

Better Business Bureau's National Advertising Division Annual Conference
Keynote Address
Commissioner Julie Brill
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Thank you for that introduction. It is a great pleasure to be back in New York speaking to NAD about the Federal Trade Commission's advertising initiatives. I was lucky enough to address this group in 2012, and looking back on my remarks three years ago, I am amazed at how much has changed – and perhaps even more amazed at how much has not changed.

For example, in 2012, I talked about the spectacular leaves this time of year in my hometown of Randolph, Vermont. I haven't been back there for about a week, but my family is sending "see what you are missing" pictures, and I can report – the foliage is still spectacular.

In 2012, I talked about the excitement over the Washington Nationals making the playoffs – the first time for a D.C. baseball team since 1933. Less than two weeks after that speech, the Cardinals ended the Nats' season and broke every baseball fan's heart in the Washington metro area. March of *this year*, Sports Illustrated picked the Nats to take the National League East and possibly go on to win it all. But by the beginning of this month, the team was all but eliminated from post-season play. I guess that's a slight improvement – a month less worth of raised hopes, a little less pain when the season came crashing down.

And when I spoke to you in 2012, we were a month out from national elections, and all anybody could talk about was politics. I talked about the rise of fact checking and its impact on campaigns, the benefits of a well-informed electorate, the parallels with well-informed consumers, and the role that both advertisers and the FTC play in making sure consumers are able to make thoughtful decisions about the products they buy and the personal data they share.

Now, in 2015, we are a year and a month out from national elections, and all anybody can talk about is politics. Again, the campaign landscape is dominated by talk of – if not facts – then "telling it like it is," and "straight talk." The chattering classes this year are obsessed with front-runner Donald Trump and how the billionaire reality TV star has managed not to flame out yet, as they have predicted every week since he entered the race. One of the primary reasons people polled say they support Trump is because he speaks his mind and doesn't hide behind consultant-crafted images or slick TV ads. As one Trump backer told *The Atlantic*, "What you see is what you get, all the cards are on the table."¹ Stephen Colbert presciently invented the word – "truthiness" – for truth that is not necessarily defined by what is fact, but instead by what seems real. And what seems real is what comes to us, ostensibly unfiltered, through YouTube videos, Twitter trends, Facebook posts, and reality TV shows.

This is one of the biggest changes I have seen since we last met. With the rapid rise of social media and constant connectivity through more and more devices swapping more and more

¹ Conor Friedersdorf, *Why Do People Support Donald Trump?* THE ATLANTIC (Aug. 17, 2015), available at <http://www.theatlantic.com/politics/archive/2015/08/donald-trump-voters/401408/>.

information, we are entering the age of the democratization of truth. If it is trending, it must be true. If it has five stars on Yelp, one thousand positive reviews on Open Table, or over 90 percent on Rotten Tomatoes, the opinion must be fact.

It is against this new backdrop that I would like to address several advertising issues of special interest to the FTC, a list strikingly similar to the issues I addressed in 2012: endorsement disclosures; data use and disclosures in ad tech; health claims for mobile apps, dietary supplements and other products and services. And I will launch our discussion from the same touch point I did in 2012, because while the swirling cyber-atmosphere is reshaping the world for advertisers and the FTC, basic principles remain unchanged. As I said back then: “The fundamental goal of [the advertising industry] is the same as it always was: to sell a product or a service. And the FTC’s interest in advertising is the same as it has always been: to make sure ads are providing consumers with the information they need to make meaningful choices about the goods and services they want to buy.”²

Endorsement and Testimonial Disclosures in New Media

The transformation of the environment in which consumers make their purchasing decisions was brought home to me a couple of weeks ago, in my own home. I stuck my head in my teenage son’s door to yell at him to stop playing video games and get outside to rake up some of those spectacular leaves, and I realized he was not playing video games. He was watching YouTube personality “PewDiePie” play – and comment on – video games – *Call of Duty* to be precise. PewDiePie is not his given name, I am guessing, but it is his real name in the minds of his 39 million subscribers on YouTube, a Guinness World Record.³ That’s more subscribers than music artist Taylor Swift and the band One Direction combined.⁴

