

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

26

TABLE OF AUTHORITIES

CASES

Celotex Corp. v. Catrett, 477 U.S. 317 (1986)8

Chrysler Corp. v. FTC, 561 F.2d 357 (D.C. Cir. 1977).....9

FTC v. Affordable Media, LLC, 179 F.3d 1228 (9th Cir. 1999).....24

FTC v. Amy Travel Serv., Inc., 875 F.2d 564 (7th Cir. 1989).23, 24

FTC v. Cyberspace.com, LLC, 453 F.3d 1196 (9th Cir. 2006).....11, 24

FTC v. Gill, 71 F. Supp. 2d 1030 (C.D. Cal. 1999).....9

FTC v. H. N. Singer, Inc., 668 F.2d 1107 (9th Cir. 1982)22

FTC v. Medlab, Inc., 615 F. Supp. 2d 1068 (N.D. Cal. 2009).....10

FTC v. Nat’l Urological Grp., 645 F. Supp. 2d 1167 (N.D. Ga. 2008).....14, 16

FTC v. Natural Solution, Inc., No. CV-06-6112JFW,
2007 U.S. Dist. LEXIS 60783 (C.D. Cal. 2007).....22

FTC v. Pantron I Corp., 33 F.3d 1088 (9th Cir. 1994).....3, 10, 11, 22

FTC v. Publ’g Clearing House, Inc., 104 F.3d 1168 (9th Cir. 1997).....22, 23, 24

FTC v. QT, Inc., 448 F. Supp. 2d 908 (N.D. Ill. 2006).....10, 11

FTC v. SlimAmerica, Inc., 77 F. Supp. 2d 1263 (S.D. Fl. 1999)20

FTC v. Stefanchik, 559 F.3d 924 (9th Cir. 2009).....3, 9, 22

FTC v. US Sales Corp., 785 F. Supp. 737 (N.D. Ill. 1992)9

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

FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020 (7th Cir. 1988).....9

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)9

In Re Removatron Int’l Corp., 111 FTC 206 (1985)18

Removatron Int’l Corp. v. FTC, 884 F.2d 1489 (1st Cir. 1989).....10

Simeon Mgmt. v. FTC, 579 F.2d 1137 (9th Cir. 1978)9

Sterling Drug, Inc. v. FTC, 741 F.2d 1146 (9th Cir. 1984)10

NOTICE OF MOTION FOR SUMMARY JUDGMENT

On February 14, 2014, at 9:30 a.m., pursuant to Federal Rule of Civil Procedure 63, the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Q: What did you read on our website that caused you to
3 decide on getting the Diabetic Pack?

4 A: You claimed that it worked.

5 — Defendants’ customer survey¹

6 “I would tell [my patients]: do the diet thing; do the
7 exercise thing; do the sleep thing; save your money and don’t
8 buy the Diabetic Pack.”

9 — W. Timothy Garvey, M.D.²

10 **I. INTRODUCTION**

11 Diabetes afflicts millions of Americans and can cause serious disability and death.
12 Wellness Support Network, Inc. capitalized on this public-health problem by marketing
13 unproven remedies for diabetes and insulin resistance, a diabetes-related condition. The
14 company persuaded thousands of consumers to purchase its “breakthrough” products by
15 promising lower blood sugar and “life changing results”; by publishing dramatic customer
16 “success” stories; and by suggesting the products were “validated” by the Nobel Prize. Among
17
18
19
20
21
22
23
24
25
26
27
28

1 can cause serious complications, including heart disease, stroke, blindness, kidney disease, and
2 loss of limbs.¹⁰ It is therefore critical for diabetics and prediabetics to keep their blood sugar in a
3 range that will minimize damage to the body.¹¹

4 C. WSN's Products

5 WSN has sold the Diabetic Pack ("DP") and the Insulin Resistance Pack ("IRP")
6 (collectively, the "Products") since 2004. DP and IRP are the same product under different
7 names, containing the exact same ingredients.¹² WSN advertised the Products as containing
8 vitamins, minerals, and botanical extracts, formulated into three components: the Glucose
9 Support Formula (capsules), the Vitamin-Mineral Formula (tablets), and the Calcium-
10 Magnesium Formula (tablets).¹³ The company advertised and sold the Products until at least
11 2011.¹⁴ Although WSN stopped marketing the products as the "Diabetic Pack" and "Insulin
12 Resistance Pack" in 2011, they continue to sell similar products¹⁵ and to make claims similar to
13 those made for DP.¹⁶

14 WSN sold the Products on the WSN website, Amazon.com, eBay.com, and over the
15 phone.¹⁷ A 30-day supply averaged \$62.65.¹⁸ After subtracting money returned to customers,

16 _____
17 ¹⁰ Garvey Report at 9.

