

Sergeant's and Bayer's products work through contact, and neither affects fleas and ticks before they come into contact with the dog.

44. Sergeant's misleading use of a bubble in its ad stands in stark contrast to Bayer's use of a bubble in previous advertising. *See* Ex. 4, Bayer Print Advertisement (May 2010). Bayer used a bubble precisely to inform the public that there is no such thing as a force field that prevents fleas and ticks from coming into contact with pets—that is why effective parasiticides that kill and repel are so important.

45. In the alternative, to the extent that the claims described in Paragraphs 39 through 43 above are not necessarily implied, they are still understood by consumers as implying the false messages that (a) Fiproguard is more effective than K9 Advantix and Advantage, (b) Fiproguard provides immediate, 100% protection, and (c) Fiproguard kills or repels fleas and ticks before they come into contact with the pet.

The Pronyl Commercial

46. Upon information and belief, the Pronyl Commercial first aired in March 2013 on television. It was also posted to Sergeant's website for Pronyl at <http://www.pronylotc.com/> and the popular video streaming website YouTube at <http://youtu.be/VJK03RJGk1E>.

47. The Pronyl Commercial makes several literally false advertising claims, including that (a) Pronyl prevents biting on pets more than competing products, (b) Pronyl prevents biting on humans more than competing products, and (c) Pronyl kills faster than competing products.

48. The Pronyl Commercial begins immediately with a false superiority claim: “You know how two things can look the same but be very different. Other flea and tick products work eventually but Sergeant’s Pronyl OTC[®] Max for dogs starts to kill in minutes.”



49. The commercial then goes on to state that “That means faster protection and fewer bites for your pets and your family.”

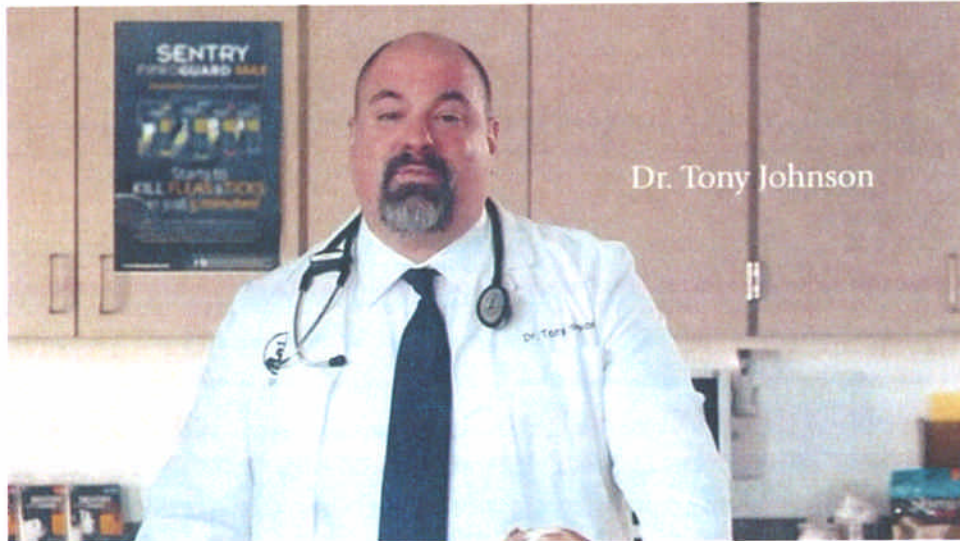
50. The claims in this advertisement are literally false. Pronyl does not kill fleas or ticks any faster than K9 Advantix. It also does not protect pets from flea or tick bites more than K9 Advantix does. Further, Pronyl is indicated only for flea and tick treatment on dogs. It has not been approved for and cannot make any claims for treatment of humans.

The Dr. Tony Johnson Video

51. Sergeant's also has posted a video titled "Introducing SENTRY® Fiproguard® - Dr. Tony Johnson" on its website at <http://www.fiproguard.com/info/> and on YouTube at <http://youtu.be/zi9RgU2gUE8> that makes series of false establishment claims similar to those in the Fiproguard Commercial. Ex. 5, Transcript, SENTRY® Fiproguard® - Dr. Tony Johnson.

