advertising's effect on images is likely to last longer than its effect on *sales* (Ross, Tr. 7513).

789. Dr. Brock testified that, because the beliefs for these attributes are high for user and nonuser alike, and are independent of experience with the product, it is reasonable to conclude that these beliefs about Bufferin and Excedrin will [**202**] continue indefinitely for both users and nonusers (Brock, Tr. 8698).

790. In order to change consumer beliefs about products, a corrective message in advertising should be used (Brock, Tr. 8702; Ross, Tr. 7526–28). To increase the chances for successful communication, the corrective message should employ persuasive communication techniques similar to those used to create the beliefs initially. It is also desirable to pre-test a corrective message before use to ensure that the corrective message is being communicated (Brock, Tr. 8705–06). Moreover, the corrective message will be more successful if the other messages in the advertisements do not contradict, conflict, or obscure the corrective message in any way (Jacoby, Tr. 9570–71).

791. Complaint counsel seek corrective advertising directed to consumer beliefs of superior efficacy with respect to Excedrin and Excedrin P.M. and superior speed and safety with respect to Bufferin. Complaint counsel do not seek any corrective advertising with respect to the tension relief images involving Bufferin and Excedrin.

792. In order to support a corrective order provision directed to the so-called establishment claims regarding efficacy or safety of the products involved, complaint counsel must show that consumers currently hold an image that:

(a) it has been established that Bufferin is faster-acting and causes stomach distress less often than aspirin;

(b) it has been established that Excedrin and Excedrin P.M. are more effective than aspirin;

(c) these images are significantly attributable to respondents' advertisements;

(d) these images have caused and are likely to cause consumers to purchase Bufferin, Excedrin or Excedrin P.M.; and

(e) these images will endure for some time after the unlawful advertisements cease in the absence of corrective messages.

793. Complaint counsel have not introduced any direct evidence concerning consumer images specified in (a) and (b) of the preceding Finding, but instead rely on inferences based on inferences: namely that it may be reasonably inferred from the inferred establishment claims regarding Bufferin, Excedrin and Excedrin P.M. that consumers currently hold corresponding establishment images about these products. [**203**]

794. To the extent that the record contains evidence tending to show that consumers held superiority images about Bufferin and Excedrin and to the extent that it may be inferred that the misleading claims alleged in Paragraphs 9 and 10 of the Complaint played a significant role in creating or maintaining these images, it is found that the evidence is not so clear or convincing as to support a conclusion that these images are likely to endure for an appreciable period of time after the advertising claims have ceased.

VII. LIABILITY OF ADVERTISING AGENCIES

A. *Respondent Ted Bates*[7]

795. Respondent Bates actively participated in the creation and dissemination of certain of the challenged advertisements for Bufferin in its capacity as advertising agency for Bristol-Myers, commencing in February 1968 (CX 655C). That participation included development of marketing plans for the promotion and sale of Bufferin as well as creation of certain advertising themes, review of advertisements for appearance, time, position, size and reproduction (CX 655D). Bates was directly involved in the development of advertising themes including the Faster/Gentler-than-aspirin concept (CX 554A) and the "Doctors recommend Bufferin" claim (CX 560).

796. In connection with the development of Bufferin advertisements for Bristol, Bates has relied in good faith upon the judgments of Bristol-Myers' Medical Department inasmuch as Bates does not have in-house medical officers or retain medical consultants (Lanman, Tr. 11431).

797. Bates played a substantial role as Bristol-Myers' ad agency in creating and disseminating the following advertisements for Bufferin between 1968 and 1976: CX 1–7, 22–93, 95, 107, 112–114, 719–722, 751, 761R–V, Z018–020, 760R–V, Z015–016 (CX 655; CX 800). These advertisements were disseminated from 1968 to 1976 and made the representations listed in CX 815, except for Complaint Paragraphs 7A(3) and 9A(3).

