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15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**
17 San Francisco Division

18 FEDERAL TRADE COMMISSION,

19 Plaintiff,

20 v.

21 WELLNESS SUPPORT NETWORK,
22 INC., a corporation,

23 ROBERT HELD, individually and as
24 an officer of Wellness Support
25 Network, Inc., and

26 ROBYN HELD, individually and as
27 an officer of Wellness Support
28 Network, Inc.,

Defendants.

Case No. 3:10-cv-04879-JCS

**OPPOSITION TO DEFENDANTS’
MOTION TO DISMISS
COMPLAINT
[Fed. R. Civ. Pro. 8(a), 9(b), &
12(b)(6)]**

Hearing Date: February 4, 2011
Time: 1:30 p.m.
Courtroom A, 15th Floor
Honorable Magistrate Judge Joseph C.
Spero

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FEDERAL STATUTES

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1 INTRODUCTION

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

15 Wellness Support Network, Inc. ("WSN"), Robert Held, and Robyn Held
16 (collectively, "defendants") have moved to dismiss this action pursuant to Rules
17 12 (b)(6), 8(a) and 9(b) of the Federal Rules of Civil Procedure. *Motion to*
18 *Dismiss* (Dkt. #41); *see* FED. R. CIV. P. 12(b)(6), 8(a), 9(b). Defendants' motion
19 is ill-founded. As described below, the *Complaint* (Dkt. #1) in this matter
20 complies with Rule 9(b), even assuming an action by the Federal Trade
21 Commission ("FTC" or "Commission") is subject to the strictures of Rule 9(b).
22 The complaint also contains more than sufficient detail to meet the liberal
23 pleading requirements of Rule 8(a). For these reasons, the Court should deny
24 defendants' motion in its entirety.

25 1. STATEMENT OF ISSUES PURSUANT TO LOCAL RULE 7-4

- 26 a. Do the allegations in the FTC's complaint satisfy Rule 9(b)?
27 b. Must the FTC's complaint satisfy Rule 9(b)?
28 c. Do the allegations in the FTC's complaint satisfy Rule 8(a)?

FACTS AND OVERVIEW OF FTC LAW

The FTC's complaint alleges that since 2004 defendants have engaged in unlawful conduct in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, in connection with the advertisement and sale of two dietary supplements called WSN Diabetic Pack ("Diabetic Pack") and WSN Insulin Resistance Pack ("Insulin Resistance Pack"). As described below, the complaint describes in detail the conduct at issue and how it violates the FTC Act.

Paragraphs 10 to 23 of the complaint describe the defendants' business practices that are the subject of this lawsuit. Specifically, the complaint describes the dietary supplements that defendants have marketed and sold to consumers. *Complaint* (Dkt. #1) ¶¶ 10–19. The complaint describes how the defendants operated websites touting the supplements as treatments for diabetes and insulin resistance. *Id.* at ¶¶ 20–23. The exhibits to the complaint are screen captures of defendants' websites, *id.* at Exhibits A–C, and the complaint quotes those exhibits extensively to make clear some of the ways in which defendants made the offending claims, *id.* at ¶¶ 20–21. The complaint asserts that the individual defendants participated in advertising WSN's dietary supplement offers, and describes how they benefitted from those offers. *Id.* at ¶¶ 6–8, 28. The complaint also alleges that consumers were injured by defendants' false or unsubstantiated advertising. *Id.* at ¶ 28.

The complaint alleges that the defendants' conduct violated Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce," 15 U.S.C. § 45(a), while Section 12 prohibits the false advertising of food or drugs. The complaint alleges that the representations described in the complaint are deceptive. *Complaint* ¶¶ 22–27. To prove deception in violation of Sections 5 or 12, the FTC need establish only that: (1) the defendants made a

1 representation or omission, or engaged in a practice; (2) the representation,
2 omission, or practice was likely to mislead consumers acting reasonably under
3 the circumstances; and (3) the representation, omission, or practice was material.
4 *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994) (*citing In re*
5 *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 163–64 (1984)); *Kraft, Inc. v. FTC*, 970
6 F.2d 311, 314 (7th Cir. 1992). The complaint alleges that the corporate
7 defendant, WSN, claimed that Diabetic Pack is a scientifically proven effective
8 treatment for diabetes; that the product reduces or eliminates the need for insulin
9 and other diabetes medications; and that Diabetic Pack is clinically proven to
10 reduce blood glucose levels by an average of 31.9%. *Complaint* ¶ 24. The
11 complaint also alleges that WSN claimed that Insulin Resistance Pack reverses
12 and manages insulin resistance, prevents diabetes, is a scientifically proven
13 effective treatment for insulin resistance, and is clinically proven to reduce blood
14 glucose levels by an average of 31.9%. *Id.* at ¶ 26. The complaint then alleges
15 that these representations are false or were not substantiated at the time they
16 were made, and thus constitute false advertising and deceptive acts or practices
17 in violation of the FTC Act. *Id.* at ¶¶ 25, 27.

