

IN THE MATTER OF

THE DOW CHEMICAL COMPANY, ET AL.

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

Docket C-3533. Complaint, Sept. 23, 1994--Decision, Sept. 23, 1994

This consent order requires, among other things, Marion Merrell Dow Inc. to license its dicyclomine formulations and production technology to a third party within twelve months, and to contract manufacture dicyclomine for the third party while that party awaits Food and Drug Administration approval to sell its own dicyclomine. The consent order also prohibits, for ten years, acquisition of any dicyclomine manufacturing, production or distribution capabilities without prior Commission approval.

Appearances

For the Commission: *Ann B. Malester, Claudia R. Higgins, James Egan and Mary Lou Steptoe.*

For the respondents: *Michael Malina, Kaye, Scholer, Fierman, Hays & Handler, New York, N.Y. Edward H. Stratemeier, in-house counsel for Marion Merrell Dow Inc., Kansas City, MO.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondents, The Dow Chemical Company ("Dow"), a corporation subject to the jurisdiction of the Commission, and Marion Merrell Dow Inc. ("MMD"), a subsidiary of Dow and a corporation subject to the jurisdiction of the Commission, acquired certain stock of the Rugby-Darby Group Companies, Inc. ("Rugby"), a corporation also subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, and Section 5(b) of the FTC Act, as amended, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

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

(a) "*Respondent Dow*" or "*Dow*" means The Dow Chemical Company, a corporation organized and doing business under the laws of the state of Delaware, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Dow and their respective directors, officers, employees, agents and representatives acting on behalf of Dow, and their successors and assigns.

(b) "*Respondent MMD*" or "*MMD*" means Marion Merrell Dow Inc., a corporation organized and doing business under the laws of Delaware, its predecessors, subsidiaries, divisions, groups and affiliates controlled by MMD and their respective directors, officers, employees, agents and representatives acting on behalf of MMD, and their successors and assigns.

(c) "*Rugby*" means Rugby Group, Inc.

(d) "*Commission*" means the Federal Trade Commission.

(e) "*Acquisition*" means the acquisition by MMD of certain stock of Rugby relating to the production of generic pharmaceutical products, which stock is the subject of a stock purchase agreement dated October 4, 1993.

II. THE RESPONDENTS

2. Respondent Dow, which controls MMD and holds a majority of MMD's stock, is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business located at 2030 Dow Center, Midland, Michigan.

3. Respondent MMD, a subsidiary of Dow, is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business located at 9300 Ward Parkway, Kansas City, Missouri.

4. MMD manufactures and sells pharmaceutical products and products for hospital use, including cardiovascular products, respiratory products, smoking cessation products and gastrointestinal products, such as Bentyl[®] (the branded dicyclomine hydrochloride), an antispasmodic drug used for the treatment of functional or irritable bowel syndrome.

5. Respondents at all times relevant herein have been engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose business affects commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUIRED COMPANY

6. Rugby is a corporation organized and existing under the laws of the state of New York, with its principal offices located at 100 Banks Avenue, Rockville Centre, New York.

7. Rugby manufactures and sells pharmaceutical products, including generic dicyclomine hydrochloride used for the treatment of irritable bowel syndrome.

8. Rugby is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business affects commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

9. On October 4, 1993, MMD and Rugby signed a stock purchase agreement whereby MMD acquired certain stock of Rugby for approximately \$300 million.

V. THE RELEVANT MARKET

10. The relevant line of commerce in which to analyze MMD's acquisition is the market for dicyclomine hydrochloride capsules and tablets.

11. The relevant section of the country is the United States.

12. The relevant market is highly concentrated. MMD and Rugby are the only United States Food and Drug Administration approved manufacturers of dicyclomine hydrochloride capsules and tablets.

VI. ENTRY CONDITIONS

13. Entry into the relevant market is difficult and time consuming.

VII. COMPETITION

14. Prior to the acquisition, MMD and Rugby were actual competitors in the relevant market.

VIII. EFFECTS OF THE ACQUISITION

15. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

- (a) The acquisition eliminated actual, direct and substantial competition between MMD and Rugby;
- (b) The acquisition increased the likelihood that MMD will exercise market power in the relevant market; and
- (c) The acquisition created a monopoly in the manufacture and sale of dicyclomine hydrochloride capsules and tablets.

IX. VIOLATIONS CHARGED

16. The acquisition described in paragraph nine constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the consummated acquisition of certain stock of Rugby-Darby Group Companies, Inc. ("Rugby") by Marion Merrell Dow Inc. ("MMD"), a subsidiary of The Dow Chemical Company ("Dow") (collectively referred to as "respondents"), and respondents having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

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

1. Respondent Dow is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its principal place of business located at 2030 Dow Center, Midland, Michigan.
2. Respondent MMD is a subsidiary of Dow, and is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its principal place of business located at 9300 Ward Parkway, Kansas City, Missouri.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

- A. "*Dow*" means The Dow Chemical Company, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Dow, and

its respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. "MMD" means Marion Merrell Dow Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by MMD, and its respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. "Rugby" means Rugby Group, Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by Rugby, and its respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

D. "Respondents" means Dow and MMD.

E. "Commission" means the Federal Trade Commission.

F. "Acquisition" means the acquisition by respondents of certain Rugby stock that is the subject of a stock purchase agreement dated October 4, 1993.

G. "Rugby intangible dicyclomine assets" means those assets relating to the manufacture and sale of dicyclomine tablets and capsules acquired in the Acquisition that are not part of Rugby's physical facilities or other tangible assets, including but not limited to all formulations, patents, trade secrets, technology, know-how, specifications, designs, drawings, processes, quality control data, research materials, technical information, management information systems, software, the Drug Master file, and all information relating to United States Food and Drug Administration ("FDA") approvals.

H. "Potential New Entrant" means the person(s) for whom MMD shall contract manufacture, and to whom MMD shall sell, dicyclomine tablets and capsules and license the Rugby intangible dicyclomine assets. The Potential New Entrant must be a generic or a branded pharmaceutical manufacturer with manufacturing facilities approved by the FDA for the manufacture of generic or branded pharmaceutical products in the United States.

I. "Dicyclomine tablets and capsules" means pharmaceutically acceptable finished tablets and capsules consisting of either 10mg or 20mg of dicyclomine hydrochloride U.S.P. manufactured under an approved New Drug Application ("NDA") or an approved Abbreviated New Drug Application ("ANDA") for sale in the United States and that have received at least an AB rating by the FDA.

J. "Contract manufacture" means the manufacture of an unlimited volume of dicyclomine tablets and capsules by MMD for sale

to a Potential New Entrant in finished packaged form suitable for commercial sale in the United States.

K. "*Finished packaged form*" means packaged in all forms required by the Potential New Entrant so as to optimize sales and distribution of the product, including but not limited to inscribing the name and identification codes of the Potential New Entrant on the packaging of dicyclomine capsules or tablets, and packaging the dicyclomine tablets and capsules in units required by the Potential New Entrant, as permitted by Rugby's existing ANDA.

L. "*Formulation*" means any and all information, including both patent and trade secret information, technical assistance and advice, relating to the manufacture of dicyclomine tablets and capsules that meet United States Food and Drug Administration approved specifications therefore.

II.

It is further ordered, That:

A. Within twelve (12) months from the date this order becomes final, MMD shall enter into an agreement (hereinafter "agreement"), in good faith:

1. To license to the Potential New Entrant in perpetuity a non-exclusive right to the Rugby intangible dicyclomine assets at no minimum price; and

2. To contract manufacture and deliver in a timely manner the volume of dicyclomine tablets and capsules requested by the Potential New Entrant, at a price not to exceed 48% of the Average Wholesale Price of Rugby's dicyclomine tablets and capsules in effect as of July 2, 1993.

MMD shall enter into such agreement to license and contract manufacture only with a Potential New Entrant that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission and that is consistent with the purposes of this order. The purposes of this order are: (a) to provide the means for establishing an ongoing, viable enterprise to replace the competition in the dicyclomine tablet and capsule market alleged in the Commission's complaint to have been eliminated by the

Acquisition; and (b) to remedy the lessening of competition alleged in the Commission's complaint to have resulted from the Acquisition.

B. The agreement shall require the Potential New Entrant to submit to the Commission a certification attesting to the Potential New Entrant's good faith intention and actual plan to obtain FDA approval of its own NDA or ANDA for the manufacture and sale of dicyclomine tablets and capsules in an expedited manner. The agreement shall terminate in the event that the Potential New Entrant fails to sell or discontinues the sale of contract manufactured dicyclomine tablets and capsules prior to obtaining FDA approval, or abandons its efforts or fails to obtain FDA approval of its own NDA or ANDA for dicyclomine tablets and capsules within seven (7) years from the date the Commission approves the agreement.

