

STATEMENT OF COMMISSIONER ORSON SWINDLE CONCURRING IN PART AND
DISSENTING IN PART
in *Novartis Corporation et al.*, Docket No. 9279

Today, the Commission has decided to order corrective advertising based on a full adjudicative record for the first time in nearly 25 years. I agree with my colleagues that respondents Novartis and Novartis Consumer Health, Inc. (collectively "Novartis" or "respondents") made the unsubstantiated claim that their Doan's analgesic product is superior to other over-the-counter ("OTC") analgesics in treating back pain ("the superior efficacy claim"). I also agree that the traditional cease-and-desist provisions contained in Parts I and II of the Order, which would prohibit Novartis from making the same or similar deceptive claims in the future, are necessary and appropriate. Unlike my colleagues, however, I conclude that the evidence does not support the imposition of the corrective advertising remedy contained in Part IV of the Order.

Corrective advertising is intended to prevent the harm to consumers and competition that is caused when a false belief engendered by prior deceptive advertising lingers. Novartis made an implied superior efficacy claim for Doan's through short television advertisements that have not been disseminated since May 1996. The majority concludes that these advertisements caused a false superior efficacy belief that has lingered and is likely to continue to linger until the corrective advertising provision terminates in July 2000 or beyond. I disagree with this conclusion, because the evidence offered to prove lingering effect is extremely weak, consisting mainly of inconclusive extrinsic evidence, indefinite expert testimony and broad inferences. This evidence is certainly far weaker than the evidence that proved the existence of a lingering effect in *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 762 (D.C. Cir. 1977), *modifying and enforcing* 86 F.T.C. 1398 (1975). I conclude that this weak evidence does not prove by a preponderance of the evidence that the false superior efficacy belief is likely to linger until July 2000 or beyond. Therefore, the Commission cannot order corrective advertising in this case.

I also conclude that the corrective advertising requirement, which is a form of compelled speech, infringes on Novartis's right to engage in commercial speech under the First Amendment to the United States Constitution. The Commission may compel Novartis to engage in corrective advertising only if the remedy "directly advances a substantial governmental interest" and is "no more extensive than necessary to serve that interest." *Central Hudson Gas & Electric Corp. v. Public Serv. Comm. of N.Y.*, 447 U.S. 557, 566 (1980). Because it has not been proven that the false superior efficacy belief in this case is likely to linger, there is no false belief that needs to be corrected to prevent deception; therefore, corrective advertising cannot directly advance any substantial governmental interest. In addition, because the majority opinion has not given adequate consideration to alternatives to corrective advertising or to less restrictive alternatives to the all-media corrective advertising remedy imposed (such as a corrective statement on the product label or point-of-sale materials), the Commission has not shown that the prescribed corrective advertising requirement here is no more extensive than necessary to prevent deception.

Corrective advertising is an extraordinary remedy that can serve the salutary purpose of preventing harm to consumers and competition. I have supported the imposition of corrective advertising provisions in those rare instances where the legal standard for its imposition has been

satisfied and the remedy was otherwise warranted. I will continue to support the use of corrective advertising remedies in appropriate cases. But I am not willing to support a corrective advertising remedy in this case because the adjudicated record does not prove that any false superior efficacy belief is likely to linger and because the imposition of the remedy would be unconstitutional.

I. Deception and Traditional Relief

Before I turn to the question of corrective advertising, let me make clear that I concur in the majority's conclusions that Novartis's superior efficacy claim was deceptive and that the traditional cease-and-desist relief imposed by the order is necessary and appropriate. Administrative Law Judge Lewis F. Parker ("the ALJ") concluded that Novartis had violated Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45, 52, by making the unsubstantiated claim that Doan's was superior to other OTC analgesics in treating back pain. Initial Decision ("ID") at 63-64. In its appeal from the ALJ's conclusion that the superior efficacy claim was deceptive, Novartis argued only that the claim was not material to consumers. I agree with the majority's conclusion that the superior efficacy claim was material, Majority Op. at 11-20, although not with all of the reasoning that supports this conclusion.⁽¹⁾ Accordingly, I agree that Novartis engaged in deception in violation of Sections 5 and 12 of the FTC Act.

The Commission has wide discretion in choosing a remedy to prevent Novartis from engaging in the same or similar deception in the future. The Commission may include provisions in its cease-and-desist orders that go beyond prohibiting the repetition of the deception that has been found, so long as such "fencing-in" relief bears a "reasonable relation" to the unlawful practices found. *FTC v. National Lead Co.*, 352 U.S. 419, 429 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611-13 (1946). In determining the appropriate extent of fencing-in relief to remedy a law violation, the Commission considers the seriousness and deliberateness of the violations; the ease with which the unlawful conduct could be transferred to other products; and the respondent's history of violations. *See, e.g., Kraft, Inc.*, 114 F.T.C. 40, 139-40 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992); *Thompson Medical Co.*, 104 F.T.C. 648, 833 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).

The Order here includes both core relief prohibiting Novartis from repeating its deceptive superior efficacy claim for Doan's and traditional fencing-in relief preventing similar violations. Part I prohibits Novartis from making any unsubstantiated claim that Doan's or any other OTC analgesic is more efficacious than other OTC analgesics for relieving back pain or any other particular type of pain. Part II also bars Novartis from making any unsubstantiated claim regarding the efficacy, safety, benefits, or performance of Doan's or any other OTC analgesic. Given the seriousness of deceptive health claims and the ease with which Novartis could make similar unsubstantiated claims for Doan's or other OTC analgesics, both the core relief and the fencing-in relief included in Parts I and II of the Order are necessary and appropriate.

II. Corrective Advertising

The majority also would require Novartis to undertake corrective advertising. Part IV of the Order mandates that Novartis make a specified corrective statement in all of its "advertising"⁽²⁾

(except television or radio advertisements of 15 seconds or less in duration) for "one year and until the respondents have expended on Doan's advertising a sum equal to the average amount spent annually during the eight years of the challenged campaign." The prescribed corrective statement is: "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."