18 ¹¹

1 were strikingly consistent over the years. Three key themes were lower blood sugar levels,
2 reduced dependency on medication, and scientific proof of these benefits. For example,
3 webpages for DP included a picture of the product next to a large headline announcing a
4 “Diabetes Breakthrough.”²⁶ Stating that the product is “specifically formulated for the dietary
5 management of diabetes,” the website promised “lower [] blood sugar, safely and effectively
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Glucotrol. Also Neurontin 300 mg, Tricor 160 mg, Lipitor 200 mg,
2 Diovan 80 mg and Avandia. I was taking all this and on the second
3 visit he walked in the room, never looked at my sugar readings, and
4 said you need insulin...I started researching and found your site on the
5 Internet...Now, with all those pills, you can imagine what was
6 happening to my body, I was being poisoned. I threw all the
7 medicines out the window and went a month with no medicine and
8 just the Diabetic Pack supplement. I leveled off in the 120 range.³²

9 The website contained repeated references to science, including the headline, "Nobel
10 Prize Validates Amazing Technology," followed by references to the "Foodform" process
11 underlying DP.³³ The website claimed that the "superiority of Foodform technology" had been
12 confirmed by "Nobel Prize winning scientists" and over 60 independent American university
13 studies,³⁴ and referred to studies that purportedly showed a 31.9% drop in blood sugar³⁵ levels.

14 WSN's webpage for IRP closely resembled those for DP. The webpage consistently
15 heralded an "Insulin Resistance Breakthrough" in large, bold type.³⁶ The list of "breakthrough
16 benefits" included "Reduced Insulin Resistance," "Improved Utilization of Glucose," and "Helps
17 Prevent Diabetes."³⁷ The website promised "reverse Insulin Resistance, safely and effectively

18 ³² Ortiz Ex. 47 at 1-2, Ex. 48 at 1-2.

19 ³³ FAC Ex. A at Dkt. 27-1, p.3 (2009 website); Ortiz Ex. 42 at 2 (2007 website); Ex. 44 at 2
20 (2009); Ex. 45 at 2, (2010). See also FAC Ex. B at Dkt. 27-3, p. 4 (2010 website) ("Nobel Prize
21 Winning Technology Validates WSN Diabetic Pack Ingredients!"); FAC Ex. A at Dkt. 27-1, p. 2
22 (2009 website); Ortiz Exs. 42-45 at 1 (2007-2010 websites); Ex. 46 at 2 (2010).

23 ³⁴ FAC Ex. A at Dkt. 27-1, p. 3 (2009 website); Ortiz Exs. 42-45 at 2 (2007-2010 websites);
24 also FAC Ex. B at Dkt. 27-3, p. 5 (2010 website); Ortiz Ex. 46 at 2 (2010 website) (citing Nobel
25 Prize support for the superiority of Foodform nutrients).

26 ³⁵ FAC Ex. A at Dkt. 27-1, pp. 2, 3 (2009 website); Ortiz Exs. 24-27 at 3-4 (2007-2010
27 websites); Ex. 28 at 4 (2011); Ex. 29 at 3-4 (2012).

28 ³⁶ FAC Ex. C at Dkt. 27-5, p. 3 (2010 website); Ortiz Exs. 19-23 at 1 (2007-2011 websites); Ex.
29 28 at 1 (2011); Ex. 30 at 1 (2007); Ex. 32 at 2 (2009); Ex. 33 at 1 (2010); Exs. 35-41 at 1 (2007-
30 2011).

