

IN THE MATTER OF
SCHERING-PLOUGH HEALTHCARE PRODUCTS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3741. Complaint, May 16, 1997--Decision, May 16, 1997

This consent order prohibits, among other things, the Tennessee-based manufacturer of health care products from making certain claims about the effectiveness or length of protection provided by any children's sun protection product unless they possess scientific evidence to substantiate the claims, and from misrepresenting the existence, contents, validity, results or conclusions of any test or study concerning sun protection products. The consent order requires the respondent to produce and distribute 150,000 consumer education brochures regarding sunscreen protection for children.

Appearances

For the Commission: *Mamie Kresses and Toby Levin.*

For the respondent: *Nancy Buc, Buc & Beardsley, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Schering-Plough Healthcare Products, Inc., a corporation, ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Schering-Plough Healthcare Products, Inc. is a Delaware corporation, with its principal office or place of business at 3030 Jackson Avenue, Memphis, Tennessee.

PAR. 2. Respondent has manufactured, advertised, labeled, promoted, offered for sale, sold, and distributed over-the-counter health care products, including "Coppertone Kids" sunblock lotion, to consumers. Coppertone Kids is a "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements and promotional materials for Coppertone Kids, including but not necessarily limited to the attached

Exhibits A through H. These advertisements and promotional materials contain the following statements and depictions:

A. (Depiction: child performing cannonball dive off of diving board) Coppertone Kids sunblock lasts through 32 back flips, 64 cannonballs and 52 belly flops. Introducing new Coppertone Kids 6-Hour Waterproof Sunblock. It goes on. And goes on protecting. In and out of the water, all day long. Because it's the sunblock that keeps kids protected from the sun, and waterproof for a full six hours. As proven by kids themselves in test after test. Coppertone Kids 6-Hour Waterproof Sunblock. It goes on. And stays on. Read and follow label directions (Exhibit A)(magazine ad)

B. (Depiction: child performing cannonball dive off of diving board) Coppertone KIDS sunblock lasts through 32 back flips, 64 cannonballs and 52 belly flops. Coppertone KIDS 6-Hour Waterproof Sunblock goes on and stays on. In and out of the water. All day long. Because it's the waterproof sunblock that keeps kids protected from the sun for a full six hours. As proven by kids themselves in test after test. Coppertone KIDS 6-Hour Waterproof Sunblock. It goes on and stays on. Read and follow label directions (Exhibit B)(magazine ad)

C. (Sound effects: kids playing in pool) ... Kids can last in the water for hours...But all sunblocks can't. That's why there's Coppertone Kids Waterproof Sunblock. It lasts 6 full hours, in and out of the water, so you don't have to reapply it as often. Which means your kids get great protection, and you get peace of mind...Coppertone Kids 6-Hour Waterproof Sunblock. It goes on and stays on. Use as directed. (Exhibit C) (radio ad)

D. (Sound effects: kids playing in pool; mother repeating herself) Billy, time for more sunblock. ...time for more sunblock. ...time for more sunblock... Coppertone Kids waterproof sunblock is made to last a full 6 hours, in and out of the water, so you won't have to reapply it as often. That means your kids get great protection, and you can stop repeating yourself... Coppertone Kids 6 hour waterproof sunblock. It goes on. And stays on. (Exhibit D) (radio ad)

E. (Depiction: Three mothers fishing at the ocean. One mother reels in her son from the water, applies sunscreen on the child, and then cuts the fishing line holding him) ...Mom's gotta keep a line on her kids... 'cause she's gotta keep re-applying that sunblock every time they come out of the water. But now there's new Coppertone Kids 6 Hour Waterproof Sunblock. (super: USE ONLY AS DIRECTED) It keeps a kid protected from the sun, and waterproof for a full six hours. So Mom puts it on...and cuts them loose... New Coppertone Kids 6 Hour Waterproof Sunblock. It goes on and stays on. (Super: It goes on. And stays on.) (Exhibit E) (tv ad)

F. Coppertone Kids sunblock is uniquely formulated to provide long-lasting waterproof protection. This waterproof formula lasts for a full 6 HOURS in and out of the water, and keeps kids protected from the sun's burning UVA and UVB rays. 6-HOUR WATERPROOF - Ideal for water active kids. LONG LASTING - Kid tested to go on and stay on... (Exhibits F & G) (label and promotion sample)

G. Dear Doctor: ...Coppertone, the most trusted name in suncare, now provides a complete line of sunblocks specially formulated for children...Coppertone KIDS offers 6-hour waterproof protection. ...