A. Legal Standard

Corrective advertising is a type of fencing-in relief for which the court in *Warner-Lambert* adopted a higher standard than the "reasonably related" standard applicable to traditional forms of fencing-in relief. *Warner-Lambert*, 562 F. 2d at 762. ⁽³⁾ In *Warner-Lambert*, the respondent spent "vast sums" on a 51-year advertising campaign making the false claim that Listerine mouthwash was effective in treating colds and sore throats. 86 F.T.C. at 1468, 1502. In affirming the Commission's imposition of an approximately one-year corrective advertising requirement, the court held the Commission could impose a corrective advertising requirement if it concluded that "Listerine's advertisements play[ed] a substantial role in creating or reinforcing in the public's mind a false belief about the product" and "this belief [would] linger on after the false advertising ceases." 562 F. 2d at 762. The court relied on consumer surveys over many years and expert testimony in concluding that there was substantial evidence in the record as a whole to support these two factual prerequisites. *Id.* at 762 n.65. The *Warner-Lambert* court also concluded that the approximately one-year time period for the corrective advertising requirement was not "an unreasonably long time in which to correct a hundred years of cold claims." *Id.* at 764.

Since it decided *Warner-Lambert*, the Commission has considered the imposition of corrective advertising in three adjudicated cases, all of them involving claims made for OTC analgesics. *Sterling Drug, Inc.*, 102 F.T.C. 395 (1983), *aff'd*, 741 F.2d 1146 (9th Cir. 1984); *Bristol-Myers Co.*, 102 F.T.C. 21 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984); *American Home Products Corp.*, 98 F.T.C. 136 (1981), *aff'd as modified*, 695 F.2d 681 (3d Cir. 1982). In none of these cases, however, did complaint counsel prove the factual prerequisites for ordering corrective advertising - - that the deceptive advertisements substantially created or reinforced a false belief and that the belief was likely to linger - - and thus the Commission declined in each case to order corrective advertising. Because *Warner-Lambert* is the only adjudicated case in more than two decades in which the Commission has ordered corrective advertising, it provides the benchmark⁽⁴⁾ for determining whether the evidence proves⁽⁵⁾ the factual prerequisites for corrective advertising. I do not think that the evidence here proves these prerequisites.

B. Lingering Effect

In my view, corrective advertising cannot be ordered in this case because the evidence does not prove that any false superior efficacy belief substantially caused by the deceptive advertising campaign is likely to linger.⁽⁶⁾ The majority concludes that the false superior efficacy belief will linger, but fails to address or even identify how long the belief must be likely to linger to support the corrective advertising remedy in this case. A false superior efficacy belief will not support corrective advertising unless it is likely to linger throughout the period during which the corrective advertising provision will be in effect. Without a lingering false belief, there is no

more reason to impose a corrective advertising remedy than there is for a doctor to prescribe a remedy for a patient who has already recovered. Specifically, the false superior efficacy belief must exist at the time that the Commission's order becomes final -- that is, the date on which the corrective advertising provision must commence -- and must continue, albeit presumably at a decreasing level due to the effects of the provision, at least until the corrective advertising requirement expires.⁽⁷⁾ Hence, for the Commission to order corrective advertising in this case, the false superior efficacy belief would have to exist when the Order becomes final (in July 1999⁽⁸⁾) and would have to continue to exist until the corrective advertising requirement terminates (in July 2000 or beyond).⁽⁹⁾

The ALJ did not order corrective advertising because he was not persuaded that the evidence in the record proved that the false superior efficacy belief would linger. ID at 63-64. According to the ALJ, the evidence revealed that it is uncertain⁽¹⁰⁾ that the false belief is likely to linger, given that the advertisements in *Warner-Lambert* ran for 51 years while the advertisements here ran for only 8 years. *Id.* at 64. The ALJ also found unpersuasive the testimony of Dr. Michael Mazis, complaint counsel's marketing expert, that the false superior efficacy belief would linger. *Id.* at 63. Finally, the ALJ not only rejected complaint counsel's argument that a lingering effect can be inferred from other facts, but also found "indications in the record that the belief in Doan's superiority may be transitory," *id.*, including evidence that the deceptive advertisements were not memorable and did not cause any increase in product sales. *Id.* at 64-65. A careful review of the evidence persuades me that the ALJ correctly concluded that the requisite lingering effect has not been proven.

1. Direct Evidence of Lingering Effect

The majority first relies on extrinsic evidence for its conclusion that the false superior efficacy belief will linger. In December 1996, National Family Opinion, Inc. ("NFO") conducted a mail panel research study of consumer beliefs (the "1996 NFO Study"). CX-421. The 1996 NFO Study tested the efficacy beliefs of users and aware non-users of six OTC analgesics -- Advil, Aleve, Bayer, Doan's, Motrin, and Tylenol. For each of these OTC analgesics, users and aware non-users were asked whether they strongly agreed, agreed, somewhat agreed, neither agreed nor disagreed, somewhat disagreed, disagreed, or strongly disagreed with the statement that the OTC analgesic was "more effective than other over-the-counter pain relievers for back pain." CX 421-V. For each of these six OTC analgesics, a significant proportion of the users and aware non-users had a false superior efficacy belief,⁽¹¹⁾ even though none of the OTC analgesics other than Doan's had been advertised specifically as a back pain medication. Even though many users and aware non-users held the false superior efficacy belief for all of the OTC analgesics, Dr. Mazis testified that, following statistical adjustments, on average 20 to 25% more users and aware non-users of Doan's had a false superior efficacy belief than did the users and aware non-users of the other OTC analgesics tested. Mazis Tr. at 1385. Given a statistical confidence level of approximately 5%, Dr. Mazis testified that when a 20% reduction (i.e., only a reduction of one in five of the relevant consumers) occurred, there would no longer be a lingering false superior efficacy belief to be corrected. *Id.* at 1385, 1386-87.

