

IN THE MATTER OF
STERLING DRUG, INC., ET AL.

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

Docket 8919. Complaint, Feb. 23, 1973—Final Order, July 5, 1983

This order requires a New York City manufacturer of nonprescription drug products, among other things, to cease advertising that "Bayer Aspirin," "Bayer Children's Aspirin," "Vanquish," "Cope," "Midol" or any other nonprescription internal analgesic has been proven to be superior to other pain relieving products, unless such claim has been substantiated by two well-controlled clinical tests. The company must have a reasonable basis to support any claim that its pain relievers are therapeutically superior to others, as well as competent and reliable scientific evidence for representations that the comparative pharmaceutical qualities of its analgesics have been proven or established. The order further prohibits the manufacturer from advertising that its products contain any unusual or special ingredient, when in fact such ingredient is commonly used in similar products; or from making any claim which misrepresents the product's analgesic ingredient.

Appearances

For the Commission: *Joel N. Brewer, Randell C. Ogg, Teresa A. Hennessy, Leslie E. Rossen and Roberta Gross.*

For the respondents: *Lionel Kestenbaum, Norman G. Knopf, William D. Appler, Jeffrey L. Kestler, Amanda B. Pedersen and Susan S. Pecaro, Bergson, Borkland, Margolis & Adler, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Sterling Drug, Inc., a corporation, Dancer-Fitzgerald-Sample, Inc., a corporation, and Lois Holland Callaway, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. For purposes of this complaint the following definitions shall apply:

1. *Commerce* means commerce as defined in the Federal Trade Commission Act.

2. *False advertisement* means false advertisement as defined in the Federal Trade Commission Act.

PAR. 2. Respondent Sterling Drug, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 90 Park Avenue in the City of New York, State of New York. [2]

Respondent Dancer-Fitzgerald-Sample, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 347 Madison Avenue, in the City of New York, State of New York.

Respondent Lois Holland Callaway, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 745 Fifth Avenue, in the City of New York, State of New York.

PAR. 3. Respondent Sterling Drug, Inc., is now and has been for all times relevant to this complaint engaged in the manufacturing, advertising, offering for sale, sale and distribution of certain non-prescription internal analgesic preparations which come within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act. The designations, directions for use and active ingredients for some of these analgesic drugs are as follows:

1. Designation: "Bayer Aspirin"

Active ingredients:

Aspirin

Dosage: 1 or 2 tablets with water every
4 hours, as necessary, up to 12 tablets a day.

2. Designation: "Bayer Children's Aspirin"

Active Ingredients:

Aspirin

Dosage: Varies depending upon age of child.

3. Designation: "Cope"

Active Ingredients:

Aspirin

Caffeine [3]

Methapyrilene Fumarate

Magnesium Hydroxide

Aluminum Hydroxide (Dried Gel)

Dosage: 1 or 2 tablets every 4 hours, as needed, up to 9 tablets per day.

4. Designation: "Vanquish"

Active Ingredients:

Aspirin
Caffeine
Acetaminophen
Magnesium Hydroxide
Aluminum Hydroxide (Dried Gel)
Dosage: 2 caplets with water. Can be repeated every 4 hours if needed, up to 12 caplets per day.

5. Designation: "Midol"Active Ingredients:

Aspirin
Caffeine
Cinnamedrine HCL
Dosage: 2 Midol Tablets with water. Repeat 1 or 2 tablets every 4 hours as needed, up to 8 tablets per day.

PAR. 4. Respondent Dancer-Fitzgerald-Sample, Inc., is now and for all times relevant to this complaint has been an advertising agency of Sterling Drug, Inc., and for all times relevant to this complaint, has prepared and placed for publication, advertising material, including but not limited to the advertising referred to herein, to promote the sale of the said "Bayer Aspirin", "Bayer Children's Aspirin" and "Cope".

Respondent Lois Holland Callaway, Inc., for all time relevant to this complaint has been an advertising agency of Sterling Drug, Inc., and for all times relevant to this complaint, has prepared and placed for publication advertising material, including but not limited to the advertising referred to herein, to promote the sale [4] of the said "Vanquish".

PAR. 5. In the course and conduct of its aforesaid business, respondent Sterling Drug, Inc., causes the said analgesic drug preparations, when sold, to be transported from its places of business located in various States of the United States to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent Sterling Drug, Inc., maintains and at all times relevant to this complaint has maintained, a substantial course of trade in said preparations in commerce. The volume of business in such commerce has been and is substantial.

PAR. 6. In the course and conduct of their businesses, respondents Sterling Drug, Inc., Dancer-Fitzgerald-Sample, Inc., and Lois Holland Callaway, Inc., have disseminated, and caused the dissemination of, certain advertisements concerning the said drugs by the United States mail and by various means in commerce, including but not limited to, advertisements inserted in magazines and newspapers,

and by means of television and radio broadcasts transmitted by television and radio stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said drugs and have disseminated, and caused the dissemination of, advertisements concerning said drugs by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said drugs in commerce.

PAR. 7. Typical of the statements and representations made in the advertisements, but not all inclusive thereof, are the following:

A. For Bayer Aspirin:

(1) To relieve a headache fast Bayer Aspirin's got the best help there is. Of all the leading pain relievers you see advertised, only Bayer is 100% aspirin. And Aspirin is what doctors recommend. [5]

(2) I'm Ozzie Nelson. Here's something I'm passing along to *my* family. This booklet about pain relievers. Bayer tested its aspirin for quality against 220 other brands. The results? Bayer is superior. I also read about the latest report written by the American Medical Association Council on Drugs . . . Straight aspirin is preferred over other non-prescription pain relievers. Find out why . . . aspirin's the best pain reliever. And Bayer's the best aspirin.

(3) Has anyone ever improved on Bayer Aspirin? Made a faster Aspirin? A more effective Aspirin? Lots of people have tried. They took plain Aspirin. Made it bigger. Smaller. They buffered it. They added extra ingredients. They squeezed it. Squared it. Flavored it. Gummed it. Capsuled it. Fizzed it. Even tried spraying it . . . They did everything—but improve it. Today there is still nothing faster . . . nothing more effective . . . than good old genuine Bayer Aspirin. It's pure Aspirin . . . not part Aspirin. It works wonders for headache, muscle pain, aches and fever of a cold. For just about anything that hurts.

(4) Would you like to see the inside story on all the major pain relievers you see advertised? Inside every single leading pain reliever is the same major ingredient . . . Aspirin . . . every one of those products relies chiefly on Aspirin. Surprised? Don't be . . . after all, Aspirin is the only pain reliever doctors overwhelmingly recommend for nearly every type of ache or pain. And did you know that Bayer is the only one of those pain relievers that makes all its own Aspirin? With care and experience no one else can match? That's why pure Bayer Aspirin, without Bufferin or Caffeine or any other extra ingredient is the pain reliever for you.

(5) Deciding which pain reliever you should take can be like a game. Some talk about strength, some talk about speed, some talk about ingredients they don't name. But of all the leading pain relievers you see advertised, Bayer is the only one that is all Aspirin. And Aspirin is what doctors recommend. [6]

(6) Bayer wants you to *know* about pain relievers . . . did you know that two Bayer Aspirin tablets bring all the pain relief power a headache can use? Did you know that Bayer without any additives is every bit as fast and effective in relieving pain as those products that have additives?