31 ³⁷ FAC Ex. C, Dkt. 27-5, p. 3 (2010 website); Ortiz Ex. 17 at 1 (2008 website), Ex. 18 at 1
32 (2011), Ex. 19 at 1 (2007), Ex. 20 at 1 (2008) Ex. 21 (2009), Ex. 23 at 1 (2011), Exs. 30-32 at
33 1 (2007-2009), Ex. 34 at 1 (2011), Ex. 35 at 1 (2007); also Ortiz Ex. 22 at 1 (2010 website),
34 Ex. 33 at 1 (2010), Ex. 38 at 1 (2010) ("health benefits" rather than "breakthrough benefits").

with absolutely no side effects³⁸, and referred to IRP as “specifically formulated for the dietary management of insulin resistance³⁹.” The superiority of Foodform was touted via references to the Nobel Prize and “60 independent American university studies⁴⁰.” The IRP ads also cited the study that purportedly showed a 31.9% drop in blood sugar levels⁴¹. Lastly, some webpages promised that “a new breakthrough can protect you from becoming diabetic.”⁴²

III. LEGAL STANDARDS

A. Summary Judgment Standard

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law⁴³.” A party moving for summary judgment must show the absence of a genuine dispute as to any material fact with respect to an essential element of the non-moving party’s claim, or to a defense on which the non-moving party will bear the burden of persuasion at trial⁴⁴. The burden then shifts to the opposing party to designate “specific facts showing there is a genuine issue for trial.”⁴⁵

B. Deceptive Advertising Under The FTC Act

Section 5(a) of the FTC Act prohibits unfair or deceptive acts and practices in or

³⁸ FAC Ex. C, Dkt. 27-5, p. 3 (2010 website); Ortiz Exs. 17-23 at 1 (2008-2011 websites); Ortiz Exs. 30-41 at 1 (2007-2011 websites).

³⁹ FAC Ex. C; Dkt. 27-5, p. 3 (2010 website); Ortiz Exs. 19-22 at 1 (2007-2010 websites); Ex. 30 at 1 (2007); Ex. 32 at 1 (2009), Ex. 33 at 1 (2010), Ex. 35 at 1 (2007); Ex. 38 at 1 (2010); Ex. 40 at 1 (2008); Ex. 41 at 1 (2011). See also FAC Ex. C, Dkt. 27-6, p. 3 (2010 website); Ortiz Ex. 40 at 4 (2008 website); Ex. 41 at 4 (2011) (similar statements).

⁴⁰ FAC Ex. C, Dkt. 27-5, p. 4 (2010 website); Ortiz Ex. 17 at 2 (2008 website); Ex. 18 at 2 (2011); Ex. 19 at 2-3 (2007); Ex. 20 at 2 (2008); Ex. 21 at 2 (2009); Ex. 23 at 1 (2011); Ex. 30 at 1-2 (2007); Ex. 31 at 2 (2008); Ex. 32 at 2 (2009); Ex. 34 at 2 (2011); Ex. 35 at 2-3 (2007).

⁴¹ FAC Ex. C, Dkt. 27-5, p. 4 (2010 website); Ortiz Ex. 17 at 2 (2008 website); Ex. 18 at 2 (2011); Ex. 19 at 2 (2007); Ex. 20 at 2 (2008); Ex. 21 at 2 (2009); Ex. 23 at 2 (2011); Ex. 28 at 4 (2011); Exs. 30-32 at 2 (2007-2009); Ex. 34 at 2 (2011); Ex. 35 at 2 (2007).

⁴² Ortiz Ex. 17 at 1 (2008 website); Ex. 18 at 1 (2011); Ex. 31 at 1 (2008); Ex. 34 at 1 (2011).

⁴³ FED. R. CIV. P. 56(a).

⁴⁴ Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

⁴⁵ Id. at 324.

1 related efficacy claims is “competent and reliable scientific evidence.”⁶³ The FTC asserts that
 2 WSN’s non-establishment claims relating to the effectiveness of its products (i.e., Claims 1, 2, 5,
 3 6, and 7) are unsubstantiated.