Coppertone KIDS

* Waterproof for a full 6 hours

* Long-lasting protection...

* Available in SPF 15 and 30

... All Coppertone Children's Sunblocks are clinically tested on children, so you can be confident your patients are getting safe, effective sun protection. (Exhibit H) (promotional letter to doctors)

PAR. 5. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through H, respondent has represented, directly or by implication, that a single application of Coppertone Kids provides six hours of protection from the sun for children engaged in sustained vigorous activity in and out of the water.

PAR. 6. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through H, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 7. In truth and in fact, at the time it made the representation set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. Through the use of statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A, B, F, G and H, respondent has represented, directly or by implication, that it has conducted tests demonstrating that a single application of Coppertone Kids provides six hours of protection from the sun for children engaged in sustained vigorous activity in and out of the water.

PAR. 9. In truth and in fact, respondent has not conducted tests demonstrating that a single application of Coppertone Kids provides six hours of protection from the sun for children engaged in sustained vigorous activity in and out of the water. Among other reasons, none of the tests relied upon by respondent evaluated a single application of the product under the advertised conditions of use, *i.e.*, sustained

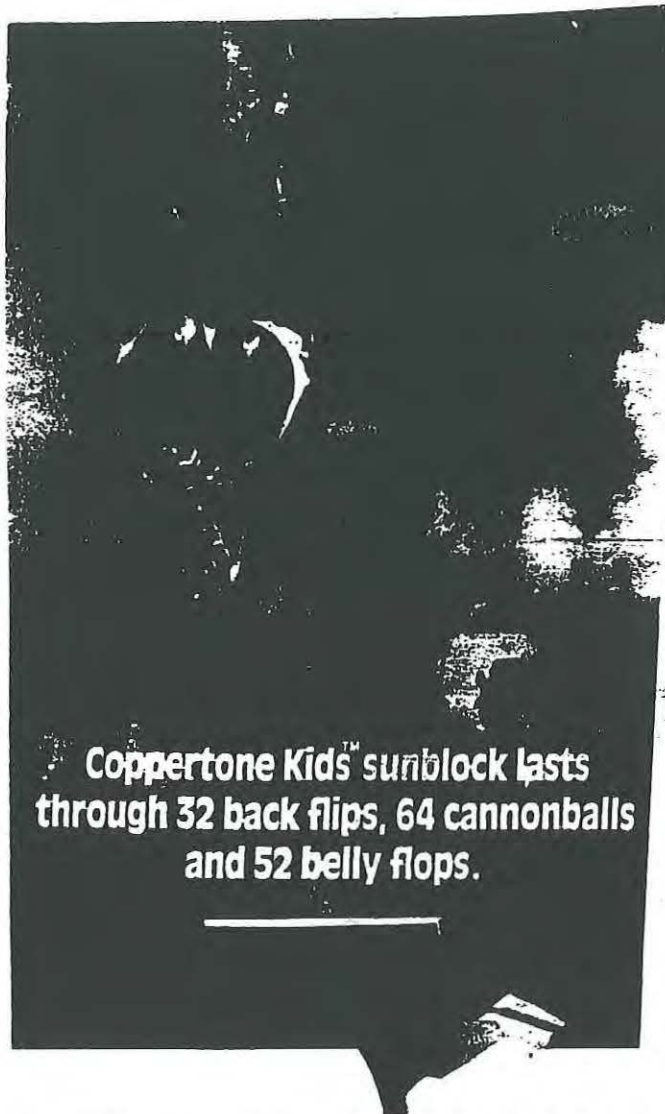
vigorous activity in and out of the water. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

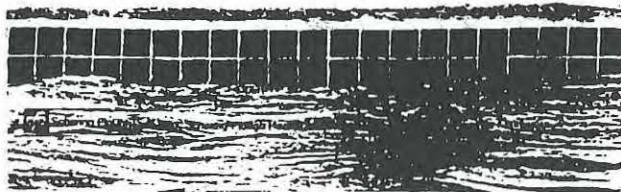
1301

Complaint

EXHIBIT A



**Coppertone Kids™ sunblock lasts
through 32 back flips, 64 cannonballs
and 52 belly flops.**



Introducing new Coppertone Kids
6-Hour Waterproof Sunblock. It
goes on. And goes on protecting.
In and out of the water, all day long.
Because it's the sunblock that
keeps kids protected from the sun,
and waterproof for a full six hours.
As proven by kids themselves in
test after test. Coppertone Kids
6-Hour Waterproof Sunblock.
It goes on. And stays on.