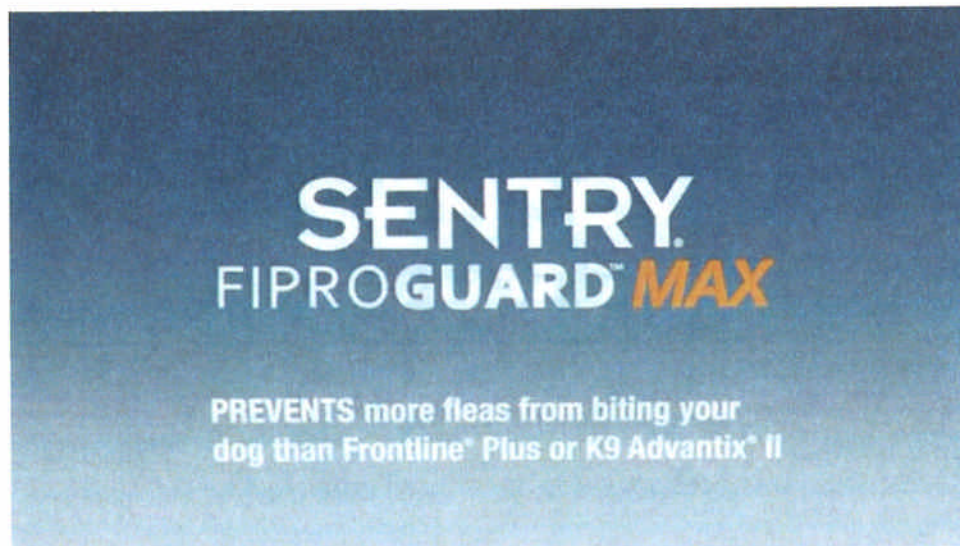
52. This video falsely claims that Fiproguard (a) prevents more fleas from biting than K9 Advantix, by killing fleas before they can bite, and (b) continues to prevent more fleas from biting pets than K9 Advantix for an entire month.

53. The video begins with a veterinarian purportedly educating the audience of the benefits of Fiproguard.



54. The vet claims that Fiproguard kills so fast that fleas do not even have time to bite before they die.

55. He then goes on to claim that Fiproguard “ prevents more fleas from biting your pet than Frontline® Plus or K9 Advantix® II” and that “[i]ndependent clinical studies show that Fiproguard® Max keeps up that speed and power throughout the entire month, protecting your pets and your home for the full thirty days.”



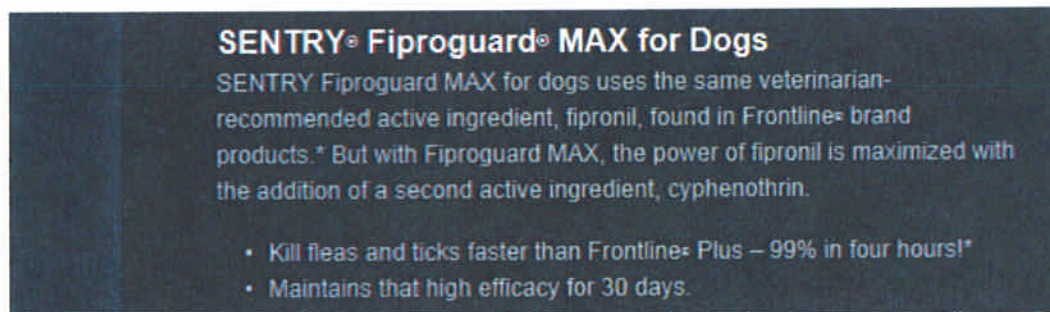
56. The video concludes by showing a purported disclaimer that “independent studies” show that Fiproguard prevents more fleas from biting and taking a blood meal than K9 Advantix within the first hour after weekly reinfestation averaged over a 5 week period.



57. For reasons already discussed above, these claims are not only unsupported by the tests upon which the video purports to rely, but are also literally false. Similarly, for the reasons discussed above, the disclaimer is likewise ineffective.

