

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

In the Matter of  
Novartis Corporation,  
and Novartis Consumer Health, Inc.,  
Complainants

Docket No. 9279

ORDER GRANTING APPLICATION FOR STAY  
OF PART IV OF ORDER

Respondent Novartis Corporation and Novartis Consumer Health, Inc. ("Novartis") filed a petition for stay pending appeal of the Commission's order of May 15, 1999, as modified by order dated July 2, 1999, ("Order") which imposes a corrective advertising requirement. Complainant's counsel opposes the granting of a stay. For the reasons stated below, the Commission grants the application and stays the enforcement of Part IV of its Order pending a ruling by the United States Court of Appeals for the District of Columbia Circuit. All other provisions of the Order remain in effect during the pendency of the appeal.

Commission adjudicative orders (except divestiture orders) take effect "upon the date of service, unless stayed, in whole or in part, and a brief for such stay is filed within sixty days after their date of service." 16 C.F.R. § 3.56(c). Such conditions as may be appropriate may be included in the Commission's order or an appropriate court's order on appeal. 45 U.S.C. 45(g)(2). A party seeking a stay must first apply for such relief to the Commission. Novartis has done so in a timely manner.

Commission Rule 3.56(c), 16 C.F.R. § 3.56(c), sets out the applicable legal standards for the granting of a stay pending appeal. The Commission will grant a stay if the following four factors: (1) "the likelihood of success on appeal"; (2) "the degree of injury to other parties if a stay is granted"; (3) "the public interest"; and (4) "why the stay is more in the public interest." *Id.*

We consider each of these reasons in turn.

### Likelihood of Success on the Merits

Novartis's assertions of a likelihood of success on the merits merely exist

that we have already considered and rejected in our May 27, 1999 opinion and that

has been removed from reconsideration. Novartis's FS claims that

Doan's is a generic off-brand of the same active ingredient as Tylenol

and that the two are interchangeable. The FTC has found that such claims are

deceptive if they are not based on objective evidence. In this case, the

operator's claim was a generic claim rebutted by surveys that demonstrated

changes in consumer attitudes

during the course of the campaign. In re Novartis Corp., 1999 FTC LEXIS 90, at \*84-88 (May 13, 1999). We have explained that the

FTC study, which documented a lingering of consumer misbeliefs six months after the

deceptive advertising campaign ended, was not rendered invalid merely because it did

not ask specifically about the effect of the challenged advertisements. App. for Stay

at 8-9. Changes in consumer perceptions with respect to the product, however, do not

invalidate the study. In re Novartis Corp., 1999 FTC LEXIS 90, at \*91.

the period of the challenged campaign adequately demonstrates causality, and the

validity of the study. Novartis Corp., 1999 FTC LEXIS 90, at \*91.

previously rejected Novartis's next argument -- that false beliefs on

the part of consumers that Doan's was more efficacious for the treatment of back pain

is not a claim that consumers would not believe. We have already pointed out that Novartis's own

operator's claim was a generic claim rebutted by surveys that demonstrated

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recovery, nonrecovery, or reversal on appeal; a party may be irreparably injured if the Commission on request of the Commission, clearly has the authority to impose the corrective advertising. Thus, the Commission's decision were to be overturned on appeal, showing that it would be irreparably injured if the Commission's decision were to be overturned on appeal.

### Harm to Others and the Public Interest

Because complaint counsel represents the public interest in effective law enforcement, we consider the third and fourth prongs together. See *Id.* at 7-8.

Novartis contends that the issuance of a stay would be in the public interest

because immediate implementation of the corrective advertising requirement could cause harm to individuals for whom Doan's could be effective from using the product. In fact, our finding that the challenged advertising campaign was deceptive and consumers continue to harbor false beliefs that Doan's is superior to other products for the treatment of back pain, *Novartis Corp.*, 1999 FTC LEXIS 90, at \*94, 102-03, demonstrates that the public interest would, if anything, cut against the issuance of a stay. There is no doubt that if we grant a stay, some consumers laboring under the misimpression that Doan's is superior for the treatment of back pain would purchase Doan's who would not have responded to any treatment for back pain. Individuals may have a range of different responses to any treatment for back pain.

Anart from the stayed provisions of Part IV, all other provisions of the Order will

of California Dental Association 1095-FTC

not sought to stay those provisions of the Order

ants found to be unlawful. Respondent has thus

attempted to minimize the harm to the public interest while focusing on the provisions

of the Order that are found to be unlawful

generation of a law

EXIS 256 at 2 (Respondent has

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of the Order that are found to be unlawful

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By the Commission, Commissioner Swindle concurring:

Benjamin I. Berman

Acting Secretary

ATTACHMENT:

Concurring Statement of Commissioner Orson Swindle