Read and follow label directions.

**NEW!
Coppertone
KIDS™**

**The 6-Hour
Waterproof Sunblock.**

EXHIBIT B

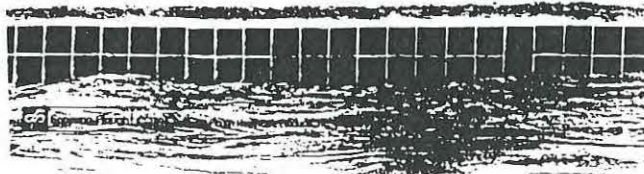
Complaint

123 F.T.C.

EXHIBIT B



**Coppertone KIDS[®] sunblock lasts
through 32 back flips, 64 cannonballs
and 52 belly flops.**



010005

Coppertone KIDS 6-Hour
Waterproof Sunblock goes on and
stays on. In and out of the water.
All day long. Because it's the
waterproof sunblock that keeps
kids protected from the sun
for a full six hours. As proven by
kids themselves in test after test.
Coppertone KIDS 6-Hour
Waterproof Sunblock. It goes on
and stays on.



Read and follow label directions

**Coppertone
KIDS[®]**

**It goes on.
And stays on.**

301

Complaint

EXHIBIT C



C10010

MESSNER VETERE BERGER McNAMEE SCHMETTERER/EURO RSCG

Tom Messner
Barry Vetere
Ron Berger
Louise McNamee
Bob Schmetterer
Ed Tedeschi
Larry Ditzelmer
Jim Durfee
Richard Roth
Phil Silvestri
Paul Wolfe

AS RECORDED RADIO SCRIPT**COPPERTONE KIDS 6-HOUR WATERPROOF SUNBLOCK**

Job # SPC-34014

Recorded: 3/22/94

CK1002-3

"CANNONBALL" :30

SFX: (KIDS PLAYING IN POOL-LAUGHING/SPLASHING)

KID: (SCREAMING) C-a-n-n-o-n-b-a-l-l !

SFX: (LOUD SPLASH)

ANNCR: Kids can last in the water for hours.

KID: (SCREAMING) J-a-c-k k-n-i-f-e !

SFX: (LOUD SPLASH)

ANNCR: But all sunblocks can't. That's why there's Coppertone Kids Waterproof Sunblock. It lasts 6 full hours, in and out of the water, so you don't have to reapply it as often. Which means your kids get great protection, and you get peace of mind.

KID: (SCREAMING) B-e-l-l-y-f-l-o-p !

SFX: (LOUD SLAP)

ANNCR: Coppertone Kids 6-Hour Waterproof Sunblock. It goes on and stays on. Use as directed.

30000009

Complaint

123 F.T.C.

EXHIBIT D

010013

SCHERING-PLOUGH HEALTHCARE PRODUCTS ADVERTISING CORP.

DATE: MARCH 18, 1994 AIR DATE: FEBRUARY 28, 1994
PRODUCT: COPPERTONE KIDS LENGTH: RADIO :30
TITLE: "BROKEN RECORD" COMML CODE: CK1001-3

(SOUND EFFECTS OF KIDS PLAYING IN POOL KEEP REPEATING WOMAN'S VOICE)

WOMAN: BILLY, TIME FOR MORE SUNBLOCK.

(RECORD SCRATCHES)

...TIME FOR MORE SUNBLOCK.

(RECORD SCRATCHES)

...TIME FOR MORE SUNBLOCK.

(RECORD SCRATCHES)

(MUSIC)

ANNCR: COPPERTONE KIDS WATERPROOF SUNBLOCK IS MADE TO LAST A FULL 6 HOURS, IN AND OUT OF THE WATER, SO YOU WON'T HAVE TO REAPPLY IT AS OFTEN. THAT MEANS YOUR KIDS GET GREAT PROTECTION, AND YOU CAN STOP REPEATING YOURSELF. AT LEAST ABOUT ONE THING.

WOMAN: BILLY, TIME FOR BED.

(RECORD SCRATCHES)

...TIME FOR BED.