18 The complaint also makes specific factual allegations as to individual
19 defendants Robert and Robyn Held. It states that Robert Held, during times
20 material to the complaint, was the President and an owner of corporate defendant
21 WSN, a closely held corporation, and that Robyn Held was a WSN officer. *Id.*
22 at ¶ 6-8. The complaint furthermore alleges that the Helds “participated in the
23 advertising and marketing of products” for WSN. *Id.* at ¶¶ 7-8.

24 In addition to seeking a permanent injunction and monetary relief against
25 corporate defendant WSN, the complaint seeks a permanent injunction and
26 monetary relief against the individual defendants. An individual may be held
27 liable for injunctive relief for corporate violations of the FTC Act if a court finds
28 that the individual (1) participated in the violative practices or (2) had authority

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

14 The complaint also seeks such relief as the Court finds necessary to
15 redress injury to consumers. WSN is liable for consumer restitution if the FTC
16 can prove it violated the FTC Act. To obtain such relief from an individual for
17 corporate misconduct, the FTC must additionally show that the individual had
18 knowledge of the deception. *Publ’g Clearing House*, 104 F.3d at 1171. The
19 FTC can establish that the individual had the requisite knowledge by showing
20 one of the following: (1) actual knowledge of material misrepresentations, (2)
21 reckless indifference to the truth or falsity of the misrepresentations, or (3) an
22 awareness of a high probability of fraud along with an intentional avoidance of
23 the truth. *Id.* The FTC is not required to show that a defendant intended to
24 defraud consumers to hold the defendant individually liable for monetary relief.
25 *Id.* (citing *Amy Travel*, 875 F.2d at 574). Moreover, the extent of an individual’s
26 participation in the violative conduct alone is sufficient to establish the requisite
27 knowledge for monetary relief. *FTC v. Affordable Media, LLC*, 179 F.3d 1228,
28 1235 (9th Cir. 1999). As noted above, the complaint alleges that Robert and

1 Robyn Held participated in the conduct at issue, and that both individuals had
 2 the authority to control the corporate defendant's practices. *Complaint*, ¶¶ 7-8.
 3 Either of these facts alone would be enough to subject the Helds to monetary
 4 liability for WSN's deceptive advertising.

6 ARGUMENT

7 **2. Even if Rule 9(b) did apply here, the FTC's complaint meets its** 8 **pleading standard**

9 Federal Rule of Civil Procedure 9(b) states, in part, "In alleging fraud or
 10 mistake, a party must state with particularity the circumstances constituting
 11 fraud or mistake." In their *Motion to Dismiss*, defendants argue that Rule 9(b)
 12 applies in this action and that the FTC has not met its standards. Defendants'
 13 argument is based largely on two recent decisions (arising from one matter) by
 14 the Honorable Judge Richard Seeborg. The two decisions are *FTC v. Swish*
 15 *Marketing*, 2010 U.S. Dist. LEXIS 15016, 2010-1 Trade Cas. (CCH) ¶ 76,918
 16 (N.D. Cal. 2010), and *FTC v. Benning*, 2010 U.S. Dist. LEXIS 64030, 2010-1
 17 Trade Cas. (CCH) ¶ 77,081 (N.D. Cal. 2010). In *Benning*, the Court opined in
 18 *dicta* that "insofar as the elements of a section 5 misrepresentation claim mirror
 19 a claim for fraud (with the exception of scienter), the 'general applicability of
 20 Rule 9(b) to section 5 actions is a real prospect.'" *Benning*, 2010 U.S. Dist.
 21 LEXIS 64030 at *12-*13; *citing dicta from Swish Marketing*, 2010 U.S. Dist.
 22 LEXIS 15016 at *9-*10.