C. The agreement shall require the Potential New Entrant to submit to the Commission a verified written report setting forth in detail its efforts to sell contract manufactured dicyclomine tablets and capsules and to obtain FDA approvals necessary for manufacturing its own dicyclomine tablets and capsules. The agreement shall require such report to be submitted one (1) year from the date the agreement becomes effective and annually thereafter until contract manufacturing ceases. The agreement shall also require the Potential New Entrant to report to the Commission at least thirty (30) days prior to its discontinuing the sale of contract manufactured dicyclomine tablets and capsules or abandoning its efforts to obtain FDA approvals necessary for manufacturing its own dicyclomine tablets and capsules.

D. MMD shall deliver dicyclomine tablets and capsules to the Potential New Entrant within two (2) months from the date the Commission approves the Potential New Entrant and the agreement. The Potential New Entrant shall have the right to continue to purchase dicyclomine tablets and capsules from MMD pursuant to the agreement until six (6) months after the date that the Potential New Entrant obtains FDA approval of its own NDA or ANDA for the manufacture and sale of dicyclomine tablets and capsules in the United States.

E. MMD shall make representations and warranties to the Potential New Entrant that the contract manufactured dicyclomine tablets and capsules meet the United States Food and Drug Administration approved specifications therefore and are not adulterated or misbranded within the meaning of the Food, Drug and Cosmetic Act,

21 U.S.C. 321, *et seq.* MMD shall agree to indemnify, defend and hold the Potential New Entrant harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the manufactured dicyclomine tablets and capsules to meet the specifications. This obligation shall be contingent upon the Potential New Entrant giving MMD prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting MMD to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel. This obligation shall not require MMD to be liable for any negligent act or omission of the Potential New Entrant or for any representations and warranties, express or implied, made by the Potential New Entrant that exceed the representations and warranties made by MMD to the Potential New Entrant.

F. Upon reasonable notice from and at the option of the Potential New Entrant, MMD shall provide information, technical assistance and advice sufficient to assist the Potential New Entrant in obtaining FDA approval for the manufacture and sale of dicyclomine tablets and capsules. Such assistance shall include reasonable consultation with knowledgeable employees of MMD and training at the Potential New Entrant's facility for a period of time sufficient to satisfy the Potential New Entrant's management that its personnel are appropriately trained in the manufacture of dicyclomine tablets and capsules.

G. While the obligations imposed by paragraphs II.A, II.D or paragraph III of this order are in effect, respondents shall take such actions as are necessary to maintain the viability and marketability of the Rugby intangible dicyclomine assets and the tangible assets needed to contract manufacture and sell dicyclomine tablets and capsules and to prevent the destruction, removal, wasting, deterioration or impairment of any of the Rugby intangible and tangible assets relating to the manufacture of dicyclomine tablets and capsules except in the ordinary course of business and except for ordinary wear and tear that does not affect the viability and marketability of the Rugby intangible and tangible assets.

III.

It is further ordered, That:

A. MMD shall consent to the appointment of a trustee by the Commission to terminate MMD's prior agreement, if any, and to enter into a new agreement on behalf of MMD with a Potential New Entrant selected by the trustee if:

1. MMD has not entered into an agreement to contract manufacture dicyclomine tablets and capsules and to license the Rugby intangible dicyclomine assets to a Potential New Entrant within twelve (12) months as provided for in paragraph II of this order; or

2. The Potential New Entrant terminates the agreement to contract manufacture, fails to sell, or discontinues the sale of contract manufactured dicyclomine tablets and capsules in the United States prior to obtaining FDA approval of its own NDA or ANDA for the manufacture and sale of dicyclomine tablets and capsules; or

3. The Potential New Entrant abandons its efforts or fails to obtain FDA approval of its own NDA or ANDA for dicyclomine tablets and capsules within seven (7) years from the date the Commission approves the agreement.

In the event the Commission or the Attorney General brings an action against respondents to enforce this order pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, MMD shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it for any failure by respondents to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A of this order, MMD shall consent to the following terms and conditions regarding the trustee's powers, duties, authorities, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of MMD, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acqui-

sitions and divestitures. If MMD has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to MMD of the identity of any proposed trustee, MMD shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to enter into an agreement as specified in paragraph II of this order.

3. Within ten (10) days after appointment of the trustee, MMD shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to enter into the agreement required by paragraph II of this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3 to terminate any prior agreement and to enter into the agreement specified in paragraph II of this order, which agreement shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period the trustee has submitted a plan or believes that the agreement required by paragraph II of this order can be entered into within a reasonable time, the twelve (12) month period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend the twelve (12) month period only two (2) times and for no longer than twelve (12) months each time.

5. The trustee shall have full and complete access to the personnel, books, records, facilities and technical information related to the manufacture of dicyclomine tablets and capsules and to the Rugby intangible dicyclomine assets, or to any other relevant information, as the trustee may reasonably request. Respondents shall cooperate with any reasonable request of the trustee. Respondents shall take no action to interfere with or impede the trustee's ability to enter into the agreement required by paragraph II of this order. Any delays in entering into the agreement required by paragraph II of this order caused by respondents shall extend the time under paragraph III.B.4 for entering into the agreement required by paragraph II of this order in an amount equal to the delay, as determined by the Commission or, for the court-appointed trustee by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to MMD's absolute and unconditional obligation to enter into the agreement required by paragraph II of this order at no minimum price. The agreement shall be made in the manner and with a Potential New Entrant as set out in paragraph II of this order; provided, however, if the trustee receives bona fide offers from more than one Potential New Entrant, and if the Commission determines to approve more than one such Potential New Entrant, the trustee shall enter into an agreement as required by paragraph II of this order with the Potential New Entrant selected by MMD from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of MMD, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of MMD, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the agreement required by paragraph II of this order and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of MMD and the trustee's power shall be terminated.

8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparations for, or defense of any claim whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from the misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee

issue such additional orders or directions as may be necessary or appropriate to enter into the agreement required by paragraph II of this order.

11. The trustee shall report in writing to MMD and to the Commission every sixty (60) days concerning the trustee's efforts to enter into the agreement required by paragraph II of this order.

IV.

It is further ordered, That for a period of ten (10) years from the date this order becomes final, respondents shall not acquire, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

(a) Any stock, share capital, equity, leasehold or other interest in any concern, corporate or non-corporate, presently engaged in, or within the two years preceding such acquisition engaged in, the manufacture, production, distribution or sale of dicyclomine tablets and capsules in the United States; or

(b) Any assets currently used for or previously used for (and still suitable for use for) the manufacture and production of dicyclomine tablets and capsules in the United States from any concern, corporate or noncorporate, presently engaged in, or within the two years preceding the acquisition engaged in the manufacture, production, distribution or sale of dicyclomine tablets and capsules in the United States.

Provided, however, that the obligations imposed by this paragraph shall not terminate while the obligations of paragraphs II or III are in effect.

V.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until the Commission has approved a Potential New Entrant, MMD shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied

with paragraphs II and III of the order. MMD shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of this order, including a description of all substantive contacts or negotiations for entering into the agreement required by this order, including the identity of all parties contacted. MMD shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the agreement required by paragraph II of this order.

B. One (1) year from the date this order becomes final and annually for the next nine (9) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with paragraphs II, III and IV of this order.

Provided, however, that the obligations imposed by this paragraph shall not terminate while the obligations of paragraphs II or III are in effect.

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondents, respondents shall permit any duly authorized representatives of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondents, relating to any matters contained in this consent order; and

B. Upon five (5) days notice to respondents, and without restraint or interference from respondents, to interview officers or employees of respondents, who may have counsel present, regarding such matters.

VII.

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

Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Today, the Commission accepts a consent agreement settling charges that Marion Merrell Dow's consummated acquisition of certain stock in the Rugby-Darby Group Companies, Inc. would substantially lessen competition in the United States market for dicyclomine hydrochloride capsules and tablets. I support the allegations in the complaint that the acquisition created a monopoly in the manufacture and sale of dicyclomine hydrochloride capsules and tablets, and I have reason to believe the acquisition violated the law. I dissent because I find the remedy insufficient.

Ideally, the Commission would have sought to enjoin the transaction. Although it did not seek a preliminary injunction, the Commission still should seek through administrative litigation divestiture of assets sufficient to create a viable, independent dicyclomine business. Administrative litigation takes time but affords a much higher likelihood of obtaining effective relief by divestiture of an ongoing enterprise than does a technology license designed to induce new entry.