(RECORD SCRATCHES)

...TIME FOR BED.

ANNCR: COPPERTONE KIDS 6 HOUR WATERPROOF SUNBLOCK. IT GOES ON. AND STAYS ON.

©1994 Schering-Plough HealthCare Products, Inc.

00000012

1301

Complaint

EXHIBIT E

COPPERTONE KIDS

"MOMS FISHING"

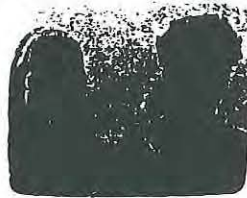
Coppertone
KIDS

CLIENT: Schering-Plough HealthCare Products

PXCK-3913 TV :30



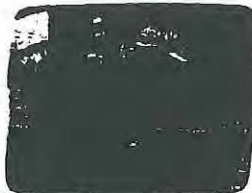
1ST MOM:
Looks like Betty's got one.



2nd MOM:
Way to go Betty.
1st MOM:
Get ready, he's gonna run.



3rd MOM:
Not if I can help it. Gotcha!



ANNCR: (VO)
Mom's gotta keep a line on her kids...



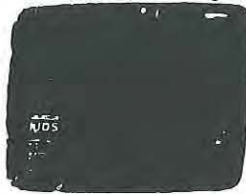
'cause she's gotta keep re-applying that sunblock every time they come out of the water.



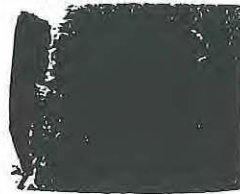
But now there's new
Coppertone Kids



6 Hour Waterproof Sunblock.



It keeps a kid protected from the sun, and waterproof for a full six hours.



So Mom puts it on... and cuts them loose.



MOM:
Have fun Billy!



ANNCR: (VO)
New Coppertone Kids
6 Hour Waterproof Sunblock.



It goes on. And stays on.

It goes on and stays on.

00000020

Complaint

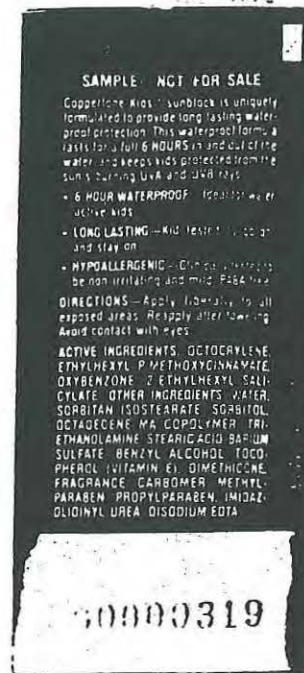
EXHIBIT F



1301

Complaint

EXHIBIT G



Complaint

123 F.T.C.

EXHIBIT H

Coppertone®
Children's Sunblocks

Dear Doctor:

As a healthcare professional, you know that it has been estimated that 50% of the sun damage a person experiences over a lifetime occurs before age 18. However, research indicates that regular use of a sunblock with a Sun Protection Factor of 15 during the first 18 years of a child's life can reduce the risk of developing some types of skin cancer later in life by as much as 78%.

Coppertone®, the most trusted name in suncare, now provides a complete line of sunblocks specially formulated for children — Water BABIES® and Coppertone KIDS™. Coppertone KIDS offers 6-hour waterproof protection.

Water BABIES®

- Specially formulated for baby's delicate skin
- Hypoallergenic, non-irritating
- Waterproof
- Available in SPF 15, 30, and 45

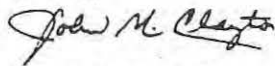
Coppertone KIDS™

- Waterproof for a full 6 hours
- Long-lasting protection
- Hypoallergenic, non-irritating
- Available in SPF 15 and 30

Enclosed please find samples of both Water BABIES and Coppertone KIDS plus an educational brochure called "Sun Safety for Children." This brochure offers parents some practical tips on how to block the sun's damaging rays without blocking the fun.

All Coppertone Children's Sunblocks are clinically tested on children, so you can be confident your patients are getting safe, effective sun protection.

Sincerely,



John M. Clayton, Ph.D.

00000116

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Schering-Plough Healthcare Products, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office or place of business at 3030 Jackson Avenue, Memphis, Tennessee.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

For the purpose of this order, the following definitions shall apply:

A. "*Sun protection product*" shall mean any product intended for, or promoted as, providing users with protection against the harmful effects of sun exposure or ultraviolet radiation, including but not limited to products containing a sunscreen ingredient.