23 Even if Rule 9(b) did apply here – which the FTC does not concede (*see*
 24 § 2.c., *infra*) – neither the *Benning* nor *Swish Marketing* decision casts any doubt
 25 on the sufficiency of the complaint in this case. In *Swish Marketing*, the Court
 26 held that a plaintiff seeking to comply with Rule 9(b) must allege the "who,
 27 what, where, when, and how" of the charged misconduct. *Swish Marketing*,
 28 2010 U.S. Dist. LEXIS 64030, at *4 (quoting *Cooper v. Pickett*, 137 F.3d 616,

1 627 (9th Cir. 1997)). If liability for corporate fraud is alleged against individual
2 defendants, “the allegations should include the misrepresentations themselves
3 with particularity and, where possible, the roles of the individual defendants in
4 the misrepresentations.” *See id.* at *4-5 (quoting *Moore v. Kayport Package*
5 *Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989)); *see also Swartz v. KPMG*
6 *LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (Rule 9(b) requires a plaintiff to provide
7 “an account of the time, place, and specific content of the false representations
8 as well as the identities of the parties to the misrepresentations.”). As described
9 below, the complaint amply meets these standards.

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

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

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

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

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

1 implied message conveyed by the ad is false” or that “the advertiser lacked a
2 reasonable basis for asserting that the message was true”); *FTC Policy Statement*
3 *Regarding Advertising Substantiation*, appended to *In re Thompson Medical*
4 *Co.*, 104 F.T.C. 648, 839 (1984) (when an advertisement expressly claims or
5 implies a specific type of substantiation, then the advertiser must possess that
6 level of substantiation); and *Dietary Supplements: An Advertising Guide for*
7 *Industry*, available on the FTC website at [http://business.ftc.gov/](http://business.ftc.gov/documents/bus09-dietary-supplements-advertising-guide-industry)
8 *documents/bus09-dietary-supplements-advertising-guide-industry* (extensive
9 guidance on a number of topics, including the applicability of FTC law to
10 dietary supplements, how to identify claims made in one’s advertising, and the
11 level and quality of support needed for a wide variety of claims, with numerous
12 illustrative examples).

13 In short, Rule 9(b) requires neither that the standards defendants refer to
14 be pled, nor that defendants’ very detailed questions be answered in a complaint.

15 **b. The complaint satisfies Rule 9(b) with respect to the individual**
16 **defendants’ liability.**

17 The FTC’s complaint alleges that Robert and Robyn Held are individually
18 liable for both injunctive and monetary relief. These allegations both pass
19 muster under Rule 9(b). In general, to hold an individual liable for injunctive
20 relief for corporate acts, the FTC must show that an individual defendant either
21 directly participated in or had the authority to control the deceptive acts of the
22 corporate defendant. *FTC v. Publishing Clearing House*, 104 F.3d 1168, 1170
23 (9th Cir. 1997). Once individual liability for corporate acts is established, the
24 FTC may recover equitable monetary relief from an individual defendant by
25 showing the defendant “had actual knowledge of material representations, [was]
26 recklessly indifferent to the truth or falsity of a misrepresentation, or had an
27 awareness of a high probability of fraud along with an intentional avoidance of
28 the truth.” *Id.* at 1171. As described below, the FTC’s complaint here

1 adequately alleges both injunctive and monetary liability against the individual
2 defendants.

3 The complaint pleads that Robert and Robyn Held participated in WSN's
4 violations of Section 5(a) and 12 of the FTC Act. The complaint states that the
5 Helds "participated in the advertising and marketing of products" for WSN,
6 *Complaint* ¶¶ 7-8, then goes on to explain what those products were, *id.* at ¶¶ 10-
7 19, and exactly how WSN advertised and marketed them in violation of the FTC
8 Act, *id.* at ¶¶ 20-21 and Exhibits A-C. Indeed, *Complaint* Exhibits A-C show
9 that the representations on the WSN websites were made under the name "Bob
10 Held." *See id.* at Ex. A, p. 6; Ex. B, p. 7; and Ex. C, p. 5. In their motion,
11 defendants concede that the Helds are "executives at WSN" and that the
12 complaint alleges their active participation in WSN's deceptive scheme. *Motion*
13 *to Dismiss*, p. 7. But they ignore the FTC's allegations that WSN is a closely
14 held corporation of which Robert Held is the president and owner and Robyn
15 Held is an officer. *See Complaint*, ¶¶ 6-8. Taken together, these facts give rise
16 to the reasonable presumption that Robert and Robyn Held participated in *and*
17 had the authority to control the corporate defendant. *FTC v. Amy Travel Serv.,*
18 *Inc.*, 875 F.2d 564, 574-75 (7th Cir. 1989) (individual liability found, in part,
19 because the individual defendants founded the businesses, were principal
20 shareholders and officers, and participated directly in the scam).

