

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

COMMISSIONERS: Robert Pitofsky, Chairman
 Sheila F. Anthony
 Mozelle W. Thompson
 Orson Swindle

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| In the Matter of |) | |
| |) | |
| NOVARTIS CORPORATION, ET AL. |) | Docket 9279 |
| |) | |
| a corporation. |) | |
| |) | |

**ORDER MODIFYING ORDER, DENYING PETITION FOR RECONSIDERATION,
AND DENYING AS MOOT APPLICATION FOR STAY**

Respondents Novartis Corporation and Novartis Consumer Health, Inc. (collectively “Novartis”) have petitioned the Commission, pursuant to Rule 3.55 of the Commission’s Rules of Practice, 16 C.F.R. § 3.55, to reconsider and to stay Part IV of our final Order in this matter.

Rule 3.55 requires that such a petition “must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission.” 16 C.F.R. § 3.55. Novartis argues that reconsideration is appropriate because factual developments since the record has been closed undermine certain factual predicates of our corrective advertising order, and because the contours of the corrective advertising requirements imposed in the order raise issues not addressed by the parties. We are not entirely satisfied that relief pursuant to Rule 3.55 is warranted here. Novartis could have introduced the recent factual developments upon which it now relies before this late stage. Moreover, while the parties in their briefs primarily addressed the propriety of the performance-based standard for the duration of corrective advertising urged by complaint counsel, the durational requirements of prior corrective advertising orders might have alerted Novartis that the information it only now adduces would be relevant here. *See FTC v. Warner-Lambert Co.*, 562 F.2d 749, 753, 764 (D.C. Cir. 1977) (imposing durational requirement based upon extent of prior expenditures), *cert. denied*, 435 U.S. 950 (1978).

Despite these reservations, we have, in any event, the power to modify our Order on our own initiative pursuant to Rule 3.72(a) of our Rules of Practice. 16 C.F.R. § 3.72(a). In light of the issues raised in Novartis' petition, we have determined to exercise our discretion to modify the Order.

The corrective advertising requirements imposed in our Order of May 13, 1999 were to continue until Novartis expended on Doan's advertising a sum equal to the average spent annually during the eight years of the deceptive advertising campaign, and in any event for no less than one year. Novartis now contends that, in light of its current business plans, the existing Order may have the practical effect of imposing requirements lasting many years. Relying upon the declaration of Barry Cohen, Director of Analgesics, Novartis asserts that it has substantially reduced its advertising and other promotional expenditures for Doan's products and plans greatly to reduce, or to stop altogether, such expenditures in the future. Cohen Decl. ¶¶ 5-8. The result of these changed circumstances, claims Novartis, is that our corrective **advertising** requirement, including the requirement of placing corrective messages on the product label, may remain in effect for a long and indefinite period.

Some of Novartis' other arguments appear to be premised upon a simple misreading of our final Order. Novartis seems to believe that only expenditures on advertising containing the corrective message will count toward the minimum expenditure requirement imposed by that Order. Pet. at 4 (asserting that the Order requires Novartis to "include the corrective notice on all advertising until it has spent \$8 million on advertising *containing the notice*" (emphasis added)). Thus, Novartis concludes that fifteen-second television advertisements, which it has used exclusively in the past and which are exempted from the corrective requirements of the Order, would not count toward that minimum. Novartis argues that the use of such commercials would thereby be deterred. Pet. at 5 (arguing that the Order "for all practical purposes forces Novartis to use" thirty-second television advertisements). In fact, the terms of the Order plainly count all expenditures for the purpose of "Doan's advertising" toward the minimum, regardless of whether such advertising is or is not required to contain the corrective message. Thus, the order will not penalize Novartis for using fifteen-second television advertisements if it chooses to do so. To the contrary, the exception of such advertisements from the corrective advertising requirement was designed precisely to permit the use of the fifteen-second advertisement format that Novartis has historically favored. Op. at 35, 37.

We also reject Novartis' claim that the mere facts that they have reduced advertising expenditures for Doan's and that sales of Doan's products have decreased undermine the need for corrective advertising as a general matter. Pet. at 9-10. The likelihood of lingering consumer misbeliefs based upon Novartis' *past* conduct is what is relevant in order to determine whether corrective advertising is required. Doan's current sales and advertising budget are not directly relevant to that issue.

We turn now to the question of the duration of the Order. A corrective advertising order should not outlast the lingering misconceptions that it is designed to correct. *See Warner-*

Lambert Co., 562 F.2d at 764. In order to ensure that the corrective advertising requirements we impose in this case will not remain in effect beyond the period during which the misbeliefs caused or substantially reinforced by Novartis' deceptive advertising campaign are likely to linger, we will modify the durational provision of the Order. Specifically, because Novartis' deceptive advertising campaign lasted for eight years, the corrective advertising order should last no longer than an equivalent number of years after that campaign ended. Three years have already elapsed since June 1996, when Novartis stopped airing the challenged advertisements. Thus, Part IV of the Order, as modified, will remain in effect for five additional years. If, as it claims, Novartis will cease its media advertising and consumer promotion expenditures, the Order will nonetheless require the corrective message to appear on the product packaging for five years. Accordingly,

IT IS ORDERED that the Final Order in this matter dated May 13, 1999 be, and it hereby is, modified to revise Part IV to read as follows:

IT IS FURTHER ORDERED that respondents Novartis Corporation and Novartis Consumer Health, Inc., corporations, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or any device, do forthwith cease and desist from disseminating or causing the dissemination of any advertisement for Doan's in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, unless the advertising includes the following corrective notice, clearly and prominently, in the exact language that follows:

"Although Doan's is an effective pain reliever, there is no evidence that Doan's is more effective than other pain relievers for back pain."

Provided, that respondents' obligation to include the corrective notice shall not be required for any television or radio advertisement of 15 seconds or less in duration;

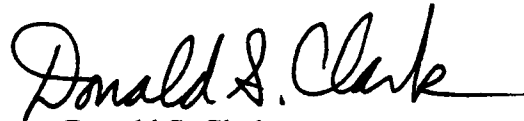
Provided further, that respondents' obligation to include the corrective notice in all advertising shall continue until respondents have expended on Doan's advertising a sum equal to the average spent annually during the eight years of the challenged campaign, except the obligation shall continue for at least one year and for no longer than five years after this Order becomes effective.

IT IS FURTHER ORDERED that Part IV of the Final Order shall not be effective until the sixtieth day after service of this Order Modifying Order.

IT IS FURTHER ORDERED that respondents' petition for reconsideration is DENIED.

IT IS FURTHER ORDERED that Novartis' petition for a stay pending appeal is DENIED AS MOOT.*

By the Commission, Commissioner Swindle dissenting.



Donald S. Clark
Secretary

ISSUED: July 2, 1999

* Novartis' stay motion was directed solely to Part IV of the original Final Order, which the Commission has now replaced with the revised Part IV. Novartis may, if it chooses, timely file a motion to stay the effect of this revised Part IV of the Final Order pending appeal.