While the 1996 NFO Study shows that 20% more Doan's users and aware non-users have the false superior efficacy belief than the users and aware non-users of other OTC analgesics, it does

not prove that this level of beliefs about Doan's is the lingering effect of the deceptive advertising. Study participants were simply never asked whether they had ever seen any Doan's advertising, much less the particular deceptive advertisements at issue here. Mazis Tr. at 1642, 1644, 1786. It is not impossible that study participants saw the deceptive advertising before it was discontinued in May 1996 and formed the false superior efficacy belief as a result of exposure to this advertising, and that this belief lingered until December 1996. However, a variety of influences -- other than any particular advertising campaign -- create, reinforce, and change consumer beliefs about a product. Given that other, entirely plausible influences could well be responsible for the belief reported in the 1996 NFO Study (such as historic positioning and the introduction of new extra strength Doan's products), I am not willing to infer that the belief is the enduring effect of the discontinued deceptive advertising. Jacoby Tr. at 3005-06; Scheffman Tr. at 2618.

Even if the 1996 NFO Study had established that the false superior efficacy belief had lingered, it would prove only that the belief had lingered until December 1996 - not that it was likely to linger until July 2000 or beyond. Persuasive expert testimony is one possible method⁽¹²⁾ of proving that the false superior efficacy belief would continue to linger from December 1996 until July 2000 or beyond. Dr. Mazis, complaint counsel's expert, did testify that the heightened false superior efficacy belief is likely to linger, but his testimony on lingering effect is not persuasive. In support of his conclusion, Dr. Mazis briefly mentioned the length and effectiveness of the advertisements, the emphasis in the advertisements on the superior efficacy claim, and the results of copy tests. But he provided no analysis of the reasons that each of these factors demonstrates that a lingering effect is likely under the particular facts of this case. Mazis Tr. at 1255-56. In the absence of a thorough analysis as to why these considerations mean that the false superior efficacy belief is likely to linger, the unsupported conclusion of Dr. Mazis that the false belief will linger is no more persuasive than the conclusions of Novartis' experts that it will not. See Whitcup Tr. at 2336; Scheffman Tr. at 2536; Jacoby Tr. at 3201.⁽¹³⁾

Moreover, even assuming that Dr. Mazis had testified persuasively that the false superior efficacy belief generally is likely to linger, his testimony is flawed because it is extraordinarily indefinite as to how long the belief is likely to linger. Dr. Mazis variously phrased the length of the likely lingering effect as that it would "last for quite some time," it would "go on for years," it would "not go away quickly," it would linger for a "very, very long time," it would linger a "considerable length of time," and it would be "hard to know" how long it would linger, but "beliefs tend to dissipate slowly." Mazis Tr. at 1254, 1256, 1263, 1798, 1975. Dr. Mazis's testimony thus does not address with any specificity how long the false superior efficacy belief is likely to linger.⁽¹⁴⁾

Dr. Mazis's expert testimony is far weaker than the expert testimony that has been offered in other Commission corrective advertising cases on the issue of how long the false belief will linger. For example, in *Warner-Lambert*, one marketing expert testified that the levels of false cold and sore throat efficacy beliefs for Listerine "would continue at the 1971 rate (59 percent) for about two years after colds advertising ceased and would remain high even *after* five years," while another marketing expert opined that "in the absence of colds advertising consumer beliefs would decline at *no greater* a rate than 5 percent a year." 86 F.T.C. at 1503-04 (emphasis in original). Similarly, in *American Home Products*, experts testified that after deceptive

advertising making a false superior efficacy claim about Anacin ceased, the false belief created would linger among non-users for "approximately one year" and among users for more than one year. 98 F.T.C. at 283-84.

Some quantitative assessment is needed in this case if expert testimony is going to support the imposition of corrective advertising. After all, because the deceptive advertising here ceased three years ago, corrective advertising cannot be ordered as a matter of law if the false superior efficacy belief is likely to linger for three years or less, while it could be ordered if the belief is likely to linger for approximately four years or more. Expert testimony that the false superior efficacy belief is likely to linger for some indeterminate period of time is of little probative value when the Commission must decide whether the belief is likely to linger for a particular period of time. Given Dr. Mazis's lack of analysis in support of his opinion that the false belief is likely to linger and his inability to identify with any specificity how long the false belief will linger, I conclude, like the ALJ, that his testimony is not persuasive.

2. Inference of Lingering Effect

Absent a basis in the direct evidence, the majority turns to inference as an additional ground for its conclusion that the heightened level of false superior efficacy beliefs among Doan's users and aware non-users will linger. Majority Op. at 30-31. The majority infers a lingering effect from the fact that the deceptive superior efficacy claim was very salient to consumers. *Id.* at 30. The majority also draws such an inference from the fact that the deceptive superior efficacy claim was clearly and consistently conveyed to consumers, as revealed by copy tests. *Id.* at 30-31. Finally, the majority infers lingering effect from the fact that the deceptive advertising campaign was an integral part of an eight-year advertising campaign that cost \$65 million. *Id.* at 30.

The Commission has said that inferences drawn from other facts may be used to prove the requisite lingering effect in some circumstances. "[A]bsent probative evidence one way or the other, [the Commission may] infer that a deceptive advertisement will leave a lingering deceptive impression in consumers' minds." *American Home Products Corp.*, 98 F.T.C. at 408 n.93; see *Bristol-Myers*, 102 F.T.C. at 380 n.102 ("survey evidence is only one factor to be considered in determining whether corrective advertising is appropriate in a particular case"); *Statement in Regard to Corrective Advertising*, 6 Trade Reg. Rep. (CCH) ♦ 39,046 at 41,705 (1979) ("In some cases, the [Commission] might conclude that corrective advertising is necessary without formal surveys to show that consumers have lasting wrong impressions about the product."). While an inference from other facts may be employed in appropriate cases, such an inference generally will have less probative value than direct evidence because inference is by nature an indirect and imprecise method of proof.⁽¹⁵⁾ Indeed, it is important to emphasize that the only time that the Commission has ordered corrective advertising in an adjudicated case in more than two decades, it relied on direct evidence in the form of persuasive extrinsic evidence and expert testimony, not simply on inferences. *Warner-Lambert*, 86 F.T.C. at 1501-04.