21 The Helds' protestations of ignorance of the false or unsubstantiated
22 claims in their advertising, *see Motion to Dismiss* at 7, are irrelevant: actual
23 knowledge that their conduct violated the FTC Act is not required to establish
24 liability. Knowledge can be demonstrated by showing actual knowledge of
25 material misrepresentations, reckless indifference to the truth or falsity of the
26 misrepresentations, or an awareness of a high probability of fraud along with an
27 intentional avoidance of the truth. *Affordable Media*, 179 F.3d at 1234; *see also*
28 *Publishing Clearing House*, 104 F.3d at 1171, *citing FTC v. American Standard*

1 *Credit Sys., Inc.*, 874 F. Supp. 1080, 1089 (C.D. Cal. 1994); *Amy Travel*, 875
2 F.2d at 574. The FTC does not have to show an intent to defraud. *Affordable*
3 *Media*, 179 F.3d at 1234; *Publ’g Clearing House*, 104 F.3d at 1171. An
4 individual’s degree of participation in the corporation’s business affairs is
5 probative of knowledge. *Amy Travel*, 875 F.2d at 574. Moreover, in *Benning*,
6 the case most prominently cited by defendants, the Court advised that “Rule
7 9(b)’s particularity requirement does not extend to the elements of knowledge
8 and authority to control. These may be averred generally in a manner akin to
9 Rule 8 requirements.” *Benning*, 2010 U.S. Dist. LEXIS 64030 at *13.

10 The complaint alleges that Robert and Robyn Held “formulated, directed,
11 controlled, had the authority to control, or participated in the policies, acts or
12 practices of WSN,” including participating “in the advertising and marketing of
13 products” for WSN. *Complaint* at ¶¶ 7-8, 10, 16.. The complaint further alleges
14 that WSN is a closely held corporation, *id.* at ¶ 6, an environment where it is
15 more than plausible that the individual defendants had at least “reckless
16 indifference to the truth or falsity of the misrepresentations, or an awareness of a
17 high probability of fraud along with an intentional avoidance of the truth.”
18 *Publishing Clearing House*, 104 F.3d at 1171; *see also Swish Marketing*, 2010
19 U.S. Dist. LEXIS 15016, *16 (size, structure, and senior management
20 involvement in a corporate defendant relevant to adequacy of pleading for
21 individual defendant). In sum, the facts in the complaint would support a
22 finding of knowledge based on either individual participation in the deceptive
23 acts, or on the individual defendants’ participation in the business affairs of a
24 closely-held corporation.

25 **c. Not only does the FTC’s complaint comply with Rule 9(b), but**
26 **the Rule should not apply here in any event**

27 Defendants argue that the FTC’s complaint must comply with Rule 9(b).
28 *Motion to Dismiss* at 3. Persuasive case law suggests, however, that Rule 9(b)

1 does not apply here. An allegation of deception under the FTC Act is not a
2 claim of fraud. Neither Sections 5 or 12 of the FTC Act, nor the complaint itself
3 mention “fraud,” and the elements of a Section 5 or 12 action under a deception
4 theory are not synonymous with those of fraud. Therefore, Rule 9(b) does not
5 apply.

6 Rule 9(b) states: “In alleging fraud or mistake, a party must state with
7 particularity the circumstances constituting fraud or mistake. Malice, intent,
8 knowledge, and other conditions of a person’s mind may be alleged generally.”
9 Fed. R. Civ. P. 9(b). By its terms, Rule 9(b) applies to causes of action based
10 upon fraud (*i.e.*, causes of action where fraud is an essential element of the
11 claim). *Id.*; *see Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir.
12 2003). It also applies if a complaint alleges fraud or alleges facts that
13 necessarily constitute fraud. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124
14 (9th Cir. 2009) (*citing Vess*, 317 F.3d at 1105). Although Rule 9(b) applies to
15 such averments of fraud, the Supreme Court has declined to extend Rule 9(b) to
16 other causes of action. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513
17 (2002) (“Rule 9(b), for example, provides for greater particularity in all
18 averments of fraud or mistake. This Court, however, has declined to extend
19 such exceptions to other contexts.”).

