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10 **UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
 11 **SAN FRANCISCO DIVISION**

12 FEDERAL TRADE COMMISSION,  
 13

14 Plaintiff,

15 v.

16 WELLNESS SUPPORT NETWORK, INC., a  
 corporation,  
 17

18 ROBERT HELD, individually and as an officer  
 of Wellness Support Network, Inc., and

19 ROBYN HELD, individually and as an officer  
 of Wellness Support Network, Inc.,  
 20

21 Defendants.  
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Case No. 3:10-cv-4879 JCS

**FEDERAL TRADE COMMISSION'S  
 MOTION FOR SUMMARY  
 JUDGMENT**

Hearing Date: February 14, 2014  
 Hearing Time: 9:30 a.m.  
 Location: Courtroom G, 15th Floor

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**NOTICE OF MOTION FOR SUMMARY JUDGMENT**

1  
2 On February 14, 2014, at 9:30 a.m., pursuant to Federal Rule of Civil Procedure 56, the  
3 Federal Trade Commission (“FTC”) will move this Court for summary judgment against  
4 Defendants Wellness Support Network, Inc., Robert Held, and Robyn Held for violations of  
5 Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a), 52.

6 The FTC respectfully requests this Court to grant summary judgment against all  
7 Defendants as to all issues in this case. As explained below, the FTC has established sufficient  
8 material facts, about which there is no genuine dispute, to support a finding that Defendants are  
9 liable as a matter of law. Judgment as to each Defendant should include a permanent injunction  
10 to prevent future violations of the law, and an award of monetary relief for injured consumers.

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.

— Defendants’ customer survey<sup>1</sup>

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

— W. Timothy Garvey, M.D.<sup>2</sup>

8 **I. INTRODUCTION**

9 Diabetes afflicts millions of Americans and can cause serious disability and death.  
10 Wellness Support Network, Inc. capitalized on this public-health problem by marketing  
11 unproven remedies for diabetes and insulin resistance, a diabetes-related condition. The  
12 company persuaded thousands of consumers to purchase its “breakthrough” products by  
13 promising lower blood sugar and “life changing results”; by publishing dramatic customer  
14 “success” stories; and by suggesting the products were “validated” by the Nobel Prize. Among  
15 other things, Wellness Support Network’s ads claimed that their products prevent or treat  
16 diabetes, that customers could reduce or throw away their diabetes medications, and that  
17 scientific studies proved these claims. Yet there is no proof that the company’s products work.

18 The Federal Trade Commission (“FTC”) brought this case against Wellness Support  
19 Network and its owners, Robert and Robyn Held (collectively, “WSN” or “Defendants”) to stop  
20 their deceptive advertising, prevent future deception, and obtain redress for injured consumers.

21  
22 \_\_\_\_\_  
23 <sup>1</sup> Declaration of FTC Investigator Kelly Ortiz (“Ortiz Dec.”), Exhibit 8 (“Ortiz Ex. 8” or “Ex. 8”)  
24 (“WSN Diabetes Pack Purchaser Survey”); *see also* Ortiz Ex. 6 at 119:3-7, 18-21; 121:5-8, 22-  
25; 123:13-124:16 (Deposition of Deborah Gilleard (“Gilleard Dep.”)).

25 <sup>2</sup> Ortiz Ex. 11 at 239:1-4 (Deposition of Dr. W. Timothy Garvey (“Garvey Dep.”)). Dr. Garvey  
26 is Butterworth Professor and Chair of the Department of Nutrition Sciences at the University of  
27 Alabama at Birmingham, and director of the NIH-funded UAB Diabetes Research and Training  
28 Center. Since 2003 he has also served as Staff Physician and Geriatric Research, Education, and  
Clinical Center Investigator at the Birmingham Veterans Affairs Medical Center. Declaration of  
W. Timothy Garvey, M.D. (“Garvey Dec.”), Ex. A at 1-2 (Expert Report of W. Timothy Garvey  
 (“Garvey Report”)).

1 To prove that WSN’s ads are deceptive under the FTC Act, the FTC must show: (1) there is a  
 2 representation, omission, or practice; (2) that is likely to mislead consumers acting reasonably  
 3 under the circumstances; and (3) the representation, omission, or practice was material.<sup>3</sup> Expert  
 4 testimony, Defendants’ admissions, and corporate records make clear that there is no genuine  
 5 dispute as to any of these elements, the individual defendants’ personal liability, the amount of  
 6 consumer injury, or any other material fact. Summary judgment is therefore appropriate.

## 7 **II. FACTUAL BACKGROUND**

### 8 **A. The Defendants**

9 Defendant Wellness Support Network, Inc., is a California corporation co-owned by  
 10 individual defendants Robert and Robyn Held.<sup>4</sup> The Helds exercise complete control over  
 11 Wellness Support Network, and have actively participated in the conduct at issue in this case.<sup>5</sup>

### 12 **B. Background On Diabetes And Insulin Resistance**

13 Diabetes mellitus is a group of disorders that affect 25 million adults in the United  
 14 States.<sup>6</sup> The disorders are characterized by abnormal glucose metabolism, in particular  
 15 “hyperglycemia,” which refers to high levels of glucose (or sugar) in the blood.<sup>7</sup> Insulin is a  
 16 hormone, produced in the pancreas, that helps to unlock the body’s cells so that glucose in the  
 17 blood can be absorbed by the cells and used for energy.<sup>8</sup> When the pancreas does not produce  
 18 enough insulin, or if the cells do not respond normally to the insulin that is produced (known as  
 19 “insulin resistance”), glucose builds up in the blood.<sup>9</sup> Over time, high levels of blood glucose

20 \\_\_\_\_\_  
 21 <sup>3</sup> *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994); *FTC v. Stefanichik*, 559 F.3d 924,  
 928 (9th Cir. 2009).

22 <sup>4</sup> Joint Statement of Undisputed Material Facts (Dkt. #162) (“SOF”) 2, 4, 9; Ortiz Ex. 12 at 15  
 23 (“Defendants’ Response to Plaintiff’s First Set of Requests for Production of Documents and  
 24 Tangible Things” (“1<sup>st</sup> RFP Resp.”), #27)); Ortiz Ex. 13 (e-mail) (referenced in Ortiz Ex. 12 at  
 15 (1<sup>st</sup> RFP Resp. #27)).

25 <sup>5</sup> See Sec IV.C., *infra*.

26 <sup>6</sup> Garvey Report at 9.

27 <sup>7</sup> Garvey Report at 9.

28 <sup>8</sup> Garvey Report at 9.

<sup>9</sup> Garvey Report at 9. For a description of insulin resistance, see Garvey Report at 9-11.