4 3. Determining Whether The Claims Are Material

5 Finally, the FTC must prove that the claims are material. Certain types of advertising
 6 claims are presumptively material, including express product claims⁶⁴ health and safety
 7 claims,⁶⁵ and claims that are likely to affect consumers’ choice of a product.⁶⁶

8 IV. ARGUMENT

9 A. WSN’s Advertisements Violated The FTC Act

10 1. WSN’s Advertisements Make The Challenged Claims

11 At the core of the FTC’s case are the nine claims identified in the⁶⁷ FAC

- 12 Claim 1. DP is an effective treatment for diabetes (FAC Count 1a);
- 13 Claim 2. Scientific studies prove that DP is an effective treatment for
 diabetes (FAC Count 1c);
- 14 Claim 3. DP reduces or eliminates the need for insulin and other diabetes
 medications (FAC Count 1b);
- 15 Claim 4. DP is clinically proven to cause an average drop in blood glucose
 levels of 31.9% (FAC Count 1d);
- 16 Claim 5. IRP reverses insulin resistance (FAC Count 2a);
- 17 Claim 6. IRP manages insulin resistance (FAC Count 2b);
- 18 Claim 7. IRP prevents diabetes (FAC Count 2c);
- 19 Claim 8. Scientific studies prove IRP is an effective treatment for insulin
 resistance (FAC Count 2d); and
- 20 Claim 9. IRP is clinically proven to cause an average drop in blood glucose
 levels of 31.9% (FAC Count 2e).

21 The following nine sections explain why there is no genuine dispute that WSN’s ads
 22 convey each of the challenged claims.

23 _____
 24 ⁶³ See QT448 F. Supp. 2d at 959 (citing *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1156-57
 25 (9th Cir. 1984)).

26 ⁶⁴ *Pantron I*, 33 F.3d at 1095-96.

27 ⁶⁵ QT, Inc, 448 F. Supp. 2d at 960, 965-66.

28 ⁶⁶ *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006)

⁶⁷ FAC (Dkt. 27) ¶¶ 24, 26.

1 a. WSN Claimed that DP Is An Effective Treatment For Diabetes

2 WSN's ads claimed that DP is an effective treatment for diabetes. As noted above,
3 WSN's ads for DP repeatedly touted DP's ability to lower blood sugar—a key treatment goal for
4 diabetics.⁶⁸ For example, one PPC ad promoted a “[c]linically proven drug-free solution that
5 lowers blood sugar,⁶⁹ while another told consumers they could “have normal blood sugar
6 levels.”⁷⁰ WSN's webpage for DP announced a “diabetes breakthrough” that would “lower your
7 blood sugar, safely and effectively, with absolutely no side effects.”⁷¹ The webpage also listed
8 “lower blood glucose levels⁷² as one of DP's “breakthrough benefits.” Lastly, customer
9 testimonials described dramatic drops in blood sugar.⁷³

10 The effective treatment claim was also conveyed by representations that DP could do the
11 same job as diabetes medications. As discussed further below, WSN's website featured DP
12 users who achieved lower blood sugar while eliminating medication, including, in one instance,

13
14 _____
15 ⁶⁸ Garvey Report at 17 (identifying controlling blood sugar as a key treatment goal).

16 ⁶⁹ SOF 102, 105, 106.

17 ⁷⁰ Ortiz Ex. 9 (“RealFoodNutrients Diabetes campaign setup”); Ortiz Ex. 6 at 134:7-18 (Gilleard
18 Dep.). See also Ortiz Ex. 10 at 60:17-61:13, 128:9-23 (Huan Dep.); Ortiz Ex.10-A (e-mail);

1 “50 units of insulin.”⁷⁴ The website touted “less dependency on medications” while promising
 2 lower blood sugar levels.⁷⁵ In addition, one of WSN’s most successful PPC ads promoted a
 3 “Natural Diabetes Medicine” that “lower[s] blood sugar”⁷⁶ certainly an “effective treatment”
 4 claim. Another PPC ad promoted a diabetes “solution” with a “90% success”⁷⁷ rate.”

