Dissenting Statement of Commissioner Maureen K. Ohlhausen
In the Matter of Health Discovery Corporation, File No. 132-3211
and FTC v. Avrom Boris Lasarow, et al., File No. 132-3210
February 23, 2015

These matters are another example of the Commission using an unduly expansive interpretation of advertising claims to justify imposing an inappropriately high substantiation requirement on a relatively safe product.[1] As I have previously stated, "We must keep in mind. . . that if we are too quick to find stronger claims than the ones reasonable consumers actually perceive, then we will inadvertently, but categorically, require an undue level of substantiation for those claims."[2] Because I fear this course of action will inhibit the development of beneficial products and chill the dissemination of useful health information to consumers, I dissent.

I do not dispute that companies must have adequate substantiation to support the claims that they make, and I thus would have supported complaints and substantiation requirements based on the app developers' claims that their apps automatically assessed cancer risk more accurately than a consumer's unaided self-assessment using the ABCDE factors.[3]

However, the complaints and orders in these cases go further, demanding a high level of substantiation for a wide range of potential advertising claims. Specifically, the orders require rigorous, well-accepted, blinded, human clinical tests to substantiate any claim that the app increases consumers' chances of detecting skin cancer in the early stages.[4] Both orders also impose the same high substantiation standard on any claim that an app "detects" or diagnoses melanoma or risk factors of melanoma.[5] The orders could thus be read to require the app developers to demonstrate that their apps assess cancer risk as well as dermatologists, even if their ads make much more limited claims.

Thus, the orders impose a high level of substantiation despite lacking evidence that the marketing claims require such substantiation, and the complaints' vague claim construction obscures this flawed approach.[11] Despite the assurances in the majority's statement as to what the orders require, the complaints imply – and the majority appears to agree[12] – that reasonable consumers expected the apps to substitute for professional medical care. This disconnect raises the possibility that the Commission may use vague complaints to impose very high substantiation standards on health-related apps even if the advertising claims for those apps are more modest.

This approach concerns me. Health-related apps have enormous potential to improve access to health information for underserved populations and to enable individuals to monitor mor1(a)-v2(oa)-3oc.(Th.7)1(ti(oa)-3oc.(Th.7)1(ti(oa)-.1 Tw 7(ea0)-1( )5(t)-2(o he)4(o)7(w)]TJ)5(w)]Ta