798. Despite the fact that Bates created and disseminated advertisements which represented that it was established that Bufferin relieves pain faster than aspirin (Complaint ¶ 7A(1)), internal memoranda reveal that Bates knew that the comparative speed and safety claims to be open to question, although there was some scientific basis for these claims. One memorandum dated April 1969, and titled "Bufferin Briefing", stated that "clinical evidence indicates all [aspirin] work similarly well physiologically" and that all brands of aspirin were very similar in objectively proven effectiveness. It went

[7] References to advertisements disseminated by Bates do not include CX 8–22.

on to add [204] that "Bufferin cannot claim to be the best pain reliever because no one has as yet found a way of measuring time or degree of headache relief objectively. Subjective tests have not been able to substantiate Bufferin's apparent superiority" (CX 563B, C, M; *see also* CX 561).

799. Bates' awareness of the limited support for the "faster" claims for Bufferin is reflected in the following comments from its files: "Everybody agrees we can't document 'best against pain' since that strongly implies relief. There's still some disagreement about being the best" (CX 556, dated 2/13/69).

800. In addition to the internal memoranda, Bates had in its files authoritative documents which specifically addressed the issue of whether faster dissolution of aspirin, and higher blood levels of aspirin, could in fact be correlated with increased or more rapid pain relief. One of these was the Food and Drug Administration's "Fact Sheet on Aspirin" (CX 469), published in November 1972. With respect to Bufferin, it stated that there was "no evidence to indicate speed of onset of its action in relieving pain is significantly increased over plain aspirin." It also concluded that certain advertising claims including the "twice as fast" claim were misleading (CX 469B).

801. Bates also had reviewed the *AMA Drug Evaluations,* Second Edition (CX 512), and expressed concern over its statement that "available evidence does not indicate that buffered aspirin tablets are preferable to plain aspirin" (CX 646B).

802. Bates knew or should have known that, at the time its advertisements were disseminated, the claims relating to comparative freedom from side effects for Bufferin were open to question. Bates had in its files, at the time the advertisements were disseminated, information which indicated that the claims made for gentleness had not been scientifically proven. The FDA Fact Sheet published in 1972 stated, upon comparing Bufferin with plain aspirin, that "[M]ost of the published studies indicate there is little difference in the incidence of stomach upsets after ingestion of Bufferin or plain aspirin" (CX 469B). Also, a Bristol-Myers memorandum and the accompanying Bates analysis of the second edition of the *AMA Drug Evaluation* reveals that Bates was aware of the AMA's conclusion that "results of controlled clinical studies have not conclusively demonstrated that the use of these mixtures results in . . . less gastric upset" (CX 646B). These comments, according to Bristol-Myers' own description, were the same "negative and damaging comments" which appeared in the first edition of the *AMA Drug Evaluations* (CX 646A). Furthermore, soon after Bates acquired the Bufferin account, an article appeared which was "not particularly favorable to Bufferin's medical copy" (CX 493A). That article cited findings by researchers that "people [205]

taking heavy doses of aspirin cannot protect themselves against ulcers by using buffering compounds" (CX 493B). At the very least, these findings contradicted Bates' absolute and comparative claims in the advertisements relating to side effects with Bufferin.

803. Commencing in mid-1969 and continuing through 1970, Bates disseminated a series of Bufferin advertisements which were referred to as the "Sensitive People Campaign." In an internal memorandum reviewing the status of the analgesic market information and the nature of Bufferin advertising written in April 1969, just prior to the dissemination of the advertising campaign (CX 800K–L), Bates concluded that "[T]ension is an area not currently being exploited to the degree it has been—'Sensitive People' may exploit it" (CX 563J).

804. Furthermore, Bates' use of the "Sensitive People" advertisements to "exploit" the tension claims for Bufferin conflicted with the spirit of the NAB Code Advertising Guidelines for Non-Prescription Drugs. Emphasizing the tension relief capacity of Bufferin contradicts the NAB guide that advertising should avoid representing "that a product will alter a user's mood or attitude beyond that reasonably experienced through the relief of symptoms/conditions for which the product has been proven effective" (RX 235, Exhibit A, p. 1).