(7) Confused by claims? By shapes and sizes? By strange sounding ingredients? When you need fast relief from headache pain, don't forget this fact . . . Bayer is 100% Aspirin

and Aspirin is the strongest pain reliever you can buy. No wonder Bayer works wonders.

(8) If you've ever heard that all aspirin's alike, here's something you should know. While it's true that the United States Pharmacopoeia does set standards for aspirin, Bayer surpasses these standards in many ways. For example, Bayer standards require complete tablet disintegration within thirty seconds. That's ten times faster than the accepted five-minute standard. It's one of the things that helps make Bayer fast and gentle.

(9) 1ST MAN: How come Bayer doesn't buffer its aspirin? BAYER MAN: There's really no need to. In relieving pain, buffered aspirin isn't any faster or gentler than Bayer. Yes.

(10) When hot weather makes you feel headachy, tense, irritable, two Bayer Aspirin and a short rest can help you feel better fast!

It happens to most of us on a hot, humid summer day, when the pressures of daily living mount up. By mid-afternoon we feel so headachy and edgy that the simplest chore, the smallest disturbance becomes an irritation. We're in no mood to enjoy life or the company of others.

Here's how to turn that mood around: just take two Bayer Aspirin for your headache, sit down for a few minutes and relax. You too will say, "Bayer works wonders." These few minutes can make a world of difference in the way you feel and act. You'll enjoy being with people, and they'll enjoy being with you. [7]

Whenever you get headachy, tense and out of sorts on a hot summer afternoon, set aside a few minutes for Bayer Aspirin and a brief rest. Bayer is *pure* aspirin, not just *part* aspirin. Ask your pharmacist.

(11) Bayer recently tested its aspirin against 220 other brands. For purity, stability, speed of disintegration, Bayer was consistently better.

(12) I read about recent Bayer tests on aspirin. They tested for *quality*, for purity, for *freshness* against 220 other brands. The tests showed that Bayer makes the superior aspirin.

B. Bayer Aspirin for Children:

... You don't settle for any children's aspirin. You want the best. You want Bayer because no one makes aspirin like Bayer. No one purifies aspirin like Bayer. No one protects Aspirin like Bayer.

C. For Cope:

(1) Important studies made at the world's leading headache clinic show that for relief of severe nervous tension headaches a combination of a pain reliever and a sedative provides greater relief than either medication alone. Of all the leading remedies you can buy for ordinary nervous tension headaches, only Cope combines a gentle relaxer with a powerful pain reliever for really effective relief. If you have chronic headaches, see your doctor. For the usual nervous tension headache get Cope.

(2) I get it on rainy days. I get it during rush hour. I get it when the boss looks over my shoulder. When the name of the pain is nervous tension headache, the name of the remedy is Cope. Because Cope gives you a powerful pain reliever plus a gentle relaxer. [8]

D. For Vanquish:

(1) (3 tablets are shown with 1 caplet of Vanquish)

For your headache pain, here are your major choices: This leading extra strength product has no buffers. This leading buffered product has no extra strength. This leading pain reliever has strength but no buffers. Of all the leading pain relievers you can buy, only Vanquish gives you extra strength and gentle buffers. Vanquish. The choice. (Sterling Drug, Inc.)

(2) When you get a headache we think you should take Vanquish. And we'll show you why in a head to head comparison. This is Vanquish. It gives you extra strength and gentle buffers. And its the only leading pain reliever that does. This is a leading extra strength product. It has no buffers. And there are no buffers in this other extra strength product either. This leading buffered product comes without extra strength. We think your headache deserves extra strength and you deserve gentle buffers. (Sterling Drug, Inc.)

(3) Vanquish is different. It gives you proven effectiveness of Aspirin as in this tablet plus extra medication as in these. But it also includes two gentle buffers . . . With Vanquish the only one. (Sterling Drug, Inc.)

(4) Her headache is killing me. When she gets a pain in the head, it can be a big pain to me, so I give her Vanquish. Vanquish is strong medicine. Vanquish contains more pain relievers than the largest selling extra strength tablet . . . and it has gentle buffers. How's your headache, dear? Dit Dit Dit Dah . . . Vanquish is strong medicine. (Sterling Drug, Inc., and Lois Holland Callaway, Inc.) [9]

E. For Midol:

(1) Live Your Life . . . Relieved of Menstrual Distress. In the modern life you lead, there come the calm times, too. Strolling hand in hand. Reading together. Talking together. These are the precious, serene moments. And you let nothing interfere. Not even functional menstrual distress. How? With Midol. Because MIDOL contains:

An exclusive anti-spasmodic that helps STOP CRAMPS

Medically-approved ingredients that RELIEVE HEADACHE, LOW BACKACHE
. . . CALM JUMPY NERVES . . .

Plus a special mood-brightener that gives you a real lift . . . gets you through the trying pre-menstrual period feeling calm and comfortable.

PAR. 8. Through the use of these advertisements, and others similar thereto not specifically set out herein, it was represented directly or by implication:

A. By respondents Sterling Drug, Inc., and Dancer-Fitzgerald-Sample, Inc., that it has been established that:

1. Bayer Aspirin is superior in terms of significant therapeutic effect to any other aspirin.
2. Bayer Children's Aspirin is superior in terms of significant therapeutic effect to any other children's aspirin.
3. A recommended dose of Cope is more effective for the relief of "nervous tension headache" pain than a recommended dose of any other non-prescription internal analgesic.

B. By respondent Sterling Drug, Inc., that it has been established that:

1. A recommended dose of Vanquish is more effective for the relief of pain than a recommended dose of aspirin or buffered aspirin.

2. Because Vanquish contains "gentle buffers" it will result in less gastric discomfort than any non-prescription internal analgesic not containing buffers. [10]

C. By respondents Sterling Drug, Inc. and Lois Holland Callaway, Inc., that a recommended dose of Vanquish is more effective for the relief of pain than the largest selling "extra strength" tablet.

PAR. 9. In truth and in fact, none of said representations has been established, for reasons including, but not limited to, the existence of a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drugs, as to the validity of all such representations.

PAR. 10. Through the use of these advertisements, and others similar thereto not specifically set out herein, it was represented directly or by implication by respondents Sterling Drug, Inc., and Dancer-Fitzgerald-Sample, Inc. that:

A. Bayer Aspirin is superior in terms of significant therapeutic effect to any other aspirin.

B. Bayer Children's Aspirin is superior in terms of significant therapeutic effect to any other children's aspirin.

PAR. 11. There existed, at the time of said representations, no reasonable basis for making the above representations, in that respondents lacked competent and reliable scientific evidence sufficient to support such representations.

PAR. 12. Through the use of these advertisements, and other similar thereto not specifically set out herein, it was represented directly or by implication:

A. By respondents Sterling Drug, Inc., and Dancer-Fitzgerald-Sample, Inc., that a recommended dose of Cope is more effective for the relief of "nervous tension headache" pain than a recommended dose of any other non-prescription internal analgesic.

B. By respondent Sterling Drug, Inc., that:

1. A recommended dose of Vanquish is more effective for the relief of pain than a recommended dose of aspirin or buffered aspirin.

2. Because Vanquish contains "gentle buffers" it will result in less gastric discomfort than any non-prescription internal analgesic not containing buffers. [11]

C. By respondents Sterling Drug, Inc. and Lois Holland Callaway,

Inc., that a recommended dose of Vanquish is more effective for the relief of pain than the largest selling "extra strength" tablet.

