

**STATEMENT OF COMMISSIONER
ORSON SWINDLE
CONCURRING IN PART AND
DISSENTING IN PART**

in Novartis Corporation et al., Dkt. No. 9279

The Commission recently issued a decision in this case in which it concluded that the respondents made the unsubstantiated claim that Doan's is superior to other over-the-counter analgesics in treating back pain. To remedy this deception, the Commission ordered the respondents to make a specified corrective statement in Doan's advertising (except radio and television ads of 15 seconds or less in duration), including on product packages. The Order requires that the corrective statement be made "for one year and until respondent has expended on Doan's advertising a sum equal to the average amount spent annually during the eight years of the challenged campaign." I dissented from the imposition of this corrective advertising remedy because, among other things, the evidence did not prove that any false belief created by the deceptive advertising had lingered and was likely to continue to linger until July 2000, that is, until the end of the one-year period during which corrective advertising was required. Novartis Corporation et al., Dkt. No. 9279 (May 13, 1999) (Statement of Commissioner Orson Swindle, concurring in part and dissenting in part).

The respondents have petitioned the Commission to reconsider the corrective advertising requirement, arguing that basing the duration of the requirement on both a fixed one-year period and the amount of Doan's advertising expenditures will have unintended, adverse consequences. The respondents have submitted a declaration stating that they spent only \$30,000 in 1998 on Doan's advertising and plan to spend nothing in 1999 on such advertising. Given these minimal advertising expenditures, the respondents argue that it will be a very long time until they have spent on Doan's advertising an amount equal to the average amount spent annually during the campaign (\$8 million), especially since the annual sales of the product have declined to only about \$11 million. The respondents claim that they are likely to be required to place the corrective statement on packaging for many years to come - - a corrective requirement that will last far longer than the one year that the Commission originally intended. The Commission has denied the petition for reconsideration, and I concur in the denial because the petition does not raise any new questions about the decision and final order that the respondents did not have an opportunity to address in their appeal to the Commission.

The majority, however, has also decided sua sponte to reopen the Order and place a five year limitation on the duration of the corrective advertising requirement. The majority concludes that a modification is needed to ensure that the corrective advertising requirement will not outlast

whatever lingering false belief the deceptive advertising campaign created. The majority specifically reasons that because the "deceptive advertising campaign lasted for eight years, the corrective advertising order should last no longer than an equivalent number of years after that campaign ended." *Novartis Corporation et al.*, Dkt. No. 9279, Order Modifying Order, Denying Petition for Reconsideration, and Denying as Moot Application for Stay at 2 (July 2, 1999). Because the respondents have not run their deceptive advertisements since May 1996, that is, three years ago, the corrective advertising provision "will remain in effect for five additional years." *Id.* The practical effect of the modification is that the respondents very likely will have to make the corrective statement on Doan's packages until five years after the modified Order becomes effective, that is, until September 2004.[\(1\)](#)

In support of the conclusion that the false superior efficacy belief is likely to linger until September 2004, the majority has relied exclusively on the general proposition that a false belief is likely to linger for the same period of time after the deceptive advertising has stopped as the period during which the advertising ran. The majority cites nothing in support of this general proposition, nor am I aware of any extrinsic evidence, expert testimony, case law, or other authority that supports it.

The Commission's adoption of this general proposition raises a serious policy question as to how frequently the Commission will order corrective advertising in the future. If false beliefs are to be assumed likely to linger for the same period of time after the deceptive advertising has stopped as the period during which the advertising ran, corrective advertising could be ordered in most deceptive advertising cases. It does not serve the public interest to adopt a new principle for determining lingering effect that could be used to transform corrective advertising from an extraordinary remedy into a commonplace remedy.

The majority deserves credit for its willingness to recognize that the original Order imposed broader relief than intended and to modify the original Order to limit the relief.

But the modified Order still imposes what is likely to be a five-year corrective advertising requirement. The evidence in the record does not prove that any false belief is likely to linger in the minds of consumers through the duration of the requirement,[\(2\)](#) which extends more than eight years after the respondents discontinued making their implied deceptive claim. Without proof that any false belief is likely to last this long period of time, the corrective advertising requirement contained in the modified Order serves no remedial purpose and cannot be justified.

I therefore dissent as to the corrective advertising provision included in the modified Order.[\(3\)](#)

1. Absent a stay, the modified Order will take effect in September 1999, sixty days after it is served on the respondents.
2. My separate statement in this case, accompanying the majority's principal opinion, contains a comprehensive discussion of the reasons why the evidence in the record does not prove that a false belief is likely to linger until July 2000, much less September 2004. *Novartis Corporation et al.*, Dkt. No. 9279 (May 13, 1999) (Statement of Commissioner Orson Swindle, concurring in part and dissenting in part).

3. Because the Commission has modified the original Order, I support the Commission's decision to deny the respondents' motion to stay the original Order since the motion is moot.