The order requires Marion Merrell Dow to grant a nonexclusive license to certain intangible dicyclomine assets, including patents and technology, and for up to seven years to sell to the person acquiring the license dicyclomine tablets and capsules at a price not exceeding 48 percent of the average wholesale price on July 2, 1993. Technology licenses tend to be highly regulatory and less effective than divestitures in restoring competition. Further, because of the great difficulty government agencies have in specifying competitive market prices, it is highly questionable whether requiring sales of dicyclomine at a Commission-specified maximum price will provide con-

sumers with interim relief from the monopoly. Indeed, since the Commission granted early termination of the Hart-Scott-Rodino waiting period on July 12, 1993, it seems entirely possible that the price on July 2 reflected the impending merger to monopoly and was already supra-competitive.

Complaint

118 F.T.C.

IN THE MATTER OF

STOUFFER FOODS CORPORATION

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

Docket 9250. Complaint, Oct. 28, 1991--Final Order, Sept. 26, 1994

This final order prohibits Stouffer Foods Corporation, the manufacturer and advertiser for Lean Cuisine frozen entrees, from misrepresenting, in any manner, the existence or amount of sodium or any other nutrient or ingredient in any of its frozen-food products.

Appearances

For the Commission: *Theodore H. Hoppock* and *Nancy S. Warder*.

For the respondent: *Hugh Latimer, Wiley, Rein & Fielding*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Stouffer Foods Corporation, Inc. ("Stouffer" or "respondent"), a corporation, has violated provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it would be in the public interest, alleges:

PARAGRAPH 1. Stouffer is a Pennsylvania corporation with its offices and principal place of business at 5750 Harper Road, Solon, Ohio.

PAR. 2. Stouffer has advertised, offered for sale, sold, and distributed Stouffer's Lean Cuisine, a "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

PAR. 4. Respondent has disseminated or caused to be disseminated advertisements for Stouffer's Lean Cuisine, including but not

necessarily limited to, the advertisement attached hereto as Exhibit A. The headline of Exhibit A contains the following statement:

OF ALL THE THINGS WE MAKE, WE MAKE SENSE!

(Emphasis added.)

The text of Exhibit A contains the following statements:

Of all the things we at Stouffer's pack into our 34 Lean Cuisine entrees - the freshest ingredients, the ripest vegetables and the perfect blend of herbs and spices - there are some things we skimp on: Calories. Fat. Sodium. With less than 300 calories, controlled fat and always less than 1 gram of sodium* per entree, we make good sense taste great.

In a footnote next to a second asterisk Exhibit A states in fine print as follows:

*All Lean Cuisine entrees have been reformulated to contain less than 1 gram (1000 mg.) of sodium.

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that Stouffer's Lean Cuisine entrees are low in sodium.

PAR. 6. In truth and in fact, in many cases, Stouffer's Lean Cuisine entrees are not low in sodium. Therefore, the representation set forth in paragraph five was and is false and misleading.

PAR. 7. In its advertising for Stouffer's Lean Cuisine entrees, respondent has represented, directly or by implication, that the entrees contain less than 1 gram of sodium. This advertising has failed to disclose adequately that 1 gram is equivalent to 1000 milligrams, which is the commonly used unit of measurement for sodium. This fact would be material to consumers in their purchase or use decisions regarding the product. In light of the representation made, the failure to disclose adequately this fact is likely to lead reasonable consumers to underestimate the level of sodium in the entrees and is a deceptive practice.

PAR. 8. The acts and practices alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Complaint

118 F.T.C.

EXHIBIT A



EXHIBIT A



OF ALL THE THINGS WE MAKE,
WE MAKE **SENSE!**

Of all the things we at Stouffer's® pack into our 34 Lean Cuisine® entrees—the freshest ingredients, the ripest vegetables and the perfect blend of herbs and spices—there are some things we skip on: Calories. Fat. Sodium. With less than 300 calories, controlled fat and always less than 1 gram of sodium per entree, we make good sense taste great.*

*All Lean Cuisine entrees have been reformulated to contain less than 1 gram (1000 mg) of sodium



LEAN ON LEAN CUISINE

INITIAL DECISION

BY JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE

AUGUST 6, 1993

INTRODUCTION

On October 28, 1991, the Federal Trade Commission issued an administrative complaint charging Stouffer Food Corporation with violations of Section 5 of the Federal Trade Commission Act in connection with claims made by Stouffer in the advertising and sale of its Lean Cuisine brand of frozen entrees.

After pleading and discovery, the case came on for evidentiary hearings commencing on February 8, 1993, and closing on March 8, 1993. The transcript of the hearings consists of 1662 pages. About 580 exhibits, some of which were deposition transcripts, were admitted into evidence. Proposed findings were completed by June 21, 1993, and indexes to the proposed findings were filed on July 14, 1993.

SUMMARY OF COMPLAINT ALLEGATIONS

The complaint alleged (1) that respondent's ads falsely represented that Lean Cuisine entrees are low in sodium through "statements contained in the advertisements," including that they "skimp on: Calories. Fat. Sodium. With less than 300 calories, controlled fat and always less than 1 gram of sodium per entree, we make good sense taste great." The complaint quoted a footnote "in fine print" from the ads: "All Lean Cuisine entrees have been formulated to contain less than 1 gram (1000 mg.) of sodium." (Paragraphs 4 and 5 of complaint.) The complaint also alleged (2) that the ads failed to disclose adequately the material fact that "1 gram is equivalent to 1000 milligrams, which is the commonly used unit of measurement for sodium." (Paragraph 7 of complaint.)

FINDINGS OF FACT

Respondent and Jurisdiction

1. Stouffer Foods Corporation, Inc., (Stouffer) is a corporation organized, existing and doing business under and by virtue of the

laws of the State of Pennsylvania, with its offices and principal place of business located at 5750 Harper Road, Solon, Ohio. (Answer paragraph 1.)

2. Stouffer manufactures and sells frozen entrees consisting of two product lines: the Stouffer "Red Box" line and the Lean Cuisine line. (Annett, Tr. 875, 931.)

3. For the purposes of Section 12 of the Federal Trade Commission Act, 15 U.S.C. 52, Lean Cuisine is a "food," as defined in Section 15 of the Act, 15 U.S.C. 55. (Compl. paragraph 2; Answer paragraph 2.)

4. During all times relevant, including the years 1990-91, Stouffer has advertised, offered for sale, sold, and distributed Stouffer's Lean Cuisine. (Answer paragraph 2.)

5. At all times relevant to the complaint, the acts and practices of respondent alleged in the complaint have been in or affecting commerce. (Answer paragraph 3.)

6. Stouffer is a subsidiary of Nestle U.S.A. which is owned by Nestle S.A. of Switzerland. (Annett, Tr. 925.)

Lean Cuisine and Frozen Entrees

7. Lean Cuisine is a line of frozen entrees. (Block, Tr. 775.)

8. As an entree, Lean Cuisine is packaged in a tray as a single serving item. (Annett, Tr. 876.)

9. During 1990-91, the Lean Cuisine line averaged 850 milligrams of sodium per entree. (CX-523-T-Z.) There were Lean Cuisine entrees that contained more than 1000 milligrams of sodium. (Annett, Tr. 909.)

10. During 1990-1991, annual sales for the Lean Cuisine line were over two hundred million dollars. (CX-523-Z-1, Z-2.)

11. Stouffer also manufactures and sells the "Red Box" line. (Annett, Tr. 875, 931; CX 84.)

12. Beginning in October, 1989, Stouffer also manufactured and sold another line of frozen entrees, the Right Course line. (CX-382 at 21 [Audette Dep.]; Annett, Tr. 880.) These products were promoted on their lower levels of fat, cholesterol, and sodium compared to the Stouffer Red Box line and the Lean Cuisine line. (Annett, Tr. 880, 890, 931; CX-96; CX-88.) The average sodium content for Right Course was under 600 milligrams. (Annett, Tr. 880.)

In the fall of 1990, the Right Course line was dropped. (Annett, Tr. 880-81.)

13. The Lean Cuisine line was introduced in 1981. (Block, Tr. 775.) The brand featured calorie-control (under 300 calories per entree) and taste. (*Id.*)

14. In the mid-1980's, new "healthy" frozen food products entered the market, including Weight Watcher's, Budget Gourmet, and later, ConAgra's Healthy Choice. (Annett, Tr. 874, 878.)

15. Lean Cuisine began losing market share. (*Id.* at 864; CX-84.) In 1989, Lean Cuisine had 33% of the calorie-controlled entree market; that figure dropped to 25% in 1990. (CX-84.)

16. During this time, consumers became concerned about nutrition, including the fat, cholesterol, and sodium in food. (Annett, Tr. at 864, 902, 914; Block, Tr 777; CX-84.)

17. Consumers were confused about the Lean Cuisine line, particularly the sodium content. (Block, Tr. 785.) Many consumers viewed Lean Cuisine's sodium content as high. (Annett, Tr. 917-18; Block, Tr. 809; CX-58-G; CX-65; CX-139-62.)

