CONCURRING STATEMENT OF COMMISSIONER ORSON SWINDLE
in *Novartis Corp., et al.*, Dkt. No. 9279

The Commission has granted Novartis's 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 C.F.R. § 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 F.T.C. 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 the 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 package 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

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[1] To support the corrective advertising requirement, the evidence in the record would have had 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.

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 conclusions 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's 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.

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[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*.