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

#### 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.<sup>12</sup> 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).<sup>13</sup> The company advertised and sold the Products until at least  
 11 2011.<sup>14</sup> Although WSN stopped marketing the products as the “Diabetic Pack” and “Insulin  
 12 Resistance Pack” in 2011, they continue to sell similar products,<sup>15</sup> and to make claims similar to  
 13 those made for DP.<sup>16</sup>

14 WSN sold the Products on the WSN website, Amazon.com, eBay.com, and over the  
 15 phone.<sup>17</sup> A 30-day supply averaged \$62.65.<sup>18</sup> After subtracting money returned to customers,

16 \_\_\_\_\_  
 17 <sup>10</sup> Garvey Report at 9.

18 <sup>11</sup> Garvey Report at 17. Blood sugar levels in healthy adults are generally less than 100  
 19 milligrams per deciliter (mg/dl), while a blood sugar level between 100 mg/dl and 125 mg/dl  
 indicates prediabetes, and over 125 mg/dl indicates diabetes. Garvey Report at 13.

20 <sup>12</sup> SOF 24, 60; *see also* SOF 95-98 (Diabetic Pack instructions for use).

21 <sup>13</sup> SOF 93, 95.

22 <sup>14</sup> Ortiz Ex. 1 at 25:14-26:12 (Deposition of Robert “Bob” Held (“B. Held Dep.”)).

23 <sup>15</sup> Ortiz Ex. 1 at 25:14-26:4 (B. Held Dep.). The company rebranded its products and sells the  
 24 components under new names. SOF 25, 26, 56, 79. The Glucose Support Formula (“GSF”)  
 25 component retains that name, while the Calcium-Magnesium Formula and Vitamin and Mineral  
 26 Formula have been combined into the “Life Support Formula” (“LSF”). SOF 56, 79. GSF and  
 LSF are sold separately. SOF 56. Although WSN no longer advertises a “Diabetic Pack,” it still  
 27 sells the three components of the product to customers who ask for it. SOF 67; Ortiz Ex. 4 at  
 40:5-20 (Deposition of Robyn Held (“R. Held Dep.”)).

28 <sup>16</sup> Second Declaration of David Gonzalez (“2d Gonzalez Dec.”), Ex. 2.

<sup>17</sup> SOF 71; Ortiz Ex. 4 at 32:17-33:9 (R. Held Dep.); Ortiz Ex. 1 at 28:8-12 (B. Held Dep.).

<sup>18</sup> Declaration of David Gonzalez (“Gonzalez Dec.”), Ex. A at 4.

1 WSN's sales revenue for the Products between 2004 and 2012 totaled \$2,198,612.12.<sup>19</sup>

2 **D. WSN's Advertising**

3 WSN advertised its Products primarily through online "pay-per-click" ("PPC")  
4 campaigns,<sup>20</sup> in which WSN's ads were displayed when consumers performed certain searches  
5 on the Internet.<sup>21</sup> Defendants chose "keywords" they thought consumers might use as search  
6 terms, including such phrases as "cure diabetes," "natural diabetes cure," and "diabetes  
7 treatment."<sup>22</sup> Two of WSN's most lucrative PPC ads read as follows:

8 Can't Lower Your Blood Sugar?  
9 Clinically Proven Drug Free  
10 Solution That Lowers Blood Sugar

11 Control Blood Sugar Level  
12 Clinically Proven Natural Solution  
13 To Diabetes With A 90% Success Rate<sup>23</sup>

14 Consumers clicking on WSN's PPC ads would land on WSN's website,<sup>24</sup> which  
15 contained numerous pages advertising the Products.<sup>25</sup> The design and content of these webpages

16 \_\_\_\_\_  
17 <sup>19</sup> Gonzalez Dec. Ex. A at 4. *See also* Gonzalez Dec. at 2-3.

18 <sup>20</sup> SOF 102-103.

19 <sup>21</sup> Ortiz Ex. 4 at 105:23-106:12 (R. Held Dep.); Ortiz Ex. 15 at 4 ("Defendants' Response to  
20 Plaintiff's First Set of Interrogatories" ("1<sup>st</sup> Rog Resp."), #1).

21 <sup>22</sup> Ortiz Ex. 4 at 107:25-108:11, 127:1-128:23 (R. Held Dep.).

22 <sup>23</sup> Ortiz Ex. 9 ("RealFoodNutrients Diabetes campaign setup"); Ortiz Ex. 6 at 134:7-18 (Gilleard  
23 Dep.); *see also* SOF 106; Ortiz Ex. 10 at 60:17-61:13, 128:9-23 (Deposition of Ted Huffman  
24 ("Huffman Dep.)); Ortiz Ex. 10-A (e-mail); Ortiz Ex. 10-B (Declaration of Craig Kauffman Re  
25 Internet Search Term Research) (substantially similar representations).

26 <sup>24</sup> Ortiz Ex. 15 at 4-6 (1<sup>st</sup> Rog Resp., #1-3); Ortiz Ex. 4 at 107:2-8, 111:4-14, 129:16-130:3 (R.  
27 Held Dep.).

28 <sup>25</sup> Printouts of some of Defendants' webpages appear as Exhibits 17 to 48 to the Ortiz  
Declaration. The HTML files from which the printouts were made were provided by the  
Defendants during discovery, and are lodged as Ortiz Ex. 49 (*see also* Ortiz Dec. ¶ 33). *See*  
Ortiz Dec. ¶¶ 22-32, Ortiz Ex. 16 at 4-5 ("Defendants' Third Supplemental Response to  
Plaintiff's First Set of Requests for Production of Documents and Tangible Things" ("3rd Supp.  
RFP Resp.") #1, #5). Website ads preserved by the FTC are also provided as Exhibits 1 and 2 to  
the Second Gonzalez Declaration. Website ads also appear as Exhibits A-C (Dkt. 27-1 to 27-5)  
to the First Amended Complaint ("FAC") (Dkt. 27). These exhibits were authenticated by

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.”<sup>26</sup> Stating that the product is “specifically formulated for the dietary  
 5 management of diabetes,” the website promised to “lower [] blood sugar, safely and effectively  
 6 with absolutely NO SIDE EFFECTS!! GUARANTEED!!”<sup>27</sup> Checklists of “breakthrough  
 7 benefits” included “lower blood glucose levels” and “less dependency on medications.”<sup>28</sup> The  
 8 website also contained testimonials, including this one from customer “Barbara Culver”:

9 This is the first time that I have ever ordered a product that really did  
 10 what it said it would do! I was taking 50 units of insulin plus pills  
 11 twice a day and my blood sugar just kept going up. I was tired all of  
 12 the time and I could fall asleep as soon as I sat down. I also kept  
 13 gaining weight. Since I’ve been using the Diabetic Pack I have lost 9  
 14 pounds, I have all kinds of energy and my sugar is down in the low  
 15 100s. Also I don’t take insulin any more!<sup>29</sup>

16 Another prominently-featured testimonial stated, “[m]y blood sugar went from 230 to 117 in just  
 17 21 days.”<sup>30</sup> Among numerous other testimonials<sup>31</sup> was one from “Jeff Rice,” who ignored his  
 18 doctors’ advice and “threw all the medicines out the window”:

19 It has been a transformation of my sugar’s running in the 300 to 250  
 20 range to 120 and lower...The first doctor put me on Glucotrol 10 mg.  
 21 The second doctor put me on Glucophage 2000 mg along with the

22 Defendants. *See* Ortiz Ex. 14 at 4 (“Defendants’ Response to Plaintiff’s First Set of Requests for  
 23 Admissions” (“1<sup>st</sup> RFA Resp.”) #1-3).