The Fiproguard Website

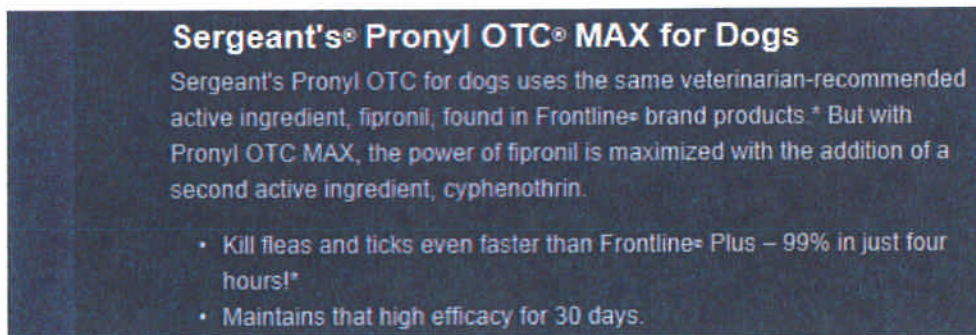
58. The Fiproguard website makes the false claim that Fiproguard “[k]ill[s] fleas and ticks faster than Frontline® Plus – 99% in four hours!” and that Fiproguard “[m]aintains that high efficacy for 30 days.” Ex. 6, Screenshot, Fiproguard Website, <http://www.fiproguard.com/info/> (last visited Apr. 13, 2013).



59. This claim is both a false establishment claim and literally false, as Fiproguard does not kill 99% of fleas and ticks in four hours or maintain 99% efficacy for a full month, and defendants have no tests that can prove it does so. In the four efficacy studies submitted to the EPA in 2010, for example, not a single study showed that Fiproguard had 99% efficacy within 4 hours for a full 30 days. *See* Ex. 1, EPA Efficacy Review (Dec. 6, 2010). Fiproguard never exceeds 75% efficacy within four hours after application. Across the four studies, Fiproguard manages to reach 99% efficacy only once--*two weeks* after application within four hours of reinfestation—but that efficacy is not maintained for 30 days. *Id.*

The Pronyl Website

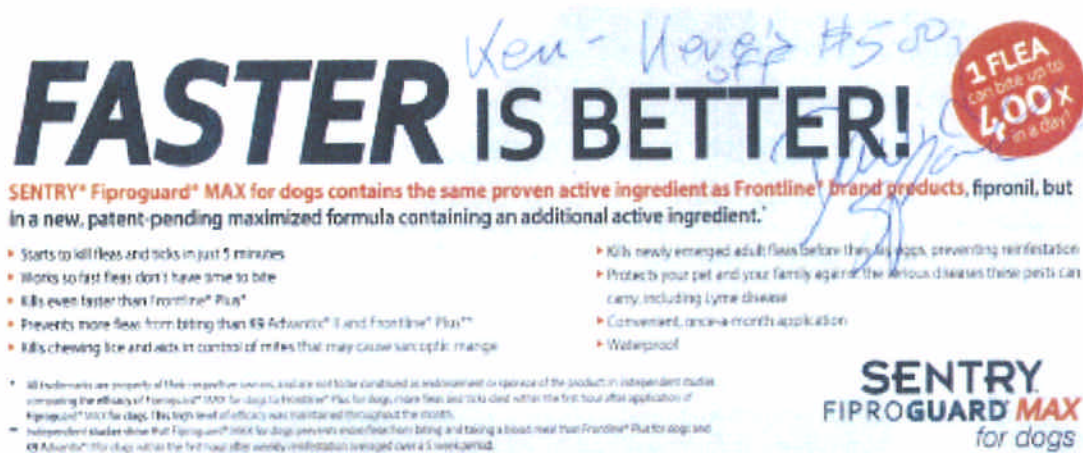
60. The Pronyl website, at <http://www.pronylotc.com/info/>, also makes the same claim that Pronyl kills 99% of fleas and ticks in four hours and maintains that efficacy for 30 days. Ex. 7, Screenshot, Pronyl Website, <http://www.pronylotc.com/info/> (last visited Apr. 13, 2013).



61. Like the parallel claim on the Fiproguard website, this claim is a false establishment claim and literally false.

The Fiproguard Coupon

62. Sergeant's has also started distributing coupons that further reinforce its false advertising claims. Ex. 8, Fiproguard Coupon. These coupons repeat the false claims made in each of Sergeant's other advertisements: that Fiproguard (a) is faster, and better, than K9 Advantix, and (b) prevents more fleas from biting than K9 Advantix, by killing so fast that fleas don't have time to bite. It, too, has a purported disclaimer claiming that "independent studies" support its claim that Fiproguard prevents more fleas from biting than K9 Advantix.



63. For the same reasons discussed above, these claims are all literally false and unsupported by the studies that Sergeant's purportedly relies on.

Sergeant's False Advertisements Have Harmed Bayer

64. The flea and tick advertising season begins around March and only lasts a few months. Thus, Bayer has only a brief window during the flea and tick season to persuade consumers and retailers to choose its products. Instead of competing fairly in

the marketplace, Sergeant's, as a relative newcomer to the market for topical flea and tick products, has deliberately lied to consumers and retailers just as the flea and tick season begins, ensuring that consumers and retailers will be deceived into buying Sergeant's products instead of Bayer's established and highly effective products.