While inference of lingering effect may be considered in this case, the particular inferences that the majority seeks to draw are not persuasive. The majority first infers a lingering effect from the purported powerful impact of the deceptive advertising on consumers, which, in turn, is based on the majority's conclusions that the superior efficacy claim was "very salient" and was made

"clearly and consistently." Consumers may have taken away the implied claim immediately after seeing the deceptive advertisements, but only a minimal proportion (between 1% and 8%) of test participants recalled the claim 24 hours or 72 hours after viewing the advertisements along with programming and other advertisements.⁽¹⁶⁾ Similarly, only a minimal proportion (0% top-of-the-mind and 2% total unaided) of consumers recalled any advertising for Doan's, including the deceptive advertisements. RX 2-O. Although consumers could conceivably form a belief about a product based on a deceptive advertisement without being able to recall the claim shortly thereafter or without being able to recall any advertising for the product, the far more plausible conclusion is that the extremely low recall of the deceptive claim and of Doan's advertising means that the deceptive advertisements had no real lasting impact because they were not memorable. Whitcup Tr. at 2123. Indeed, the conclusion that the deceptive advertisements did not have a powerful impact on consumer beliefs is corroborated by the fact that unit sales of Doan's declined during 1988 to 1993, the first five years in which the deceptive advertisements were being disseminated. RX-189-A; Scheffman Tr. at 2550-51; Stewart Tr. at 3487. I am not persuaded that an inference can be drawn that this ineffective advertising campaign caused a false belief that is likely to linger until July 2000 or beyond, more than four years after Novartis ceased disseminating the deceptive advertisements.

The majority, emphasizing that the campaign lasted eight years, cost \$65 million, and reached 80 to 90% of the target audience 20 to 27 times per year, also would infer a lingering effect from the purported extensiveness of the advertising campaign. Majority Op. at 30-31. But reaching 80 to 90% of one's target audience 20 to 27 times per year pales in comparison to the level of advertising by Novartis's competitors, who reach 98 to 99% of their target audience between 32.5 and 121.2 times per year. JX 2-H, ¶ 32; RX 36-M, Z-27. Moreover, Novartis was primarily using short television advertisements (15 seconds in duration), while its competitors generally were using much longer advertisements (30 seconds and 45 seconds in duration). IDF 318; Peabody Tr. at 465. Given that Novartis competes with other OTC analgesic advertisers for the limited attention of OTC analgesic customers, I am not persuaded that the relatively infrequent and short advertisements here captured the limited attention that consumers devote to considering information about OTC analgesics so as to have caused strong beliefs that are likely to linger for years.⁽¹⁷⁾

A comparison to prior Commission cases in which corrective advertising has been considered and rejected also persuades me that a lingering effect cannot be inferred from the fact that Novartis clearly and consistently made a very salient superior efficacy claim for Doan's during an eight-year, \$65 million advertising campaign. The deceptive advertising campaign here pales in comparison with other deceptive advertising campaigns (especially when advertising expenditures are measured in constant dollars) that have not resulted in the Commission imposing corrective advertising. See Appendix A.⁽¹⁸⁾ For example, in *American Home Products*, the respondent had made, expressly and by clear implication, a false superior efficacy claim for Anacin during a more than 12-year, \$204 million advertising campaign. 98 F.T.C. at 151. The Commission did not order a statement to correct any resulting false superior efficacy establishment belief because there was "little likelihood that a false or unsubstantiated image of proven superiority [would] survive" in light of the traditional relief contained in the Commission's cease-and-desist order. *Id.* at 411.

Similarly, in *Bristol-Myers*, the respondent had made, expressly and by clear implication, false superior efficacy claims for Bufferin and Excedrin that were important to consumers. These claims were made during a 13-year, \$171 million advertising campaign for Bufferin, and a 13-year, \$98 million advertising campaign for Excedrin. 102 F.T.C. at 21, 104-06, 254, 260. The Commission did not order a statement to correct any resulting false superior efficacy establishment claims for either Bufferin or Excedrin. The Commission concluded that such a remedy was not warranted because there was "no evidence that consumers will retain an image that this superiority has been established," *id.* at 380, and in the absence of such evidence the Commission was unwilling to infer the existence of such an enduring image from the superior efficacy belief held and the extent and nature of the deceptive advertising campaign. *Id.* at 380 n.102. Accordingly, *Bristol-Myers* and *American Home Products*⁽¹⁹⁾ provide no support for the inference that the majority draws in this case.

In contrast, it might be instructive to consider a recent case in which I drew an inference of lingering effect. *R.J. Reynolds Tobacco Co*, FTC File No. 992-3025 (Mar. 1, 1999). In August 1997, R.J. Reynolds ("Reynolds") commenced a massive⁽²⁰⁾ national advertising campaign running innovative print, billboard, and point-of-sale advertisements for Winston cigarettes that made an express "No Additives" representation. The advertising campaign was so successful that by the end of 1997, Reynolds had already increased its volume of Winston sales by 9%. *1997 RJR Nabisco Annual Report* 24 (1997). In March 1999, when the advertising campaign was ongoing, the Commission accepted for public comment a consent agreement with Reynolds accompanied by a complaint alleging that the "No Additives" representation made the implied claim that Winston cigarettes are safer to smoke because they contain no additives. The proposed order would require that Reynolds make a corrective statement in its advertising for one year. I was willing to infer that the false belief would linger in the minds of consumers for one year "[b]ased on the extent and magnitude of the ongoing ad campaign and the demonstrated strength of the implied health claim." Inferring a one-year lingering effect from the ongoing, massive, and innovative advertising campaign in *R.J. Reynolds* for purposes of accepting a consent agreement for public comment, however, is a far cry from the present case, in which a more than four-year lingering effect is being inferred from a long-discontinued, limited, and uncreative advertising campaign.⁽²¹⁾

In my view, complaint counsel have not met their burden of proving that the false superior efficacy belief concerning Doan's is likely to linger. The direct evidence in the record on the issue of lingering effect -- the 1996 NFO Study and Dr. Mazis's testimony -- is far weaker than the direct evidence of lingering effect that justified corrective advertising in *Warner-Lambert*, and it does not persuade me that the false superior efficacy belief is likely to linger. The inference as to lingering effect that the majority seeks to draw is not persuasive, and the Commission did not draw such an inference from even stronger facts in *American Home Products* and *Bristol-Myers*. Complaint counsel's failure to meet their burden of proof on the issue of lingering effect should not be surprising, given how rarely complaint counsel will be able to prove this effect. *See* R. Pitofsky, *Beyond Nader*, 90 Harv. L. Rev. at 697 (if the burden of proving lingering effect remains with complaint counsel -- so that complaint counsel is not simply entitled to a presumption on this issue -- then corrective advertising will be "imposed rarely"). Without stronger evidence of lingering effect, the Commission cannot order corrective advertising.