PewDiePie’s success is no fluke. YouTube content related to gaming generates hundreds of billions of views and claims 15% of content on the site.⁵ To cater to this active market, the company recently launched a video network devoted to clips of users, players, and fans playing video games.⁶

And gamers aren’t the only ones who are video blogging. A recent study by GlobalWebIndex found that 42% of Internet users logged into a video blog in the last month and listened to video bloggers discuss everything from beauty products to cat breeds to whether NASA faked the moon launches. Many of these video bloggers monetize their creations through

² See Keynote Address by Commissioner Julie Brill at the Better Business Bureau’s National Advertising Division Annual Conference. New York, New York (Oct. 1, 2012), available at https://www.ftc.gov/sites/default/files/documents/public_statements/opening-remarks-commissioner-julie-brill/121001nadspeech.pdf.

³ Kevin Lynch, *The Voice, PewDiePie and Dr. Dre Cement Their Place In New Guinness World Records 2016 Book*, GUINNESS WORLD RECORDS (Aug. 31, 2015), available at <http://www.guinnessworldrecords.com/news/2015/8/the-voice-pewdiepie-and-dr-dre-%E2%80%A8cement-their-place-in-new-guinness-world-record-394549>.

⁴ See *id.*; PewDiePie Channel, <http://www.youtube.com/users/PewDiePie> (last visited Sept. 27, 2015).

⁵ Carla Marshall, *15% of ALL YouTube Videos Relate to Gaming: Minecraft & PewDiePie FTW*, REELSEO (Dec. 13, 2014), available at <http://www.reelseo.com/15-per-cent-youtube-gaming-videos/>.

⁶ Chris Foxx, *YouTube Gaming Launch Poses Challenge To Twitch*, BBC NEWS (Aug. 26, 2015), available at <http://www.bbc.com/news/technology-34015600>.

online ads – though I am pretty sure the Area 51 crowd is not making a fortune. To maximize exposure, some video bloggers and content creators partner with “multi-channel” entertainment networks, which sell ad space on the video blogs. So far, so good. But what happens if a video blogger is paid to provide a review for a game or a gaming console? In the absence of appropriate disclosures, viewers would likely be deceived since they reasonably believe that the video commentary represents an unbiased user experience. If a real-life teenager in a jerky video feed tells you that Grand Theft Auto V is on fleek, well, it must be true, right?

This is where effective disclosures come in. The requirement is pretty straightforward and reflects that same philosophy that I discussed in 2012, and that remains true at the FTC today: even in the face of new challenges and new technologies, our fundamental goal is to make sure that consumers have the information they need to make meaningful choices. In the case of online and video reviews, that means that consumers ought to know about connections between endorsers and advertisers. As multi-channel entertainment network, Machinima, learned earlier this month, the FTC’s Endorsement Guides apply as much to vloggers, online content creators, and those who pay them, as they do to any other advertiser or endorser.

Machinima ran an ad campaign on behalf of Microsoft and its advertising agency, Starcom MediaVest Group, to promote the Xbox One gaming system and several games. As part of Machinima’s ad campaign, it paid and solicited video bloggers to post Xbox game play videos that appeared to reflect the objective opinions of the video bloggers. The resulting videos did not disclose adequately, and typically did not disclose at all, that the video bloggers were compensated, a practice my fellow FTC Commissioners and I had no hesitation in labeling deceptive. As part of the proposed settlement, Machinima is prohibited from similar deceptive conduct, and it must ensure that any reviewers under its network clearly and conspicuously disclose when they have been paid for endorsements.⁷

And what of Microsoft and Starcom? Why didn’t the FTC bring an action against them? As we explained in our closing letters to these two companies, the Commission considered that these companies had good disclosure policies and procedures, and the Machinima incident was isolated, occurring in spite of these good policies. In addition, both companies required that Machinima remedy the situation once they learned that Machinima had paid endorsers without making the proper disclosures, and they adopted additional safeguards to prevent future incidents.⁸

Twitter is another medium in which seemingly real endorsements from real people can run afoul of the FTC’s enforcement of truth in advertising. Last November, Sony and its ad agency, Deutsch LA, agreed to settle charges about their promotion of Sony’s PS Vita handheld gaming console.⁹ The Commission believed that the companies misled consumers about the

⁷ FTC, Press Release, Xbox One Promoter Settles FTC Charges That it Deceived Consumers With Endorsement Videos Posted By Paid ‘Influencers’ (Sept. 2, 2015), *available at* <https://www.ftc.gov/news-events/press-releases/2015/09/xbox-one-promoter-settles-ftc-charges-it-deceived-consumers>.