805. Documents in Bates' files reveal that Bates knew when the advertisements were disseminated that the analgesic ingredient in Bufferin was aspirin. The following comments in an internal memorandum titled "Bufferin Briefing, 4/14/69" make this clear: "Bufferin is a combination of aspirin and two antacids" (CX 563M). The memo also discusses Bufferin's place in the analgesics advertising market and what claims it can make to compete with other aspirin containing analgesics including Anacin, Bayer and Excedrin (CX 563M, N).

806. Notwithstanding Bates' knowledge that aspirin is the chief analgesic ingredient in Bufferin, Bates failed to disclose in its advertisements that Bufferin contained aspirin and suggested that the pain reliever in Bufferin was something other than aspirin. In 1969, Bates even suggested considering disclosure of Bufferin's aspirin content in advertising for the first time (CX 554M). Apparently, this suggestion was not adopted.

807. Regarding the claim that physicians recommend Bufferin more than any other OTC internal analgesic product, Bates knew or should have known that there was no reasonable basis for this claim. This fact is clearly reflected in a memorandum in Bates' files, dated April 1969, which points out that "Although doctors specify Bufferin by brand more than any other brand, they most often recommend plain aspirin" (CX 563J). This fact had been brought to Bates' attention by Walter Law, an official [**206**] of CBS in charge of Program Practices in March of 1969, who, in reviewing copy of certain adver-

tisements, said that "doctors have no reason to specify plain aspirin by brand name. Generic aspirin is specified 4 times more frequently than Bufferin" (CX 560A).

808. Moreover, the supposed basis for these claims, *i.e.*, the National Prescription Audit (CX 364–380) and the National Disease and Therapeutic Index (CX 381–390), were either invalid (NPA data represents solely prescription filling activity without considering nonprescription activity at retail pharmacies) or not supportive of the claim (NDTI showed Tylenol and generic aspirin were recommended more frequently than Bufferin) (F. 708–09, *supra*).

B. *Respondent Young & Rubicam*

809. Respondent Young & Rubicam actively participated in the creation and dissemination of the challenged advertisements for Excedrin and Excedrin P.M. in its capacity as advertising agency for Bristol-Myers since before Dr. Lanman joined Bristol-Myers in 1962 (RX 1; Lanman, Tr. 11430–31). Young & Rubicam assisted its client in the creation and development of advertising strategies; creation and preparation of television and print advertisements and creation of sales promotion programs. Young & Rubicam also supervised the production of advertisements and occasionally conducted market and consumer research (CX 657). Throughout the relevant time period Young & Rubicam relied in good faith upon the judgments of Bristol-Myers' Medical Department inasmuch as Young & Rubicam did not have in-house medical officers or retain medical consultants (YRRX 231, p. 4).

810. With respect to superior efficacy claims for Excedrin, Young & Rubicam knew that there was no clearcut scientific evidence to support these claims. As late as January 9, 1970 an internal report in Young & Rubicam's files clearly stated, in a question and answer format, that "there is no support for this claim [that Excedrin works better than aspirin] and the only explanation in laymen's terms would be the mere definition of synergism" (CX 496A). Elaborating on the possible role of Excedrin's ingredients (*i.e.*, aspirin, salicylamide, acetaminophen and caffeine), the report again states that "there is no clinical efficacy story, but merely one of inference" (CX 496A).

811. In December 1970, presumably after Young & Rubicam was advised of the existence of the Emich Study (CX 425), a letter from Young & Rubicam to Bristol-Myers referring to that study stated: for "the first time ever, an OTC analgesic has been able to make the unique and distinctive claim: 'more effective' " (CX 628A). Young & Rubicam recognized the need for **[207]** a high quality of scientific support for such superior efficacy claims in that same December 1970 letter, where it stated "[W]hen and if the efficacy copy is taken off the

networks, we must realize that there may be great difficulty and reluctance, due to stringent network requirements, to get similar copy approved or reinstated" (CX 628A). This letter confirms that prior to the Emich Study, Young & Rubicam knew it had no adequate clinical data in support of its superior claims for Excedrin.