PAR. 13. There existed, at the time of said representations, a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drugs, as to the validity of such representations.

PAR. 14. Moreover, respondents made said representations without disclosing the existence of such a substantial question as to the validity of each representation. In light of the representations made, the existence of such a substantial question is a material fact, which, if known to consumers, would be likely to affect their consideration of whether or not to purchase such products. Thus, respondents have failed to disclose material facts.

PAR. 15. Through the use of the aforesaid advertisements and others similar thereto not specifically set out herein, it was represented directly or by implication:

A. By respondents Sterling Drug, Inc. and Dancer-Fitzgerald-Sample, Inc. that a recommended dose of Bayer Aspirin relieves nervous tension, anxiety and irritability and improves the user's mood.

B. By respondents Sterling Drug, Inc., and Dancer-Fitzgerald-Sample, Inc. that a recommended dose of Cope relieves nervous tension, anxiety and irritability and will enable persons to cope with the ordinary stresses of everyday life.

C. By respondent Sterling Drug, Inc. that a recommended dose of Midol relieves nervous tension, stress, fatigue and depression and improves the user's mood.

PAR. 16. There existed at the time of said representations no reasonable basis for making the above representation in that respondents had no competent and reliable scientific evidence to support such representations.

PAR. 17. Through the use of the advertisements referred to in Paragraph Seven, sections (A) (2) (3) (4) (6) (7) and (9), (C), and (D) above it was represented directly or by implication: [12]

A. By respondents Sterling Drug, Inc., Dancer-Fitzgerald-Sample, Inc., that Bayer Aspirin is as effective for the relief of headache pain (including "nervous tension headache" pain) as, and will cause gastric discomfort no more frequently than, any other non-prescription internal analgesic, including Cope and Vanquish;

B. By respondents Sterling Drug, Inc., and Dancer-Fitzgerald-Sample, Inc., that Cope is more effective for the relief of "nervous tension headache" pain than any other non-prescription internal analgesic, including Bayer Aspirin and Vanquish;

C. By respondent Sterling Drug, Inc., that Vanquish is more effec-

tive for the relief of headache pain than any aspirin, including Bayer Aspirin, and will cause less gastric discomfort than any non-buffered internal analgesic, including Bayer Aspirin.

The representations referred to sections (A), (B), and (C) above are mutually inconsistent. Respondents have made claims for a product that are inconsistent with contemporaneous claims for other products made by the same firm.

PAR. 18. Furthermore, in advertisements for Cope, respondents Sterling Drug, Inc., and Dancer-Fitzgerald-Sample, Inc. referred to the results of tests or studies and represented, directly or by implication, that such tests or studies prove the claim that a recommended dose of Cope is more effective for the relief of "nervous tension headaches" than recommended doses of all other non-prescription internal analgesics.

PAR. 19. In truth and in fact, the tests or studies referred to do not prove the claim that a recommended dose of Cope is more effective for the relief of "nervous tension headaches" than recommended doses of all other non-prescription internal analgesics.

PAR. 20. Through the use of the advertisements referred to in Paragraph Seven, Sections A(11) and (12), and other similar thereto not specifically set out herein, respondents Sterling Drug, Inc. and Dancer-Fitzgerald-Sample, Inc. represented, directly or indirectly, that Bayer Aspirin has been tested against 200 other brands of aspirin for quality, purity, freshness, stability, and speed of disintegration, and that the results of the tests demonstrated that Bayer Aspirin is qualitatively superior to all of the other brands tested in all respects, and therapeutically superior to all of the other brands tested. [13]

PAR. 21. In truth and in fact, the tests referred to do not demonstrate that Bayer Aspirin is qualitatively superior in all respects, including speed of disintegration, to all other aspirins tested. Moreover, these tests do not demonstrate that Bayer is therapeutically superior to all other brands because at the time of such representations there existed a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drug product, concerning the validity, significance or interpretation of such tests as related to such representation.

PAR. 22. Respondents Sterling Drug, Inc. and Dancer-Fitzgerald-Sample, Inc. represented directly or by implication that Cope contained a unique formula in that it alone among non-prescription headache remedies contained both a pain reliever and an ingredient with sedative properties. In truth and in fact the ingredients referred to are aspirin and methapyrilene, both of which were available for non-prescription use in Excedrin PM. Therefore, the advertisements re-

ferred to in Paragraph Seven (C)(1) were and are misleading in a material respect.

PAR. 23. Respondents Sterling Drug, Inc. and Lois Holland Callaway, Inc., marketed and advertised Vanquish without disclosing in the advertising for this product that it contains aspirin and caffeine. Aspirin and caffeine are well-known commonplace substances widely available in a variety of non-prescription products. Moreover, the use of aspirin or caffeine can be injurious to health and may cause undesirable side effects. Thus, respondents have failed to disclose in advertising a material fact, which if known to certain consumers would be likely to affect their consideration of whether or not to purchase such products.

PAR. 24. Furthermore, respondents Sterling Drug, Inc. and Dancer-Fitzgerald-Sample, Inc. marketed and advertised Cope without disclosing in the advertising for this product that it contains aspirin and caffeine. Aspirin and caffeine are well-known commonplace substances widely available in a variety of non-prescription products. Moreover, the use of aspirin or caffeine can be injurious to health and may cause undesirable side effects. Thus, respondents have failed to disclose in advertising a material fact, which if known to certain consumers would be likely to affect their consideration of whether or not to purchase such products. [14]

PAR. 25. Furthermore, respondent Sterling Drug, Inc. marketed and advertised Midol without disclosing in the advertising for this product that it contains aspirin and caffeine. Aspirin and caffeine are well-known commonplace substances widely available in a variety of non-prescription products. Moreover, the use of aspirin or caffeine can be injurious to health and may cause undesirable side effects. Thus, respondent has failed to disclose in advertising a material fact, which if known to certain consumers would be likely to affect their consideration of whether or not to purchase such products.

PAR. 26. Furthermore, in advertisements for Midol, respondents Sterling Drug, Inc. and Thompson-Koch Company represented directly or by implication that the analgesic ingredients in Midol are other than ordinary aspirin and that the stimulant in Midol is other than caffeine.

PAR. 27. In truth and in fact, the analgesic ingredient in Midol is ordinary aspirin, and the stimulant in Midol is caffeine.

PAR. 28. The advertisements referred to in Paragraph Eight above were, and are, misleading in material respects, as alleged in Paragraphs Nine, Thirteen, Fourteen, Nineteen, Twenty-one, Twenty-two, Twenty-three, Twenty-four, Twenty-five, and Twenty-seven and constitute and now constitute false advertisements.

PAR. 29. The making of claims for a product that are inconsistent

with contemporaneous claims for other products made by the same firm, as alleged in Paragraph Seventeen above, and the making of representations as alleged in Paragraphs Eleven, Thirteen, Fourteen, and Sixteen, constituted and now constitute unfair or deceptive acts or practices in commerce.