⁸ FTC, Closing Letters to Microsoft and Starcom Counsel (Aug. 6, 2015), *available at* https://www.ftc.gov/system/files/documents/closing_letters/nid/150902machinima_letter.pdf.

⁹ FTC, Press Release, Sony Computer Entertainment America To Provide Consumer Refunds To Settle FTC Charges Over Misleading Ads For PlayStation Vita Gaming Console (Nov. 25, 2014), *available at* <https://www.ftc.gov/news-events/press-releases/2014/11/sony-computer-entertainment-america-provide-consumer->

capabilities of the PS Vita. On top of that, Deutsch LA asked its employees to post positive tweets about the PS Vita to their personal Twitter accounts using the same hashtag – #gamechanger – that Deutsch used in its advertisements. We believed that these tweets were misleading because they did not disclose that they were written by employees with a material connection to the product. The orders against Sony and Deutsch prohibited them from engaging in similarly misleading practices, and Sony was ordered to administer a redress program providing a \$25 refund or \$50 merchandise voucher to eligible consumers.

Consumers are turning more and more and more to YouTube and Twitter for their product information, to be sure, but perhaps an even more powerful influence on their choices is online user reviews. I recently heard about a young woman who got married in what she called a “wedding by Yelp.” She booked her reception at a site with 99 positive reviews on theknot.com, found a caterer with 46 five-star reviews on Yelp, wrote personalized wedding vows with a book from Amazon with 106 thumb ups from readers, and booked the number one rated Maui hotel on Trip Advisor for her honeymoon.

Like the 60% of consumers who read online reviews before making a purchase decision,¹⁰ this bride trusted the assessments of real people more than the paid advertising she saw on – or offline. But at the FTC, we are concerned that an aura of authenticity can shield reviews that deceive rather than inform consumers. Earlier this year, the FTC entered into a consent order with AmeriFreight, an auto shipment broker that bragged about “more highly ranked ratings and reviews than any other company in the Auto Transport Business.”¹¹ However, AmeriFreight did not mention that it gave consumers a \$50 discount to review the company’s services and encouraged positive reviews by offering a \$100 monthly prize for the review with the most creative subject title and “best content.” The Commission believed that AmeriFreight failed to properly disclose that its reviewers were paid endorsers and that the company’s claims about its ratings were deceptive. Our settlement requires AmeriFreight to disclose material connections with endorsers clearly and prominently in the future.

Cases like Machinima, Sony and AmeriFreight should serve as a clear message that, even in the age of YouTube, Twitter, and other people-powered social media platforms, fundamental disclosure principles still apply. Endorsements must be truthful and not misleading. If there is a connection between an endorser and an advertiser that would affect how consumers evaluate the review, that connection must be clearly and conspicuously disclosed.

refunds; *see also* FTC, Press Release, FTC Approves Final Orders Related to False Advertising by Sony Computer Entertainment America and Its Ad Agency Deutsch LA for PS Vita Game Console (Mar. 31, 2005), *available at* <https://www.ftc.gov/news-events/press-releases/2015/03/ftc-approves-final-orders-related-false-advertising-sony-computer>.

¹⁰ Graham Charlton, *Ecommerce Consumer Reviews: Why You Need Them and How To Use Them*, ECONSULTANCY – Blog (July 8, 2015), *available at* <http://www.brandview.com/en/2015/03/customer-reviews-affect-61-percent-of-online-shoppers-2/>; *see also*, Nielsen, *Global Survey of Trust In Advertising Report* (Sept. 26, 2013), *available at* <http://www.nielsen.com/us/en/insights/reports/2013/global-trust-in-advertising-and-brand-messages.html>.