18. Responding to consumer's new nutritional awareness, Stouffer reformulated Lean Cuisine with new recipes and seasonings, diminished the importance of low calories and reduced the fat and sodium. (Block, Tr. 781.) In order to counteract the perception that Lean Cuisine was high in sodium, and because it was becoming a health issue in the media, Stouffer asked Irene Block of Tatham/RSCG (Tatham), Stouffer's advertising agency, to develop ads stating the facts on the sodium content of the product. (Block, Tr. 785-86.)

19. In March of 1987, Richard B. Annett, the group marketing manager for Lean Cuisine, sent a letter to the National Advertising Division (NAD) of the Council of Better Business Bureaus concerning an ad disseminated by a competitor, Budget Gourmet, in the Miami, Florida area. (CX-24; Annett, Tr. 894-95.) The ad claimed that the Budget Gourmet Slim Selects were:

"At Around \$1.89, Under 300 Calories, And Under 1 Gram of Sodium, One of Man's Lighter Creations."

(CX-24-A-B.)

20. The letter to the NAD was about Budget Gourmet's sodium claim (CX-24):

Print advertising for Budget Gourmet's "Slim Select" entrees has come to our attention . . . which, as you will note, has prominently displayed the representation that the Slim Select entrees contain "Under 1 Gram of Sodium." We draw this matter to your attention as we view this statement as blatantly misleading to the consuming public and one which contravenes the industry-wide practice of utilizing the descriptor of sodium content in terms of milligrams and not grams. In essence the producers of Budget Gourmet Slim Select entrees have intentionally misrepresented the sodium content in this product by quantifying sodium content in grams.

21. The Budget Gourmet ad did not mention milligrams. (CX-24-A-B.)

22. On April 8, 1987, NAD wrote to Mr. Annett that there was "no basis to believe that the accurate statement 'Under 1 Gram of Sodium,' is misleading to consumers." (RX-12-A.) Mr. Annett had no consumer research showing that use of the phrase "under 1 gram of sodium" was misleading to consumers. (Annett, Tr. 870, 926-27.)

23. Sue Lally, manager of regulatory affairs for Stouffer, informed Mr. Annett that the U.S. Department of Agriculture permitted sodium disclosure statements on labels in terms of grams as well as milligrams. (Annett, Tr. 872, 927-28.)

24. Stouffer then determined that it would be appropriate to use the 1 gram terminology in its new Lean Cuisine ads. (Annett, Tr. 872-73.)

25. When the "Lean on Lean Cuisine" campaign was launched in late 1989 with "Lean on Lean Cuisine" and "Taste Like A Million," there was no reference to sodium in the ads. (Block, Tr. 783-84.) After Lean Cuisine had been reformulated, sodium content was included in the two ads. (Block, Tr. 784-85.)

26. Mr. Annett informed Tatham-Laird personnel working on the campaign that the use of "lower" sodium or "controlled" sodium was acceptable for the advertising but that "low" was not. (RX-8-A-B; Block, Tr. 788-90; Annett, Tr. 887-89.)

27. In the early 1990's ConAgra's Healthy Choice became the market leader on the low end of the nutritional spectrum for frozen entrees. (Annett, Tr. 878.) Healthy Choice products competed successfully with low sodium, low cholesterol and low fat. (Annett, Tr. 878-79; RX-58.)

28. Stouffer, in 1989-90, was marketing three lines of frozen food, each to different dietary needs. Lean Cuisine occupied middle ground. (CX-88; Annett, Tr. 878-92.) Stouffer marketed its Red Box frozen products to consumers who did not control their fat, sodium

or cholesterol intake. (CX-88; Annett, Tr. 878-79, 890.) Stouffer marketed its Right Course entrees, as a healthier product line than Lean Cuisine, with less than 600 milligrams of sodium and lower levels of cholesterol and fat. (CX-88; Annett, Tr. 880, 889-93.)

29. The Chairman and CEO of Nestle Enterprises, Inc., did not permit Lean Cuisine to use "health-oriented" advertising, since he felt it might interfere with the marketing of the Right Course line of products. (CX-45-A; Annett, Tr. 890-93, 928-30.)

30. Stouffer reduced the cholesterol, fat and sodium in the Right Course line, but in late 1990 the Right Course line of products was discontinued. (Annett, Tr. 880-81.)

31. Stouffer then embarked on a second reformulation of the Lean Cuisine line. The sodium was again reduced, to a maximum of 600 milligrams per entree, and the fat and cholesterol content also was reduced. (Block, Tr. 803; RX-9-D-F.)

32. In July 1991, Stouffer and Tatham-Laird ran a singing radio commercial known as "Anniversary/Turkey Rev." (CX-7; Block, Tr. 803.)

The Ads

33. From January 1990 through August 1991, Stouffer ads featured Lean Cuisine entrees. (CX-523-M-Q; CX-527; CX-528-F-Z-116.) This campaign cost three million dollars (CX-523-S; CX-527-A, CX-528-G), and reached millions of consumers nationwide. (CX-79.)

34. The Lean on Lean Cuisine ad is a two-page magazine ad. (CX-1.) The ad, at 64% of its size, is attached as Appendix A.

35. The Lean on Lean Cuisine ad ran in magazines from January through February, 1990. (CX-523-M-Q.) The magazines were Cosmopolitan, Redbook, Bon Appetit, Shape, New Woman, Glamour, Working Mother, and Working Woman, all directed primarily to women. (Zinkhan, Tr. 486.)

36. The 300 Like a Million ad (CX-2) is attached as Appendix B.

37. The 300 Like a Million ad ran in magazines from June, 1990 through January, 1991. (CX-523-M-Q.) These magazines included Moxie, Eating Well, Glamour, Business Woman, Family Circle, Newsweek Woman, Working Woman, Ladies' Home Journal and New Woman, directed primarily to women. (Zinkhan, Tr. 486.)

38. The Make Sense ad (CX-4) is attached as Appendix C.

39. The Make Sense ad ran in Good Housekeeping, Glamour, Family Circle, Cosmopolitan, People, Shape, and New Woman, directed primarily to women. (CX-523-M-Q; Zinkhan, Tr. 486; Annett, Tr. 919-20.) This ad ran from January through March, 1991. (CX-523-M-Q.)

40. A version of the Make Sense ad (CX-5) ran in Military Lifestyle, People, and Health (CX-523-N), with different text:

95% fat free. Never more than a gram of sodium.* Always less than 300 calories. Lean Cuisine makes great food and good sense. . . .

(CX-5.) This ad ran from February through April, 1991. (CX-523-N.)

41. The Ole, O'lean ad is a two page ad promoting both Stouffer's "Red Box" and Lean Cuisine New Mexican entrees. (CX-6.) The left-hand side of the ad presents claims for the "Red Box" line. The right-hand side promotes Lean Cuisine. (*Id.*) The ad, at 64% size is attached as Appendix D.

42. The Ole, O'lean ad ran in People, Cosmopolitan, Working Mother, Redbook, and New Woman, directed primarily to women, and also in Newsweek. (CX-527; Zinkhan, Tr. 486; Annett, Tr. 919-20.) This ad ran from April through May, 1990. (CX-527.)

43. The radio advertisement, Anniversary Turkey, was sixty seconds long. (CX-7.) This ad stated:

Ten new tenth anniversary entrees from--you guessed it--Stouffer's Lean Cuisine. These babies are healthier than ever. Lower in sodium, fat and cholesterol. Read those boxes, people, these numbers are low.

The ad concluded with singers singing "Stouffer's Lean Cuisine . . . Taste you can love for life." (*Id.*)

44. The Anniversary Turkey ad went over 230 radio stations from June through August, 1991. (CX-528-G to Z-116.)

Facial Analysis of Ads

45. One message of the challenged print ads is healthy eating: Lean Cuisine has large quantities of healthy ingredients, and small amounts of undesirable nutrients. (CX-1-6.)

46. The Make Sense ads' headlines state "Of all the things we make, we make SENSE!" (CX-4, CX-5.) The ad describes all the

good ingredients in Lean Cuisine entrees in contrast to the undesirable nutrients that are present only in minimal amounts (CX-4):

Of all the things we at Stouffer's pack into our 34 Lean Cuisine entrees--the freshest ingredients, the ripest vegetables and the perfect blend of herbs and spices--there are some things we skimp on: Calories. Fat. Sodium. With less than 300 calories, controlled fat and always less than 1 gram of sodium* per entree, we make good sense taste great.

47. CX-4 states that Stouffer "skimp[s]" on sodium, a description virtually synonymous with a low amount of sodium.

48. CX-2 and CX-3 state in a footnote that "All Lean Cuisine entrees are currently being reformulated to contain less than 1 gram (1000 mg.) of sodium."

49. CX-4 and CX-5 state in a footnote that "All Lean Cuisine entrees have been reformulated to contain less than 1 gram (1000 mg.) of sodium."