812. Subsequent to the Emich Study, it was not unreasonable for Young & Rubicam to have accepted the study at face value and relied on it as a reasonable substantiation for the efficacy claims for Excedrin.

813. In disseminating the claim that Excedrin is stronger and more effective than aspirin in relieving pain in certain advertisements for Excedrin (CX 801) and Excedrin P.M. (CX 821), Young & Rubicam represented that the ingredient giving relief was other than ordinary aspirin. In fact, Young & Rubicam impliedly represented that common aspirin was not an ingredient in Excedrin (Complaint ¶ 21). As it knew, however, aspirin was part of the Excedrin formula, it knew that this claim was false (Complaint ¶ 22).

814. With regard to tension-relief claims for Excedrin and Excedrin P.M., it is reasonable to assume that Young & Rubicam relied in good faith upon Bristol-Myers Medical Department's judgment regarding the reasonableness of scientific-medical substantiation found in general biomedical literature. Although these purported authorities were woefully outdated and did not constitute a reasonable basis for the tension relief claim with respect to Bristol-Myers, which knew or should have known that the dated general references could no longer be relied on, at least since 1969, Young & Rubicam had no reason to question Bristol-Myers' judgment in this regard. Under the circumstances, it was not unreasonable for Young & Rubicam to have relied on Bristol-Myers' medical judgment as to the adequacy of medical scientific substantiation for the claim.

DISCUSSION

A. *The Meaning of Advertisements*

It is well established that the Commission, and an administrative law judge, may determine the meaning of an advertisement solely from an examination of what is contained therein, without consumer testimony or survey data as to how an advertisement is perceived by the consumer. The test is whether, after reviewing an advertisement in its entirety, an [208] interpretation is reasonable in light of what appears in the advertisement. An advertisement may convey more than one claim, and the same claim may be susceptible of more than one interpretation by the consumer. If an advertisement is capable of

conveying more than one impression to the consumer and any one of them is false or misleading, the advertisement may be found to be false or misleading. From its own review of an advertisement, the Commission may find impressions which the advertisement is likely to convey to the public, and determine whether such impressions have a tendency or capacity to deceive the public, even in cases where a number of consumers may testify that they were not actually deceived.[8] In determining the tendency and capacity of an advertisement to mislead, the Commission looks to the impression an advertisement may make on the average consumer—the gullible and unthinking as well as the trained and sophisticated.[9] Indeed, the central purpose of Section 5 is "to abolish the rule of *caveat emptor* which traditionally defined rights and responsibilities in the world of commerce." *FTC* v. *Sterling Drug, Inc.,* 317 F.2d 669, 674 (2d Cir. 1963).

In this connection, the unique impact of modern print or electronic commercials upon the viewer deserves further discussion. The revolutionary insight Marshall McLuhan has provided for contemporary mass communication is that "medium is the message."[10] This insight invites an understanding of the unique dimensions of today's mass-media communication. Today's printed and electronic mass communication does not aim to communicate classified data and fragments of information in the conventional sense as much as it stresses pattern recognition, in which visual and aural configurations serve as symbols. The "message" is not to be understood through the technical meaning of printed or spoken words or sounds as much as it is through recognition of the aural-visual pattern of the "medium" itself. At the risk of oversimplification, the message is recognized and understood through patterns of aural-visual symbols which are intended to evoke a desired imagery in the mind of the viewers. A casual viewer of today's television commercials is struck by the element of essential truth in McLuhan's insight. With **[209]** respect to many television commercials that one encounters today, it is fair to say that their evaluation is not complete when one stops at the meaning of their technical "content"—what the spoken words say. One needs to proceed to the "pattern" of symbols—what the commercials (medium) in its totality symbolizes to the psychic and social consciousness of the audience-viewer. The key to true understanding is not literal classifi-

[8] *E.g., Ford Motor Company,* 87 F.T.C. 756, 794–795 (1976), and the cases cited therein.