24 <sup>26</sup> FAC Ex. A at Dkt. 27-1, p. 2 (2009 website); Ortiz Exs. 42-46 at 1 (2007-2010 websites).

25 <sup>27</sup> FAC Ex. A at Dkt. 27-1, p. 2 (2009 website); Ortiz Ex. 42 at 1 (2007), Ex. 43 at 1 (2008), Ex.  
 26 45 at 1 (2010).

27 <sup>28</sup> FAC Ex. A at Dkt. 27-1, p. 3 (2009 website); Ortiz Ex. 42 at 1-2 (2007), Ex. 43 at 1-2 (2008),  
 28 Ex. 44 at 2 (2009), Ex. 45 at 2 (2010).

<sup>29</sup> FAC Ex. A at Dkt 27-2, p. 1 (2009 website); FAC Ex. B at Dkt. 27-3, p. 5 to Dkt 27-4, p.1  
 (2010 website); Ortiz Ex. 43 at 2-3 (2008 website) (substantially similar). *See also* Ortiz Ex. 42  
 at 2-3 (2007 website); Ex. 44 at 2-3 (2009); Ex. 45 at 2-3 (2010); Ex.46 at 2-3 (2010)  
 (substantially similar).

<sup>30</sup> FAC Ex. A at Dkt. 27-1, p. 2. (2009 website); Ortiz Exs. 42-46 at 1 (2007-2010 websites).

<sup>31</sup> Ortiz Ex. 47 (2009 website), Ex. 48 (2010).

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 searching 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 supplements. I leveled off in the 120 range....<sup>32</sup>

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.<sup>33</sup> The website claimed that the “superiority of Foodform technology” had been  
12          confirmed by “Nobel Prize winning science and over 60 independent American university  
13          studies,”<sup>34</sup> and referred to studies that purportedly showed a 31.9% drop in blood sugar levels.<sup>35</sup>

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

18          <sup>32</sup> Ortiz Ex. 47 at 1-2, Ex. 48 at 1-2.

19          <sup>33</sup> 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          <sup>34</sup> FAC Ex. A at Dkt. 27-1, p. 3 (2009 website); Ortiz Exs. 42-45 at 2 (2007-2010 websites); *see*  
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          <sup>35</sup> 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          <sup>36</sup> 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 1 (2009); Ex. 33 at 1 (2010); Exs. 35-41 at 1 (2007-  
30          2011).

31          <sup>37</sup> 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 at 1 (2009), Ex. 23 at 1 (2011), Exs. 30-32 at  
33          1 (2007-2009), Ex. 34 at 1 (2011), Ex. 35 at 1 (2007); *see 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”).

1 with absolutely no side effects,”<sup>38</sup> and referred to IRP as “specifically formulated for the dietary  
 2 management of insulin resistance.”<sup>39</sup> The superiority of Foodform was touted via references to  
 3 the Nobel Prize and “60 independent American university studies.”<sup>40</sup> The IRP ads also cited the  
 4 study that purportedly showed a 31.9% drop in blood sugar levels.<sup>41</sup> Lastly, some webpages  
 5 promised that “a new breakthrough can protect you from becoming diabetic.”<sup>42</sup>

### 6 **III. LEGAL STANDARDS**

#### 7 **A. Summary Judgment Standard**

8 Summary judgment is appropriate “if the movant shows that there is no genuine dispute  
 9 as to any material fact and the movant is entitled to judgment as a matter of law.”<sup>43</sup> A party  
 10 moving for summary judgment must show the absence of a genuine dispute as to any material  
 11 fact with respect to an essential element of the non-moving party’s claim, or to a defense on  
 12 which the non-moving party will bear the burden of persuasion at trial.<sup>44</sup> The burden then shifts  
 13 to the opposing party to designate “specific facts showing there is a genuine issue for trial.”<sup>45</sup>

#### 14 **B. Deceptive Advertising Under The FTC Act**

15 Section 5(a) of the FTC Act prohibits unfair or deceptive acts and practices in or  
 16

17  
 18 <sup>38</sup> 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).

19 <sup>39</sup> FAC Ex. C; Dkt. 27-5, p. 3 (2010 website); Ortiz Exs. 19-22 at 1 (2007-2010 websites); Ex. 30  
 20 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  
 21 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).

22 <sup>40</sup> FAC Ex. C, Dkt. 27-5, p. 4 (2010 website); Ortiz Ex. 17 at 2 (2008 website); Ex. 18 at 2  
 23 (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).

24 <sup>41</sup> FAC Ex. C, Dkt. 27-5, p. 4 (2010 website); Ortiz Ex. 17 at 2 (2008 website); Ex. 18 at 2  
 25 (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).

26 <sup>42</sup> Ortiz Ex. 17 at 1 (2008 website); Ex. 18 at 1 (2011); Ex. 31 at 1 (2008); Ex. 34 at 1 (2011).

27 <sup>43</sup> FED. R. CIV. P. 56(a).

28 <sup>44</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

<sup>45</sup> *Id.* at 324.

1 affecting commerce,<sup>46</sup> while Section 12 prohibits false advertisements for any food, drug, device,  
 2 or cosmetic.<sup>47</sup> To prove that WSN's ads are deceptive under Sections 5(a) and 12, the FTC must  
 3 show that: (1) there is a representation, omission, or practice; (2) that is likely to mislead  
 4 consumers acting reasonably under the circumstances; and (3) the representation, omission, or  
 5 practice was material.<sup>48</sup> In this case, the FTC must satisfy these elements with respect to the  
 6 nine claims set forth in the First Amended Complaint (the "challenged claims").<sup>49</sup>

7 *I. Determining Whether The Claims Were Made*

8 The FTC's first step in proving deception is establishing that WSN's ads made the  
 9 challenged claims. The Court can ascertain the meaning of WSN's ads by examining the ads  
 10 themselves.<sup>50</sup> Both express and implied claims may violate the FTC Act,<sup>51</sup> and deception may  
 11 be found based on the "net impression" created by an ad.<sup>52</sup>

12 To prove that a claim was made, the FTC need not prove that WSN acted in bad faith or  
 13 intended to deceive consumers.<sup>53</sup> That is, advertisers are liable for all claims reasonably  
 14 conveyed by their advertising, whether they intended to make the claims or not.<sup>54</sup> Finally, an ad  
 15 "capable of being interpreted in a misleading way should be construed against the advertiser."<sup>55</sup>  
 16 In Section IV.A.1., below, the FTC applies these standards to the nine challenged claims.