PAR. 30. The use by respondents of the aforesaid deceptive statements, representations, or claims, and the dissemination of the aforesaid false advertisements has had and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements, representations, or claims were and are true and into the purchase of substantial quantities of said drugs of respondent Sterling Drug, Inc. by reason of said erroneous and mistaken belief. [15]

PAR. 31. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Sterling Drug, Inc. has been and now is in substantial competition in commerce, with corporations, firms and individuals in the sale of drug products of the general kind and nature as those sold by respondent.

In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Dancer-Fitzgerald-Sample, Inc. has been, and now is in substantial competition in commerce with other advertising agencies.

In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Lois Holland Callaway, Inc. has been, and now is in substantial competition in commerce with other advertising agencies.

PAR. 32. The aforesaid acts and practices of respondents, as herein alleged, including the dissemination of false advertisements, as aforesaid, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

INITIAL DECISION BY

MONTGOMERY K. HYUN, ADMINISTRATIVE LAW JUDGE

JANUARY 30, 1981

PRELIMINARY STATEMENT

On February 23, 1973, the Federal Trade Commission ("Commission") issued a complaint charging Sterling Drug Inc. ("Sterling"),

Dancer-Fitzgerald-Sample, Inc. ("DFS") and Lois Holland Callaway, Inc. ("LHC") with violations of Sections 5 and 12 of the Federal Trade Commission Act, as amended (15 U.S.C. 45 and 52) in connection with certain advertisements for Bayer Aspirin ("Bayer"), Bayer Children's Aspirin ("BCA"), Vanquish, Cope and Midol, all over-the-counter ("OTC") internal analgesic products. Similar complaints were issued on the same date against *Bristol-Myers Company et al.* (Docket No. 8917) [102 F.T.C. 21] and *American [2] Home Products Corporation* (Docket No. 8918) [98 F.T.C. 136], in connection with certain advertisements for certain OTC internal analgesic products marketed by these firms.

On May 9, 1973, respondents Sterling & DFS filed their respective answers and LHC filed its answer on May 19, 1973, each denying that it violated the Federal Trade Commission Act. Administrative Law Judge William K. Jackson, originally assigned to this proceeding, entered a Prehearing Order, dated October 3, 1973, setting forth the issues of fact and law to govern the adjudicatory proceeding. This case, along with the two analgesic cases referred to above, was assigned to me upon Judge Jackson's retirement, effective January 1, 1975.

The parties were allowed extensive pretrial discovery. Numerous prehearing conferences were held in order to simplify the issues, to resolve disputes related to discovery and generally to expedite the trial preparation in this case.

Joint hearings in the three analgesic cases were held from June 6 through August 1, 1977. A number of complaint counsel's witnesses common to the three cases testified as to the design and execution of various surveys and studies upon which complaint counsel sought to rely. Some 66 exhibits were received in evidence and the transcript of the joint hearings comprised some 2850 pages. The joint hearings were followed by separate trials in Docket 8918 and Docket 8917 and an Initial Decision in each of the two cases has been filed on September 1, 1978 and September 28, 1979, respectively.

The separate trial in this case began in October 1979 and the record was closed on August 26, 1980. The record testimony covers over 18,000 pages of transcript. Some forty witnesses testified, including a large number of expert witnesses, and some 410 exhibits were received in evidence. In addition, a large volume of scientific publications and material was discussed by expert witnesses. By order dated September 12, 1980, the Commission extended the date within which to file the initial decision through January 30, 1981.

Neither advertising agency is defending this action at the present time. Lois Holland Callaway, Inc. is now insolvent and its creditor's committee is not defending the action (CX 690). Dancer-Fitzgerald-

Sample, Inc. was discharged by Sterling Drug Inc. in June 1976, and has had no responsibility nor interest in respondent's products since that time. Dancer-Fitzgerald-Sample entered into a consent order agreement with complaint counsel which was signed on December 8, 1977, and made final by the Commission on July 1, 1980 (45 FR 26,344-47, April 18, 1980; 45 FR 48,606, July 21, 1980) [96 F.T.C. 1 (1980)]. [3]

Based on the Complaint, Answers and Prehearing Orders, the following issues are matters for determination in this proceeding:

1. With respect to advertising representations for Bayer:

(a) That "it was represented, directly or by implication . . . , that it has been established that . . . Bayer Aspirin is superior in terms of significant therapeutic effect to any other aspirin." (Complaint ¶ 8; *see* Contested Issues of Fact ¶ 2(a), September 25, 1973, adopted by Prehearing Order, October 3, 1973 [hereinafter "Contested Issues of Fact"])

(b) That the above representation was not established "for reasons including, but not limited to, the existence of a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drugs, as to the validity of all such representations." (Complaint ¶ 9; *see* Contested Issues of Fact ¶ 3, Contested Legal Issues ¶¶ 3, 4, September 25, 1973, adopted by prehearing order, October 3, 1973 [hereinafter "Contested Legal Issues"])

(c) That "it was represented directly or by implication . . . [that] Bayer Aspirin is superior in terms of significant therapeutic effect to any other aspirin." (Complaint ¶ 10; *see* Contested Issues of Fact ¶ 4(a))

(d) That there existed "no reasonable basis" for making the above representation at the time it was made, "in that respondents lacked competent and reliable scientific evidence sufficient to support such representations." (Complaint ¶ 11; *see* Contested Issues of Fact ¶ 5; *see* Contested Legal Issues ¶¶ 1, 2)

(e) That "it was represented directly or by implication . . . that a recommended dose of Bayer Aspirin relieves nervous tension, anxiety and irritability and improves the user's mood." (Complaint ¶ 15; *see* Contested Issues of Fact ¶ 9(a))

(f) That there existed "no reasonable basis" for making the above representation at the time it was made, "in that respondents had no competent and reliable scientific evidence to support such representations." (Complaint ¶ 16; *see* Contested Issues of Fact ¶ 10; Contested Legal Issues ¶¶ 1, 2)

(g) That "it was represented, directly or indirectly, that Bayer Aspirin has been tested against [4] 220 other brands of aspirin for quality,

purity, freshness, stability, and speed of disintegration, and that the results of the tests ["223 test"] demonstrated that Bayer Aspirin is qualitatively superior to all of the other brands tested in all respects." This was interpreted by respondent as meaning overall pharmaceutical superiority. It was interpreted by complaint counsel as meaning superiority in each tested respect. On October 2, 1975, the Administrative Law Judge adopted complaint counsel's interpretation. (Complaint ¶ 20; Contested Issues of Fact ¶ 15) This position was later explained as referring to the respects enumerated in ¶ 20 of the Complaint: quality, freshness, stability, and speed of disintegration (Order Denying Complaint Counsel's Motion for Summary Judgment, October 24, 1975, note page 6; Oral Argument on Motion for Partial Summary Judgment, October 22, 1975, pp. 24-25).