III. Constitutionality of Corrective Advertising Requirement

I also believe that the corrective advertising provision is a form of compelled speech that infringes Novartis's constitutional right to engage in commercial speech. The Supreme Court has recognized that advertising is a form of commercial speech entitled to protection under the First Amendment to the United States Constitution. The free flow of commercial information through advertising is "indispensable to the proper allocation of resources in a free enterprise system" because it informs the numerous private decisions that drive the system. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). Advertising is critical to consumers because a "particular consumer's interest in the free flow of commercial information ... may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763. Corrective advertising requirements disrupt the free flow of information from advertisers to consumers because they compel advertisers to make statements that they would not otherwise make, sometimes having adverse incidental consequences for those advertisers. *See Sterling Drug, Inc.*, 102 F.T.C. at 723 (Initial Decision); *see also* R. Pitofsky, *Beyond Nader*, 90 Harv. L. Rev. at 698 ("The purchase of advertising space or time for the corrective message is expensive, and the remedy is unusually embarrassing to the false advertiser."); Note, *Corrective Advertising - - The New Response to Consumer Deception*, 72 Colum. L. Rev. 415, 429, 431 (1972) (remedy is "severe" and "dramatic").

Notwithstanding the fact that corrective advertising remedies disrupt the free flow of information from advertisers to consumers and may otherwise harm advertisers, the burdens associated with such compelled speech pass constitutional muster if they meet the test first enunciated in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm. of N.Y.*, 447 U.S. 557 (1980). *Central Hudson* set out a framework for determining whether a regulation of commercial speech (or compelled speech in the commercial speech context⁽²²⁾) survives First Amendment scrutiny:

For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

I agree with my colleagues that the initial portions of the *Central Hudson* test have been satisfied, *see Warner-Lambert*, 562 F. 2d at 771 (corrective advertising is intended to serve the substantial governmental interest of protecting citizens against deception), but I disagree that the corrective advertising provision here "directly advances the governmental interest asserted" and is "not more extensive than is necessary to serve that interest."

A. Direct Advancement of Substantial Governmental Interest

Central Hudson requires that the restriction on commercial speech "directly advance [] the governmental interest asserted." 447 U.S. at 566.⁽²³⁾ This "is not satisfied by mere speculation or conjecture; rather [the government] must demonstrate that the harms it recites are real and that its

restrictions will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71; *see also 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1509 (1996) ("some impact" in redressing harm is not enough; ban on alcohol price advertising must "*significantly* reduce alcohol consumption") (emphasis in original). A restriction thus will not be sustained if "it provides only ineffective or remote support for the government's purpose." *Edenfield*, 507 U.S. at 770, *quoting Central Hudson*, 447 U.S. at 564; *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

Corrective advertising is intended to prevent deception by curing the lingering false beliefs of consumers that were caused by deceptive advertising. The record before us does not demonstrate that the false superior efficacy belief here is likely to linger through the time that the corrective advertising provision will be in effect. As explained above, the only evidence that a heightened level of false superior efficacy beliefs is likely to linger until July 2000 or beyond is the inconclusive 1996 NFO Study, the unsupported and indefinite testimony of Dr. Mazis, and the unwarranted broad inferences that the majority draws. This weak evidence of lingering effect does not satisfy the Commission's burden of showing direct advancement of a substantial governmental interest, because a corrective advertising provision cannot prevent deception arising from false superior efficacy beliefs in the absence of proof that such lingering beliefs are likely to exist. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995) ("anecdotal evidence" and "educated guesses" are not sufficient); *Edenfield*, 507 U.S. at 771 (conclusory testimony is not sufficient).⁽²⁴⁾

B. No More Extensive than Necessary

The corrective advertising requirement also violates the last prong of *Central Hudson*, 477 U.S. at 566, which requires that the governmental restriction be no more extensive than necessary to serve the asserted governmental interest. *See also Warner-Lambert*, 562 F.2d at 758 (Commission has a "special responsibility to . . . order corrective advertising only if the restriction inherent in its order is no greater than necessary to serve the interest involved"). This means that there must be a "reasonable fit" between the restriction imposed and the government interest sought to be advanced. *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). "[I]f there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *City of Cincinnati*, 507 U.S. at 417 n.13; *see also Rubin*, 514 U.S. at 490-91 (no reasonable fit between restriction and governmental interest existed because less restrictive options were available). In analyzing the fit between the restriction and the governmental interest, the government must carefully calculate the costs and benefits associated with the restriction. *City of Cincinnati*, 507 U.S. at 417-18; *Fox*, 492 U.S. at 480.

The majority addresses in one short paragraph whether the corrective advertising provision here is a reasonable fit with the asserted governmental interest in preventing deception. The paragraph states that the Commission has balanced the need for correcting lingering false beliefs against Novartis's ability to broadcast effectively, the upshot of which is to exempt short television and radio advertisements from the corrective advertising requirement. Majority Op. at 37. Thus, except for not applying the corrective advertising requirement to short television and radio advertisements, the majority does not consider any less restrictive alternatives. This minimal

analysis is not the careful calculation of the costs and benefits associated with alternatives that *Central Hudson* requires.