20 A claim that the defendants violated Section 5¹ by engaging in “deceptive
21 acts and practices” is not a claim of fraud. Courts regularly have held that a
22 Section 5 claim “is not a claim of fraud as that term is commonly understood or
23 as contemplated by Rule 9(b).” *See FTC v. Freecom Communs., Inc.*, 401 F.3d
24 1192, 1204 n.7 (10th Cir. 2005) (holding that Rule 9(b) does not apply to
25 Section 5 claims under the FTC Act); *see also FTC v. Innovative Mktg.*, 2009
26 U.S. Dist. LEXIS 84358, at *20, 2009-2 Trade Cas. (CCH) ¶ 76,742 (D. Md.

27
28 ¹ Under Section 12(b) of the FTC Act, 15 U.S.C. Section 52(b), a violation of Section
12(a) constitutes an unfair or deceptive practice under Section 5, 15 U.S.C. Section 45.

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

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

24
25
26 ² At least one court in this Circuit has unambiguously applied Rule 9(b) in an FTC
27 case, however: See *FTC v. Lights of America, Inc.*, 2010 U.S. Dist. LEXIS 137088, *13-*14
28 (C.D. Cal. 2010) (holding Rule 9(b) applies in FTC actions because FTC Act claims are
analogous to negligent misrepresentation). This case is not controlling in this District,
however, and goes against the weight of the aforementioned authorities.

1 Many courts that have examined this issue have held that, unlike fraud,
2 the FTC need not prove intent, reliance, or injury to establish a violation of
3 Section 5. *See Freecom*, 401 F.3d at 1204 n.7 (“Unlike the elements of common
4 law fraud, the FTC need not prove scienter, reliance, or injury to establish a § 5
5 violation.”); *Nat’l Testing Servs.*, 2005 U.S. Dist. LEXIS 46485, at *4–5
6 (holding that Rule 9(b) does not apply to Section 5 claims because neither intent
7 to deceive, proof of consumer reliance, nor proof of consumer injury are
8 necessary elements of Section 5); *Commundyne*, 1993 U.S. Dist. LEXIS 18708,
9 at *3–5 (holding that a claim under Section 5 is not a claim of fraud or mistake
10 subject to Rule 9(b) because it has no scienter or reliance requirement).

11 One rationale for this conclusion is that an FTC action is “not a private or
12 common law fraud action designed to remedy a singular harm, but a government
13 action brought to deter deceptive acts and practices aimed at the public and to
14 obtain redress on behalf of a large class of third-party consumers who purchased
15 defendants’ products and services over an extended period of time.” *Freecom*,
16 401 F.3d at 1204 n.7 (citing *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d
17 1312, 1316 (8th Cir. 1991)). These decisions are consistent with Ninth Circuit
18 cases that similarly have held that the FTC need not prove elements that are
19 traditionally required in a fraud case to establish a violation of the FTC Act.
20 *See, e.g., FTC v. Publ’g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir.
21 1997) (proof of intent to defraud not required); *FTC v. Figgie Int’l*, 994 F.2d
22 595, 605–06 (9th Cir. 1993) (unlike common law fraud, proof of subjective
23 reliance by each individual consumer not required); *see also Removatron Int’l*
24 *Corp. v. FTC*, 884 F.2d 1489, 1495 (1st Cir. 1989) (proof of “a willful, knowing
25 or deliberate act” not required); *FTC v. Kitco of Nev., Inc.*, 612 F. Supp. 1282,
26 1293 (D. Minn. 1985) (unlike common law fraud, proof of subjective reliance by
27 each individual consumer not required); *FTC v. Five-Star Auto Club*, 97 F.
28 Supp. 2d 502, 526 (S.D.N.Y. 2000) (proof of intent to defraud or deceive not

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

3 In sum, allegations of deception under the FTC Act are not claims of
4 fraud. For this reason, many courts have held that Rule 9(b) does not apply to a
5 cause of action brought under the FTC Act under a deception theory. For the
6 same reason, this Court should deny the defendant's motion to dismiss based
7 upon *Swish* and *Benning*, which did not decide this issue.

