

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

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In the Matter of	)	
Novartis Corporation,	)	
and Novartis Consumer Health, Inc.,	)	Docket No. 9279
Corporations	)	

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ORDER GRANTING APPLICATION FOR STAY  
OF PART IV OF ORDER

On July 19, 1999, respondents Novartis Corporation and Novartis Consumer Health, Inc. (collectively "Novartis") applied for a stay pending appeal of Part IV of the Commission's order of May 13, 1999, as modified by order dated July 2, 1999, (hereinafter "Order") which imposes a corrective advertising requirement. Complaint counsel opposes the granting of a stay. For the reasons stated below, the Commission grants the application and stays the enforcement of Part IV of its Order pending a ruling disposing of the petition for review recently filed by Novartis in the United States Court of Appeals for the District of Columbia Circuit. All other provisions of the Order will remain in effect during the pendency of the appeal.

Commission adjudicative orders (except divestiture orders) take effect "upon the sixtieth day after" their date of service, unless "stayed, in whole or in part and subject to such conditions as may be appropriate by . . . the Commission" or "an appropriate court of appeals." 15 U.S.C. § 45(g)(2). A party seeking a stay must first apply for such relief to the Commission. Novartis has done so in its July 19 application.

Commission Rule 3.56(c), 16 C.F.R. § 3.56(c), sets out the applicable legal standard for the granting of a stay pending appeal. An applicant for a stay must address the following four factors: (1) "the likelihood of the applicant's success on appeal"; (2) "whether the applicant will suffer irreparable harm if a stay is not granted"; (3) "the degree of injury to other parties if a stay is granted"; and (4) "why the stay is in the public interest." Id.

We consider each of these prongs in turn.

I. Likelihood of Success on the Merits

Novartis's assertions of a likelihood of success on the merits merely revisit arguments that we have already considered and rejected in our May 27, 1999 opinion and in our order of July 2 denying its petition for reconsideration. Novartis first claims that consumer misbeliefs about Doan's superior efficacy for back pain could have been caused by that product's historical positioning as a remedy for back pain, and might not have been substantially created or reinforced by the deceptive advertising campaign. App. for Stay at 7-8. That claim is rebutted by surveys that demonstrate significant changes in consumer attitudes during the course of the campaign. In re Novartis Corp., No. 9279, 1999 FTC LEXIS 90, at \*84-88 (May 13, 1999). We have explained that the NFO Study, which documented a lingering of consumer misbeliefs six months after the deceptive advertising campaign ended, was not rendered invalid merely because it did not ask specifically about the effect of the challenged advertisements. App. for Stay at 8-9. To the contrary, the temporal coincidence of changes in consumer perceptions with the period of the challenged campaign adequately demonstrates causality, and hence the validity of the study. Novartis Corp., 1999 FTC LEXIS 90, at \*91.

We also have previously rejected Novartis's next argument -- that false beliefs on the part of consumers that Doan's was more efficacious for the treatment of back pain than other brands would not necessarily make such consumers more likely to purchase Doan's. App. for Stay at 9-13. Indeed, we have pointed out that Novartis's own expert has conceded that a back pain sufferer who mistakenly believes that a product is superior for the treatment of back pain "would be motivated to purchase the product." Novartis Corp., 1999 FTC LEXIS 90, at \*71 (citing Jacoby Tr. 3371). Finally, Novartis even argues against the very exemption that the Commission granted it -- claiming that the exemption of advertisements of fifteen seconds or less renders the corrective advertising requirement "irrational." App. for Stay at 15. That incongruous claim is rebutted by the fact that the exemption was designed specifically to ensure that our corrective advertising requirement would not hinder Novartis's ability to use its historically preferred advertising format. See Novartis Corp., 1999 FTC LEXIS 90, at \*107. Novartis offers no reason for us to question our prior treatment of any of these points, and its renewal of these arguments, without more, is insufficient to justify the grant of a stay. See In re Toys "R" Us, Inc., No. 9278, slip op. at 1 (Dec. 1, 1998); In re Detroit Auto Dealers Ass'n, Inc., No. 9189, 1995 FTC LEXIS 256, at \*4 (Aug. 23, 1995).

We recognize that our prior determination -- that consumer misbeliefs substantially caused or reinforced by the deceptive advertising campaign are likely to

linger -- is based upon a complex factual record. We are confident of the correctness of our decision and the grant of the stay pending appeal neither states nor implies doubt on our part as to the merits of Novartis's claims. See In re California Dental Ass'n, 1996 FTC LEXIS 277, at \*9. Nevertheless, it is well settled that arguable difficulties arising from the application of the law to a complex factual record can support a finding that a stay applicant has made a substantial showing on the merits. See In re Toys "R" Us, Inc., No. 9278, slip op. at 1 (collecting cases). We remain convinced, for the reasons articulated in our previous opinion, see Novartis Corp., 1999 FTC LEXIS 90, at \*95-103, that the effects of Novartis's deceptive advertising campaign would linger for at least five more years (at which time the corrective advertising requirement will automatically terminate). Nevertheless, Novartis's arguments on the merits are adequate (if barely so) to warrant consideration of the remaining factors noted above.