5 In sum, there is no genuine dispute that WSN claimed that DP is an effective treatment
 6 for diabetes.

7 b. WSN Claimed That Scientific Studies Prove That DP Is An
 8 Effective Treatment For Diabetes

9 In addition to claiming that DP is an effective treatment for diabetes, WSN claimed that
 10 scientific studies proved DP’s efficacy. For example, several of WSN’s most successful PPC ads
 11 expressly touted a “clinically proven” diabetes “solution.”⁷⁸ WSN’s website also made this
 12 claim. The website represented that “Nobel Prize winning science and over 60 independent
 13 American university studies confirm the superiority of Foodform technology” -- “Foodform
 14 technology” being the manufacturing process for DP.⁷⁹ The 2009 website also prominently
 15 claimed that “studies show a 31.9% drop in blood sugar levels”⁸⁰ and stated:

16 A recent independent clinical trial was done on one of the [] herbal
 17 ingredients from this amazing product. This study was done on type

18 _____
 19 ⁷⁴ FAC Ex. A at Dkt. 27-2, p. 1 (2009 website Barbara Culver” stating her blood sugar “just
 20 kept going up” in spite of “50 units of insulin plus pills twice a day,” and that since using DP her
 21 “sugar is down in the low 100s” and “I don’t take insulin anymore.” See also Ortiz Exs. 42-44
 22 at 2-3 (2007-2009 websites); Ex. 45 at 3-4 (2010); Ex. 46 at 2-3 (2010) (substantially similar).

23 ⁷⁵ FAC Ex. A., Dkt. 27-1, p. 3 (2009 website Ortiz Exs. 42-45 at 2 (2007-2010 websites).

24 ⁷⁶ Ortiz Ex. 9 at 2 (“RealFoodNutrients Diabetes campaign sets up”); also Ortiz Ex. 6 at
 25 125:20-25, 134:7-18 (Gilleard Dep.).

26 ⁷⁷ Ortiz Ex. 9 at 2 (“RealFoodNutrients Diabetes campaign sets up”); also Ortiz Ex. 6 at
 27 125:20-25, 134:7-18 (Gilleard Dep.).

28 ⁷⁸ Ortiz Ex. 9 at 2 (“RealFoodNutrients Diabetes campaign sets up”); also Ortiz Ex. 6 at
 125:20-25, 134:7-18 (Gilleard Dep.). See also SOF 106.

⁷⁹ FAC Ex. A at Dkt. 27-1, p. 3 (2009 website Ortiz Exs. 42-45 at 2 (2007-2010 websites);
 also FAC Ex. B at Dkt. 27-3, p. 5 (2010 website); Ortiz Ex. 46 at 2 (2010 website) (citing Nobel
 Prize support for the superiority of Foodform nutrients).

⁸⁰ FAC Ex. A, Dkt. 27-1, p. 2 (2009 website Ortiz Exs. 42-45 at 1 (2007-2010 websites).

1 2 diabetics (mildly insulin dependent) and reported an average drop
of blood glucose levels of 31.9% [emphasis in original].⁸¹

2 Repeated references to the Nobel Prize served to bolster the “studies prove” claim. For
3 example, the site consistently claimed that DP “is the most technologically advanced product of
4 its kind available anywhere and was validated by the 1999 Nobel Prize for physiology,”⁸²
5 suggesting that physiological studies proved efficacy of DP. The website also reprints
6 studies⁸³ relating to various DP ingredients.⁸⁴

7 Given the above, there is no genuine dispute that WSN claimed that scientific studies
8 prove that DP is an effective treatment for diabetes.

9 c. WSN Claimed That DP Reduces Or Eliminates The Need For
10 Insulin And Other Diabetes Medications

11 WSN’s ads claimed that DP reduces or eliminates the need for insulin and other diabetes
12 medications. WSN’s PPC ads expressly promise a “drug-free” “solution” to diabetes.⁸⁵
13 Similarly, the WSN website expressly stated that one of DP’s “breakthrough benefits” is “less
14 dependency on medication.”⁸⁶ In addition, the webpage said:

15 Diabetes is a disease that if you don’t take effective action against, it simply gets worse.

16 _____
17 ⁸¹ FAC Ex. A, Dkt. 27-1, p. 3 (2009 website); Ortiz Exs. 42-45 at 2 (2007-2010 websites).

18 ⁸² FAC Ex. A, Dkt. 27-2, p. 1 (2009 website); Ortiz Exs. 42-45 at 3 (2007-2010 websites).
19 Robert Held admits that the Nobel Prize-winning technology described on the WSN website has
nothing to do with lowering blood sugar and is the technology underlying DP. Ortiz Ex. 1 at
137:11-25, 138:1-4 (B. Held Dep.).