8 **3. The allegations in the complaint satisfy Rule 8 as to all defendants.**

9 Pursuant to Rule 8(a)(2) of the Federal Rules of Civil Procedure, a
10 complaint need only set forth a "short and plain statement" that gives a
11 defendant fair notice of plaintiff's grounds for entitlement for relief. Fed. R. Civ.
12 P. 8(a)(2). See *Farmer v. Countrywide Financial Corp.*, 2009 U.S. Dist. LEXIS
13 49553 at *5 (C.D. Calif. 2009) ("ordinary pleading rules are not meant to impose
14 a great burden upon a plaintiff")' citing *Dura Pharmaceuticals, Inc. v. Broudo*,
15 544 U.S. 336, 346 (2005). In evaluating a Rule 12(b)(6) motion, the court
16 should "construe the complaint in the light most favorable to the plaintiff, taking
17 all . . . allegations as true and drawing all reasonable inferences from the
18 complaint in [plaintiff's] favor." *Doe v. United States*, 419 F.3d 1058, 1062 (9th
19 Cir. 2005). See also *al-Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th Cir. 2009),
20 citing *Newcal Indus., Inc., v. Ikon Office Solutions*, 513 F.3d 1038, 1043 n. 2
21 (9th Cir. 2008).

22 The Supreme Court recently explained that:

23 to survive a motion to dismiss, a complaint must
24 contain sufficient factual matter, accepted as true, to
25 'state a claim to relief that is plausible on its face.' A
26 claim has facial plausibility when the plaintiff pleads
27 factual content that allows the court to draw the
28 reasonable inference that a defendant has acted

1 unlawfully.

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

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

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

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

4 The complaint contains sufficient factual content to allow the court to
5 draw the reasonable inference that defendants have acted unlawfully. The
6 complaint states that defendants' claims are false or were not substantiated at the
7 time they were made. There is robust caselaw and detailed published guidance
8 noting that false or unsubstantiated claims constitute deceptive acts or practices
9 which violate the FTC Act. See, e.g., *FTC v. Direct Mktg. Concepts, Inc.*, 624
10 F.3d 1, 8 (1st Cir. 2010) ("Where the advertisers lack adequate substantiation
11 evidence, they necessarily lack any reasonable basis for their claims. . . . And
12 where the advertisers so lack a reasonable basis, their ads are deceptive as a
13 matter of law."); *Thompson Med. Co. v. FTC*, 791 F.2d 189, 194 (D.C. Cir.
14 1986) (An advertisement is deceptive as a matter of law if the advertisement
15 represents that a particular type of substantiation exists for a product claim (e.g.,
16 "if it states that a product has been found to be superior by scientific tests")
17 unless the advertiser possesses at least the advertised level of substantiation); see
18 also *In re Thompson Med. Co.*, 104 F.T.C. 648, app. at 839 (1984), *aff'd*, 791
19 F.2d 189 (D.C. Cir. 1986) (FTC Policy Statement Regarding Advertising
20 Substantiation); FTC, *Dietary Supplements: An Advertising Guide for Industry*
21 (April 2001). The caselaw and other sources also provide guidance to marketers
22 on how to conform to the law in their advertising and marketing. When the FTC
23 alleges that defendants' claims are false or unsubstantiated, it is alleging that
24 defendants have failed to follow the requirements elucidated in caselaw and
25 other sources. This fact, taken as true, allows the court to draw the reasonable
26 inference that defendants have violated the FTC Act.

27 The complaint also alleges plausible claims against defendants Robert and
28 Robyn Held for their individual violations of the FTC Act. In addition to

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

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

1 held liable for both injunctive and monetary relief.

2 **4. CONCLUSION**

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

7
8 Respectfully submitted,

9 WILLARD K. TOM
10 General Counsel

11 /s/ Kenneth H. Abbe

12

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CERTIFICATE OF SERVICE

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

Leslie Holmes, Esq.
Leslie@HULawyers.com
Holmes & Usoz
Attorney for Defendants

and by sending the attached document via email to:

Mitchell S. Fuerst, Esq
mfuerst@fuerstlaw.com

and

Andrew S. Ittleman, Esq
aittleman@fuerstlaw.com

Fuerst Ittleman PL
Attorneys for Defendants

I swear under penalty of perjury that the foregoing is true and correct.
Executed on January 14, 2011, at San Francisco, California.

/s/ Laura Fremont

Laura Fremont
Attorney
Federal Trade Commission