First, the majority does not analyze whether there are any narrower alternatives to imposing corrective advertising, including considering whether traditional cease-and-desist order provisions (such as those contained in Parts I and II of the Order, or triggered disclosure requirements) could be adequate to address future deception.⁽²⁵⁾ Second, assuming that some corrective advertising provision is warranted, the majority does not address in any detail whether there are narrower alternatives to this particular corrective advertising provision. The corrective advertising requirement in this case apparently is intended to closely track the requirement imposed in *Warner-Lambert*. The respondent in *Warner-Lambert* was required to make a corrective statement in all advertising until it had "expended on Listerine advertising a sum equal to the average annual Listerine advertising budget for the period of April 1962 to March 1972." 86 F.T.C. at 1515.⁽²⁶⁾ Here, Novartis is required to make a corrective statement in all of its "advertising" (except short television and radio advertisements) for "one year and until the respondents have expended on Doan's advertising a sum equal to the average amount spent annually during the eight years of the challenged campaign." The Order defines an "advertisement" broadly to include any intended inducement to sale that appears in a brochure, newspaper, magazine, free standing insert, marketing kit, leaflet, circular, mailer, book insert, letter, catalog, poster, chart, billboard, public transit card, point-of-purchase display, package insert, package label, product instructions, electronic mail, website, homepage, film, slide, radio, television, cable television, program-length commercial or infomercial, or in any other medium.

Part IV thus imposes a corrective advertising requirement that is nearly identical to the one-year, all-media requirement that the Commission imposed in *Warner-Lambert*.

While applying the corrective requirement to all media may have been a reasonable fit with the objective of correcting false beliefs in *Warner-Lambert*, it is not a reasonable fit in this case. In *Warner-Lambert*, the Commission was trying to correct false beliefs among the *general public* concerning Listerine mouthwash, and so an all-media corrective advertising provision was consistent with that objective. *See Warner-Lambert*, 86 F.T.C. at 1501, 1503 (false beliefs exist among "Listerine users as well as nonusers"; "long after Listerine cold efficacy advertising ceased, a substantial portion of the *public* would continue to believe") (emphasis added). In contrast, the Commission here is trying to correct false superior efficacy beliefs among *Doan's users and aware non-users*. *Mazis Tr.* at 1385, 1805 (back pain sufferers who are neither Doan's users nor aware non-users have no need to receive the corrective statement). Therefore, the media chosen for the dissemination of the corrective message here must be targeted to Doan's users and aware non-users if the Commission's remedy is to achieve the reasonable fit that is constitutionally required. *See 44 Liquormart, Inc.*, 517 U.S. 484, 529 (1996) (O'Connor, J., concurring in judgment) ("The scope of the restriction on speech must be *reasonably*, though it need not be perfectly, *targeted* to address the harm intended to be regulated.") (emphasis added). Significantly, the difference between the general public as a target audience and Doan's users and aware non-users as a target audience is quite substantial, given that 31% of back pain sufferers (itself a subset of the general public) are neither Doan's users nor aware non-users. *Mazis Tr.* at 1793.

The corrective advertising requirement here is in no way limited to media that are likely to target Doan's users and aware non-users. One narrower alternative that would more accurately target Doan's users and aware non-users is to require the corrective statement only on product labeling and in packaging. Product labeling and packaging are sources of critical safety and efficacy information for users and potential users of Doan's, such as indications for use, directions, warnings, drug interactions, active ingredients, and inactive ingredients. *See Mazis Tr.* at 1607-08 (product package can affect beliefs; consumers look at the product package immediately at the point of purchase). Another narrower alternative is brochures with corrective information that would be made available to Doan's users and aware non-users through prominent displays on the drug store shelves and other locations at which Doan's and other OTC analgesics are sold. Indeed, the Commission has used similar media to target a particular group of consumers who have false beliefs to be corrected.⁽²⁷⁾ Although dissemination of a corrective statement through product packaging and point-of-sale displays, either separately or combined, is a less restrictive alternative that may well be adequate to correct the false belief among Doan's users and aware non-users, the majority does not consider the imposition of such alternatives - - much less conduct a careful calculation of their costs and benefits. Therefore, the corrective advertising requirement imposed here has not been demonstrated to be no more extensive than necessary, as *Central Hudson* requires.

IV. Conclusion

Because the evidence in the record does not prove that the false superior efficacy belief will linger for the requisite period of time for imposing corrective advertising under the standard set forth in *Warner-Lambert*, and also because the corrective advertising provision is an unconstitutional infringement on Novartis's right to engage in commercial speech under the First Amendment, I dissent from Part IV of the Order.

1. The evidence does not prove that Novartis intended to make the claim or that it was able to charge a premium because of the challenged advertisements, Majority Op. at 13-15, and therefore I do not join in the majority's conclusion as to materiality to the extent that it relies on these findings. I agree with the majority that the effectiveness of the deceptive advertising campaign is not relevant to the issue of materiality, *id.* at 16-17, but I do not join in the majority's additional determination that the campaign was effective.

2. "Advertising" is defined in the Order to include claims made in a brochure, newspaper, magazine, free standing insert, marketing kit, leaflet, circular, mailer, book insert, letter, catalog, poster, chart, billboard, public transit card, point-of-purchase display, package insert, package label, product instructions, electronic mail, website, homepage, film, slide, radio, television, cable television, program-length commercial or infomercial, or in any other medium."

3. *See California SunCare, Inc.*, 123 F.T.C. 332, 391 (1997) (Statement of Commissioner Roscoe B. Starek, III, concurring in part and dissenting in part) (*Warner-Lambert* imposes a "more demanding standard for corrective advertising" than traditional fencing-in relief, such as affirmative disclosure requirements.).

4. The majority states that the Commission "has frequently noted that the amount of evidence in *Warner-Lambert* was unusually strong and far exceeded the threshold needed to impose corrective advertising." Majority Op. at 30. As discussed below in the text, the Commission has simply recognized that inference, not direct evidence, may be used in appropriate cases. The availability of inference does not relieve complaint counsel of the burden of proving lingering effect by a preponderance of the evidence. Moreover, *Warner-Lambert* did set the standard for corrective advertising, and the evidence in that case is the only benchmark that we have for assessing the sufficiency of evidence supporting corrective advertising. *See E. Levi, An Introduction to Legal Reasoning 2* (1949) (the extension of a rule of law to new facts "depends upon a determination of what facts will be considered similar to those present when the rule was first announced").

