC v. Pantron I Corp.*, 33 F.3d  
5 1088 (9<sup>th</sup> Cir. 1994) (“*Pantron I*”), defining “truth” and “substantiation” in connection with  
6 deceptive advertising under the FTC Act, does not apply because in that case the product at issue  
7 was a drug whereas here, the products are medical foods.

8 The FTC counters that: 1) Defendants’ argument that the claims fail because their products  
9 are not dietary supplements, as alleged by the FTC, but rather medical foods, lacks merit because the  
10 FTC Act does not distinguish between dietary supplements and medical foods and in any event, the  
11 argument turns on a factual question that may not be determined on a Rule 12(b)(6) motion; 2) there  
12 is no First Amendment right to engage in deceptive advertising and the FTC’s enforcement of the  
13 FTC Act does not infringe on Defendants’ commercial speech rights; 3) the FTC is not attempting to  
14 evade the rulemaking procedures set forth in the APA because it is not attempting to make a new  
15 rule but rather, is simply enforcing established standards relating to advertising of products that  
16 includes health claims, as set forth in *Pantron I*; furthermore, administrative agencies are free to  
17 announce new principles of law during adjudication, with only narrow exceptions that do not apply  
18 here; and 4) in citing a policy document in its brief filed in opposition to Defendants’ previous  
19 motion to dismiss, the FTC did not suggest that that document had the force of law and the FTC  
20 does not rely on that document in support of its claims, which are based on the FTC Act.

### 21 **III. ANALYSIS**

#### 22 **A. Legal Standard**

##### 23 **1. Rule 12(b)(6)**

24 A complaint may be dismissed for failure to state a claim for which relief can be granted  
25 under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(6). “The purpose  
26 of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the complaint.” *N. Star*  
27 *Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). Generally, a plaintiff’s burden at the





1 **IV. CONCLUSION**

2 The Motion is DENIED on the basis that it is untimely under Rule 12(g)(2).

3 IT IS SO ORDERED.

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5 Dated: September 12, 2011



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6 **JOSEPH C. SPERO**  
7 United States Magistrate Judge

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