17  
 18 <sup>46</sup> 15 U.S.C. § 45(a).

19 <sup>47</sup> 15 U.S.C. § 52; *see also* 15 U.S.C. § 55 (providing definitions for Sec. 12).

20 <sup>48</sup> *FTC v. Wellness Support Network, Inc.*, No. C-10-04879JCS, 2011 U.S. Dist. LEXIS 36453,  
 21 at \*17-18 (N.D. Cal. Apr. 4, 2011) (citing *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir.  
 1994)).

22 <sup>49</sup> FAC (Dkt. 27) ¶¶ 24, 26.

23 <sup>50</sup> *FTC v. US Sales Corp.*, 785 F. Supp. 737, 745 (N.D. Ill. 1992) (citing *FTC v. Colgate-  
 Palmolive Co.*, 380 U.S. 374 (1965)).

24 <sup>51</sup> *FTC v. Gill*, 71 F. Supp. 2d 1030, 1043 (C.D. Cal. 1999), *aff'd*, 265 F.3d 944 (9th Cir. 2001).

25 <sup>52</sup> *Stefanchik*, 559 F.3d at 928; *see also Gill*, 71 F. Supp. 2d at 1043.

26 <sup>53</sup> *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988).

27 <sup>54</sup> *See, e.g., Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 363 n.5 (D.C. Cir. 1977).

28 <sup>55</sup> *Simeon Mgmt. v. FTC*, 579 F.2d 1137, 1146 (9th Cir. 1978) (citing *Resort Car Rental Sys.,  
 Inc. v. FTC*, 518 F.2d 962 (9th Cir. 1975)).

2. *Determining Whether The Claims Were Likely To Mislead*

Next, the FTC must show that the challenged claims are likely to mislead reasonable consumers. The FTC can make this showing by demonstrating *either* that the claims are false (known as asserting a “falsity” theory) *or* that WSN lacked a reasonable basis for making the claims (known as a “reasonable basis” or “substantiation” theory).<sup>56</sup> Under a falsity theory, the FTC must show that the given claim is false.<sup>57</sup> Under a substantiation theory, the FTC must prove that the defendant lacked a reasonable basis for its claims —that is, lacked sufficient substantiation for them.<sup>58</sup> The FTC need not, however, conduct or present studies proving that WSN’s products do not work as claimed.<sup>59</sup> In this case, the FTC alleges that all nine challenged claims are unsubstantiated, and that some of them are also false.

To assess whether an advertiser has sufficient substantiation for a claim, the court first determines what level of substantiation an advertiser must have, then determines whether the advertiser possessed that level of substantiation.<sup>60</sup> When an ad claims that a particular level of substantiation exists (e.g., “tests prove,” “studies show”) the advertiser must possess that level of substantiation.<sup>61</sup> (Such claims are sometimes known as “establishment claims.”<sup>62</sup>) Here, the FTC asserts that WSN lacks the level of substantiation claimed in its ads; therefore, WSN’s establishment claims (i.e., Claims 3, 4, 8, and 9 as listed below) are both false and unsubstantiated.

If an ad does not reference a specific level of support, the court determines the appropriate level of substantiation. Here, the proper level of substantiation for WSN’s health-

<sup>56</sup> *FTC v. Medlab, Inc.*, 615 F. Supp. 2d 1068, 1079 (N.D. Cal. 2009) (citing *Pantron I*, 33 F.3d at 1096).

<sup>57</sup> *Pantron I*, 33 F.3d at 1096.

<sup>58</sup> *Id.*

<sup>59</sup> *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 959 (N.D. Ill. 2006), *aff’d*, 512 F.3d 858 (7th Cir. 2008); *see also Pantron I*, 33 F.3d at 1096.

<sup>60</sup> *Pantron I*, 33 F.3d at 1096.

<sup>61</sup> *Removatron Int’l Corp. v. FTC*, 884 F.2d 1489, 1492 n.3 (1st Cir. 1989).

<sup>62</sup> *See, e.g., Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1150 (9th Cir. 1984).

1 related efficacy claims is “competent and reliable scientific evidence.”<sup>63</sup> 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 claims,<sup>64</sup> health and safety  
 7 claims,<sup>65</sup> and claims that are likely to affect consumers’ choice of a product.<sup>66</sup>

## 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 the FAC<sup>67</sup>:

- 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 <sup>63</sup> See *QT*, 448 F. Supp. 2d at 959 (citing *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1156-57  
 25 (9th Cir. 1984)).

26 <sup>64</sup> *Pantron I*, 33 F.3d at 1095-96.

27 <sup>65</sup> *QT, Inc.*, 448 F. Supp. 2d at 960, 965-66.

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

<sup>67</sup> FAC (Dkt. 27) ¶¶ 24, 26.



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

WSN's ads claimed that DP is an effective treatment for diabetes. As noted above, WSN's ads for DP repeatedly touted DP's ability to lower blood sugar—a key treatment goal for diabetics.<sup>68</sup> For example, one PPC ad promoted a “[c]linically proven drug-free solution that lowers blood sugar,”<sup>69</sup> while another told consumers they could “have normal blood sugar levels.”<sup>70</sup> WSN's webpage for DP announced a “diabetes breakthrough” that would “lower your blood sugar, safely and effectively, with absolutely no side effects!”<sup>71</sup> The webpage also listed “lower blood glucose levels”<sup>72</sup> as one of DP's “breakthrough benefits.” Lastly, customer testimonials described dramatic drops in blood sugar.<sup>73</sup>

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

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<sup>68</sup> Garvey Report at 17 (identifying controlling blood sugar as a key treatment goal).

<sup>69</sup> SOF 102, 105, 106.

<sup>70</sup> Ortiz Ex. 9 (“RealFoodNutrients Diabetes campaign setup”); Ortiz Ex. 6 at 134:7-18 (Gilleard Dep.). *See also* Ortiz Ex. 10 at 60:17-61:13, 128:9-23 (Huffman Dep.); Ortiz Ex. 10-A (e-mail); Ortiz Ex. 10-B (Declaration of Craig Kauffman re Internet Search Term Research)(substantially similar representations).