¹¹ FTC, Press Release, FTC Stops Automobile Shipment Broker from Misrepresenting Online Reviews (Feb. 27, 2015), *available at* <https://www.ftc.gov/news-events/press-releases/2015/02/ftc-stops-automobile-shipment-broker-misrepresenting-online>.

To help the ad industry understand how to comply with our Endorsement Guides in this brave new world of social media and word of mouth advertising, in June, the FTC updated its “What People Are Asking” FAQs to the Endorsement Guides.¹² We outlined how to make proper disclosures for blogging and video blogging, social media campaigns, pre-recorded and live-stream gaming videos, and employee endorsements. If you or your clients are involved in word of mouth salesmanship – and truthfully, who isn’t involved in this powerful form of marketing these days¹³ – I urge you to review our updated FAQs.

Data Collection and Use in Advertising

Advertising has become one of the most technologically advanced and data driven industries in our economy.¹⁴ More than ever, advertisers leverage data to reach customers, personalize experiences, and make predictions about consumer behavior. Targeted advertising can be good for your business, for business in general, and for consumers. But how much data is collected about consumers, how it is stored, and how it is used, raise significant privacy concerns. And while these are definitely 21st century conundrums, the principles with which the FTC protects consumer privacy date back over 100 years, to concerns first raised by Louis Brandeis. Consumers must be given reasonable notice of and control over how their personal data is collected and used – and that applies regardless of how many zettabytes of data we are talking about.

A newly emerging form of tracking uses sensors to track customers’ mobile phone signals to detect individualized or aggregated traffic patterns about consumers as they travel through stores and malls. The amount of data collected and the uses for the data can vary, and so do the privacy challenges the practice raises.¹⁵ For instance, a retail mobile site might not track data that is unique to a device or user, or it might immediately aggregate the data collected without linking it to the user or her device. Retailers use this sort of aggregated information to improve their offerings and store layouts. Other retail mobile location trackers collect device level data to serve consumers with ads on their smartphones that might be relevant to them as they shop.

¹² See FTC, The FTC’s Endorsement Guides: What People Are Asking, *available at* <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.

¹³ Kimberly Whitler, *Why Word Of Mouth Marketing Is the Most Important Social Media*, FORBES (July 17, 2014), *available at* <http://www.forbes.com/sites/kimberlywhitler/2014/07/17/why-word-of-mouth-marketing-is-the-most-important-social-media/>.

¹⁴ *Infographic— What Data-Driven Marketing Looks like in 2015: Consumer demand for personalization makes information most valuable currency*, ADWEEK (Mar. 23, 2015), *available at* <http://www.adweek.com/news/technology/infographic-what-data-driven-marketing-looks-2015-163607>.

¹⁵ See Ashkan Soltani, *Privacy Trade-Offs In Retail Tracking*, FTC - Tech@FTC Blog (Apr. 30, 2015), *available at* <https://www.ftc.gov/news-events/blogs/techftc/2015/04/privacy-trade-offs-retail-tracking>.

At a bare minimum, where device-level data is collected or stored, it is critical that consumers are aware of retail mobile location tracking when it is happening, and are able to exercise some control over its use. Without better communication to consumers, we may see a demand for apps that automatically disable transmission of signals upon contact with tracking networks.¹⁶

However, it is not enough that companies communicate with and provide choices to consumers regarding retail mobile location tracking. They must also be *truthful* about these choices. And that is where retail mobile location tracking company Nomi Technologies fell short, in the Commission's view.¹⁷ Nomi's privacy policy stated that it would "always allow consumers to opt-out of Nomi's service on its website as well as at any retailer using Nomi's technology." The problem? For the first nine months of 2013 – during which time Nomi collected information about nine million mobile devices – the promised in-store opt-out mechanism was not available, and consumers were not informed when tracking was taking place. Nomi settled charges with the FTC that it violated the FTC Act by misrepresenting the choices that would be offered to consumers and the information that would be made available about retail location tracking.