50. The radio spot, Anniversary Turkey, (CX-7) describes Lean Cuisine as follows:

These babies are healthier than ever. Lower in sodium, fat and cholesterol. Read those boxes, people, these numbers are low.

51. The first low sodium statement in the radio spot claims that the entrees are "healthier than ever" because, among other things, they are now "[l]ower in sodium." The ad then refers to the nutritional information on the packages and states, in absolute terms, that "these numbers are low," for the undesirable nutrients including sodium. (Block, Tr. 823-24.)

ZINKHAN COPY TEST

52. U.S. Research Company ("USR") did a copy test of three of the print ads to determine whether they conveyed the low sodium claim. (CX-374.) USR is experienced in such copy tests. (Kloc, Tr. 304-05, 313-14.) The questionnaire USR used was designed by Dr. Zinkhan, a professor of marketing at the University of Houston. (CX-373; Zinkhan, Tr. 475; Kloc, Tr. 312.)

53. Dr. Zinkhan's questionnaire used open-ended and close-ended questions. (CX-374-Z-29, Z-30.) An open-ended question provides copy test participants with little context in order to obtain unprompt-

ed answers phrased in their own words. (Zinkhan, Tr. 478; Kloc, Tr. 306.) A structured, close-ended question asks about a specific issue and provides the answers. Consumers select one of the answers. (Zinkhan, Tr. 478; Kloc, Tr. 307; CX-522.)

54. Dr. Zinkhan's copy test asked open-ended questions followed by close-ended questions. (Zinkhan, Tr. 499-508.) It used a control question, regarding the sugar content of Lean Cuisine, to find any bias from the use of close-ended questions. (*Id.* at 513-14.)

55. The three print ads tested were Lean on Lean Cuisine, 300 Like a Million and We Make Sense. (Kloc, Tr. 331-32; Zinkhan, Tr. 522-24; CX-1, CX-3-4.) One hundred participants viewed these three ads at four shopping malls. (Kloc, Tr. 339-40; CX-374-B-C; Zinkhan, Tr. 539.)

56. From 43 to 60% of participants answering open-ended questions stated that the ads claimed that Lean Cuisine frozen entrees are low in sodium and, after subtraction of the control question responses, from 78 to 86% gave that response to close-ended questions. (Zinkhan, Tr. 523-26; CX-374-Z-11, Z-20-21; CX-526.)

57. The copy test was conducted in four shopping malls located in Poughkeepsie, NY; Orlando, FL; Houston, TX; and Mission Viejo, CA. (CX-374B; Kloc, Tr. 320.) The interviewing was done by USR. (Kloc, Tr. 308-09.) Dr. Zinkhan approved the mall sites. (Zinkhan, Tr. 539.)

58. The copy test consisted of a screener and the main questionnaire. (CX-374-Z-25 to Z-52.) USR employees screened consumers in the shopping malls. (Kloc, Tr. 323.)

59. Qualified consumers were asked to view some ads. (CX-374-Z-28; Zinkhan, Tr. 497-98.) These participants read one of the three ads and were questioned by trained interviewers. (Kloc, Tr. 328-33; Zinkhan, Tr. 498-501; CX-374-Z-29.)

60. The interviews were supervised by Mr. Kloc of USR. (Kloc, Tr. 320.)

61. Dr. Zinkhan observed the interviewer training and interviews at the Houston mall facility. (Zinkhan, Tr. 522, 535-36.) The training and interviews were conducted professionally. (*Id.* at 535-36.)

62. A pretest of the main questionnaire was conducted prior to the copy test. (Kloc, Tr. 312.)

63. As a result of the pretest, the wording of Question 3 of the main questionnaire was changed to eliminate the misinterpretation by

participants. (Kloc, Tr. 316-18.) Dr. Zinkhan gave his approval of this change. (Zinkhan, Tr. 534-35; Kloc, Tr. 318.)

64. USR interviewed 300 participants, 100 for each of the three ads. (Kloc, Tr. 339; CX-374-B.)

65. USR creates code categories into which responses are placed. (Kloc, Tr. 340-41.) Based on their review of one-third of the questionnaires, USR created a preliminary set of coding categories. (*Id.* at 341.)

66. Dr. Zinkhan suggested changes including a separate coding category for "low sodium" responses. (*Id.*) Dr. Zinkhan's changes were used by the coders to categorize the responses to each of the three open-ended questions. (*Id.* at 538; Kloc, Tr. 344.)

67. Two experienced coders, coded each of the 300 questionnaires. (Kloc, Tr. 344-45.) The coders did not know that the FTC was the client or that the issue of interest was whether the ad conveyed a low sodium claim. (*Id.* at 346.)

Universe

68. The universe of Dr. Zinkhan's copy test was comprised of the consumers Stouffer intended to persuade to purchase the product by disseminating the challenged ads. (Zinkhan, Tr. 475, 479, 481; Popper, Tr. 1509; Annett, Tr. 919.)

69. The universe consisted of women who were the principal food shoppers for their household, between the ages of 25 and 54, who had purchased a frozen entree in the last three months and who were not following a medically supervised diet. (CX-374-Z-27 to Z-29; Zinkhan, Tr. 481-97.) Participants who wore glasses to read needed to have those glasses to qualify. (CX-374-Z-26; Zinkhan, Tr. 488.)

70. In determining the universe, Dr. Zinkhan relied on Stouffer's description of its target audience (CX-523-Z-7 to Z8), Stouffer consumer surveys (CX-65-Z-3 to Z-25; CX-524) and his own judgment. (Zinkhan, Tr. 479-97.) He reviewed consumer research (CX-69-W), consumer correspondence with Stouffer (CX-140; CX-181; CX-182; CX-221; CX-276) and an analysis of the magazines in which the ads appeared. (Zinkhan, Tr. 485-86, 490-93, 495-97.)

71. Stouffer described the target audience for Lean Cuisine ads as primarily female although not exclusively, without specifying the percentage of men. (Zinkhan, Tr. 484; CX-523-Z-7 to Z-8.) Dr. Zinkhan did not include males in his sample. (Zinkhan, Tr. 484.)

During 1990-91, 15.5 to 17% of regular Lean Cuisine purchasers were men. (RX-37-B; Ross, Tr. 1101-03.) Stouffer also described the age of its target audience as "25-54, with an opportunity in the under 25 segment." (CX-523-Z-8.) Of those who regularly bought Lean Cuisine in 1990-91, 9% were under 25; 25% were over 54. (RX-37-B.)

72. Most of the magazines in which the ads appeared were women's magazines. (Zinkhan, Tr. 486.) People, the magazine with the largest circulation, is read "primarily" by women. (Annett, Tr. 920.)

Funneling Questions

73. Funneling of questions in a copy test refers to proceeding from general questions to more narrow questions on specific issues. (Zinkhan, Tr. 476; Popper, Tr. 1505; Ross, Tr. 1251.) Funneling reveals the participants' unaided response to the ads. (Zinkhan, Tr. 476; Kloc, Tr. 307; Popper, Tr. 1505.)

74. Funneling is the best way to ask questions on a copy test. (Zinkhan, Tr. 476; Popper, Tr. 1506; Ross, Tr. 1251-53.)

75. Dr. Zinkhan's copy test used funneling. (Zinkhan, Tr. 499.) It began with an open-ended question designed to get participants to state:

1. What point or points does the Lean Cuisine ad make about the product?
2. What reason or reasons does the ad mention or suggest for you to buy Lean Cuisine?
3. Is there anything else you can recall about the ad?

(CX-374-Z-29 to Z-30.)

76. The remaining questions in Dr. Zinkhan's copy test were close-ended questions. (Dr. Zinkhan, Tr. 500-01.) The test (CX-374-Z-30) asks: "Does the ad say or suggest anything about the amount of calories [or sugar] [or sodium] in Lean Cuisine, entrees?" If "yes," it asks: "Does the ad say or suggest that Lean Cuisine entrees are..."

1. High in calories [or sugar] [or sodium]
2. Low in calories [or sugar] [or sodium]
3. Neither high nor low in calories [or sugar] [or sodium]."

Open-ended Questions.

77. In designing a copy test, the collection of data must occur as soon as possible after exposure to the ad. (Ross, Tr. 1233.) The first question in Dr. Zinkhan's copy test obtained data within seconds of when respondents read the ad. (*Id.*)

78. Question 1, the first open-ended question in Dr. Zinkhan's copy test does not prompt participants for any specific response. (Zinkhan, Tr. 502; Kloc, Tr. 336; CX-536-Z-24.)

79. Question 1 permits participants to give one answer, multiple answers, or no answer at all. (*Id.* at 501-02; Kloc, Tr. 336.) It permits responses to be based upon the text or pictures in the ad and the visual depictions in the ad. (Zinkhan, Tr. 503-04; Kloc, Tr. 337.) There is a reasonable likelihood that participants would answer Question 1 truthfully. (Zinkhan, Tr. 503; Kloc, Tr. 336-37.)