<sup>71</sup> FAC Ex. A at Dkt. 27-1, p. 2 (2009 website); Ortiz Ex. 42 at 1 (2007 website); Ex. 43 at 1 (2008); Ex. 44 at 1 (2009); Ex. 45 at 1 (2010); *see also* FAC Ex. B at Dkt. 27-3, p. 3 (2010 website). Although in 2010 some webpages said that DP “maintains” rather than “lowers” blood sugar levels, in the overall context of the ad this distinction is meaningless. Testimonials in the ads still touted lower blood sugar levels. *See* Ortiz Ex. 46 at 1-4 (2010 website); *see also* Ortiz Ex. 48 (2010). And since diabetes is marked by high blood sugar, the phrase “maintain normal blood sugar levels” conveys either that DP first *lowers* blood sugar, or that it prevents it from rising once stabilized. Either reading conveys that DP is an effective treatment for diabetes.

<sup>72</sup> FAC Ex. A at Dkt. 27-1, p. 3 (2009 website); Ortiz Exs. 42-43 at 1 (2007-2008 websites); Exs. 44-45 at 2 (2009-2010).

<sup>73</sup> “My blood sugar went from 230 to 117 in just 21 days.” (“James Marshall”) FAC Ex. A, Dkt. 27-1, p. 2 (2009 website); Ortiz Ex. 42-46 at 1 (2007-2010 websites); *see also* Ex. 47 at 14-15 (2009); Ex. 48 at 14-15 (2010). “[B]efore [DP] my reading was 191, now after just a few weeks my readings range from 93 to 112.” (“Joan Lynch”) FAC Ex. A, Dkt. 27-2, pp. 2-3 (2009 website). *See also* Ortiz Exs. 42 at 4 (2007 website); Exs. 43-45 at 4-5 (2008-2010); Ex. 46 at 4 (2010) (substantially similar).

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

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 prove* DP’s efficacy. For example, several of WSN’s most successful PPC ads  
 11 expressly touted a “clinically proven” diabetes “solution.”<sup>78</sup> 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.<sup>79</sup> The 2009 website also prominently  
 15 claimed that “studies show a 31.9% drop in blood sugar levels,”<sup>80</sup> 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 <sup>74</sup> 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 <sup>75</sup> FAC Ex. A., Dkt. 27-1, p. 3 (2009 website); Ortiz Exs. 42-45 at 2 (2007-2010 websites).

24 <sup>76</sup> Ortiz Ex. 9 at 2 (“RealFoodNutrients Diabetes campaign setup”); *see also* Ortiz Ex. 6 at  
 25 125:20-25, 134:7-18 (Gilleard Dep.).

26 <sup>77</sup> Ortiz Ex. 9 at 2 (“RealFoodNutrients Diabetes campaign setup”); *see also* Ortiz Ex. 6 at  
 27 125:20-25, 134:7-18 (Gilleard Dep.).

28 <sup>78</sup> Ortiz Ex. 9 at 2 (“RealFoodNutrients Diabetes campaign setup”); *see also* Ortiz Ex. 6 at  
 125:20-25, 134:7-18 (Gilleard Dep.). *See also* SOF 106.

<sup>79</sup> FAC Ex. A at Dkt. 27-1, p. 3 (2009 website); Ortiz Exs. 42-45 at 2 (2007-2010 websites); *see*  
 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*).

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

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

Repeated references to the Nobel Prize served to bolster the “studies prove” claim. For example, the site consistently claimed that DP “is the most technologically advanced product of its kind available anywhere and was validated by the 1999 Nobel Prize for physiology,”<sup>82</sup> suggesting that physiological studies prove the efficacy of DP. The website also reprints studies<sup>83</sup> relating to various DP ingredients.<sup>84</sup>

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

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

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

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

<sup>81</sup> FAC Ex. A, Dkt. 27-1, p. 3 (2009 website); Ortiz Exs. 42-45 at 2 (2007-2010 websites).

<sup>82</sup> FAC Ex. A, Dkt. 27-2, p. 1 (2009 website); Ortiz Exs. 42-45 at 3 (2007-2010 websites). Robert Held admits that the Nobel Prize-winning technology described on the WSN website has nothing to do with lowering blood sugar and is not the technology underlying DP. Ortiz Ex. 1 at 137:11-25, 138:1-4 (B. Held Dep.).

<sup>83</sup> SOF 139; *see also* SOF 37.

<sup>84</sup> References to studies of “ingredients” or “Foodform” do not negate the overall impression that DP *itself* has been proven effective by scientific studies. WSN’s ads emphasize the link between 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 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, 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), *aff’d*, 356 Fed. Appx. 358 (11th Cir. 2009) (unpublished).

<sup>85</sup> Ortiz Ex. 9 at 2 (“RealFoodNutrients Diabetes campaign setup”); *see also* Ortiz Ex. 6 at 125:20-25, 134:7-18 (Gilleard Dep.).

<sup>86</sup> 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.<sup>87</sup>

4 This passage conveys that—unlike medications—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.<sup>88</sup> 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...”<sup>89</sup>

10 Based on the above, there is no genuine dispute of 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 a **31.9%** drop in blood sugar levels!  
17 [emphasis in original].”<sup>90</sup> These “studies” are later clarified to be an “independent clinical  
18 trial.”<sup>91</sup> The 31.9% claim consistently appeared on the website in other years as well, in slightly

19 \_\_\_\_\_  
20 <sup>87</sup> 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); *see also* Ortiz Ex. 46 at 2  
(2010 website).

22 <sup>88</sup> 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); *see also*  
24 Ortiz Exs. 42 at 2-3 (2007 website); Exs. 44-46 at 2-3 (2009-2010) (substantially similar  
statements).

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

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

27 <sup>91</sup> “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.<sup>92</sup> 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.<sup>93</sup> 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.”<sup>94</sup> In some years, the website also carried a large  
 8 headline stating, “You Can Reverse Insulin Resistance! Yes, a new breakthrough can protect  
 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!!”<sup>95</sup> 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.”<sup>96</sup> WSN’s website also stated that “[t]he WSN Insulin Resistance Pack is a medical  
 18 food for the dietary management of insulin resistance.”<sup>97</sup> Given these express statements, there  
 19 is no genuine dispute that WSN claimed that IRP manages insulin resistance.<sup>98</sup>

20  
 21 

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<sup>92</sup> Ortiz Exs. 25-29 at 4 (2008-2012 websites).

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

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

25 <sup>95</sup> Ortiz Ex. 31 at 1 (2008 website); Ex. 34 at 1 (2011).

26 <sup>96</sup> 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 <sup>97</sup> FAC Ex. C at Dkt. 27-6, p. 3 (2010 website); Ortiz Exs. 22, 38 at 1 (2010 website).