(h) That the so-called "223 test" does "not demonstrate that Bayer Aspirin is qualitatively superior in all respects, including speed of disintegration, to all other aspirins tested." (Complaint ¶ 21; *see* Contested Issues of Fact ¶ 16; Contested Legal Issues ¶¶ 3, 4)

(i) That it was represented that the "223 test" "demonstrated that Bayer Aspirin is . . . therapeutically superior to all of the other brands tested." (Complaint ¶ 20; *see* Contested Issues of Fact ¶ 17)

(j) That the "223 test" does "not demonstrate that Bayer is therapeutically superior to all other brands because at the time of such representations there existed a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drug product, concerning the validity, significance or interpretation of such tests as related to such representation." (Complaint ¶ 21; *see* Contested Issues of Fact ¶ 18; Contested Legal Issues ¶¶ 3, 4)

2. With respect to advertising representations for BCA:

(a) That "it was represented, directly or by implication . . . , that it has been established that . . . Bayer Children's Aspirin is superior in terms of significant therapeutic effect to any other children's aspirin." (Complaint ¶ 8; *see* Contested Issues of Fact ¶ 2(b))

(b) That the above representation was not established "for reasons including, but not limited to, the existence of a substantial question, recognized by [5] experts qualified by scientific training and experience to evaluate the safety and efficacy of such drugs as to the validity of all such representations." (Complaint ¶ 9; *see* Contested Issues of Fact ¶ 3; Contested Legal Issues ¶¶ 3, 4)

(c) That "it was represented directly or by implication . . . [that] Bayer Children's Aspirin is superior in terms of significant therapeutic effect to any other children's aspirin." (Complaint ¶ 10; *see* Contested Issues of Fact ¶ 4(b))

(d) That there existed “no reasonable basis” for making the above representation at the time it was made, “in that respondents lacked competent and reliable scientific evidence sufficient to support such representations.” (Complaint ¶ 11; *see* Contested Issues of Fact ¶ 5; Contested Legal Issues ¶¶ 1, 2)

3. With respect to advertising representations for *Vanquish*:

(a) That “it was represented directly or by implication . . . that it has been established that:

(i) A recommended dose of *Vanquish* is more effective for the relief of pain than a recommended dose of aspirin or buffered aspirin;

(ii) Because *Vanquish* contains ‘gentle buffers’ it will result in less gastric discomfort than any nonprescription internal analgesic not containing buffers; and that

(iii) A recommended dose of *Vanquish* is more effective for the relief of pain than the largest selling ‘extra strength’ tablet.” (Complaint ¶ 8; *see* Contested Issues of Fact ¶¶ 2(d), 2(e), 2(f))

(b) That the above representations have not been established, “for reasons including, but not limited to, the existence of a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drugs, as to the validity of all such representations.” (Complaint ¶ 9; *see* Contested Issues of Fact ¶ 3; Contested Legal Issues ¶¶ 3, 4)

(c) That “it was represented directly or by implication . . . that: [6]

(i) A recommended dose of *Vanquish* is more effective for the relief of pain than a recommended dose of aspirin or buffered aspirin;

(ii) Because *Vanquish* contains ‘gentle buffers’ it will result in less gastric discomfort than any nonprescription internal analgesic not containing buffers; and that

(iii) A recommended dose of *Vanquish* is more effective for the relief of pain than the largest selling ‘extra strength’ tablet.” (Complaint ¶ 12; *see* Contested Issues of Fact ¶¶ 6(b), 6(c), 6(d))

(d) That at the time of the above representations regarding *Vanquish* there existed “a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drugs, as to the validity of such representations” (Complaint ¶ 13; *see* Contested Issues of Fact ¶ 7; Contested Legal Issues ¶¶ 4, 5)

(e) That these representations were made “without disclosing the existence of such a substantial question as to the validity of each representation. In light of the representations made, the existence of such a substantial question is a material fact, which, if known to consumers, would be likely to affect their consideration of whether or

not to purchase such products. Thus, respondents have failed to disclose material facts." (Complaint ¶ 4; *see* Contested Issues of Fact ¶ 8; Contested Legal Issues ¶¶ 4, 6, 7)

(f) That respondent "marketed and advertised Vanquish without disclosing in the advertising for this product that it contains aspirin. . . .¹ Aspirin . . . [is a] well-known commonplace [substance] widely available in a variety of non-prescription products. Moreover, the use of aspirin . . . can be injurious to health and may cause undesirable side effects. Thus, [7] respondents have failed to disclose in advertising a material fact, which if known to certain consumers would be likely to affect their consideration of whether or not to purchase such products." (Complaint ¶ 23; *see* Contested Issues of Fact ¶¶ 20, 21; Contested Legal Issues ¶¶ 6, 8)

4. With respect to advertising representations for *Cope*:

(a) That "it was represented, directly or by implication . . . that it has been established that a recommended dose of *Cope* is more effective for the relief of 'nervous tension headache' pain than a recommended dose of any other non-prescription internal analgesic." (Complaint ¶ 8; *see* Contested Issues of Fact ¶ 2(c))

(b) That the above representation was not established "for reasons including, but not limited to, the existence of a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drugs, as to the validity of all such representations." (Complaint ¶ 9; *see* Contested Issues of Fact ¶ 3; Contested Legal Issues ¶¶ 3, 4)

(c) That "it was represented directly or by implication . . . that a recommended dose of *Cope* is more effective for the relief of 'nervous tension headache' pain than a recommended dose of any other non-prescription internal analgesic." (Complaint ¶ 12; *see* Contested Issues of Fact ¶ 6(a))

(d) That at the time the above representation was made, there existed "a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drugs, as to the validity of such representations." (Complaint ¶ 13; *see* Contested Issues of Fact ¶ 7; Contested Legal Issues ¶¶ 4, 5)

(e) That these representations were made "without disclosing the existence of such a substantial question. . . . In light of the representations made, the existence of such a substantial question is a material fact, which, if known to consumers, would be likely to affect their consideration of whether or not to purchase such products. Thus,

¹ Paragraph 23 of the Complaint also alleged that failure to disclose that caffeine is an ingredient of Vanquish was a failure to disclose a material fact which, if known to certain consumers, would be likely to affect their consideration of whether or not to purchase the product. However, complaint counsel stated that they were not pursuing the caffeine disclosure issue (Prehearing Conference Order, October 22, 1979).

respondents have failed to disclose material facts.” (Complaint ¶ 14; see Contested Issues of Fact ¶ 8; Contested Legal Issues ¶¶ 4, 6, 7)

(f) That “it was represented directly or by implication . . . that a recommended dose of Cope [8] relieves nervous tension, anxiety and irritability and will enable persons to cope with the ordinary stresses of everyday life.” (Complaint ¶ 15; see Contested Issues of Fact ¶ 9(b))

(g) That there existed “no reasonable basis” for making the above representation at the time it was made, “in that respondents had no competent and reliable scientific evidence to support such representations.” (Complaint ¶ 16; see Contested Issues of Fact ¶ 10; Contested Legal Issues ¶¶ 1, 2)

(h) That respondents “referred to the results of tests or studies and represented, directly or by implication, that such tests or studies prove the claim that a recommended dose of Cope is more effective for the relief of ‘nervous tension headaches’ than recommended doses of all other non-prescription internal analgesics.” (Complaint ¶ 18; see Contested Issues of Fact ¶ 13)

(i) That “the tests or studies referred to do not prove the claim that a recommended dose of Cope is more effective for the relief of ‘nervous tension headaches’ than recommended dose of all other non-prescription internal analgesics.” (Complaint ¶ 19; see Contested Issues of Fact ¶ 14)

(j) That it was “represented directly or by implication that Cope contained a unique formula in that it alone among non-prescription headache remedies contained both a pain reliever and an ingredient with sedative properties . . . [and that] the ingredients referred to are aspirin and methapyrilene, both of which were available for non-prescription use in Excedrin PM. Therefore, the advertisements . . . were misleading in a material respect.” (Complaint ¶ 22; see Contested Issues of Fact ¶ 19)

(k) That respondent “marketed and advertised Cope without disclosing in the advertising for this product that it contains aspirin. . . .² Aspirin . . . [is a] well-known commonplace [substance] widely available in a variety of non-prescription products. Moreover, the use of aspirin . . . can be injurious to health and [9] may cause undesirable side effects. Thus, respondents have failed to disclose in advertising a material fact, which if known to certain consumers would be likely to affect their consideration of whether or not to purchase such products.” (Complaint ¶ 24; see Contested Issues of Fact ¶¶ 20, 21; Contested Legal Issues ¶¶ 6, 8)

5. With respect to advertising representations for *Midol*:

² Paragraph 24 of the Complaint also contained allegations regarding a failure to disclose the ingredient caffeine. This issue has been abandoned. See n. 1, *supra*.