80. Question 1 is an unbiased open-ended question. (Zinkhan, Tr. 501; Kloc, Tr. 335.)

81. Questions 2 and 3 in Dr. Zinkhan's copy test are also unbiased open-ended questions. (Zinkhan, Tr. 504-05; Kloc, Tr. 337-38.) They do not prompt participants for any specific response nor give any context to answer the questions except the ad. (Zinkhan, Tr. 505-06.) They permit one answer, multiple answers, or no answer. (Zinkhan, Tr. 504-05; Kloc, Tr. 337-38.) There is reasonable likelihood that participants would answer these questions truthfully. (Zinkhan, Tr. 505; Kloc, Tr. 336-38.)

82. A "control" in a copy test seeks bias in the question or in the participant. (CX-536-Z-33.) A control "group" is a group of participants who see a different stimulus than the challenged ad. (*Id.*)

83. Dr. Zinkhan did not use a control group for the open-ended questions in his copy test. (Zinkhan, Tr. 506-07.) Open-ended questions do not prompt participants toward a particular attribute in the ad (F. 78-81), and a control group is not required to make the results reliable evidence. (Zinkhan, Tr. 507; Kloc, Tr. 368-70.)

84. Both of Stouffer's expert witnesses in marketing research have in litigation based expert opinions on the results of open-ended questions for which there was no control group. (Popper, Tr. 1489-91; Ross, Tr. 1297, 1303.)

85. Dr. Popper designed for the Commission staff a copy test in which he did not use a control group for the open-ended questions. (*Id.* at 1491-92.)

86. Dr. Ross has given expert testimony based on the results of open-ended questions for which no control group existed. (Ross, Tr. 1288.)

87. There is little evidence that consumers had a pre-existing belief that Lean Cuisine was low in sodium. Irene Block, of respondent's advertising agency, testified that the Lean Cuisine advertising campaign was directed at correcting consumers' misconceptions about the amount of sodium in the product. She testified that many consumers thought Lean Cuisine had more sodium than it actually had, and that perception was exacerbated by the issue being played up in the media; she also testified that some consumers thought Lean Cuisine had less sodium than it actually had. (Block, Tr. 786-87.)

88. Consumer research, done to assist Stouffer's advertising agency in the development of the challenged ads and not for litigation, determined that consumers' "general perception was that the [sodium] level [of Lean Cuisine entrees] was high." (CX-58-G; Block, Tr. 809-10.)

89. Most consumers believed that the sodium content of the entire frozen food category was high. (*Id.*) At the time the challenged ads were developed most consumer's pre-existing belief about the sodium content of Lean Cuisine and similar products was that sodium was high. (*Id.*)

90. Sodium information was included in the challenged ads to inform consumers that Lean Cuisine's sodium content was lower than consumers believed it to be. (Block, Tr. 820-21.) The challenged ads were the first ads to mention the sodium content of Lean Cuisine. (*Id.* at 784-85, 787.)

91. When consumers read ads, they use their beliefs in their interpretations of the ad. (Zinkhan, Tr. 725-26; Shimp, Tr. 1563; Ross, Tr. 1258; Popper, Tr. 1447.) They do not read ads in a vacuum, disregarding their experience and knowledge. (Shimp, Tr. 1563; Zinkhan, Tr. 726.)

92. If an ad takes advantage of the reader's prior beliefs, the reader's perception of the ad may be attributed to the ad. (Ross, Tr. 1325-26; Popper, Tr. 1502-03.)

Close-ended Questions

93. The close-ended questions mentioned specific attributes. (Zinkhan, Tr. 500-01.) The purpose of such close-ended questions is to probe participants' recollection of the ad. (*Id.* at 512.)

94. Prior to answering the close-ended questions, participants were instructed to answer them “[b]ased on reading this ad. . . .” (CX-374-Z-30; Kloc, Tr. 333-34.) The close-ended questions sought responses based on what the ad suggested. (CX-374-Z-30; Zinkhan, Tr. 507.)

95. Close-ended questions asked if the ad suggested anything about the amount of sodium, calories, or sugar in Lean Cuisine entrees. (CX-374-Z-30.)

96. Participants were asked whether the amount of the attribute in Lean Cuisine was “high,” “low,” or “neither high nor low,” or “don’t know/don’t remember.” (Kloc, Tr. 331-32; CX-374-Z-30.)

Response Categories

97. If participants thought the ad asked whether the attribute was reduced or lower but not “low” they would select “neither high nor low.” (Kloc, Tr. 417, 444; Popper, Tr. 1487- 88.) If participants believed that none of the three responses were correct, they could respond “don’t know.” (Kloc, Tr. 444.)

Rotation of Close-ended Questions

98. The order in which copy test questions are asked can affect the results. (Zinkhan, Tr. 551-52; Ross, Tr. 1172.) Rotating the order of close-ended questions controls order bias. (Zinkhan, Tr. 552; Kloc, Tr. 323; Ross, Tr. 1173.)

99. The close-ended questions in Dr. Zinkhan’s copy test were rotated. (Kloc, Tr. 322-23, 333.) Order bias was controlled in Dr. Zinkhan’s copy test. (Kloc, Tr. 333; Ross, Tr. 1173, 1295-96; Zinkhan, Tr. 554.)

Sugar Control

100. When a close-ended question calls for a yes or no answer, some participants may answer by “yea saying,” the tendency to give

the answer they think the interviewer is seeking. (Zinkhan, Tr. 513, 642, 744; Popper, Tr. 1411; RX-30-C.) Some participants may give an inattentive response. (Zinkhan, Tr. 513, 642, 744; RX-30-C.)

101. A close-ended question may also have a halo effect. (Zinkhan, Tr. 513, 642, 744.) A participant with a favorable opinion of the product formed before taking the test may answer based on that opinion rather than what was in the ad. (*Id.* at 513-14.) Such responses to close-ended questions are based on “noise” factors. (RX-30-C.)

102. Because some close-ended questions may result from yea saying, inattention, or other noise factors, they require a control. (Zinkhan, Tr. at 641, 671, 742.) One control is the use of a control question. (Zinkhan, Tr. 513-14, 744; Ross, Tr. 968-69; CX-536-Z-35 to Z-36.)

103. A control question asks about a product attribute reasonably associated with the advertised product, or product category, but not closely linked with explicit claims in the ad. (Zinkhan, Tr. 514-15, 744-45; Ross, Tr. 1198-99; Popper, Tr. 1470.)

104. The control question measures the participants who answered based on yea saying, inattention, halo effect, or other noise factors. (Zinkhan, Tr. 513-14; Ross, Tr. 969.) To eliminate the effect of such external factors, the results of the test question are reduced by the control question results. (Zinkhan, Tr. 514, 520-21, 526-26; CX-536-Z-35 to Z-36; Ross, Tr. 969-70.)

105. The control attribute must not be too closely linked with explicit claims in the ad. (Zinkhan, Tr. 514-15, 744-45; Popper, Tr. 1470; Ross, Tr. 1198-99.) If the control attribute can be reasonably inferred from the ad, responses to the control question may be based on that inference. (Popper, Tr. 1472; Zinkhan, Tr. 744-45.)

106. Dr. Zinkhan selected sugar as the attribute for the control question in his copy test. (Zinkhan, Tr. 514.) Participants were asked whether the ad suggested anything about the amount of sugar in Lean Cuisine. (CX-374-Z-30.) The percentage who answered yes was subtracted from the percentage who said that the sodium content was low. (Zinkhan, Tr. 514, 520-21, 524-26.) This eliminated external factors from the final results. (*Id.*; CX-526.)

107. Dr. Zinkhan based the choice of sugar as the control because Lean Cuisine contained sugar and it is reasonably associated with Lean Cuisine, yet is not in the ads. (Zinkhan, Tr. 515-19.)

108. The choice of sugar as a control is supported by Stouffer’s data. (*Id.* at 517.)

109. One study asked whether consumers controlled nutrients or ingredients in the food they buy. (CX-68-E; Zinkhan, Tr. 517.) Fat, calories, cholesterol, sodium, and sugar were “the five most frequent targets for dietary limitation or control.” (CX-69-Z-17.)

110. Some purchasers of Lean Cuisine entrees wrote letters to Stouffer raising concerns about the sugar content of the product. (CX-273; CX-301; CX-356-362; Zinkhan, Tr. 519.)

111. Calories or fat could not be used in a control question because they were used in the ads. (Zinkhan, Tr. 514-15; Popper, Tr. 1484; Ross, Tr. 969.) Because consumers link cholesterol in a product to its fat content, it should not be used in a control question. Implied cholesterol claims were created from the mention of fat content in one of the ads. (Zinkhan, Tr. 514-15, 654; Popper, Tr. 1484.) Red meat should not be used in a control question because it is not contained in many Lean Cuisine products. (Zinkhan, Tr. 667.)