<sup>98</sup> 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 Some versions of WSN’s IRP webpage were headlined, “You Can Reverse Insulin  
3 Resistance,” and stated: “Yes, a new breakthrough can protect you from becoming diabetic and  
4 can help you reverse and eliminate your insulin resistant condition!”<sup>99</sup> A promise to “protect  
5 you from becoming diabetic” is an express prevention claim, while a promise to “reverse and  
6 eliminate your insulin-resistant condition” reasonably conveys that the product will “prevent”  
7 diabetes. Other iterations of WSN’s website also conveyed the claim, stating that one of IRP’s  
8 “breakthrough benefits” is that it “helps prevent diabetes.”<sup>100</sup> Lastly, the IRP webpage offers a  
9 syllogism. The page refers to IRP as an “Insulin Resistance Breakthrough” that allows users to  
10 “reverse insulin resistance, safely and effectively.”<sup>101</sup> The ad goes on to warn that “insulin  
11 resistance is a condition that if you don’t take effective action against, it simply gets worse, and  
12 becomes type 2 diabetes.”<sup>102</sup> Readers are then told the “good news” -- that “cutting-edge science  
13 and nutrition have come together to create a truly monumental and natural breakthrough for  
14 people who are insulin resistant.”<sup>103</sup> The ad thus conveys that: (1) without “effective action,”  
15 insulin resistance becomes diabetes; (2) effective action prevents diabetes; (3) IRP takes  
16 effective action against insulin resistance; therefore (4) IRP prevents diabetes.

h. WSN Claimed That Scientific Studies Prove That IRP Is An  
Effective Treatment For Insulin Resistance

17  
18 WSN claimed that scientific studies prove that IRP is an effective treatment for insulin  
19 resistance. Like the DP webpage, the IRP webpage consistently represented that “Nobel Prize  
20 winning science and over 60 independent American university studies confirm the superiority of  
21

22  
23 <sup>99</sup> Ortiz Ex. 17 at 1 (2008 website); Ex. 18 at 1 (2011).

24 <sup>100</sup> FAC Ex. C at Dkt. 27-5, p. 3 (2010 website); Ortiz Exs. 19-23 at 1 (2007-2011 websites).

25 <sup>101</sup> FAC Ex. C at Dkt. 27-5, p.3 (2010 website); Ortiz Ex. 30 at 1 (2007 website); Ex. 32-32 at 1  
(2009-2010).

26 <sup>102</sup> FAC Ex. C at Dkt. 27-5, p. 4 (2010 website); Ortiz Ex. 17 at 1 (2008); Ex. 18 at 1 (2011); Ex.  
27 19 at 1 (2007); Ex. 20 at 1 (2008); Ex. 21 at 2 (2009); Ex. 23 at 1 (2011).

28 <sup>103</sup> FAC Ex. C at Dkt. 27-5, p. 4 (2010 website); Ortiz Ex. 17 at 1 (2008); Ex. 18 at 1 (2011); Ex.  
19 at 1 (2007); Ex. 20 at 1 (2008); Ex. 21 at 2 (2009); Ex. 23 at 1 (2011).

1 Foodform technology”<sup>104</sup> – 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%.<sup>105</sup> 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.<sup>106</sup> References to  
 5 “clinical trials” and other science bolster the claim.<sup>107</sup> 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  
 of blood glucose levels of 31.9% and average weight loss of 4.8  
 pounds in just 30 days!<sup>108</sup>

16 There is no genuine dispute that WSN claimed that IRP is clinically proven to cause an  
 17 average drop in blood glucose levels of 31.9%.

18 2. *WSN’s Advertising Claims Are Likely To Mislead*

19 WSN’s claims are likely to mislead if they are false or unsubstantiated. As noted above,  
 20 substantiation for health claims must consist of competent and reliable scientific evidence, while  
 21 establishment claims must be supported by the level of evidence claimed in the ad.

22 To establish that WSN’s claims about the Products are false and/or unsubstantiated, the

23 \_\_\_\_\_  
 24 <sup>104</sup> FAC Ex. C at Dkt. 27-5, p. 4 (2010 website); Ortiz Ex. 17 at 2 (2008 website); Ex. 18 at 2  
 (2011); Ex. 19 at 1-2 (2007); Ex. 20 at 2 (2008); Ex. 21 at p. 2 (2009), Ex. 23 at 1 (2011).

25 <sup>105</sup> Ortiz Exs. 24-27 at 3-4 (2007-2010 website); Ex. 28 at 4 (2011); Ex. 29 at 3-4 (2012).

26 <sup>106</sup> *In Re Removatron Int’l Corp.*, 111 FTC 206, 298 (1985), *aff’d*, 884 F.2d 1489 (1st Cir. 1989).

27 <sup>107</sup> *Id.*

28 <sup>108</sup> FAC Ex. C at Dkt. 27-5, p. 4 (2010 website); *see also* Ortiz Exs. 24-27 at 3-4 (2007-2010);  
 Ex. 28 at 4 (2011); Ex. 29 at 3-4 (2012).

1 FTC submits the testimony of W. Timothy Garvey, M.D.,<sup>109</sup> a leading expert in the field of  
 2 diabetes and insulin resistance.<sup>110</sup> In summary, Dr. Garvey states that to substantiate the  
 3 significant prevention and treatment claims challenged here, “diabetes experts would require  
 4 consistent results from well-designed and well-conducted studies in representative human  
 5 populations that directly assess the specific therapeutic effects at issue.”<sup>111</sup>

6 Dr. Garvey’s report comprehensively describes the features of studies that would support  
 7 WSN’s efficacy claims.<sup>112</sup> According to Dr. Garvey, well-designed human clinical studies to  
 8 substantiate WSN’s claims would possess the following characteristics. First, they must be  
 9 *controlled*, i.e., “a placebo, sham, or existing therapy is administered to a sub-set of  
 10 participants.”<sup>113</sup> Next, they must be *randomized*, i.e., subjects are randomly assigned to receive  
 11 either placebo or the treatment being studied.<sup>114</sup> Third, they must be *double-blind*, i.e., neither  
 12 the subjects nor the investigators know whether the subjects are receiving control or  
 13 experimental treatment.<sup>115</sup> Fourth, they should be *statistically meaningful*, i.e., they should  
 14 “include enough subjects to ensure adequate statistical power and sensitivity.”<sup>116</sup> Finally, the  
 15 dosages and formulations studied should be *the same* as those sold by WSN for two reasons:  
 16 “[F]irst, physiological responses to drugs, vitamins, and minerals vary depending on dose[;] and  
 17 second, there may be interactions between the ingredients that affect their physiological  
 18 actions.”<sup>117</sup> Dr. Garvey’s conclusions are grounded in the fact that the challenged claims are  
 19 significant disease-specific treatment and prevention claims for which experts would require a  
 20

21 \_\_\_\_\_  
 22 <sup>109</sup> Garvey Dec.; Ex. A to Garvey Dec. (Garvey Report); Ortiz Ex. 11 (Garvey Dep.).

23 <sup>110</sup> See Garvey Report at 1-2; see also Garvey Report, Att. A (curriculum vitae).

24 <sup>111</sup> Garvey Report at 20.

25 <sup>112</sup> Garvey Report at 19-26 (describing criteria for high-quality diabetes study design).

26 <sup>113</sup> Garvey Report at 21.