The issues surrounding tracking consumers are magnified when we consider advances in technology that move well beyond cookies and tracking on one device. Companies are creating integrated marketing profiles that track consumers across multiples devices, often supplementing these profiles with information from third-party offline sources. Companies are also expanding into the use of less detectable techniques, like device fingerprinting, to identify multiple internet-connected devices and build profiles around the users of those devices. Because these enhanced techniques are invisible, there isn't exactly a way for consumers to find out that it's happening, let alone exercise choices about its use.

For over fifteen years now,¹⁸ the Federal Trade Commission has pushed for more consumer control over third-party data collection online. In 2010, we called for the establishment of a universal "Do Not Track" tool where consumers could opt out of cross-site data collection in their browsers.¹⁹ And in 2012, at an event at the White House, major trade associations committed to finding a way to honor browser-based opt-outs by the end of that year.²⁰ The World Wide Web Consortium – or W3C – recently standardized the meaning and

¹⁶ *See id.*

¹⁷ FTC, Press Release, Retail Tracking Firm Settles FTC Charges it Misled Consumers About Opt Out Choices (Apr. 23, 2015), *available at* <https://www.ftc.gov/news-events/press-releases/2015/04/retail-tracking-firm-settles-ftc-charges-it-misled-consumers>.

¹⁸ *See generally*, FTC, PRIVACY ONLINE: FAIR INFORMATION PRACTICES IN THE ELECTRONIC MARKETPLACE (May 2000) (FTC Report to Congress), *available at* <https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-fair-information-practices-electronic-marketplace-federal-trade-commission-report/privacy2000text.pdf>.

¹⁹ FTC, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: A PROPOSED FRAMEWORK FOR BUSINESSES AND POLICYMAKERS at 66-68 (Dec. 2010) (Preliminary Staff Report), *available at* <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-preliminary-ftc-staff-report-protecting-consumer/101201privacyreport.pdf>.

²⁰ White House, Blog, *We Can't Wait: Obama Administration Calls for a Consumer Privacy Bill of Rights for the Digital Age* (Feb. 23, 2012), *available at* <https://www.whitehouse.gov/blog/2012/02/23/we-can-t-wait-obama-administration-calls-consumer-privacy-bill-rights-digital-age>.

operation of the “Do Not Track” mechanism.²¹ And yet, here we are, in 2015, and consumers’ still do not have an adequate means to opt-out of data collection. It is more clear than ever that self-regulation needs to keep up with the times: after all these years, consumers still don’t understand what’s happening with their personal information, and they continue to struggle to control targeted advertising and data collection.

This is even true for advertising targeted to sensitive health conditions – industry codes may rule out the use of doctor *diagnoses* for targeting, but web searches and visiting medical websites seem to be fair game. So the fact that you surfed the web or used an app to learn about an STD or heart disease can be added to behavioral profiles and lead to targeted ads on other websites. For too long, this has been a loophole in industry rules, and it should be closed.

Truthfully, it is surprising to me that the ad tech industry hasn’t been more motivated to offer consumers better tools to protect their privacy, because it has always been the case that consumers could take matters into their own hands. And that is precisely what appears to be happening. PageFair recently reported that over 45 million Americans are using ad-blocking technologies, as are 144 million customers around the globe.²² And that was before Apple released iOS 9 – which enabled consumers to more easily incorporate ad-blocking on their iPhones and iPads – a couple of weeks ago. Immediately, an ad-blocking app named “Peace” became the number one paid app in the U.S. App Store.²³ After two days in the store, and 38,000 downloads,²⁴ the developer withdrew the app because he was concerned that its blocking wasn’t sufficiently sophisticated.²⁵ But guess what? Peace’s number one spot in the App Store was then replaced by Crystal, another ad-blocker.²⁶

Many ad-blocking programs – like EFF’s Privacy Badger and Disconnect.me – will whitelist advertisers that commit to limit data retention. It has also surprised me that, so far, few advertisers seem willing to take up the offer.

Clearly, there is consumer demand for ad-blocking. I urge industry to create robust and innovative tools to address this demand in a sophisticated way. Not to find ways around consumer choice, but to provide consumers with something they clearly want: to see advertising that respects their privacy and that they can trust.

