

**Separate Statement of Commissioner Maureen K. Ohlhausen  
Dissenting in Part  
In the Matter of i-Health, Inc. and Martek Biosciences Corporation  
June 5, 2014**

The Commission has long interpreted Section 5 of the FTC Act<sup>1</sup> to require an advertiser to have a reasonable basis for making an objective claim about its product.<sup>2</sup> As we execute this mandate, we must be mindful of what we are trying to accomplish, however. As former FTC Chairman Robert Pitofsky stated, the overall goal of evaluating advertising claims is not “a broad, theoretical effort to achieve Truth, but rather a practical enterprise to ensure the existence of reliable data which in turn will facilitate an efficient and reliable competitive market process.”<sup>3</sup>

I dissent in part from today’s action because it imposes an unduly high standard of substantiation on a safe product. This unduly high standard not only risks denying consumers useful information in the present but may also, in the long term, diminish incentives to conduct research on the health effects of foods and dietary supplements and reduce the incentives of manufacturers to introduce such products.<sup>4</sup> The majority’s approach may ultimately undermine an efficient and reliable competitive market process and make consumers worse off.<sup>5</sup>

The complaint in this matter challenges the efficacy claim that BrainStrong Adult (a DHA supplement) improves memory in adults and the establishment claim that BrainStrong Adult is clinically proven to improve memory in adults.<sup>6</sup> Advertisers must support claims of efficacy of dietary supplements with “competent and reliable scientific evidence.”<sup>7</sup> For establishment

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<sup>1</sup> 15 U.S.C. § 45(a).

<sup>2</sup> FTC Policy Statement Regarding Advertising Substantiation (appended to *Thompson Med. Co., Inc.*, 104 F.T.C. 648, 840 (1984)).

<sup>3</sup> Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 671 (1977).

<sup>4</sup> See Statement of Commissioner Maureen K. Ohlhausen, Dissenting in Part and Concurring in Part, *In the Matter of GeneLink, Inc., et al.*, FTC Docket No. C4456, at 2 (Jan. 7, 2014) (“Although raising the requirement for both the number and the rigor of studies required for substantiation for all health- or disease-related claims may increase confidence in those claims, the correspond0 1 72.02C0054.89 Tm21 7ofTm21 7ofUGM60ZS%K0nJ5v6BAz6URyB5]B%b15h9g\$Pv ).

<sup>5</sup> See *id.* (“If we demand too high a level of substantiation in pursuit of certainty, we risk losing the benefits to consumers of having access to information about emerging areas of science and the corresponding pressure on firms to compete on the health features of their products.”); FTC Staff Comment Before the Food and Drug Administration In the Matter of Assessing Consumer Perceptions of Health Claims, Docket No. 2005N-0413, at 5-6 (2006) (noting the FTC’s advertising enforcement seeks to avoid “unduly burdensome restrictions that might chill information useful to consumers in making purchasing decisions.”) available at <http://www.ftc.gov/be/V060005.pdf>.

<sup>6</sup> The complaint also challenges the efficacy claim that BrainStrong Adult prevents cognitive decline. I agree with the majority that the proffered study does not support this claim.

<sup>7</sup> The FTC’s *Dietary Supplements: An Advertising Guide for Industry*

claims, where advertisements refer to a certain level of support, advertisers