27 <sup>114</sup> Garvey Report at 21.

28 <sup>115</sup> Garvey Report at 21.

<sup>116</sup> Garvey Report at 25.

<sup>117</sup> Garvey Report at 25.



1 high level of scientific support.<sup>118</sup>

2 Dr. Garvey concludes, and WSN has admitted, that no studies of the type described by  
3 Dr. Garvey exist for the challenged Products.<sup>119</sup> In fact, despite numerous references to  
4 scientific evidence in their advertisements, WSN has *no studies of its products whatsoever*.<sup>120</sup>  
5 Rather than testing their own products, WSN admits they relied on studies and other materials  
6 relating to individual ingredients in the Products.<sup>121</sup> These materials were largely found on the  
7 Internet by Defendant Robert Held, who is neither a doctor nor a scientist.<sup>122</sup> WSN further  
8 admits that most of the studies relied on were performed on only one ingredient each out of over  
9 40 ingredients in WSN's Products,<sup>123</sup> which in Dr. Garvey's opinion renders the studies  
10 inadequate to determine the efficacy of those Products.<sup>124</sup> Dr. Garvey concludes, therefore, that  
11 these studies fall far short of providing adequate substantiation for WSN's efficacy claims.<sup>125</sup>

12 Dr. Garvey's expert report further concludes that the studies offered by WSN suffer from  
13 many deficits in addition to the fact that they do not test the combination of ingredients in  
14 WSN's Products. First, many of the studies were conducted in vitro or on animals, and such  
15 tests cannot substantiate that the tested ingredients work in humans.<sup>126</sup> Second, the single-

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17 <sup>118</sup> Garvey Report at 20.

18 <sup>119</sup> Garvey Report at 26 (“I conclude that none of the WSN claims... are supported by competent  
19 and reliable scientific evidence.”); SOF 31; *see also* Ortiz Ex. 14-A at 3-62, 63-126 (2<sup>nd</sup> RFA  
20 Resp. #192-255, 260-323).

21 <sup>120</sup> SOF 31; *see also* Ortiz Ex. 14-A at 3-62, 63-126 (2<sup>nd</sup> RFA Resp. #192-255, 260-323).

22 <sup>121</sup> SOF 31. None of these studies were performed by or for Defendants. *See also* Ortiz 14-A at  
23 3-62, 63-126 (2<sup>nd</sup> RFA Resp. #192-255, 260-323).

24 <sup>122</sup> SOF 29; Ortiz Ex. 1 at 32:22-33:7, 33:15-22, 33:23-24, 33:25-34:4 (B. Held Dep.).

25 <sup>123</sup> Ortiz Ex. 1 at 39:23-40:1 (B. Held Dep.); *see also* Ortiz Ex. 3 (ingredient list).

26 <sup>124</sup> *See* Garvey Report at 27-28; *see also* Garvey Report at 23, 24-25; *see also* *FTC v.*  
27 *SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1274 (S.D. Fl. 1999) (holding that single-ingredient  
28 studies were insufficient to substantiate claims for a combination product, and requiring double-  
blind study of the combination of ingredients in the product because “ingredients taken in  
combination may interact in ways which negate the benefits of the same ingredients taken  
alone.”

<sup>125</sup> Garvey Report at 26-27.

<sup>126</sup> Garvey Report at 23, 24.

1 ingredient studies suffered from various flaws that make them inapplicable to WSN's products,  
2 such as insufficient size, lack of placebo or other controls, and testing of much larger doses than  
3 are found in WSN's products.<sup>127</sup> Lastly, Dr. Garvey determined that even some well-designed  
4 studies showing positive results for individual ingredients were not conclusive because other  
5 well-designed studies produced inconclusive or negative results.<sup>128</sup> Dr. Garvey's uncontroverted  
6 opinion establishes that there is no genuine dispute that WSN's claims about the efficacy of their  
7 Products (Claims 1, 3, 5, 6, and 7) are unsubstantiated.

8 In addition, because WSN does not possess the level of scientific evidence claimed in its  
9 advertising, its establishment claims (Claims 2, 4, 8, and 9 as listed at Section IV.A.1.) are both  
10 unsubstantiated and false.<sup>129</sup> These claims all assert that clinical or other scientific studies prove  
11 the efficacy of WSN's products. As stated above, Dr. Garvey's uncontroverted expert opinion is  
12 that WSN's efficacy claims must be supported by human clinical trials on the Products  
13 themselves. As WSN admits, and Dr. Garvey confirmed, the Products have not been tested in  
14 this or any other manner. The establishment claims are thus inherently false and unsubstantiated,  
15 and therefore likely to mislead.

### 16 3. *WSN's Claims Are Material*

17 To prove deception, the FTC must lastly show that the claims made by WSN were  
18 material. As explained above, express claims, health claims, and claims about a core aspect of a  
19 product are presumptively material. All of the challenged claims are health claims and all  
20 concerned efficacy, an issue that would be important to prospective customers. In addition,  
21 many of the claims were express. There is thus no genuine dispute that the claims are material.

22 \_\_\_\_\_  
23 <sup>127</sup> See Garvey Report at 26-64, comprehensively analyzing the available literature on many of  
24 the Products' active ingredients and explaining why those studies fail to adequately substantiate  
25 Defendants' claims.

26 <sup>128</sup> See Garvey at 34 (analyzing the calcium literature), 43-47 (analyzing the magnesium  
27 literature), and 50-55 (analyzing the chromium literature and noting on page 54 that "the  
28 considerable number of well-designed clinical trials that have observed no effect of chromium  
supplementation on glucose homeostasis makes it unlikely that chromium has a clinically  
significant effect on serum glucose, serum insulin, insulin secretion, or insulin sensitivity.").

<sup>129</sup> Garvey Report at 8.

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.<sup>130</sup> 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.”<sup>131</sup> Reliance and resulting injury are proven by showing that WSN made widely  
6 disseminated material representations and that consumers purchased the Defendants’ products.<sup>132</sup>  
7 As described above, these requirements are fully met.<sup>133</sup> 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,<sup>134</sup> 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.<sup>135</sup> 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.<sup>136</sup> 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.<sup>137</sup> Although he is not a doctor or

18 \_\_\_\_\_  
19 <sup>130</sup> 15 U.S.C. §53(b); *FTC v. Stefanichik*, 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 <sup>131</sup> *Pantron I*, 33 F.3d at 1102.

24 <sup>132</sup> 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 <sup>133</sup> See Sections II.C.; II.D.; IV.A.1-3.

27 <sup>134</sup> *Stefanichik*, 559 F.3d at 931.

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

<sup>136</sup> SOF 4, 17; Ortiz Ex. 13.