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²¹ World Wide Web Consortium (Aug. 20, 2015), available at <http://www.w3.org/TR/tracking-dnt/>.

²² PageFair, *The Cost of Ad Blocking: PageFair and Adobe 2015 Ad Blocking Report* at 5 (2015), available at http://downloads.pagefair.com/reports/2015_report-the_cost_of_ad_blocking.pdf; Kate Kaye, *Do Not Track Is Finally Coming, but not as Originally Planned*, ADVERTISING AGE (July 17, 2015), available at <http://adage.com/article/privacy-and-regulation/track-finally-coming-planned/299536/>.

²³ Sarah Perez, *A Day After iOS 9’s Launch, Ad Blockers Top the App Store*, TECHCRUNCH (Sept. 17, 2015), available at <http://techcrunch.com/2015/09/17/a-day-after-ios-9s-launch-ad-blockers-top-the-app-store/>.

²⁴ Jack Marshall, *Apple Propels an Ad-Blocking Cottage Industry*, WALL STREET JOURNAL (Sept. 24, 2015), available at <http://www.wsj.com/articles/propelled-by-apple-ad-blocking-cottage-industry-emerges-1443115929>.

²⁵ Marco Arment, *Just doesn’t feel good*, MARCO.ORG (Sept. 18, 2015), available at <http://www.marco.org/2015/09/18/just-doesnt-feel-good>.

²⁶ Chris Welch, *Best-Selling iOS Ad Blocker Crystal Will Let Companies Pay To Show You Ads*, THE VERGE (Sept. 24, 2015), available at <http://www.theverge.com/2015/9/24/9393941/clear-ios-ad-blocker-offering-paid-whitelist>.

Of course, the tracking we are seeing today isn't just cross-site – it's cross-device. So what you do on your computer at work might end up influencing the ads you see on your iPad at home – or even on your TV.

On November 16, we will host a workshop to examine privacy issues raised by cross-device tracking.²⁷ Among other critical questions, we will ask: what are the benefits and risks associated with the use of these new tracking technologies? Do current self-regulatory standards apply to various cross-device tracking techniques, and do they provide consumers with sufficient protections? As consumers interact with advertisers across smart phones, tablets, connected TVs, and wearables, how can companies make their tracking more transparent and give consumers greater control?

Two months after our cross-device tracking workshop, the Commission will host Privacy Con, a conference that will bring together researchers, academics, industry, consumer advocates, and regulators to discuss the latest research related to consumer privacy and data security.²⁸ Among many other topics, we are interested in learning what types of consumer privacy notices and disclosures are effective online, in the mobile environment, and on connected devices, including those with no user interface.

Health Claims for Mobile Apps, Dietary Supplements and Other Products and Services

Over the past year, the Commission has taken noteworthy actions in the area of online games and mobile apps that purport to treat health or cognitive conditions. In one set of cases, we challenged marketers who each claimed that their mobile apps, called “Mole Detective” and “MelApp,” could detect symptoms of melanoma and assess the risk of melanoma in its early stages. We found that these marketers did not have adequate evidence to support such claims.²⁹ In another case, online game developer Focus Education claimed that its children’s computer game, Jungle Rangers, permanently improved behavior associated with ADHD, and could improve focus, memory, and school performance.³⁰ We believed that these claims were similarly unsubstantiated. Most recently, the Commission and Carrot Neurotechnologies settled charges that the company deceptively marketed a mobile app that purportedly improved users’ vision.³¹

²⁷ FTC, Press Release, FTC To Host Workshop on Cross-Device Tracking Nov. 16 (Mar. 17, 2015), *available at* <https://www.ftc.gov/news-events/press-releases/2015/03/ftc-host-workshop-cross-device-tracking-nov-16>.

²⁸ FTC, Press Release, FTC Announces PrivacyCon, Issues Call to Whitehat Researchers and Academics for Presentations (Aug. 28, 2015), *available at* <https://www.ftc.gov/news-events/press-releases/2015/08/ftc-announces-privacycon-issues-call-whitehat-researchers>.