[9] *E.g., Charles of the Ritz Dist. Corp.* v. *FTC,* 143 F.2d 676 (2d Cir. 1944); *FTC* v. *Standard Education Society,* 302 U.S. 112, 116 (1937); *Exposition Press, Inc.* v. *FTC,* 295 F.2d 869, 872 (2d Cir. 1961), *cert. denied,* 370 U.S. 917 (1962); *National-Bakers Services* v. *FTC,* 329 F.2d 365, 367 (7th Cir. 1974); *Rodale Press, Inc.,* 71 F.T.C. 1184, 1237 (1971).

[10] *See* Marshall McLuhan, *Understanding Media* (1964); *The Medium Is The Message* (1967).

cation and differentiation of what the viewer sees or hears, but rather the imagery evoked by the patterned aural-visual symbols.

This observation appears to have particular application to a television commercial which projects a distinct pattern of compressed, fluid pictorial and aural images, submerging its technical "content" and appealing directly to the viewer's psychic and social consciousness. In a very real sense, the viewer's critical faculties of classification and differentiation are drowned in patterns of imagery and symbols. Thus it is possible that, in skilled and practiced hands, the spoken words of a television commercial may appear to say one thing, while its pictorial and aural imagery conveys to the psyche of the viewer-audience something quite different. This observation is of some importance in evaluating many of the television commercials involved in this proceeding. For that task, wisdom of the psychology of learning is inadequate and needs to be complemented by the McLuhanian perspective. For example, this approach is especially suited to the evaluation of the television commercials involving the "tension relief" claim, which clearly depict situational tensions of various kinds that are distinguished from pain-associated tension.

In evaluating the meaning of each advertisement, I have primarily relied on my knowledge and experience to determine what impression or impressions an advertisement as a whole is likely to convey to a consumer. When my initial determination is confirmed by the expert testimony in the record, I rested. When my initial determination disagreed with that of expert testimony, I reexamined the advertisement in question, and further considered such record evidence as copy tests and verbatim responses contained therein. In any event, I have carefully considered all relevant record evidence before reaching a final determination.

The Findings regarding the meaning of advertisements as related to the claims challenged in the Complaint are self-explanatory. However, several advertising claims challenged in the case merit further discussion.

1. The Twice As Much Pain Relief Claim For Bufferin (Complaint ¶¶ 7A(3) and 9A(3))

Complaint counsel's argument in essence is that a claim that Bufferin relieves pain twice as fast as aspirin (Complaint ¶ 7A(2)) implies a claim that Bufferin relieves twice as much pain as aspirin. However, an examination of the Bufferin **[210]** advertisements cited by complaint counsel in support of this allegation (CPF 20) clearly shows that the central and simple message of these advertisements are twofold: that Bufferin acts twice as fast as aspirin and that it is gentler than aspirin. To the extent that some consumers played back the "twice as

much relief" in a copy test (CX 301), it can arguably be attributed to the claim that Bufferin delivers twice as much pain reliever in the first important (or critical) minutes. However, the "twice as much relief" theme is so remote from what these advertisements can reasonably be said to convey, the verbatim evidence should be dismissed as "noise" in this instance. It follows that there is no basis for the establishment allegation set forth in Complaint ¶ 7A(3).

2. The Faster Pain Relief Claim For Excedrin (Complaint ¶¶ 7B(4) and 9B(4))

Complaint counsel's argument that a claim that Excedrin is more effective or stronger (extra-strength) than aspirin also implies a "faster pain relief" claim is unpersuasive. Most of the Excedrin advertisements complaint counsel cite (CPF 305) contain clear and simple messages that Excedrin is an extra-strength pain reliever, that it acts fast and lasts longer. However, a number of Excedrin advertisements did contain *"faster* pain relief" claim, either expressly or impliedly. *E.g.,* CX 115, 135, 145, 146. And, a comparative claim also implies an establishment claim, for the reasons discussed hereinafter.

3. The Tension Relief Claims For Bufferin, Excedrin and Excedrin P.M. (Complaint ¶ 12A and B)

A number of Bufferin commercials contain an implied claim that Bufferin is also an effective reliever of tension, with or without headache pain, and thus enable persons to cope with the ordinary stresses of everyday life. They include: CX 715, 49–60. While the verbal messages in these advertisements contain the word "headache pain," the overall impression one gets from each of these advertisements is unmistakably that Bufferin is good for tension, with or without headache pain and generally good for tense situations one encounters in everyday life. Indeed, the impact of the visual presentation is so dominant in these TV commercials that any passing reference made to headache pain is entirely submerged, even when one looks at the storyboards with the verbal messages spelled out in print.