B. "*Children's sun protection product*" shall mean any sun protection product that uses the word "babies," "children," "kids," or words of similar import in the name or promotion of the product, or that is advertised or promoted for use primarily by children under the age of twelve (12).

C. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

I.

It is ordered, That respondent, Schering-Plough Healthcare Products, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Coppertone Kids or any other children's sun protection product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication:

A. The length of time that a single application of the product will provide protection from the sun for individuals engaged in sustained vigorous activity in and out of the water; or

B. The efficacy of such product in providing protection against any harmful effect of sun exposure or ultraviolet radiation,

unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondent, Schering-Plough Healthcare Products, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any sun protection product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test or study.

III.

Nothing in this order shall prohibit respondent from making any representation for any sun protection product that is specifically permitted in labeling for any such product under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

IV.

It is further ordered, That respondent shall design, produce and print a color brochure concerning the importance of sunscreen usage by children, which contains all of the following messages or themes:

- A. The importance of sunscreens in preventing skin damage, including skin cancer, sunburn and premature skin aging;
- B. Regular use of a high SPF sunscreen during childhood can significantly reduce the risk of certain types of skin cancers later in life;
- C. A single bad sunburn during childhood can significantly increase a child's risk of developing skin cancer later in life;
- D. The importance of proper application of sunscreens;
- E. The need to reapply sunscreens after toweling or sustained vigorous activity; and
- F. The need to use sunscreens during outdoor activities -- not only in connection with water activities.

Respondent shall submit a draft of the brochure, and a draft plan for its dissemination, no later than sixty (60) days after the date of service of this order, to the Associate Director of the Commission's Division of Advertising Practices for review and approval. No later than sixty (60) days after the Associate Director's approval of the brochure and the dissemination plan, respondent shall disseminate 150,000 copies of the brochure to parents or organizations with access to parents or others who work with or care for children under the age of 12.

V.

It is further ordered, That, for five (5) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating any such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers or governmental organizations.

VI.

It is further ordered, That the provisions of this order shall not apply to any label or labeling printed prior to the date of service of this order and shipped by respondent to purchasers for resale prior to one hundred (100) days after service of this order.

VII.

It is further ordered, That respondent, its successors and assigns, shall:

A. Within thirty (30) days after the date of service of this order, provide a copy of this order to each of respondent's current principals, officers, and directors, and to all personnel, managers, agents, and

representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order; and

B. For a period of five (5) years from the date of service of this order, provide a copy of this order to each of respondent's principals, officers, and directors, and to all personnel, managers, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order within three (3) days after the person assumes his or her position.

VIII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising under this order.

IX.

This order will terminate on May 16, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

X.

It is further ordered, That respondent shall, within sixty (60) days after service of this order, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
CONCURRING IN PART AND DISSENTING IN PART

Today, the Commission issues a final decision and order resolving allegations about certain claims in the advertising of Coppertone Kids 6-Hour Waterproof Sunblock. I concur except with respect to Part IV of the order, which requires the respondent to develop and disseminate a consumer education brochure addressing the dangers of unprotected exposure to the sun. Consumer education brochures are an integral part of the Commission's consumer protection program, but they are not necessarily defensible adjuncts to Commission orders.

A fencing-in provision will be sustained by the courts as long as it is "reasonably related" to the violation found.¹ Fencing-in relief properly may include requirements beyond simply prohibiting the challenged conduct that are designed to "close all roads to the prohibited goal, so that [the Commission's] order may not be bypassed with impunity."² The allegedly deceptive claim is that the respondent's sunblock for children would remain effective for six hours even if the children engaged in "sustained vigorous activities in and out of the water," such as playing in sand, taking off and putting on clothes and toweling off after swimming. Complaint ¶ 5. The order expressly enjoins the respondents from making the challenged claim, either directly or indirectly, for the product at issue as well as for "any other children's sun protection product." Order ¶ I.

In addition, the order requires the respondent to develop and distribute 150,000 copies of a color brochure concerning the importance of sunscreen usage by children. The order requires that the brochure contain six messages or themes only one of which addresses the issue in this case, the need to reapply so-called water-

¹ *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *FTC v. National Lead Co.*, 352 U.S. 419, 428 (1957).