²⁹ FTC, Press Release, FTC Cracks Down on Marketers of “Melanoma Detection” Apps (Feb. 23, 2015), *available at* <https://www.ftc.gov/news-events/press-releases/2015/02/ftc-cracks-down-marketers-melanoma-detection-apps>.

³⁰ FTC, Press Release, Makers of Jungle Rangers Computer Game for Kids Settle FTC Charges that They Deceived Consumers with Baseless “Brain Training” Claims (Jan. 20, 2015), *available at* <https://www.ftc.gov/news-events/press-releases/2015/01/makers-jungle-rangers-computer-game-kids-settle-ftc-charges-they>.

³¹ FTC, Press Release, FTC Charges Marketers of ‘Vision Improvement’ App With Deceptive Claims (Sept. 17, 2015), *available at* <https://www.ftc.gov/news-events/press-releases/2015/09/ftc-charges-marketers-vision-improvement-app-deceptive-claims>.

And of course, advertising substantiation issues in more traditional advertising media were also on the Commission’s radar screen this past year.

The year began with the D.C. Circuit’s affirmance of the Commission’s 2013 decision involving advertising for POM Wonderful 100% Pomegranate Juice and POMx supplements, which claimed the products could treat, prevent, or reduce the risk of heart disease, prostate cancer, and erectile dysfunction, and were clinically proven to have such benefits.³² Although the court did not uphold the FTC order requirement for two randomized and controlled human clinical trials by POM for future disease claims, the court did affirm the FTC’s order requiring POM to have at least one such study before making disease prevention or treatment claims, and said that – depending on the facts of the case – two randomized, controlled clinical trials might be warranted in other cases.³³

Two months ago, we entered into a consent order with the marketers of a dietary supplement called Procera AVH regarding their claims, which we believed were deceptive, that the supplement could reverse age-related mental decline and memory loss.³⁴ Among other injunctive measures, these marketers paid \$1.4 million to settle the charges.

Just today we announced a suit we filed in Florida federal district court against Roca Labs regarding our concerns over its claims that its dietary supplement powder limits a user’s stomach capacity by 80%, which can then purportedly lead to as much as 21 pounds of weight loss in one month, without calorie restrictions or exercise. The company markets the product as an alternative to gastric bypass surgery, and claims it is scientifically proven to have a 90% success rate, and is safe and effective for weight loss in children as young as six years old. In addition to our concerns that Roca Labs’ weight loss claims for its powder are false and unsubstantiated, we also alleged that the company further deceives consumers by failing to disclose that it paid users to provide “success story” testimonials. We also believe that Roca Labs informs consumers, when they receive the supplement, that they were given a price “discount” in exchange for their agreement to refrain from making any disparaging statements about the company or its products. In our complaint, we charge that the defendants’ use of this non-disparagement provision is unfair and harmful because it suppresses truthful information, and likely resulted in consumers purchasing products they would not have otherwise purchased.³⁵

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³² See FTC, Press Release, Statement by FTC Chairwoman Edith Ramirez on Appellate Ruling in the POM Wonderful Matter (Jan. 30, 2015), *available at* <https://www.ftc.gov/news-events/press-releases/2015/01/statement-ftc-chairwoman-edith-ramirez-appellate-ruling-pom>.

³³ POM Wonderful, LLC, et al. v. FTC, Opinion Affirming Commission Order, Case No. 13-1060 (D.C. Cir., Jan. 30, 2015), *available at* https://www.ftc.gov/system/files/documents/cases/pom_dc_circuit1_0.pdf.

³⁴ FTC, Press Release, Supplement Marketers Will Relinquish \$1.4 Million to Settle FTC Deceptive Advertising Charges (July 8, 2015), *available at* <https://www.ftc.gov/news-events/press-releases/2015/07/supplement-marketers-will-relinquish-14-million-settle-ftc>.

³⁵ FTC v. Roca Labs, Inc., Complaint at ¶ 44 (M.D. Fla, Sept. 24, 2015), *available at* <https://www.ftc.gov/system/files/documents/cases/150928rocalabscompt.pdf>.