A number of Excedrin commercials contain express or implied claims that Excedrin is a good tension reliever. They include: CX 115–116, 120, 121, 124–125, 127–128, 132–133, 135–139, 141–144, 148, 150, 183. Many of them contain clear and direct verbal and pictorial claim that Excedrin has a "tension reliever" and "an anti-depressant" in addition to a pain reliever—as direct and explicit a tension relief claim as any that can be devised. [211]

Two Excedrin P.M. commercials contain an implied claim that Excedrin P.M. is good for tension relief, especially at night time, with or without pain. They are CX 216 and 219. The other ads complaint

counsel cite in CPF 369 present a close question. It is of course arguable that these too contain an implied claim of general tension relief at night time. However, the overall impression of these short ads is unmistakably that the "relaxing" claim is clearly related to a "sleep aid" claim. They are a world apart from the tension relief advertisements reviewed above for Bufferin and Excedrin. As to the remainder of advertisements cited in CPF 369, therefore, I am unable to find an implied general tension claim. The copy test evidence cited in CPF 370 and 375 is not persuasive in these circumstances. In my view, it simply reflects the fact that a mere mention of the word "relax" in any context is likely to evoke in the mind of some consumers an association with general tension. The Excedrin P.M. advertisements should not be indiscriminately condemned for that reason.

4. Claims Related To Ingredients (Complaint ¶ 21)

(a) *The Claim That The Pain Reliever In Bufferin Is Something Other Than Aspirin*

Numerous advertisements for Bufferin contain an implied claim that the pain relieving ingredient or pain reliever in Bufferin is something other than aspirin. Every Bufferin advertisement that refers to faster pain relief or gentleness implies that Bufferin's pain relieving ingredient is not aspirin. In my view, this claim, although not expressly made, is an insidious one and comes through very clearly in these advertisements. These advertisements include all Bufferin advertisements which are listed in Column 14 of CX 816. The fact that the advertisement frequently compares Bufferin with "plain" or "simple" aspirin does not alter the conclusion that most consumers will perceive the comparison to be Bufferin v. aspirin.

(b) *The Claims That The Pain Reliever In Excedrin Is Something Other Than Aspirin and That The Anti-Depressant In Excedrin Is Something Other Than Caffeine*

Numerous advertisements for Excedrin contain an implied yet clear claim that the ingredient that gives longer lasting pain relief or extra-strength pain relief in Excedrin is not aspirin and the anti-depressant contained in Excedrin is not caffeine. They include: CX 115–116, 122–139, 141–167, 169–173, 175–186, 188–191, 193, 202–211. CX 115 and 116 are good examples. A viewing of the TV commercials will persuade the most skeptical. Although the chemical formulas a viewer sees on the screen are in fact true, they are not likely to mean anything to an average viewer but that the long lasting pain reliever in Excedrin is [212] different from aspirin and that the anti-depressant that restores one's spirit in Excedrin is different from caffeine.

Furthermore, a number of Excedrin advertisements which feature the "Excedrin Headache" theme impliedly claim that the pain reliever in Excedrin is special, stronger, and unlike aspirin. They include CX 122–139, 141–152.