² *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

proof or water-resistant sunblock after vigorous activity or after toweling off. Order ¶ IV-E.

The brochure requirement, even the message that relates most closely to the challenged claim, is not focused on preventing the respondent from making the challenged claim or otherwise from avoiding compliance with the order. The brochure would help educate consumers regarding an important health issue, and, presumably, make them less likely to be misled by the kind of implied claims challenged in this action.³ There is no reason to think that it would enhance the deterrent effect of the order on Schering.

Presumably, the brochure requirement will not be unduly burdensome or costly for Schering because it will promote the use of its product, and the brochure is undoubtedly commendable as a public health initiative. Nevertheless, under the circumstances, it is an overly broad requirement as measured against the current standard for ordering relief.⁴ There is a value to the Commission in maintaining the integrity of the standard for imposing a fencing-in remedy.

I respectfully dissent from Part IV of the order.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III
CONCURRING IN PART AND DISSENTING IN PART

I have voted to approve final issuance of the complaint and consent order against Schering-Plough Healthcare Products, Inc. ("Schering"), because I have reason to believe that the challenged advertisements are deceptive and I find that the order, for the most part, provides appropriate relief. I continue, however, to oppose the requirement that Schering produce and distribute a consumer education brochure that includes numerous specified "messages or themes." This remedy is overbroad and is unlikely to assist in the prevention of the violations alleged in the complaint. Although I am an advocate of a strong Commission consumer education program, and we can be proud of the valuable work done by the Bureau of Consumer Protection's Office of Consumer and Business Education, the consumer education remedy contained in this order is a well-meaning but not legally justifiable effort to fund a general consumer education campaign.

³ The product label already contains the statement, "Reapply after toweling."

⁴ It would be even more difficult to justify Part IV of the order as corrective advertising, because it is unlikely that the implied claim challenged in the complaint would linger in the minds of consumers long after it ceased being made. See *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 762 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978).

The Commission enjoys extensive authority to fashion fencing-in relief for deceptive practices so long as the remedy has a reasonable relation to the violations alleged in the complaint. *See, e.g., FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *FTC v. National Lead Co.*, 352 U.S. 419, 428-29 (1957). With such authority, however, comes the responsibility to exercise it judiciously. In my view, the consumer education remedy mandated by this order bears no reasonable relationship to the violations alleged in the complaint.

The complaint alleges that Schering lacked a reasonable basis for the claim that a single application of Coppertone Kids provides six hours of protection from the sun for children engaged in sustained vigorous activity in and out of the water.¹ The order addresses this allegation by requiring scientific substantiation for claims about the efficacy of any children's sun protection product in providing protection against any harmful effect of sun exposure or ultraviolet radiation, or about the length of time that any such product will provide sun protection for individuals engaged in sustained vigorous activity in and out of the water.

In addition, however, the order requires Schering to design, produce and print a brochure -- subject to the approval of the Associate Director of the Division of Advertising Practices ("DAP") in the Commission's Bureau of Consumer Protection -- about the importance of sunscreen usage by children. The order mandates that the brochure include all of the following "messages or themes":

(A) The importance of sunscreens in preventing skin damage, including skin cancer, sunburn, and premature skin aging;

(B) Regular use of a high SPF sunscreen during childhood can significantly reduce the risk of certain types of skin cancers later in life;

(C) A single bad sunburn during childhood can significantly increase a child's risk of developing skin cancer later in life;

(D) The importance of proper application of sunscreens;

(E) The need to reapply sunscreens after toweling or sustained vigorous activity; and

(F) The need to use sunscreens during outdoor activities -- not only in connection with water activities.

¹ The complaint challenges as false the claim that Schering has conducted tests demonstrating that a single application of Coppertone Kids provides six hours of protection from the sun for children engaged in sustained vigorous activity in and out of the water. The order broadly prohibits false establishment claims for any sun protection product.