(a) That "it was represented directly or by implication . . . that a recommended dose of Midol relieves nervous tension, stress, fatigue and depression and improves the user's mood." (Complaint ¶ 15; *see* Contested Issues of Fact ¶ 9(c))

(b) That there existed "no reasonable basis" for making the above representation at the time it was made, "in that respondents had no competent and reliable scientific evidence to support such representations." (Complaint ¶ 16; *see* Contested Issues of Fact ¶ 10; Contested Legal Issues ¶¶ 1, 2)

(c) That respondent "marketed and advertised Midol without disclosing in the advertising for this product that it contains aspirin. . . .³ Aspirin . . . [is a] well-known commonplace [substance] widely available in a variety of non-prescription products. Moreover, the use of aspirin . . . can be injurious to health and may cause undesirable side effects. Thus, respondent has failed to disclose in advertising a material fact, which if known to certain consumers would be likely to affect their consideration of whether or not to purchase such products." (Complaint ¶ 25; *see* Contested Issues of Fact ¶¶ 20, 21; Contested Legal Issues ¶¶ 6, 8)

(d) That it was "represented directly or by implication that the analgesic ingredients in Midol are other than ordinary aspirin and that the stimulant in Midol is other than caffeine." (Complaint ¶ 26; *see* Contested Issues of Fact ¶ 22)

(e) That the "analgesic ingredient in Midol is ordinary aspirin, and the stimulant in Midol is caffeine." (Complaint ¶ 27) [10]

6. The Complaint further made the following allegations with regard to inconsistent representations:

(a) That "it was represented directly or by implication . . . that Bayer Aspirin is as effective for the relief of headache pain (including 'nervous tension headache' pain) as, and will cause gastric discomfort no more frequently than, any other non-prescription internal analgesic, including Cope and Vanquish." (Complaint ¶ 17; *see* Contested Issues of Fact ¶ 11(a))

(b) That "it was represented directly or by implication . . . that Vanquish is more effective for the relief of headache pain than any aspirin, including Bayer Aspirin, and will cause less gastric discomfort than any non-buffered internal analgesic, including Bayer Aspirin." (Complaint ¶ 17; *see* Contested Issues of Fact ¶ 11(c))

(c) That "it was represented directly or by implication . . . that Cope is more effective for the relief of 'nervous tension headache' pain than any other non-prescription internal analgesic, including Bayer Aspi-

³ Paragraph 25 of the Complaint also contained allegations regarding a failure to disclose the ingredient caffeine. This issue has been abandoned. *See* n. 1, *supra*.

rin and Vanquish.” (Complaint ¶ 17; *see* Contested Issues of Fact ¶ 11(b))

(d) That respondents have “made claims for a product that are inconsistent with contemporaneous claims for other products made by the same firm.” (Complaint ¶ 17; *see* Contested Issues of Fact ¶¶ 11, 12)

(e) That these representations are “mutually inconsistent.” (Complaint ¶ 17; *see* Contested Issues of Fact ¶ 12; Contested Legal Issues ¶¶ 9, 10)

7. The Complaint made the following general allegations:

(a) That the excerpts from advertisements for Bayer Aspirin, Bayer Children’s Aspirin, Vanquish, Cope and Midol listed in paragraph 7 of the Complaint were typical of the statements and representations made in the advertising. (Complaint ¶ 7; *see* Contested Issues of Fact ¶ 1)

(b) That the advertisements referred to in paragraph 8 of the Complaint were misleading in material respects, as alleged in Complaint ¶¶ 9, 13, 14, 15, 16, [11] 19, 20, 21, 22, 24 and 27 and constituted false advertisements. (Complaint ¶ 28; *see* Contested Legal Issues ¶ 11)

(c) That the making of claims for a product that are inconsistent with contemporaneous claims for other products made by the same firm, as alleged in Complaint ¶ 17 and the making of representations as alleged in Complaint ¶¶ 11, 13, 14 and 16, constituted and now constitute unfair or deceptive acts or practices in commerce. (Complaint ¶ 29; *see* Contested Legal Issues ¶¶ 9, 10)

(d) That “[t]he use by respondents of the aforesaid deceptive statements, representations, or claims, and the dissemination of the aforesaid false advertisements has had and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements, representations, or claims were and are true and into the purchase of substantial quantities of said drugs of respondent Sterling Drug, Inc. by reason of said erroneous and mistaken belief.” (Complaint ¶ 30)

(e) That “[t]he aforesaid acts and practices of respondents, as herein alleged, including the dissemination of false advertisements, as aforesaid, were and are all to the prejudice and injury of the public and of respondents’ competitors and constituted and now constitute unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.” (Complaint ¶ 32)

The proposed findings and conclusions submitted by the parties and their arguments in support thereof have been given careful consideration by me and to the extent not adopted by this Initial Decision in

the form proposed or in substance, are rejected as not supported by the evidence or as immaterial. Any motion appearing on the record not heretofore or hereby specifically ruled upon either directly or by the necessary effect of the conclusions in this Initial Decision are hereby denied.

Upon consideration of the entire record in this proceeding and having considered the demeanor of the witnesses, I make the [12] following findings of fact and conclusions of law and order based on the record considered as a whole.⁴

FINDINGS OF FACT

I. INTRODUCTION

A. *Identity of Respondents and the Nature of Their Businesses*

1. Sterling Drug Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 90 Park Avenue, New York, New York (Statement of Noncontested Issues, ¶ 1).

2. Dancer-Fitzgerald-Sample, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 347 Madison Avenue, New York, New York (*Id.* ¶ 2). On December 8, 1977, DFS agreed to an Order to Cease and Desist in this matter conforming to the requirements of Section 2.32 of the Commission Rules. The Decision and Order with respect to DFS was issued July 1, 1980 [96 F.T.C. 1 (1980)].

3. Lois Holland Callaway, Inc. is a corporation organized, existing under and by virtue of the laws of the State of New York with its office and principal place of business [13] located at 745 Fifth Avenue, New York, New York (Answer of LHC, ¶ 2). On or about September 1978, LHC ceased doing business because of its insolvency. Its affairs are presently managed by an informal creditors committee. On October 24, 1979, co-counsel to the creditors committee notified complaint

⁴ For the purposes of this Initial Decision, the following abbreviations were used:

F - Finding of Fact in this Decision.
CPF - Complaint Counsel's Proposed Findings.
CB - Complaint Counsel's Memorandum In Support of Proposed Findings.
CRB - Complaint Counsel's Memorandum In Support of Reply Findings.
RPF - Sterling's Proposed Findings.
RB - Sterling's Post-Trial Memorandum.
RRB - Sterling's Post-Trial Reply Memorandum.
Tr - Transcript of hearings, sometimes preceded by the name of the witness.
CX - Complaint counsel's documentary exhibit.
RX - Sterling's documentary exhibit.
Comp. - Complaint.
Ans. - Answer.

counsel that neither stockholders nor former officers of LHC intended to present any defense in the instant proceeding (CX 680A-D).