20 ⁸³ SOF 139; see also SOF 37.

21 ⁸⁴ References to studies of “ingredients” or “Foodform” do not negate the overall impression that
22 DP itself has been proven effective by scientific studies. WSN’s ads emphasize the link between
23 DP and the Foodform process, thus conveying that Foodform’s “proven” benefits will accrue to a
product made using that process. Similarly, consumers could reasonably expect that an
24 advertiser who touts studies on a product’s ingredients is claiming that those studies support the
efficacy of the product as a whole. See *FTC v. Nat’l Urological Grp.*, 645 F. Supp. 2d 1167,
25 1194-95, 1197 n.17 (N.D. Ga. 2008) (holding that representation in ad related to effectiveness of
the product itself, even though express language discussed only its components, is not
26 Appx. 358 (11th Cir. 2009) (unpublished).

27 ⁸⁵ Ortiz Ex. 9 at 2 (“RealFoodNutrients Diabetes campaign sets up”); also Ortiz Ex. 6 at
125:20-25, 134:7-18 (Gilleard Dep.).

28 ⁸⁶ FAC Ex. A., Dkt. 27-1, p. 3 (2009 website); Ortiz Exs. 42-45 at 2 (2007-2010 websites).

1 Unfortunately medications only treat the symptoms and usually do nothing to address the
 2 underlying causes. The good news is that cutting-edge science and nutrition have come together
 3 to create a truly monumental and natural breakthrough for diabetics.⁸⁷

4 This passage conveys that—unlike medications⁸⁸ DP will address the “underlying
 5 causes” of diabetes, thus permitting consumers to eliminate or reduce their medications.

6 Testimonials hammered the claim home. “Barbara Culver” described how she eliminated
 7 “50 units of insulin” while achieving lower blood sugar with DP.⁸⁹ Another testimonialist
 8 “threw all the medicines out the window and went a month with no medicine and just the
 9 Diabetic Pack supplements. I leveled off in the 120 (blood glucose) range...”⁹⁰

10 Based on the above, there is no genuine dispute as to material fact that WSN claimed that
 11 DP reduces or eliminates the need for insulin and other diabetes medications.

12 d. WSN Claimed That DP Is Clinically Proven To Cause An Average
 13 Drop In Blood Glucose Levels Of 31.9%

14 WSN claimed that DP is clinically proven to cause an average drop in blood glucose
 15 levels of 31.9%. The 2009 website prominently stated: “Nobel Prize winning technology
 16 validates WSN Diabetic Pack Ingredients! Studies show 31.9% drop in blood sugar levels!
 17 [emphasis in original].”⁹⁰ These “studies” are later clarified to be an “independent clinical
 18 trial.”⁹¹ The 31.9% claim consistently appeared on the website in other years as slightly

19 _____
 20 ⁸⁷ FAC Ex. A at Dkt. 27-1, p. 3 (2009 website); Ortiz Exs. 42-45 at 2 (2007-2010 websites);
 21 FAC Ex. B at Dkt. 27-3, pp. 4-5 (2010 website) (substantially similar); also Ortiz Ex. 46 at 2
 (2010 website).

22 ⁸⁸ FAC Ex. A at Dkt 27-2, p. 1 (2009 website); FAC Ex. B Dkt. 27-3, p. 5 to Dkt. 27-4, p. 1
 23 (2010 website); Ortiz Ex. 43 at 2-3 (2008 website) (substantially similar statements); so
 24 Ortiz Exs. 42 at 2-3 (2007 website); Exs. 44-46 at 2-3 (2009-2010) (substantially similar
 statements).

25 ⁸⁹ Ortiz Exs. 47-48 at 1-2 (2009-2010 websites) (Jeff Rice testimonial).

26 ⁹⁰ FAC Ex. A at Dkt. 27-1, p. 2 (2010 website); Ortiz Exs. 42-45 at p. 1 (2007-2010 websites).