## II. Irreparable Injury

Novartis must demonstrate that denial of a stay would cause it irreparable harm. Conclusory or unsupported assertions of harm do not suffice, and "mere injuries, however substantial, in terms of money" do not constitute legally cognizable irreparable injury. Sampson v. Murray, 415 U.S. 61, 90 (1974) (internal quotation marks omitted). The controlling factor is irreparable injury. Novartis bears the burden of proving that the alleged irreparable injury is substantial and likely to occur absent a stay. See Michigan Coalition of Radioactive Material Users v. Griepentrog, 945 F.2d 150, 154 (6th Cir. 1991).

Novartis alleges irreparable injury on two principal grounds: first, the non-recoverable costs it will incur in re-labeling its products while its appeal proceeds; second, the adverse effects on consumer perceptions of Doan's and on Doan's retail distribution that use of the corrective message would arguably have. App. for Stay at 18. The costs that Novartis would incur in complying with Part IV of the Order could not be recovered in the event that Novartis prevails on appeal; therefore, such costs constitute irreparable injury under these facts.

Moreover, while we are satisfied that any effects upon Doan's sales or reputation are proper remedial consequences of removing the lingering effects of Novartis's deceptive conduct, the irreparable injury inquiry examines the consequences to Novartis if it succeeds on the merits of its appeal. If a Court of Appeals were to determine that corrective advertising is not appropriate, then any lost sales or reputational harm associated with the corrective advertising requirement during the pendency of the appeal may indeed be difficult to ameliorate. See In re California Dental Ass'n, No. 9259, 1996 FTC LEXIS 277, at \*7 (May 22, 1996) (holding that where compliance could cause

confusion or require costly notification if reversed on appeal, a party may be irreparably injured). Thus, while the Commission clearly has the authority to impose the corrective advertising remedy contained in Part IV of our Order, Novartis has made an adequate showing that it would be irreparably injured if the Commission's decision were to be overturned on appeal.

### III. Harm to Others and the Public Interest

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

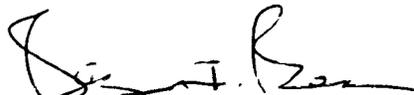
Novartis contends that the issuance of a stay would be in the public interest because implementation of the corrective advertising requirement could dissuade individuals for whom Doan's could be effective from using the product. In fact, our finding that the challenged advertising campaign was deceptive and consumers continue to harbor false beliefs that Doan's is superior to other products for the treatment of back pain, Novartis Corp., 1999 FTC LEXIS 90, at \*94, 102-03, demonstrates that the public interest would, if anything, cut against the issuance of a stay. There is a danger that, if we grant a stay, some consumers laboring under the misimpression that Doan's is superior for the treatment of back pain would purchase Doan's who would not have chosen to do so had they known the truth about the product. Moreover, the fact that individuals may have a range of different responses to any treatment for back pain, whether advertised fairly or deceptively, cannot prevent a general ban of deceptive advertising or any requirement of correction. App. for Stay at 19-20.

### Conclusion

The decision whether to stay Part IV of our Order is a close one. We recognize that granting a stay will likely entail some harm to the public interest by permitting lingering misbeliefs to affect consumer behavior during the period of the stay. In the interest of developing a reasonable accommodation between Novartis's private interests and the public interest in eliminating the lingering effects of its deceptive advertising campaign, however, and in light of the complex factual issues underlying our conclusion that corrective advertising is necessary, we stay Part IV of the Order during "the relatively brief period of a stay pending appeal." In re Toys "R" Us, Inc., No. 9278, slip op. at 2. We are confident that the Court of Appeals will resolve this matter expeditiously, thus limiting the extent of consumer injury occasioned by our grant of this stay.

Apart from the stayed provisions of Part IV, all other provisions of the Order will take effect upon the sixtieth day after service. Cf. California Dental Ass'n, 1995 FTC LEXIS 256, at \*11 (“Respondent has not sought to stay those provisions of the Order that prohibit continuation of the restraints found to be unlawful. Respondent has thus attempted to minimize the harm to the public interest while focusing on the provisions that create the greatest harm to itself.”). The stay shall remain in effect until the court of appeals issues a ruling disposing of the petition for review.

By the Commission, Commissioner Swindle concurring.



Benjamin I. Berman  
Acting Secretary

ISSUED: August 5, 1999

ATTACHMENT:

Concurring Statement of Commissioner Orson Swindle