5. Complaint counsel has the burden of proving facts in Commission adjudications by a preponderance of the evidence. *Carter Products, Inc. v. FTC*, 268 F.2d 461, 487 (9th Cir. 1959); ABA Antitrust Section, *Antitrust Law Developments* 617 (4th ed. 1997) ("The burden of proof in a Commission proceeding is on complaint counsel to establish its case by a preponderance of the evidence.") (footnotes omitted); *see* 5 U.S.C. § 556(d) ("[e]xcept as otherwise provided by statute, the proponent of a[n] * * * order has the burden of proof.").

6. I am assuming for the sake of argument that the majority is correct that the false superior efficacy belief was caused substantially by the deceptive advertising at issue, rather than by some other entirely plausible factor such as the introduction of new, extra strength Doan's products or the nine decades of positioning Doan's product as an effective remedy for back pain. *Compare Sterling Drug Co.*, 102 F.T.C. at 798-99 (concluding that it was not clear that deceptive advertising campaign was a substantial cause of false efficacy belief because "the longer a brand has been in existence, the less its image stems from one particular advertising campaign," since "[f]or a brand like Bayer, which has been on the market for years, familiarity is the primary influence on brand image").

7. See R. Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661, 697 (1977) (hereinafter "Pitofsky, *Beyond Nader*") (false belief must continue to "influence purchasing decisions up to the date of the entry of a final Commission order, and [be] likely to continue to be influential for a substantial segment of potential purchasers even if the false claims [are] no longer disseminated by the seller").

8. Commission cease and desist orders, including their corrective advertising provisions, become final 60 days after service unless the Commission or a court has granted a stay. Section 5(g) of the FTC Act, 15 U.S.C. § 45(g).

9. The corrective advertising provision could last substantially longer than one year because it is required to continue for "one year **and** at least until the respondent has expended on Doan's advertising a sum equal to the average amount spent annually during the eight years of the challenged campaign" (emphasis added). For instance, although the corrective advertising provision in *Warner-Lambert* was similarly prescribed to last until the respondent had spent the same amount on advertising as its average recent annual advertising expenditure, the provision was in effect for at least 18 months. Mazis Tr. at 1798.

10. The majority takes the ALJ to task for purportedly requiring that the lingering effect must be proven with certainty. Majority Op. at 21. The ALJ stated that "there is no certainty that the belief at issue requires corrective advertising." ID at 64. While the ALJ's language could have been more precise, the more reasonable understanding of his statement is that the evidence presented as to lingering effect was too uncertain, not that complaint counsel have not accomplished the obviously impossible task of proving lingering effect with certainty.

11. Among users, 62.3% of Advil users, 51.4% of Aleve users, 41.3% of Bayer users, 78.9% of Doan's users, 61.4% of Motrin users, and 43.8% of Tylenol users stated that their own brand was superior for back pain relief. CX-421-V. Among aware non-users, 31.2% of Advil aware non-users, 19.9% of Aleve aware non-users, 27.1% of Bayer aware non-users, 44.6% of Doan's aware non-users, 35% of Motrin aware non-users, and 22.4% of Tylenol aware non-users stated that the brand that they were aware of (but did not use) was superior for back pain relief. *Id.*

12. Another possible method of proving lingering effect would be through a series of comparable consumer surveys conducted over the course of years demonstrating that the belief is durable. In *Warner-Lambert*, for example, the Commission concluded that a false cold and sore throat efficacy belief concerning Listerine would persist based on numerous, identical quarterly market research reports over an eight-year period demonstrating that consumers had consistent levels of the belief and that the belief did not diminish substantially during periodic cessations of the advertising during the summer months. 86 F.T.C. at 1472-76, 1503-04. Other than the 1996 NFO Study, the only other extrinsic evidence that purports to show the false superior efficacy belief is the 1993 Brand Equity Study. Like the ALJ, I do not believe that the 1993 Brand Equity Study is probative because the question posed was unclear as to whether participants were being asked if Doan's was very effective in an absolute sense or if Doan's was more effective than other OTC analgesics. FF 246. Consequently, unlike *Warner-Lambert*, there is no series of comparable tests over the course of years in this case that proves the existence of a stable and enduring false superior efficacy belief.

13. Dr. Mazis also relied on consumer research studies purportedly showing lingering false beliefs about Listerine mouthwash and Hawaiian Punch fruit drink in the 1970s. He provided no analysis of the reasons why the results of these studies are applicable to the specific facts of this case -- false superior efficacy beliefs about an OTC analgesic in the 1990s. Mazis Tr. at 1256-63. Consumers of OTC analgesics may well be subject to significantly different influences than consumers of mouthwash or fruit punch; for example, advertising for OTC analgesics is much more competitive than advertising for mouthwash or fruit punch. Scheffman Tr. at 2603-04, 2626, 2647. Consumers of products in the 1990s also may well be subject to significantly different influences than in the 1970s because of new media, such as cable television, electronic mail, and websites. Without a cogent analysis of why the results of these consumer research studies are applicable to current consumer beliefs about Doan's, I am not persuaded by Dr. Mazis's testimony that these studies prove lingering effect.

14. As an example of how indefinite are Dr. Mazis's testimony and the other evidence on the issue of the duration of the false superior efficacy belief, one need look no further than the disagreement between the majority and complaint counsel over the suitable length of the corrective advertising remedy: the majority has concluded that the evidence warrants a one-year period for corrective advertising, while complaint counsel have argued that (if a fixed period is imposed) the evidence warrants an eight-year period for corrective advertising. CCRB at 40 n. 55.