112. Of the attributes considered and avoided by purchasers of frozen entrees, the most frequently mentioned attribute suitable for use in a control question was sugar. (Zinkhan, Tr. 667.)

113. Sugar is in all but one of Stouffer’s Lean Cuisine entrees. (CX-409-506.) It is listed as an ingredient on the Lean Cuisine package. (*Id.*; Zinkhan, Tr. 518.)

114. Controlling sugar is important to Lean Cuisine consumers, and it was a proper attribute for the control question. (CX-69-Z-18; Zinkhan, Tr. 517.)

Results of Zinkhan Copy Test

115. Close-ended questions will generate higher response levels for an implied claim than open-ended ones. (Zinkhan, Tr. 533-34.) Stouffer’s expert witness testified that often a researcher must rely on open-ended responses of 8 to 10% as being meaningful. (Ross, Tr. 1299.) Open-ended responses of 16% constitute a substantial number of participants taking a claim from a tested ad. (*Id.*)

116. The following percentage of participants in Dr. Zinkhan’s copy test responded to the open-ended questions that the ad communicated that Lean Cuisine entrees are low in sodium:

Initial Decision

118 F.T.C.

Make Sense (CX-4)	60%
300 Like a Million (CX-3)	45%
Lean on Lean Cuisine (CX-1)	43%

(CX-374-Z-11; Zinkhan, Tr. 523.)

117. The following percentage of participants in Dr. Zinkhan's copy test gave the low sodium response to the close-ended questions:

Make Sense (CX-4)	88%
300 Like a Million (CX-3)	90%
Lean on Lean Cuisine (CX-1)	83%

(CX-374-Z-21; CX-526; Zinkhan, Tr. 524).

118. The following percentage of participants in Dr. Zinkhan's copy test answered the control question by stating that the ad said something about the sugar content of Lean Cuisine:

Make Sense (CX-4)	5%
300 Like a Million (CX-3)	4%
Lean on Lean Cuisine (CX-1)	5%

(CX-374-Z-21; CX-526; Zinkhan, Tr. 525).

119. The following percentage of participants stated that the ad communicated that Lean Cuisine was low in sodium in response to the sodium close-ended question after deducting the percentage who answered yes to the control question:

Make Sense (CX-4)	83%
300 Like a Million (CX-3)	86%
Lean on Lean Cuisine (CX-1)	78%

(CX-526; Zinkhan, Tr. 525-26).

ROSS COPY TEST

120. Respondent Stouffer introduced a mall intercept copy test of the same three ads tested in Dr. Zinkhan's copy test. (RX-30.) The test was designed by Dr. Ross, a professor of marketing at the University of Minnesota. (RX-31.) Due to methodological defi-

ciencies, the results of Stouffer's copy test do not rebut the findings of Dr. Zinkhan's copy test.

Universe

121. The universe for Stouffer's copy test consisted of potential purchasers of Lean Cuisine, regardless of whether they were in the target audience for the ads. (Ross, Tr. 998-1000, 1094-96.) The universe was four-ninths women from 18 to 45 years, two-ninths women of any age over 45, two-ninths men from 18 to 45 and one-ninth men of any age over 45. (*Id.* at 1003.)

122. The target audience for the challenged ads was limited by Stouffer to people from 25 to 54 years old, "with an opportunity in the under 25 segment." (Zinkhan, Tr. 541; CX-523-Z-8.) Yet a large percentage of the participants in the Ross test were older. About 25% of those who buy Lean Cuisine are 55 and older. (RX-37-B.) The use of participants over the age limitations of the target audience makes the universe of the Stouffer copy test unduly broad. (Zinkhan, Tr. 541-42.)

123. The percentage of men in the copy test is twice as large as the percentage of male purchasers of Lean Cuisine. (RX-37-38; Zinkhan, Tr. 541-43.)

124. Dr. Ross intended to include in the universe purchasers of all frozen entrees with which Lean Cuisine competed. (Ross, Tr. 1110-11.) The market in which Lean Cuisine competed included Stouffer's own "Red Box" brand entrees. (Annett, Tr. 877-78.)

125. Dr. Ross improperly excluded purchasers of Stouffer's "Red Box" from the universe in his copy test. (Ross, Tr. 1111-12.)

Funneling Questions

126. The best method to determine consumer understanding of an ad is "to use a series of increasingly focused, but starting out with open-end very unstructured questions about what consumers get as main ideas and then as other ideas from a commercial. . . ." (Ross, Tr. 1249-50.) This describes the funneling approach of asking questions. (Ross, Tr. 1251; Popper, Tr. 1505; Zinkhan, Tr. 476.)

127. The copy test Dr. Ross designed for Stouffer did not begin with open-ended questions. (Ross, Tr. 1232; Zinkhan, Tr. 543; RX-30-Z-7.) Instead, it began with a close-ended question, "Did you get

any understanding about the fat content of the product from the advertisement?" (RX-30-Z-7.) Each other attribute question (sodium, calories, cholesterol and vitamins) in Stouffer's copy test also began with a close-ended question. (*Id.* at Z-7-11.) These questions "run the risk of imparting ideas ... or thoughts." (Ross, Tr. 1250; Zinkhan, Tr. 543-45; RX-30-Z-7.)

128. The form of these questions prompts participants to think about the attribute rather than their uncoached reactions to the ad. (Zinkhan, Tr. 544.) It is not appropriate to start a copy test with such questions. (Kloc, Tr. 436-37; Ross, Tr. 1250, 1252-53; Zinkhan, Tr. 543-45.)

Order Bias

129. Stouffer's copy test asked five questions, each having four subparts. (RX-30-Z-7 to Z-11.) Each of the five questions asked about an attribute, fat, sodium, calories, cholesterol, or vitamins. (*Id.*) The questions about fat were asked first, calories were third and cholesterol was fourth. (*Id.*) In half of the questionnaires, the questions about sodium were second and the questions about vitamins were asked last. The other half reversed the order of the sodium and vitamin questions. (Ross, Tr. 1179.)

130. When asking close-ended questions, researchers rotate the order to minimize order bias. (Zinkhan, Tr. 552; Ross, Tr. 1295-96.)

131. Order bias is especially important in the first and last close-ended questions. (Zinkhan, Tr. 553-54; Ross, Tr. 1038-39, 1173.) The first question sets up the survey. (Zinkhan Tr. 553; Ross Tr. 1038-39.) The results of the last question may be affected by fatigue or boredom. (Zinkhan, Tr. 553-54.)

132. The sodium question was asked last half of the time. (Ross, Tr. 1179; RX-30-F.) Because proper rotation of the questions would have placed this question in the last position one-fifth of the time, this was not a proper control for order bias. (Zinkhan, Tr. 554.)

133. The results of the sodium close-ended question for the Make Sense ad in the Stouffer copy test shows that when the question was asked in the second position (Question 2a), 22% answered "no," but when it was asked in the last position (Question 5a) 42% responded "no." (CX-539-F; Ross, Tr. 1181-82.) Since nearly twice as many participants answered "no" to the sodium question when it was in the

last position, the low sodium results may be based on order bias rather than participants' impressions of the ad. (Zinkhan, Tr. 553-54.)

Cleansed Ads

134. Stouffer's copy test used two controls. First participants were shown "cleansed" versions of the three challenged ads. (RX-30-M, O, Q.) A cleansed ad eliminates from the challenged ad all elements believed to convey the challenged claim. (Ross, Tr. 1009; Popper, Tr. 1430-33.) The theory is that any low sodium responses then obtained from the cleansed ad are the result of the participant's prior beliefs that Lean Cuisine or products in its product category are low in sodium, rather than the result of any message conveyed by the ad. (Ross, Tr. 1016-17.) The cleansed ad low sodium answers were subtracted from the low sodium results obtained from viewers of the challenged ad to control for these purported prior beliefs. (*Id.*)

135. Stouffer's copy test used cholesterol as a control question just as Dr. Zinkhan used sugar. (RX-30-C.)

136. Dr. Ross testified that a "cleansed" ad is the only appropriate control ad. (Ross, Tr. 1008-09, 1014-15, 1089-90; RX-30-B-C.) A cleansed ad can only function as a control ad if it does not convey the claim the tested ad is alleged to convey -- the low sodium claim in this case. (Zinkhan, Tr. 561-62; Ross, Tr. 961, 1008-09, 1274; Popper, Tr. 1454.)

137. In cleansing the ads, Dr. Ross changed the phrase "less than one gram" to "less than 1000 milligrams." (RX-30-M, O, Q.) With regard to the Make Sense ad, cleansing removed the phrase "there are some things we skip on: Calories. Fat. Sodium." (RX-30-M.)