27 ⁹¹ “A recent independent clinical trial was done on one of the[] herbal ingredients from this
 28 amazing product. This study was done on type 2 diabetics (mildly insulin dependent) and
 reported an average drop of blood glucose levels of 31.9% [emphasis in original]” FAC Ex.
 A at Dkt. 27-1, p. 3 (2009 website); Ortiz Exs. 42-45 at 2 (2007-2010 websites).

1 different form.⁹² In addition, the website contained studies and articles about studies, including
 2 some relating to the study that purportedly showed the 31.9% drop in blood sugar.⁹³ Based on
 3 these facts, there is no genuine dispute that WSN made the 31.9% claim.

4 e. WSN Claimed That IRP Reverses Insulin Resistance

5 WSN expressly claimed that IRP reverses insulin resistance. Proclaiming an “insulin
 6 resistance breakthrough,” WSN’s website consistently claimed the product would “reverse
 7 insulin resistance, safely and effectively.”⁹⁴ In some years, the website also carried a large
 8 headline stating, “You Can Reverse Insulin Resistance! Yes, a new breakthrough ~~product~~
 9 you from becoming diabetic and can help you reverse and eliminate your insulin-resistant
 10 condition! Reverse Insulin Resistance, safely and effectively with absolutely NO SIDE
 11 EFFECTS!! GUARANTEED!!”⁹⁵ Given these express statements, there is no genuine dispute
 12 that WSN claimed that IRP reverses insulin resistance.

13 f. WSN Claimed That IRP Manages Insulin Resistance

14 WSN expressly claimed that IRP manages insulin resistance. The WSN website
 15 consistently contained the bold headline, “Insulin Resistance Breakthrough,” followed by the
 16 statement that IRP is “specifically formulated for the dietary management of insulin
 17 resistance.”⁹⁶ WSN’s website also stated that “[t]he WSN Insulin Resistance Pack is a medical
 18 food for the dietary management of insulin resistance.”⁹⁷ Given these express statements, there
 19 is no genuine dispute that WSN claimed that IRP manages insulin resistance.⁹⁸

20
 21 ⁹² Ortiz Exs. 25-29 at 4 (2008-2012 websites).

22 ⁹³ SOF 37, 139. As noted at Sec. IV.A.2., neither this study nor any other was conducted on
 23 WSN products.

24 ⁹⁴ FAC Ex. C, Dkt. 27-5, p. 3 (2010 website); Ortiz Exs. 30-34 at 1 (2007-2011 websites).

25 ⁹⁵ Ortiz Ex. 31 at 1 (2008 website); Ex. 34 at 1 (2011).

26 ⁹⁶ FAC Ex. C at Dkt. 27-5, p. 3 (2010 website); Ortiz Ex. 22 at 1 (2010 website); Ex. 30 at 1
 27 (2007); Ex. 32 at 1 (2009); Ex. 33 at 1 (2010); Ex. 38 at 1 (2010); Ex. 41 at 1 (2011).

28 ⁹⁷ FAC Ex. C at Dkt. 27-6, p. 3 (2010 website); Ortiz Exs. 22, 38 at 1 (2010 website).

⁹⁸ See Nat’l Urological Grp., 645 F. Supp. 2d at 1199 (holding that where language of
 representation is express, “no further analysis is needed” to find the claims).

g. WSN Claimed That IRP Prevents Diabetes

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Foodform technology¹⁰⁴ – the same technology underlying IRP. Like the DP webpage, the IRP
2 webpage referenced the study that purportedly lowered blood glucose levels by 31.9%.¹⁰⁵ Taken
3 together, the website’s efficacy claims (“reverse insulin resistance,” “reduce insulin resistance”)
4 and references to studies convey that scientific studies prove IRP’s efficacy.¹⁰⁶ References to
5 “clinical trials” and other science bolster the claim.¹⁰⁷ There is thus no genuine dispute that
6 WSN claimed that scientific studies prove that IRP is an effective treatment for insulin
7 resistance.