5. The Establishment Claims (Complaint ¶ 7))

While a few advertisements in evidence contain an *express* statement that medical research in hospitals and clinics "have established" a proposition (*e.g.,* CX 100, 101), most of the advertisements in evidence do not contain the word "established." The record as a whole shows that the word "established" is not a word commonly used or understood by average consumers. However, the record shows that "established" is not an uncommon term in the biomedical sciences. Also there appears to be a general agreement among clinical pharmacologists and researchers that the term may be used loosely to mean that a study "shows" or "demonstrates" a proposition, or in a narrow, technical sense to mean that a proposition has been scientifically proven or accepted as true by the community of trained and qualified scientists and researchers, based on well-controlled clinical studies. In formal statements filed with the Federal Trade Commission in 1967 and 1968 in connection with a proposed Trade Regulation proceeding involving nonprescription analgesic products, Bristol-Myers used the term "established" in the narrow, technical sense and asserted that superiority of one analgesic product over another is not "established" unless based on a number of clinical pain studies demonstrating such superiority (Tr. 12023–24; CX 908, p. 31; CX 907, p. 14). And a number of complaint counsel's expert witnesses testified to their understanding of the word "established" in a similar, technical sense.

Secondly, a number of advertisements for Bufferin and Excedrin claiming superior speed, efficacy or safety made *express* references to medical-scientific evidence, such as hospital studies, clinical studies, blood level studies, chemical formulas, anatomical models and graphs. *See e.g.,* Bufferin advertisements: CX 2–4, 7, 10, 13, 34, 61–64, 67, 91–96, 98–101, 113–114, 721; Excedrin advertisements: CX 115–116, 118–121, 124–125, 132–133, 138–142, 144, 153–161, 164–167, 170–171, 173, 175–177, 182, 184–185, 202–204, 208, 736. CX 99, a Bufferin print advertisement, displaying a picture of anatomical model and a blood level graph comparing Bufferin and "aspirin," suggests that "Clinical studies prove" (bold types) that Bufferin acts twice as fast as "aspirin" to relieve pain.

Thirdly, there is uncontradicted expert testimony in the record that when consumers see an advertisement containing a scientific or pharmacological claim, they assume that there is a valid scientific basis

for that claim and that such a claim [213] would not be permitted by the authorities unless there was a valid scientific evidence to prove it (Ross, Tr. 7024, 7026, 7036).

Finally, the rationale of the Commission's reasonable basis requirement, as articulated in *Pfizer*,[11] compels a conclusion in the circumstances of this case that, as a matter of marketplace fairness, a superiority claim regarding Bufferin, Excedrin and Excedrin P.M., without more, implies a representation that the claimed superiority, in terms of speed of action, effectiveness or gentleness, has been sufficiently demonstrated by medical-scientific evidence, namely, established.

For all of the foregoing reasons, it is concluded that every advertisement for Bufferin, Excedrin, or Excedrin P.M. which was found to contain a comparative claim as alleged in Paragraph 9 of the Complaint also made the establishment representations alleged in the corresponding subparagraphs of Paragraph 7 of the Complaint.

B. *Pain*

Pain is said to be the most common symptom for which man seeks relief by medication. It is generally agreed that mild to moderate pain that is self-limited ("minor pain") may be treated symptomatically by self-medication.[12] Pain is a subjective condition of diverse and often obscure etiology and defies a precise definition. Beecher, a recognized authority in the study of pain and analgesia, has observed that:

> Pain is a subjective matter clearly "known to us by experience and described by illustration." [However,] lexicographers, philosophers and scientists have none of them succeeded in defining pain. Having said that it is the opposite of pleasure, or that it is different from other sensations (touch, pressure, heat, cold) or how it is mediated (through separate nerve structures), or what the kinds of it are (bright, dull, aching, pricking, cutting, burning), or what kinds of things will produce it (trauma to nerve endings or to nerves, electric shocks, intense stimulation of the sensations of touch, pressure, heat, cold), or what it comes from (injury, bodily derangements, or disease), or that certain types of mild stimulation can probably be stepped up to a painful level through conditioning or what [214] some reaction patterns to it are (escape or avoidance), none of these individual statements, nor indeed their sum total, provides a definition of pain.[13]

"Minor pain" was defined by the FDA OTC Internal Analgesics Panel as "pain that is self-limited and which requires no special treatment or prior diagnosis by a physician." Minor pain is usually described as pain "of mild to moderate intensity as opposed to sharp,

[11] *Pfizer, Inc.*, 81 F.T.C. 23 (1972).
[12] CX 514, at 35350.
[13] CX 514, at 35350–51.