Order ¶ IV. Schering must disseminate 150,000 copies of this brochure to parents or to organizations with access to parents or others who work with or care for children under age twelve.²

Of the six required messages, only statement (E) seems likely to assist in the prevention of future deception like or related to that alleged in the complaint. Yet by including this key reapplication information in an extensive list of other facts about sunscreen, the order makes it less likely that consumers will see the reapplication information. In my view, it is highly unlikely that a parent who receives and reviews whatever brochure is approved will recall the one piece of information related to the complaint allegation when the parent makes a sunscreen purchase. Because the scope of the information to be included in the brochure is so broad, the consumer education remedy is not reasonably related to the violations alleged in the complaint.³

It is also troubling that the Commission essentially is ordering the respondent to advertise that persons should buy and use more of the respondent's products. Schering already has every incentive to communicate the required messages to consumers. In fact, the consumer education remedy is advertising ("use more sunscreen") that the company might wish to do in any event since the conduct provisions of the order may prevent it from continuing to distinguish its children's sun protection product from others by claiming that it requires fewer applications. The deterrence value of this remedy is minimal at best.

Finally, if this relief were sought in litigation, rather than obtained through a consent agreement, it would not withstand scrutiny under the First Amendment. For purposes of First Amendment analysis, there is no difference between compelled speech and restrictions on speech. *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 796-97

² Like the brochure, the dissemination plan is subject to the approval of the Associate Director in charge of DAP.

³ The consumer education remedy here stands in contrast to a fencing-in provision contained in a consent order issued by the Commission last year. See *Blenheim Expositions, Inc.*, Docket No. C-3633 (Jan. 18, 1996) (requiring a franchise show promoter to undertake a limited distribution of an FTC consumer education brochure to customers attending its franchise shows). The respondent in *Blenheim* allegedly made unsubstantiated claims regarding the earnings and success of franchise owners and false claims regarding a poll of franchise owners. The brochure specifically identified FTC requirements with which franchisors must comply, including consumers' right to receive an earnings claims document, and it provided instructions on how to evaluate earnings claims. It thus contained information likely to assist the respondent's customers to detect and protect themselves from possible future misrepresentations of earnings like those alleged in the complaint. Although the brochure also addressed other issues related to the purchase of a franchise, all of the advice in the brochure at least arguably would help prospective franchisees avoid becoming victims of future violations by the respondent.

(1988). A valid restriction on commercial speech must be no more extensive than necessary to serve the substantial governmental interest directly advanced by the restriction. *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1591 (1995) (discussing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)). Thus, disclosures compelled by the FTC can be no broader than necessary to prevent future deception or to correct the effects of past deception. See, e.g., *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 164 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978). Additionally, the government bears the burden of showing that a speech restriction will advance its interest "to a material degree." 44 *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1509 (1996) (plurality opinion of Justice Stevens) (citing *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)). A commercial speech restriction that "provides only ineffective or remote support for the government's purpose" does not pass this test. 44 *Liquormart*, 116 S. Ct. at 1509 (citing *Central Hudson*, 447 U.S. at 564).

The dubious efficacy of this consumer education remedy makes it unlikely that it will directly advance the asserted governmental interest in preventing future deception by the respondent. In addition, I doubt that a credible argument can be made that the information that the order specifically requires be included in the brochure is no more extensive than necessary to prevent future violations by Schering. Certainly Schering has waived any First Amendment objections to this relief by entering into the consent agreement. Nonetheless, when a remedy implicates First Amendment rights, the Commission should be particularly reluctant to obtain through negotiation relief that it lacks at least a colorable chance to obtain in litigation.

In my view, it would be better to have no consumer education remedy in the consent order if the only alternative is an overbroad remedy of doubtful efficacy that raises First Amendment concerns.

1323

Complaint

IN THE MATTER OF

GENERAL MILLS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF
THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3742. Complaint, May 16, 1997--Decision, May 16, 1997

This consent order requires General Mills, among other things, to permit New Ralcorp to transfer to any successor party, without authorization or approval from General Mills, the right to manufacture and sell cereals identical to the Chex brand products. The consent order also prohibits General Mills from delaying production of the private label Chex rivals.

Appearances

For the Commission: *Phillip Broyles and Anthony Joseph.*

For the respondent: *James Rill, Collier, Shannon, Rill & Scott,*
Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that respondent General Mills, Inc., subject to the jurisdiction of the Commission, has agreed to acquire the branded ready-to-eat cereal and snack mix businesses from Ralcorp Holdings, Inc., in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that the acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENT GENERAL MILLS, INC.

1. Respondent General Mills, Inc. ("General Mills"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware. General Mills' headquarters, office and principal place of business is located at Number One General Mills Boulevard, Minneapolis, Minnesota. In fiscal year 1996, General Mills had sales of approximately \$5.4 billion.