4. Thompson-Koch is an unincorporated division of Sterling, which at all times pertinent to this action has acted *inter alia* as an in-house advertising agency for Midol (CX 678, admission 220; Hartman, Tr. 9135). Glenbrook Laboratories ("Glenbrook") is an unincorporated division of Sterling, which at all times pertinent to this proceeding has had responsibility for marketing all the products involved in this proceeding (CX 678, admission 38). The Sterling-Winthrop Research Institute ("SWRI") was at all times pertinent to this proceeding, an unincorporated research division of Sterling (CX 678, admission 39).

5. Sterling is now and has been engaged in the manufacturing, offering for sale, sale and distribution of "Bayer Aspirin," "Bayer Children's Aspirin," "Midol," "Cope," and "Vanquish" (Statement of Noncontested Issues, ¶ 4). In the course and conduct of its business, Sterling causes these products, when sold, to be transported from its places of business located in various States of the United States to purchasers located in various States of the United States and in the District of Columbia. Sterling maintains and at all times relevant to the proceeding has maintained a substantial course of trade in these products in commerce. The volume of such business has been substantial (Answer of Sterling, ¶ 5).

6. From 1969 through 1973 annual consumer sales for Bayer Aspirin, Bayer Children's Aspirin, Midol, Vanquish and Cope averaged \$52.6 million, \$9.38 million, \$3.9 million, \$4.9 million and \$2.57 million, respectively (CX 575A-E). In 1969, the average retail price for 100-tablet bottles of Bayer Aspirin was \$1.01; the average wholesale price for a 36-tablet package of Bayer Children's Aspirin was \$.22; the average wholesale price for a 60-tablet package of Cope was \$.71; and the average wholesale price for a 30-tablet package of Midol was \$.59 (CX 575A-B, D-E).

7. Bayer Aspirin, Bayer Children's Aspirin, Cope, Midol and Vanquish are nonprescription analgesic products which come within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act (Answer of Sterling, ¶ 3).

8. The designation, active ingredients and directions for use of these nonprescription analgesic drugs is set forth in paragraph 3 of the Complaint, and is adopted and incorporated by reference at Statement of Non-Contested Issues, paragraph 7 and admissions 965-68 of CX 678, as follows: [14]

Bayer Aspirin (per tablet):

324 milligrams (mg) aspirin.

Dosage: 1 or 2 tablets with water every 4 hours, as necessary, up to 12 tablets a day.

Bayer Children's Aspirin (per tablet):

Aspirin 81 mg

Dosage: Varies with age of child.Cope (per tablet):

Aspirin 421.2 mg

Caffeine 32 mg

Methapyrilene fumarate 12.5 mg

Buffers:

Aluminum hydroxide 25.0 mg

Magnesium hydroxide 50 mg

Dosage: 1 or 2 tablets every 4 hours as needed, up to 9 tablets per day.Midol (per tablet):

Aspirin 453.6 mg

Caffeine 32.4 mg

Cinnamedrine hydrochloride 149 mg

Dosage: 2 Midol tablets with water. Repeat 1-2 tablets every 4 hours as needed, up to 9 tablets per day.Vanquish (per tablet):

Aspirin 227 mg

Acetaminophen 994 mg

Caffeine 33 mg

Buffers:

Aluminum hydroxide 25 mg

Magnesium hydroxide 50 mg

Dosage: 2caplets with water. Can be repeated every 4 hours if needed, up to 12 caplets per day.

9. In the course and conduct of its business, Sterling disseminated, and caused to be disseminated, certain advertise[15]ments concerning Bayer Aspirin, Bayer Children's Aspirin, Cope, Midol and Vanquish, by United States mail and by various means in commerce, including, but not limited to, advertisements inserted in magazines and newspapers, and by means of television and radio broadcasts transmitted by television and radio stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing or which were likely to induce, directly or indirectly, the purchase of these drugs in commerce (Answer of Sterling ¶ 6). These activities have included the dissemination of the advertising representations challenged in this proceeding.

10. In promoting these products by advertising from 1969 through 1973 Sterling spent at least \$86.5 million for Bayer and \$15.5 million for Vanquish; for advertising from 1969 through 1972, \$11.4 million for Bayer Children's Aspirin; for advertising from 1969 through 1970, \$5 million for Cope and \$2.1 million for Midol (CX 575A-E). Thus annual advertising expenditures from 1969 through 1973 have averaged approximately \$17.3 million for Bayer and \$3.1 million for Vanquish; from 1969 through 1972, \$2.8 million for Bayer Children's Aspirin; and from 1969 through 1970, \$2.5 million for Cope and \$1 million for Midol. Average ad to sales ratio for Bayer for the 1969-1973 period amounted to 33% (17.3/52.6) (F. 6, *supra*).

11. In 1969 the average retail price per tablet was \$.0044 for non-Bayer plain 5-grain aspirin, as compared with \$.0101 for Bayer; the average 100-tablet bottle price was \$.44 for non-Bayer aspirin, compared with \$1.01 for Bayer (CX 575A, F). These figures show that in 1969 consumers were paying nearly two and a half times more for Bayer than for non-Bayer plain 5-grain aspirin.

12. Bayer Aspirin competes in the over-the-counter internal analgesic market. The prime competitors in that category are Anacin, Bufferin, Excedrin, Tylenol (nonaspirin product), and a large group of plain 5-grain aspirin brands (Alberts, Tr. 8918; Miles, Tr. 9360).

13. Bayer is the only 5-grain aspirin nationally advertised on television (Alberts, Tr. 8919; Miles, Tr. 9360). Advertising for all other 5-grain aspirins is limited to in-store promotions at the retail level, print advertising, and a very small amount of spot television (Alberts, Tr. 8919; Mattimore, Tr. 15384-85). Bayer Aspirin is the only 5-grain aspirin with 100% distribution in food and drug outlets. The other 5-grain aspirin brands have regional or limited distribution (Alberts, Tr. 8919-20; Miles, Tr. 9360).

14. Sterling regularly purchased and used Nielsen data on the analgesic market. Nielsen marketing data for the analgesic [16] market reports upon the principal brands in the market and upon a category of "All Other Adult Aspirin." This category consists of all straight aspirin brands in the market apart from Bayer: branded aspirin such as Squibb, McKesson, Norwich, St. Joseph and store brands or private-label aspirin (Alberts, Tr. 8988; Mattimore, Tr. 15383-85).

15. Bayer Aspirin's market share has declined relative to the other major analgesic brands in the last 30 years (Alberts, Tr. 8995-96). In the early 1950's, Bayer's share of the analgesic market (in dollar sales) was 25%, Anacin 20%, Bufferin 2%. In 1957, the market shares were Bayer 16%, Anacin 18%, Bufferin 15-18% (Alberts, Tr. 8995; Miles, Tr. 9362). In 1960, the market shares were Bayer 15%, Anacin 17%, Bufferin 12%, Excedrin 8-9% (Alberts, Tr. 8995-96; Miles, Tr. 9362).

