

IN THE MATTER OF

NOVARTIS CORPORATION, ET AL.

Docket 9279. Interlocutory Order, August 5, 1999

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 CFR 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' 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

beliefs 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' 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' 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' 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 or implies doubt on our part as to the merits of Novartis' 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' deceptive advertising campaign would linger for at least five more years (at which time the corrective advertising requirement will automatically terminate). Nevertheless, Novartis' 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' 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 not, 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' 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.

Commissioner Swindle concurring.

CONCURRING STATEMENT OF COMMISSIONER ORSON SWINDLE

The Commission has granted Novartis' petition for a stay pending appellate review of the corrective advertising provision contained in Part IV of the Order. I have voted in favor of granting the petition for a stay. However, I am writing separately to explain the differences between my reasons for granting the petition and those of the majority.

The Commission considers four factors when deciding whether to grant a stay: 1) the likelihood of the applicant's success on appeal; 2) whether the applicant will suffer irreparable harm absent a stay; 3) injury to others if the stay is granted; and 4) whether the stay is in the public interest. 16 CFR 3.56(c). I will discuss each factor in turn.

The existence of a false belief that is likely to linger is one of the prerequisites for corrective advertising under *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), *modifying and enforcing* 86 FTC 1398 (1975). In the instant case, the Administrative Law Judge concluded that the evidence that had been offered did not prove the existence of a lingering false belief. In dissenting from the imposition

of the corrective advertising provision in this case, I also concluded that the exceedingly weak evidence offered on this issue did not prove the existence of a lingering false belief.¹ Because, as both the ALJ and I determined, the evidence did not prove the existence of the lingering belief, which is necessary to support the imposition of corrective advertising, I conclude that there is a substantial likelihood that Novartis will prevail on the merits of its appeal.

With regard to the second factor, I also conclude that Novartis has shown that it will suffer irreparable injury in absence of a stay. If a stay is not granted, then Novartis will suffer some irreparable harm by incurring the non-recoverable cost of affixing the corrective message to approximately 2,000,000 packages of Doan's pills. Cohen Dec. ¶ 13. Moreover, if a stay is not granted, the corrective advertising requirement will compel Novartis to engage in commercial speech in violation of its rights under the First Amendment. *Novartis Corporation, et al.*, Dkt. No. 9279 (May 13, 1999) (Statement of Commissioner Orson Swindle, concurring in part and dissenting in part). The loss of First Amendment rights, even for minimal periods of time, may constitute irreparable injury sufficient to support granting a stay. See *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *National Treasury Employees v. United States*, 927 F.2d 1253, 1254 (D.C. Cir. 1991). Based on the irrevocable economic loss that Novartis will incur by relabeling its packages and the harm to its First Amendment right to engage (or not engage) in commercial speech, I conclude that Novartis will likely be irreparably harmed if the stay is not granted.

As for the third factor, if the stay is granted and the corrective advertising remedy is therefore postponed, consumers are unlikely to suffer harm because there was insufficient evidence that the false belief is likely to be lingering in the minds of consumers. Because, unlike the majority, I do not believe that the record shows any lingering effect, it follows that there will be no consumer injury if the Commission grants a stay. Finally, I conclude that the stay is in the public interest because it forestalls a possible injury to one party's Constitutional rights without injuring consumers.

My determination that all four factors to be evaluated under Rule 3.56(c) weigh in favor of granting a stay is a logical outgrowth of the

¹ To support the corrective advertising requirement, the evidence in the record would have to show that the belief was likely to linger in the minds of consumers for the duration of the requirement, which extends more than eight years after Novartis discontinued making the implied deceptive claim.

conclusion that I reached just over two months ago in dissenting from the imposition of a corrective advertising requirement. Accordingly, I agree that the appropriate result here is to stay the corrective advertising portion of the Order.

In contrast, the logical outgrowth of everything that the majority has previously said and done in this case should have resulted in a *denial* of the petition for a stay. I cannot reconcile the reasons that the majority has given for granting the stay with the unequivocal conclusions and decisive language in its opinion, especially its cursory dismissal of Novartis' arguments on the merits and reliance on purportedly substantial and ongoing consumer injury to justify the extraordinary remedy of corrective advertising. I similarly cannot reconcile the corrective advertising requirement imposed with any evidence in the record.² Rather than rehashing and belaboring these issues, however, I instead leave it to the Court of Appeals for the District of Columbia Circuit to determine whether the corrective advertising provision can be sustained notwithstanding these clear discrepancies.

² Novartis must spend \$8 million for corrective advertisements if it wants to terminate the corrective advertising requirement before September 2004. Given the majority's preoccupation with corrective advertising, I find especially puzzling the order provision that allows Novartis to count toward that \$8 million figure its expenditures for 15-second broadcast advertisements that *will not carry the corrective message*.

IN THE MATTER OF

LIBERTY FINANCIAL COMPANIES, INC.

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

Docket C-3891. Complaint, Aug. 12, 1999--Decision, Aug. 12, 1999

This consent order, among other things, prohibits Liberty Financial Companies, Inc., the Massachusetts-based website operation, from misrepresenting the purpose for the collection or use of personal information from or about children or consumers age thirteen through seventeen. The consent order requires the respondent to provide clear and prominent notice with respect to its practices regarding its collection and use of personal information.

Participants

For the Commission: *Toby Levin, Sydney Knight, Joel Winston, C. Lee Peeler and Louis Silversin.*

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

COMPLAINT

The Federal Trade Commission, having reason to believe that Liberty Financial Companies, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Liberty Financial Companies, Inc., is a Massachusetts corporation with its principal office or place of business at 600 Atlantic Avenue, Boston, Massachusetts.

2. Respondent has operated a World Wide Web ("Web") site located at *http://www.younginvestor.com* (the "Website").

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.

4. Respondent has disseminated or caused to be disseminated on its Website certain Web pages directed at children known as The Young Investor Measure Up Survey area. [*Exhibit A*]. At this area, respondent conducts a survey that collects from participants numerous items of information such as the individual's: weekly