65. Sergeant's brazenly false and misleading advertising has likely already resulted in lost sales for Bayer, and threatens to irreparably injure Bayer's reputation, market position, and the good will that Bayer has built up over the years.

66. Bayer has spent considerable time and resources in gaining valuable shelf space for its products in pet specialty retail outlets. As one of the pioneers in bringing premium animal health products directly to the consumer through pet specialty outlets, Bayer has made a substantial investment in building relationships with distributors and vendors over the years. Sergeant's conduct threatens the loyalty of these retailers, distributors, and the continued availability of shelf space. Once shelf space is lost, it is essentially impossible to regain.

67. Sergeant's conduct also will damage Bayer's ability to maintain its hard-won brand recognition among consumers of over-the-counter animal health products. Because veterinarians do not act as an intermediary in such direct-to-consumer sales, it is critical that consumers have confidence in Bayer's products. Sergeant's false advertising will confuse and mislead consumers, irreparably undermining their trust in Bayer's brands.

68. Given the short window of effective advertising in this market, any protracted litigation will not produce a remedy in time to make a difference in the current flea and tick season.

COUNT I:
FALSE ADVERTISING
UNDER SECTION 43(A) OF THE LANHAM ACT

69. Bayer repeats and realleges each and every allegation in the foregoing paragraphs as if fully set forth herein.

70. The false, misleading and deceptive statements set forth above are material and will tend to deceive consumers.

71. Sergeant's, in connection with goods and services distributed in interstate commerce, has made and is continuing to make false, deceptive and misleading descriptions and representations of fact in commercial advertising and promotion, which misrepresent the nature, characteristics and qualities of Sergeant's and Bayer's goods, services and commercial activities, in violation of 15 U.S.C. § 1125(a).

72. These violations have injured and will continue to injure Bayer and the public, causing deception, confusion and damage in an amount that cannot presently be ascertained.

73. Sergeant's acts of false advertising and unfair competition have caused irreparable injury to Bayer and, unless restrained, will cause further irreparable injury, leaving Bayer with no adequate remedy at law.

74. By reason of the foregoing, Bayer is entitled to preliminary and permanent injunctive relief against Sergeant's, restraining further acts of false advertising and unfair competition and requiring Sergeant's to correct its false and misleading statements, and to recover damages caused by reason of Sergeant's aforesaid acts in an amount to be determined at trial.

COUNT II:
UNFAIR COMPETITION
UNDER NEW YORK COMMON LAW

75. Bayer repeats and realleges each and every allegation in the foregoing paragraphs as if fully set forth herein.

76. Sergeant's has made and is continuing to make false, deceptive and misleading descriptions and representations of fact in commercial advertising and promotion, which misrepresent the nature, characteristics and qualities of Sergeant's and Bayer's goods, services and commercial activities.

77. These violations have injured and will continue to injure Bayer and the public, causing deception, confusion and damage in an amount that cannot presently be ascertained.

78. Sergeant's acts of false advertising and unfair competition have caused irreparable injury to Bayer and, unless restrained, will cause further irreparable injury, leaving Bayer with no adequate remedy at law.

79. The acts of Sergeant's as described above constitute unfair competition in violation of Bayer's rights under the New York State common law, as preserved by N.Y. Gen. Bus. Law § 360-o, and under analogous unfair competition laws in other states in which Sergeant's has disseminated its false and misleading advertising.

**COUNT III:
DECEPTIVE ACTS AND PRACTICES
UNDER NEW YORK GENERAL BUSINESS LAW §§ 349-350**

80. Bayer repeats and realleges each and every allegation in the foregoing paragraphs as if fully set forth herein.

81. Sergeant's, in the conduct of its businesses, trade, and commerce, and in the furnishing of its services in the State of New York, has made and is continuing to make false, deceptive and misleading descriptions and representations of fact in commercial advertising and promotion, which misrepresent the nature, characteristics and qualities of Sergeant's and Bayer's goods, services and commercial activities.

82. These violations have injured and will continue to injure Bayer and the public, causing deception, confusion and damage in an amount that cannot presently be ascertained.

83. Sergeant's acts of false advertising and unfair competition have caused irreparable injury to Bayer and, unless restrained, will cause further irreparable injury, leaving Bayer with no adequate remedy at law.