16. RX 291 presents Nielsen marketing data for Anacin, Bayer, Bufferin, Excedrin, Vanquish, Cope, Tylenol and All Other Adult Aspirin for the period from 1968 through 1979, showing market shares in dollar and tablet sales (RX 291; Alberts, Tr. 8968). From 1968 to 1979, Tylenol went from virtually no share to being the market leader with more than 25% of the dollar market, which is more than twice the share of its closest competitor, Anacin (RX 291A; Alberts, Tr. 8967-68). From 1968 to 1979, there was a downtrend in market share of Bayer Aspirin in both dollars and tablets (RX 291A, C; Alberts, Tr. 8974). In 1968, Bayer had 16.5% of the market in dollar sales, 27.2% in tablet sales. In 1979, Bayer had dropped to 9.9% of the market in dollar sales, 17.8% of the market in tablet sales (RX 291B, D).

17. Tablet sales data demonstrates that Bayer Aspirin, the traditional leader among 5-grain aspirin brands, has lost its leadership to the All Other Aspirin group. In 1968, Bayer had 27.2% of the tablet market compared to 23.8% for All Other Aspirin. In 1979, Bayer had 17.8% of the tablet market compared to 20.6% for All Other Adult Aspirin. Over the decade, its decline was almost three times that of the All Other Aspirin group (RX 291D; Alberts, Tr. 8974-75).

18. The store brands and private-label brands of aspirin, which number in the hundreds, are manufactured by a relatively small number of tableting companies, about 20-25 (Alberts, Tr. 9046; Mattimore, Tr. 15352-53). These brands are purchased by stores and private-label distributors on a price basis, annually or periodically, so that purchases of the same brand can be from a number of different manufacturing sources over time (Alberts, Tr. 8954; Mattimore, Tr. 15348-49; *see* Miller, Tr. 6980).

19. The analgesic market is a heavily advertised product category (Alberts, Tr. 8959-60; Miles, Tr. 9359-60; RX 292, RX 413B). From 1967 through 1973, the national television advertisers in the analgesic product category were Anacin, [17] Bufferin, Excedrin and Bayer Aspirin. Advertising expenditures were:

	Bayer (millions)	[Combined] Anacin, Bufferin, Excedrin (millions)
1967	\$15.7	\$37.1
1968	16.3	39.4
1969	17.9	45.3
1970	17.8	48.5
1971	18.0	53.1
1972	18.1	49.3
1973	14.7	45.9

(RX 292)

20. The combination products have made and continue to make claims of superiority to plain aspirin—Bufferin that it is faster and gentler, Excedrin that it is stronger, Anacin that it is stronger. In the past several years, with the growth of comparative advertising, more advertising has been directed against Bayer by name, rather than against aspirin (Alberts, Tr. 8988–89; RX 413C-P; Complaint Counsel's Admission Nos. 100–129; *see* Ross, Tr. 6092–94).

21. Bayer advertising is the only national advertising that defends plain 5-grain aspirin against the anti-aspirin advertising of buffered and combination aspirin products (Alberts, Tr. 8993–94; RX 402G-H; *see* Ross, Tr. 6099–6101).

22. In the early 1950's, respondent Sterling complained to the Federal Trade Commission about advertising for Bufferin, at that time a rather recent entrant. It contended that Bufferin advertising improperly represented that it was safer than aspirin, faster-acting than aspirin and that it was other than aspirin. Documents relating to this complaint are in the record as CX 371, RX 407 and RX 156.

23. Until the early 1970's, the Federal Trade Commission failed to take any action against Bufferin. After years of correspondence and a meeting with officials of the FTC, Sterling was led to believe that, in FTC staff's view, there was no basis for challenging the Bufferin claims under the FTC Act (CX 371, RX 156, RX 407). The FTC's failure to take any action and the inroads made by Bufferin (and later Excedrin) were among the factors considered and relied upon by respondent in developing the combination products which it introduced in the 1960's, Vanquish and Cope (Alberts, Tr. 8961; Tainter, RX 284R-S; Trout, Tr. 16104; RX 407A-H). Vanquish was introduced as an "extra-strength" product in the analgesic market segment promoted and defined as such by Excedrin (Alberts, Tr. 9012). Cope was introduced as a formulation designed for nervous tension headache (Tr. 15401–05). [18]

24. Vanquish and Cope have been minor factors in the analgesic market. During the period in which Vanquish advertisements challenged in this case were disseminated, the products accounted for 1.4% to 1.6% of the analgesic market. Since 1974, Vanquish's market share has steadily declined and in 1979 accounted for 1.1% of the analgesic market (RX 291B; CX 633). Cope's market share was 1% in 1969 to .7% in 1971; thereafter, Nielsen data was not collected for Cope (RX 291).

25. Vanquish advertising terminated in 1977. According to Sterling, there are no plans now or in the future to resume Vanquish advertising (Alberts, Tr. 9013).

26. During the period in which the challenged Cope advertisements were disseminated, Cope's market share ranged from 1% (in 1969) to

0.7% (in 1971) (RX 291B). Cope advertising terminated in 1971. According to Sterling, there are no plans to resume such advertising (Alberts, Tr. 9013). Indeed, the product in the form sold in 1969-71 is no longer on the market; it has been reformulated as a result of FDA action.

27. Midol is a specialized product, designed and promoted for the relief of menstrual symptoms. It is one of two products in the menstrual remedies category of the analgesic market (Hartman, Tr. 9136, 9142).

28. LHC has been an advertising agency for Sterling and has prepared, placed for publication and disseminated advertising material for "Vanquish" for all purposes of this proceeding after April 1971 (LHC Answer, ¶¶ 4, 6).

29. Sterling is now and has been engaged in substantial competition in commerce with other firms in the sale of drug products of the general kind and nature as those sold by Sterling, and LHC has been in substantial competition in commerce with other advertising agencies (Statement of Non-Contested Issues, ¶ 13).

II. THE BACKGROUNDS AND QUALIFICATIONS OF CERTAIN WITNESSES WHO TESTIFIED IN THIS PROCEEDING

A. *For Complaint Counsel*

Timothy C. Brock, Ph.D.

30. Dr. Timothy C. Brock is a Professor of Psychology at Ohio State University and is a licensed psychologist. Dr. Brock holds a Ph.D. from Yale University in psychology with a specialization in social psychology. In 1955 he joined the Yale Communication and Attitude Change Program and began a career in [19] the field of persuasion and communication. Since that time Dr. Brock has had extensive experience in evaluating the formation, reinforcement and endurance of beliefs and attitudes. This experience includes extensive experience in conducting and evaluating research in this area, including research regarding the formation of attitudes about consumer goods and services (Brock, Tr. 5043-44, CX 605).

31. Since 1957, Dr. Brock has contributed extensively to the body of literature regarding the role of communication in attitude formation and change. His numerous publications include research and analyses of persuasion techniques, measurement of attitude change, and identification of public opinion and attitudes (CX 605). Dr. Brock's research has also included studies on the endurance of beliefs and attitudes (Brock, Tr. 5051-52). Dr. Brock has performed two studies that address the role of persuasive communications on consumer perceptions of the performance of drugs (Brock, Tr. 5054-55).