<sup>137</sup> Ortiz Ex. 4 at 107:25-108:11 (R. Held Dep.); Ortiz Ex. 15 at 5-6 (1<sup>st</sup> Rog 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 scientist,<sup>138</sup> Mr. Held personally reformulated the Products over the years,<sup>139</sup> based not on  
 2 consultation with experts but on his own interpretation of studies and other materials he found on  
 3 the Internet.<sup>140</sup>

4 Robyn Held co-owns Wellness Support Network, and has served as director, CFO,  
 5 Secretary, and COO.<sup>141</sup> Ms. Held runs the day-to-day operations of the company and supervises  
 6 all departments.<sup>142</sup> Ms. Held participated in the decision to sell DP and IRP.<sup>143</sup> She also  
 7 designed and edited the WSN website, wrote content for the website, and chose or approved  
 8 advertising keywords used to drive potential customers to the website.<sup>144</sup> It is beyond dispute  
 9 that the Helds participated in the deceptive practices and controlled the deceptive acts of the  
 10 corporate defendant.<sup>145</sup>

11 The Helds are also liable for monetary relief. To obtain such relief from an individual for  
 12 corporate misconduct, the FTC must show not only that the individual participated in or had the  
 13 ability to control the corporation's unlawful acts, but that he or she had knowledge of the  
 14 deception.<sup>146</sup> "Knowledge" can be established through: (1) actual knowledge of material  
 15 misrepresentations, (2) reckless indifference to the truth or falsity of the misrepresentations, or  
 16

17  
 18 <sup>138</sup> Ortiz Ex. 4 at 132:22-33:7, 33:15-22, 33:23-24, 33:25-34 (B. Held Dep.).

19 <sup>139</sup> SOF 61, 62; Ortiz Ex. 2 at 201:1-3 (B. Held Dep.); Ortiz Ex. 1 at 37:12-22, 115:16-18 (B.  
 20 Held Dep).

21 <sup>140</sup> SOF 29; Ortiz Ex. 1 at 37:12-22, 38:6-13 (B. Held Dep.).

22 <sup>141</sup> SOF 9, 63; Ortiz Ex. 12 at 15 (1<sup>st</sup> RFP Resp.) #27; Ortiz Ex. 13.

23 <sup>142</sup> SOF 20, 21, 66.

24 <sup>143</sup> SOF 26, 27.

25 <sup>144</sup> SOF 7, 12, 65; Ortiz Ex. 4 at 107:25-108:11 (R. Held Dep.); Ortiz Ex. 15 at 6 (1<sup>st</sup> Rog Resp.)  
 26 #5. *See also* Amended Answer ("Answer") (Dkt. 52) ¶ 8; FAC (Dkt. 27) ¶ 8; Ortiz Ex. 1 at  
 27 149:2-22, 149:23-150:13 (B. Held Dep.); Ortiz Ex. 2-A (B. Held Depo Ex. 23).

28 <sup>145</sup> Answer (Dkt. 52) ¶¶ 7-8; *see also* FAC (Dkt. 27) ¶¶ 7-8; *see Publ'g Clearing House*, 104  
 F.3d at 1170-71 (An individual's status as an officer and authority to sign documents on behalf  
 of the corporation are sufficient to demonstrate control.); *see also FTC v. Amy Travel Serv., Inc.*,  
 875 F.2d 564, 573 (7th Cir. 1989).

<sup>146</sup> *Publ'g Clearing House*, 104 F.3d at 1171.

1 (3) awareness of a high probability of fraud along with an intentional avoidance of the truth.<sup>147</sup>

2 The FTC need not show that a defendant intended to defraud consumers to hold the defendant  
3 individually liable for monetary relief.<sup>148</sup>

4 Having participated directly in creating and approving the ads for the Products, the Helds  
5 had actual knowledge of the misrepresentations. In addition, their extensive participation in the  
6 violative conduct alone is sufficient to establish the requisite knowledge for monetary relief.<sup>149</sup>

7 The Helds also displayed reckless indifference to the truth or falsity of their claims,  
8 continuing to make their deceptive claims even after the FDA issued warning letters in 2005 and  
9 2006.<sup>150</sup> In addition, although proof of actual deception is not required to establish liability,<sup>151</sup>  
10 WSN's surveys put them on notice that some consumers may have been deceived by their  
11 claims.<sup>152</sup> Yet WSN continues to make claims similar to those challenged in this lawsuit.<sup>153</sup> For  
12 all of these reasons, the Helds are personally liable for injunctive and monetary relief.

13 **D. The Proposed Order**<sup>154</sup>

14 Generally speaking, the proposed Order bars WSN from making disease-related claims  
15 for certain types of products unless those claims are non-misleading and supported by at least  
16 two properly designed and administered human trials of the product. Non-disease, health-related

17  
18 <sup>147</sup> *Id.*

19 <sup>148</sup> *Id.* (citing *Amy Travel*, 875 F.2d at 574).

20 <sup>149</sup> *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1235 (9th Cir. 1999).

21 <sup>150</sup> Declaration of Craig Kauffman (Dkt. 35-1); see *Publ'g Clearing House*, 104 F.3d at 1171.

22 <sup>151</sup> *Cyberspace.com*, 453 F.3d at 1200-01.

23 <sup>152</sup> *Question*: "What did you read on our website that caused you to decide on getting the  
24 Diabetic Pack?" *Representative answers*: "That it could/would lower my blood sugar and get rid  
25 of the diabetes"; "Testimonials of people lowering their blood sugar levels, by taking the  
26 product." *Question*: "What particularly attracted you about the Diabetic Pack (the supplements  
27 you ordered)?" *Representative answers*: "Getting off my (4) prescribed diabetic pills"; "I  
28 needed to get my blood sugar under control. I did not want to lose my eyesight or my kidneys."  
Ortiz Ex. 8 ("WSN Diabetes Pack Purchaser Survey"); see Ortiz Ex. 6 at 119:18-21 (Gilleard  
Dep.); see also Ortiz Ex. 7 ("WSN Diabetes pack Non-Purchaser Survey").

<sup>153</sup> 2d Gonzalez Dec., Ex. 2.

<sup>154</sup> Submitted concurrently with this Motion.

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 full 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.<sup>155</sup> A strong order is needed to protect  
11 consumers.

12 **V. CONCLUSION**

13 As shown above, there is no genuine dispute as to any material fact in this case. The  
14 FTC therefore respectfully requests that the Court grant its motion for summary judgment and  
15 enter the proposed order and judgment requested.

16  
17 Respectfully Submitted,

18 JONATHAN E. NUECHTERLEIN  
19 General Counsel

20  
21 Dated: December 6, 2013

/s/ Laura Fremont  
22 LAURA FREMONT  
23 KENNETH H. ABBE  
24 JACOB A. SNOW  
25 AUSTIN A.B. OWNBEY  
26 Attorneys for Plaintiff  
27 Federal Trade Commission

28 <sup>155</sup> Ortiz Ex. 11 at 260:4-262:3, 264:15-23 (Garvey Dep.).