Our focus on unsubstantiated health claims also includes homeopathic drugs. Homeopathy, a centuries' old alternative practice, originally involved the creation of niche products formulated for an individual user. Today, it has grown into a multibillion-dollar over-the-counter industry.³⁶ Unlike other over-the-counter drugs and dietary supplements, the FDA currently does not require that over-the-counter homeopathic drugs demonstrate efficacy if they satisfy certain conditions.

In contrast, the FTC's advertising substantiation standard clearly requires that efficacy claims of all over-the-counter drugs, whether homeopathic or not, are supported by competent and reliable scientific evidence. Some advertisers incorrectly believe that homeopathic drugs that are in compliance with the FDA rules do not have to comply with FTC's ad substantiation requirements. In addition, we conducted a study that indicates a significant number of consumers do not understand homeopathy and how it is regulated.³⁷ Because of this confusion both among advertisers and consumers, we recently urged the FDA to change its regulatory framework to eliminate the potential conflict with the FTC's ad substantiation policy.³⁸

Just last week, we held a workshop on Homeopathic Medicine and Advertising where we brought together medical professionals, industry representatives, consumer advocates, and government regulators to examine how the homeopathic industry is regulated, changes in advertising for over-the-counter homeopathic drugs, and the application of Section 5 to advertising for these products.³⁹ The NAD participated in our workshop and conveyed a welcome message in one of our panels that is worth repeating: at the NAD, it doesn't matter whether you're an over-the-counter commercial drug or an over-the-counter homeopathic drug. If you want to make health-related claims, including claims made on the label of the product, you must have competent and reliable scientific evidence, in the form of randomized, human clinical trials, to support those claims.⁴⁰

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The 2012 elections brought us the website factcheck.org, and the 2016 contest has yielded the Twitter handle @RealDonaldTrump. Advertisers have not missed the trend, and are more and more taking to social media and online reviews to build buzz around products and services. As advertisers make that move, following consumers, so too does the FTC, tweaking and tailoring our guidance and standards to fit this data-driven, online, connected era.

³⁶ Homeopathic Product Regulation: Evaluating the Food and Drug Administration's Regulatory Framework After a Quarter-Century; Public Hearing, 80 Fed. Reg. 16327, 16328 (Mar. 27, 2015), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2015-03-27/pdf/2015-07018.pdf>.

³⁷ FTC, Staff Comment Before the Food and Drug Administration Regarding the Current Use of Human Drug and Biological Products Labeled As Homeopathic, and the FDA's Regulatory Framework For Such Products ("FTC Staff Comment to FDA"), Ex. B. (Aug. 21, 2015), *available at* <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2015/08/ftc-staff-comment-food-drug-administration-regarding>.

³⁸ *See generally*, FTC Staff Comment to FDA.

³⁹ FTC, Press Release, Homeopathic Medicine & Advertising: An FTC Workshop (Sept. 21, 2015), *available at* <https://www.ftc.gov/news-events/events-calendar/2015/09/homeopathic-medicine-advertising>.

⁴⁰ Homeopathic Medicine & Advertising: An FTC Workshop (Sept. 21, 2015).

It does occur to me, as I am sure it has to many of you, that there really is nothing new about our willingness to trust what seems real over what is true. Great fiction writers have exploited that human tendency for centuries. One of the greatest novels of the twentieth century, F. Scott Fitzgerald's *The Great Gatsby*, came not from the mouth of that famous, troubled millionaire, but from the narrator, Midwestern outsider Nick Carraway, who describes himself as "one of the few honest people that I have ever known."

In the final line of that novel, Nick Carraway leaves the reader with what many see as a message of the hopelessness of escaping one's history. He says, "So we beat on, boats against the current, borne back ceaselessly into the past." But I also think you can read that as hopeful dispatch, certainly as it pertains to the FTC and our protection of consumers in this rapidly evolving Internet age. Yes, the explosion of social media, connected devices, mobile apps, data, and methods of data analyses have wrought benefits and threats to consumers unimaginable even three years ago. But the principles of truth in advertising, consumer control over their data, and privacy protection behind which the FTC has always stood can and do still apply. In these times, hanging on to what has served us so well in the past is perhaps the best way to ensure we can adequately protect consumers in what will certainly continue to be a challenging future.

Thank you.