84. Sergeant's acts also have significant ramifications for the public at large. As with all drugs sold over the counter, consumers need to be able to rely on accurate information to determine which product is best for their pets. Fleas and ticks can lead not only to pain and discomfort for both consumers and pets, but also serve as vectors of dangerous diseases, such as Lyme disease, that are transmitted when the parasite bites the animal. Consumers relying on Sergeant's false advertising will be confused and misled into buying products that may not be the best choice for their pets.

85. The acts of Sergeant's as described above constitute deceptive acts and practices and false advertising in violation of N.Y. Gen. Bus. Law §§ 349-350 and the analogous unfair and deceptive acts and practices acts of other states in which Sergeant's is running its false advertising. *See, e.g.,* Kan. Stat. Ann. § 50-626.

PRAYER FOR RELIEF

WHEREFORE, Bayer respectfully prays:

1. That Sergeant's and all those acting in concert or participation with it (including, but not limited to, its officers, directors, agents, servants, wholesalers, distributors, retailers, employees, representatives, attorneys, subsidiaries, related companies, successors, assigns and contracting parties) be preliminarily and then permanently enjoined and restrained from distributing, publishing, broadcasting or otherwise disseminating, in any manner or in any medium, the advertisements referenced in this pleading or shown in Exhibits 2, 3 and 5 through 8.

2. That Sergeant's and all those in active concert or participation with it (including but not limited to its officers, directors, agents, servants, wholesalers, distributors, retailers, employees, representatives, attorneys, subsidiaries, related companies, successors, assigns and contracting parties) be permanently enjoined from distributing, publishing, broadcasting or otherwise disseminating, in any manner or in any medium, any claims stating, suggesting or implying, directly or indirectly, that:

- a. Sergeant's Combo Product is more effective or faster than K9 Advantix or Advantage in killing fleas or ticks;
- b. Sergeant's Combo Product kills or repels 100% of fleas and ticks immediately;
- c. Sergeant's Combo Product prevents more fleas from biting pets than Bayer's products;
- d. Sergeant's Combo Product continues to prevent more fleas from biting pets than Bayer's products for an entire month;
- e. Sergeant's Combo Product causes fleas and ticks to start dying within minutes;
- f. Sergeant's Combo Product can kill or repel fleas and ticks before they even come into contact with the pet.
- g. Sergeant's Combo Product prevents fleas from biting humans;
- h. Sergeant's Combo Product kills 99% of fleas and ticks in 4 hours and maintains that efficacy for 30 days.

3. That Sergeant's withdraws and recalls from its sales representatives and any and all channels of distribution any letters, flyers, advertising, promotional material, office display materials, commercials, or any other matter distributed by it or on its behalf bearing any descriptions or representations constituting false advertising concerning Sergeant's Combo Product or Bayer's products.

4. That Sergeant's and those acting in concert or participation with it (including, but not limited to, its officers, directors, agents, servants, wholesalers, distributors, retailers, employees, representatives, attorneys, subsidiaries, related companies, successors, assigns and contracting parties) take affirmative steps to dispel such false impressions that heretofore have been created by the false advertising campaign described above, including, but not limited to, corrective advertising.

5. That Sergeant's account to Bayer for its profits and any damages sustained by Bayer arising from the foregoing acts of false advertising and unfair competition.

6. That, in accordance with such accounting, Bayer be awarded judgment for such profits and for three times Bayer's actual damages arising from Sergeant's unlawful conduct, pursuant to 15 U.S.C. § 1117 and N.Y. Gen. Bus. Law § 349(h), as a result of the willful and intentional violations of Sergeant's. That Bayer have and recover its costs, including its reasonable attorneys' fees and disbursements in this action, pursuant to 15 U.S.C. § 1117 and N.Y. Gen. Bus. Law § 349(h).

7. That Bayer be awarded punitive damages pursuant to the law of the State of New York in view of Sergeant's willful and malicious conduct.

8. That Sergeant's file with the Court and serve on counsel for Bayer within thirty (30) days after entry of any injunction issued by the Court in this action, a sworn written statement pursuant to 15 U.S.C. § 1116(a) setting forth in detail the manner and

form in which Sergeant's has complied with any injunction which the Court may enter in this action.

9. That Bayer have such other and further relief as the Court may deem just and proper.

JURY TRIAL DEMAND

Bayer demands a trial by jury on all claims as to which a jury trial may be had.

Dated: New York, New York
April 15, 2013

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