15. It is extremely difficult to infer any particular duration of a lingering effect from other facts. For example, in this case, what are the differences in length of lingering effect among a material claim, a salient claim, and a very salient claim? What are the differences in length of lingering effect for an implied claim, a nearly express claim, a clear and consistent claim, and an express claim? What are the differences in length of lingering effect among a ten-year, \$45 million advertising campaign; an eight-year, \$65 million advertising campaign; and a five-year, \$75 million advertising campaign? The indeterminate duration of any inferred lingering effect indicates that the case in which inference will support corrective advertising is likely to be the exception, not the rule.

16. FF 141, 148, 153, 157, 164. While these studies may understate the level of advertising claim communication because they are designed primarily to test the memorability of advertisements, not claims in advertisements, see *Kraft, Inc.*, 114 F.T.C. at 126 n.13, they nevertheless raise serious doubt as to whether the deceptive advertisements had the claimed powerful impact on consumer beliefs.

17. In determining whether the deceptive advertisements were so extensive that an inference of lingering false belief can be drawn, the majority rejects any consideration of the extent of advertising by other competitors in the marketplace. Majority Op. at 31. However, in assessing the effects of a deceptive advertising campaign, the Commission should not treat deceptive advertising, especially comparative deceptive advertising,

as if it takes place in a vacuum. For instance, assume that Company A spent \$20 million over five years on advertisements making the deceptive claim that Product A is better than Product B, while Company B spent \$500 million over the same five years on advertisements making the claim that Product B is better than Product A.

In determining if it can be inferred that Company A's campaign is likely to create the lingering false belief that Product A is superior, the Commission should consider the nature and extent of the advertising campaigns of both Company A and Company B.

18. The majority states that I am emphasizing "the duration of the advertising campaign and the dollars spent in these cases." Majority Op. at 32 n.44. I have addressed the length of deceptive advertising campaigns and the amounts spent during these campaigns simply because they are some of the facts from which the majority is drawing an inference of lingering effect.

19. In *Sterling Drug*, the Commission did not order corrective advertising because "it ha[d] not been shown that [the deceptive] advertising created or reinforced the public's image of Bayer," 102 F.T.C. at 799, and, therefore, the Commission did not reach the issue of lingering effect.

20. *1997 Annual Report: R.J. Reynolds Tobacco Co. (1997)* ("Winston's comprehensive marketing program includes eye-catching billboards and print ads that speak straight to adults with a twist of humor. Point-of-sale displays cut through the marketplace clutter, and new packaging - with distinctive wraparound graphics - reflects the "No Bull" attitude."); American Lung Association, *American Lung Association News*, "Winston Campaign Attacked by Health Groups" (Aug. 25, 1997) (R.J. Reynolds launched a "massive national advertising campaign to reposition Winston. Ads * * * appeared in such widely circulated publications as People, Glamour, and Inside Sports magazines. Billboards, bus shelters, and other outdoor advertising proclaim Winston as the new cigarette with nothing but tobacco.").

21. Resort to inference is more likely in the context of consent agreements than in adjudicated cases. Extrinsic evidence and expert testimony often are not available to the Commission when it considers a consent agreement, which makes the use of inference more probable. See *Eggland's Best*, 118 F.T.C. 340, 365 n.3 (1994) (Statement of Commissioner Roscoe B. Starek, III, concurring) ("It is certainly unrealistic to think that we will have [extrinsic evidence of lingering effect] when the respondents enter into a consent agreement before a complaint is filed."). Moreover, because the Commission applies a "reason to believe" standard to consent agreements and a "preponderance of the evidence" standard to adjudicated cases, inference is more likely to suffice in connection with consent agreements than adjudicated cases.

22. The corrective advertising remedy mandates that Novartis make a statement that it finds objectionable in part because its competitors in the highly competitive OTC analgesic market do not have to make such statements. Therefore, the corrective advertising remedy here is a form of compelled speech that is to be analyzed under the *Central Hudson* test. See *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130, 2139 (1997) (*Central Hudson* test applies to compelled commercial speech that requires advertisers to "repeat an objectional [sic] message out of their own mouths").

23. The government has the burden of proving that a corrective advertising requirement meets the *Central Hudson* standard because "[i]t is well-established that '[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.'" *Edenfield v. Fane*, 507 U.S. 761, 770 (1993), quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n. 20 (1983); see also *Ibanez v. Fla. Dept. of Bus. & Pro. Regulation*, 512 U.S. 136, 142 n.7 (1994).

24. Similarly, it is unclear that the corrective advertising provision will in fact correct any remaining false superior efficacy beliefs (and thereby prevent deception) to any material degree in the approximately one year that it will be in effect. While testifying that the remedy will correct beliefs much more quickly than if it were not imposed, Dr. Mazis also acknowledged that "[w]e don't know how much faster" and no one "can measure with any precision how long a corrective notice for this particular case should be run." Mazis Tr. at 1975, 1382.

25. In other cases, the Commission analyzed whether other cease-and-desist provisions would substantially prevent deception before concluding that corrective advertising was the "least restrictive means of achieving a substantial and important governmental objective." *Warner-Lambert*, 562 F. 2d at 770-71; see also *American Home Products Corp.*, 98 F.T.C. at 411 (corrective advertising was not needed in part because a triggered efficacy disclosure would be sufficient to prevent deception).

26. When it issued its decision in 1975, the Commission concluded that the false belief about Listerine would linger "well into the 1980's," 86 F.T.C. at 1504, that is, at least five years after the Commission's order became final. The Commission imposed an approximately one-year corrective advertising requirement to address this lingering effect. This demonstrates an effort to carefully craft a remedy that was not overbroad.

27. See, e.g., *Eggland's Best*, 118 F.T.C. at 366 (Statement of Commissioner Roscoe B. Starek, III, concurring) (corrective statement on egg cartons was "careful[ly] craft[ed]" to "reach consumers likely to have been misled by Eggland's ads (those who are preparing to purchase the product), rather than the population at large"); *Unocal Corp.*, 117 F.T.C. 500, 511 (1994) (corrective brochure required to be mailed to customers who had company credit cards and who lived in one of five specified states in which deceptive claims were disseminated).