

Concurring Statement of Commissioner Julie Brill

In the Matter of Lumos Lab, Inc. (“Lumosity”), Kunal Sarkar, and Michael Scanlon
January 4, 2016

Today, the Commission announces a complaint and order against Lumos Lab, Inc. (also d/b/a “Lumosity”), Kunal Sarkar, and Michael Scanlon (collectively, the “defendants”), settling allegations that the defendants made false and unsubstantiated marketing claims that their Lumosity “brain training” program would provide users with real-world benefits in the performance of everyday tasks; delay age-related decline in memory and protect other age-related cognitive conditions; and reduce cognitive impairments associated with various health conditions, including post-traumatic stress disorder and stroke. The Commission’s settlement with the defendants prohibits deceptive conduct in the future and requires Lumosity to pay \$2 million toward consumer redress.

I write separately to voice my strong support for this action, and to express my concerns regarding the marketing of brain training programs going forward. In particular, I caution Lumosity and other companies about making representations that overstate the benefits of these products or misleadingly imply that improvements in the game setting transfer to real-world benefits. Section 5 of the FTC Act requires that advertisers have a reasonable basis to support their express and implied advertising claims before they are disseminated to ensure that such claims are truthful and non-deceptive.¹ Advertisers must also have rigorous, scientific support to substantiate claims for products that purport to prevent or treat health or disease-related conditions.² Because claims that indicate scientific support can easily imply to consumers greater health benefits than are actually the case, companies marketing brain training products should carefully evaluate their advertising to make sure consumers do not take away a stronger efficacy message than scientific evidence supports.

¹ *FTC Policy Statement Regarding Advertising Substantiation*, 104 F.T.C. 839 (1984) (appended to *Thompson Med. Co.*, 104 F.T.C. 648 (1984)) (“*Substantiation Statement*”) (“[W]e reaffirm our commitment to the underlying legal requirement of advertising substantiation – that advertisers and ad agencies have a reasonable basis for advertising claims before they are disseminated.”), *aff’d*, 791 F.2d 189, 193 & 196 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

² *See, e.g., POM Wonderful, LLC v. FTC*, 777 F.3d 478, 493-94 (D.C. Cir. 2015); *FTC v. Direct Marketing Concepts, et. al.*, 624 F.3d 1, 9-11 (1st Cir. 2010). *See also In the Matter of Focus Education, LLC*, No. 122 3153 (F.T.C. April 9, 2014) (complaint and consent order), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/122-3153/focus-education-llc-matter>.