8 i. WSN Claimed That IRP Is Clinically Proven To Cause An
9 Average Drop In Blood Glucose Levels Of 31.9%

10 WSN claimed that IRP is clinically proven to cause an average drop in blood glucose
11 levels of 31.9%. In addition to the multiple references to scientific studies described above,
12 some versions of WSN’s IRP webpage contained the following statement:

13 A recent independent clinical trial was done on one of the[] herbal
14 ingredients from this amazing product. This study was done on type
15 2 diabetics (mildly insulin dependent) and reported an average drop
16 of blood glucose levels of 31.9% and average weight loss of 4.8
17 pounds in just 30 days!¹⁰⁸

1 high level of scientific support.¹⁸

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

21

1 B. Defendants Are Liable For Injunctive And Monetary Relief

2 This Court has the authority to order both the injunctive and the equitable monetary relief
 3 sought by the FTC.¹³⁰ To obtain consumer restitution, the FTC must show that WSN made
 4 misrepresentations “of a kind usually relied on by reasonably prudent persons and that consumer
 5 injury resulted.”¹³¹ Reliance and resulting injury are proven by showing that WSN made widely
 6 disseminated material representations and that consumers purchased the Defendants’¹³² products.
 7 As described above, these requirements are fully met.¹³³ Therefore, the Court should order
 8 consumer restitution as a matter of law. The proper measure of recovery is the full amount lost
 9 by consumers,¹³⁴ which as stated in Section II.C. is \$2,198,612.12.

10 C. Robert And Robyn Held Are Individually Liable

11 An individual may be liable for injunctive relief under the FTC Act not only for his or
 12 her own conduct, but for a corporation’s deceptive conduct if he or she (1) participated in the
 13 deceptive practices or (2) had authority to control them.¹³⁵ The Helds are liable under both
 14 theories. Mr. Held co-founded Wellness Support Network, co-owns the company, and has
 15 served over the years as its president and a director.¹³⁶ Mr. Held wrote ads for the Products,
 16 administered the company’s “pay-per-click” advertising campaigns, and selected search term
 17 keywords used to drive consumers to WSN’s website.¹³⁷ Although he is not a doctor or

18
 19 ¹³⁰ 15 U.S.C. §53(b); FTC v. Stefanchik, 559 F.3d 924, 931 (9th Cir. 2009) (“The district court
 20 has broad authority under the FTC Act to ‘grant any ancillary relief necessary to accomplish
 21 complete justice,’ including the power to order restitution.”); FTC v. H. N. Singer, Inc., 668 F.2d
 22 1107, 1111 (9th Cir. 1982).

23 ¹³¹ Pantron I, 33 F.3d at 1102.

24 ¹³² See FTC v. Natural Solution, Inc., No. CV-06-6112JFW, 2007 U.S. Dist. LEXIS 60783, at
 25 *19 (C.D. Cal. 2007) (quoting FTC v. Figgie Int’l, 994 F.2d 595, 604 (9th Cir. 1993)).

26 ¹³³ See Sections II.C.; II.D.; IV.A.1-3.

27 ¹³⁴ Stefanchik 559 F.3d at 931.

28 ¹³⁵ FTC v. Publ’g Clearing House, Inc., 104 F.3d 1168, 1170 (9th Cir. 1997).

¹³⁶ SOF 4, 17; Ortiz Ex. 13.

¹³⁷ Ortiz Ex. 4 at 107:25-108:11 (R. Held Dep.); Ortiz Ex. 15 at 5th R(dg Response), #3, #5.
 See also Ortiz Ex. 1 at 149:2-22, 149:23-150:13 (B. Held Dep.); Ortiz Ex. 2-A (Ex. 23 to B. Held
 Dep.).

1 claims must be non-misleading and supported by competent and reliable scientific evidence.
2 WSN is also barred from misrepresenting studies, or that product benefits are scientifically
3 proven. Defendants must also pay \$2,198,612.12, ~~the~~ amount of consumer injury. Lastly,
4 the proposed Order includes provisions to ensure enforceability.

5 The scope of the proposed Order is proper given WSN's propensity to ignore warnings
6 about their claims, and the likelihood that they will continue to advertise deceptively if not
7 enjoined. The proposed Order is also proper given the potential consequences of WSN's claims.
8 As stated above, WSN claimed DP could reduce or eliminate the need for insulin and other
9 diabetes medications. Dr. Garvey warns that use of WSN products ~~instead of~~ established
10 diabetes therapy could lead to serious injury, even death.¹⁵⁵ A strong order is needed to protect
11 consumers.

12 V.

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28