Statement of Commissioner Christine S. Wilson
Concurring In Part and Dissenting in Part
FTC v. Neurometrix, Inc., et al.
File No. 1723130

February 28, 2020

Today the Commission authorizes staff to file a complaint and settlement against Neurometrix, Inc., and its founder, Chairman, President, and Chief Executive Officer Shai Gozani. The complaint alleges that Neurometrix and Gozani made false, misleading, and/or unsubstantiated advertising claims about their wearable transcutaneous electrical nerve stimulation devices (TENS), Quell and Quell 2.0.

I fully support the Commission's enforcement efforts to challenge false, unsubstantiated, and misleading claims. Accurate and complete information contributes to the efficient functioning of the market and facilitates informed consumer decision-making. In contrast, deceptive or false claims inhibit informed decision-making and cause economic injury to consumers.

In this case, I concur with the allegation that defendants made unsubstantiated claims regarding Quell's ability to achieve widespread pain relief, in areas of the body distant from the application site below the knee "by activating areas of the brain responsible for inhibition of pain." Complaint ¶ 27. I also concur with the allegation that defendants lacked substantiation for claims that Quell provides widespread relief from chronic or severe pain in areas of the body distant from the application site that fall outside spinal nerve and root segments. I dissent, though, to the extent that the complaint challenges all claims that the device can deliver non-localized pain relief and with respect to the allegation that the defendants falsely claimed that the devices were "FDA cleared" for widespread pain relief.

The Commission has long interpreted Section 5 of the FTC Act to require that advertisers have a reasonable basis for claims about their products. The Commission's evaluation of the substantiation necessary to constitute a reasonable basis for a particular claim begins with consideration of the factors articulated in the Pfizer decision. These factors examine the type of claim and product coverage, the benefits of a truthful claim, the consequences of a false claim, and the type of evidence that experts in the field believe is reasonable to substantiate a claim.[1]

My predecessors on the Commission and learned commentators have cautioned that, when evaluating an advertiser's reasonable basis, the Commission must be careful not to impose an unduly high standard of substantiation that risks denying consumers useful information, diminishing incentives to conduct research, and chilling manufacturer incentives to introduce new products to the market.[2] As Former FTC Chairman Robert Pitofsky has noted, "the

[1] Pfizer, Inc., 81 F.T.C. 23, 64 (1972).

[2] See, e.g., Statement of Commissioner Maureen K. Ohlhausen, In the Matter of Health Discovery Corporation and FTC v. Avrom Boris Lasarow, et al. (Feb. 2015), https://www.ftc.gov/public-statements/2015/02/dissenting-statement-commissioner-maureen-k-ohlhausen-matter-health; Statement of Commissioner Joshua D. Wright, FTC v. Kevin Wright; HCG Platinum, LLC; and Right Way Nutrition, LLC (Dec. 2014), https://www.ftc.gov/public-statements/2014/12/statement-commissioner-joshua-d-wright-federal-trade-commission-v-kevin; Statement of

I respectfully submit that the Commission should focus our scarce resources on marketers that make serious health and disease claims with little to no scientific support. And I encourage the Commission in future cases to give careful weight and consideration to all evidence submitted in support of claims, including emerging science, trends, and real world consumer data. Finally, I note that when deciding whether to take enforcement action, we must balance the risks of chilling research, innovation, and the dissemination of useful information against the potential benefits of enforcement.