138. Dr. Ross assumed that the cleansed ads did not convey the low sodium claim. (Ross, Tr. 1274.) Dr. Popper, Stouffer's other expert witness, stated that he would need empirical evidence to make that determination. (Popper, Tr. 1448.)

139. Stouffer's "cleansed" ads contain elements likely to convey the low sodium claim. (Zinkhan, Tr. 563-66, 569-73; Shimp, Tr. 1560-61, 1567-68, 1571-73, 1577, 1580-81.) Those ads fail as controls.

140. The challenged ads and the cleansed ads relate to sensible, healthy eating. (Shimp, Tr. 1566-68; Zinkhan, Tr. 563-66, 569-73, 690-92.) The cleansed ads link the phrase "less than 300 calories" with the phrase "less than 1000 milligrams of sodium." (Shimp, Tr.

1572, 1577, 1580; RX-30-M, O, Q; Zinkhan, Tr. 564, 571-73.) These aspects of the cleansed ads contribute to conveying a low sodium claim to consumers. (Shimp, Tr. 1566-68, 1571-73, 1577, 1580-81; Zinkhan, Tr. 563-66, 569-73.)

141. The 1000 milligrams of sodium information is ambiguous information to consumers. (Shimp, Tr. 1567-68.) Because the cleansed ads have made readers think about sensible, healthy eating, consumers relate the “less than 1000 milligrams of sodium” statement to the “less than 300 calories” statement. This results in the sodium information as part of the sensible, healthy eating. (Shimp, Tr. 1566-68; Zinkhan Tr. 565.) Thus, consumers interpret the cleansed ads to make the challenged low sodium claim. (Shimp, Tr. 1568.)

142. Consumers understand that an entree with less than 300 calories is low in calories. (Shimp, Tr. 1600-02.) Relating the phrases “less than 300 calories” and “less than 1000 milligrams of sodium,” reasonable consumers therefore interpret “less than 1000 milligrams of sodium” as meaning Lean Cuisine is also low in sodium. (*Id.*)

143. The phrase “less than” as a modifier of 1000 milligrams of sodium by itself contributes to a low sodium claim. (Zinkhan, Tr. 564, 570-71, 691.)

144. In CX-3 (300 Like a Million), the statement “less than 300 calories and most with less than 1 gram of sodium” is in bold print. The cleansed version of this ad changes “1 gram” to “1000 milligrams” but retains the bold print for the entire phrase. (RX-30-O.) The accentuation of this information contributes to a low sodium claim. (Zinkhan, Tr. 572, 691; Shimp, Tr. 1578-81.)

145. The bold print linking calories and sodium content of Lean Cuisine, and the headline, lead reasonable consumers to a low sodium claim in the ad. (Shimp, Tr. 1578-81.)

146. In creating a cleansed control ad, only the language causing the challenged claim should be removed. (Zinkhan, Tr. 566; Ross, Tr. 1014; Popper, Tr. 1453.) All other elements must be held constant. (Zinkhan, Tr. 566-67; Ross, Tr. 1014; Popper, Tr. 1453)

147. The cleansed Make Sense ad (CX-4) did not adhere to that principle. (Ross, Tr. 1286.) The cleansing of this ad did not “hold as much constant as possible.” (*Id.* at 1285.)

148. In the opinion of Stouffer’s experts, all that was required to create the cleansed version of CX-1 (Lean on Lean Cuisine) was to change “1 gram” to “1000 milligrams” and to delete the footnote.

(Ross, Tr. 1274-75; Popper, Tr. 1469-70.) However, besides those changes, Dr. Ross deleted the first two lines, as well as some other phrases, in creating the cleansed version. (Ross, Tr. 1276; CX-1; RX-30-Q.) Dr. Ross could give no reason why these deletions were made. (Ross, Tr. 1276-77.)

Cholesterol Control

149. The Stouffer copy test used cholesterol as a control question. (Ross, Tr. 1031; RX-30-C.)

150. Cholesterol is so closely related in consumers' minds to fat that it is likely that consumers will take an implied cholesterol claim from the reference to fat in the tested ads. (Zinkhan, Tr. 557, 657). As a result, the cholesterol question in the Stouffer copy test is not valid. (*Id.* at 557-58, 745; Popper, Tr. 1470; Ross, Tr. 1199.)

151. Consumers believe there is an association between fat and cholesterol. (Zinkhan, Tr. 559; Levy, Tr. 168; Ross, Tr. 1205-06.) The 1990 Health and Diet Survey conducted for the FDA asked those who had heard of high blood cholesterol to state if certain actions "would," "might," or "would not" help control high cholesterol. (CX-365-C.) One of the actions was "Eating less fat." (*Id.*) Nearly 86% answered that eating less fat would help control high cholesterol. (Levy, Tr. 167-68; CX-39-4-A.)

152. If consumers think a food is low in fat, they are likely to think it is low in cholesterol. (Levy, Tr. 169.) One of the tested ads made an express fat content claim for Lean Cuisine, while the others did so by implication. (Zinkhan, Tr. 559, 657.)

DECEPTION OF LOW SODIUM CLAIM

Amount of Sodium

153. While the challenged ads ran, Lean Cuisine entrees averaged 850 milligrams of sodium. (F. 9; CX-409-506.) This exceeded regulatory and public health organizations' guidelines for low sodium. (21 CFR 101.13(a)(3) (1992); CX-114; CX-520.)

154. For eight years, the FDA has defined low sodium as 140 milligrams or less for "single serving foods" (a bowl of soup, a piece of pizza, a cup of macaroni and cheese). (21 CFR 101.13(a)(3) (1992).)

155. In 1990 and 1991, Lean Cuisine entrees contained about twice that amount of sodium. (CX-523-T-Z.)

156. The USDA has an informal policy of 140 milligrams per component for meal-type products such as frozen dinners and entrees. (Brewington, Tr. 265.) Most frozen dinners and entrees have two, three, or four components. (*Id.* at 266.) For a three component food item, low sodium would be defined as 420 milligrams (3 times 140); for a two component food item, it would be 280 milligrams (2 times 140). (*Id.*)

157. By the USDA definition, Lean Cuisine entrees consist of two or three components. (Brewington, Tr. 285.) Low sodium for a two-component entree is 280 milligrams (2 times 140). (*Id.* at 266.)

Recommended Maximum Daily Intake for Sodium

158. In 1989, the National Academy of Sciences recommended that Americans should limit their total daily intake of sodium to 2400 milligrams or less. (CX-117-C.)

159. The Lean Cuisine line average of approximately 850 milligrams of sodium during the time in which the ads appeared represents over one-third of the recommended maximum daily intake. (FDA Food Regulations, 58 Fed. Reg. at 2227 [to be codified at 21 CFR 101.9(c)(9)]; USDA Food Regulations, 58 Fed. Reg. at 645; CX-117.)

Consumer Perceptions of Low Sodium

160. Because of Stouffers' loss of sales of Lean Cuisine, Tatham conducted research in the spring of 1989. (Shimp at 1581; CX-58-A.) The report stated as follows (CX-58-G):

The sodium content of Lean Cuisine products was frequently commented upon. Few respondents had a sense of what percentage of an average daily requirement of salt would be found in a Lean Cuisine entree, but the general perception was that the level was high.

161. Another report of four focus groups conducted in the fall of 1988 examined a proposed line of frozen entrees similar to Lean Cuisine. (Shimp at 1583; CX-102-A.) That report stated (CX-102-I; CX-104):

[J]ust laying out the levels [of cholesterol, fat, and sodium] adds confusion because many don't know how to evaluate them. Providing a comparison of the product's levels along with the recommended daily level ... seemed to satisfy their desire for the facts and allows them to understand how the product could fit into an entire day's diet.

162. Stouffer knew in September 1988 that (CX-102-K):

Consumers are confused by the vast difference in acceptable levels of sodium vs. those of fat and cholesterol. Therefore, actual sodium levels should only be utilized when a reference to the recommended daily level is also shown.

163. Studies of food labels show that consumers have difficulty understanding sodium information stated numerically and would likely interpret 1 gram of sodium as being less than 1000 milligrams of sodium. (Levy, Tr. 155.)

164. FDA label format studies show that consumers think that saturated fat levels are low because their numbers tend to be low (*e.g.*, 2, 3, 4, 5, etc. grams of saturated fat); however, consumers tend to assess sodium levels as high because their numbers are high (*e.g.*, 120, 660, 910 milligrams). (Levy, Tr. 155.)

165. One FDA labeling study had a food label with a nutrient claim of low sodium on the front panel and asked consumers whether the claim was true based on the nutritional information on the back panel. (Levy, Tr. 137.) Two claims involved low sodium: a cake with 115 milligrams of sodium and a frozen dessert with 20 milligrams of sodium, both true under FDA regulations. (CX-364-A.)

166. For the frozen dessert with 20 milligrams of sodium, 75% of respondents perceived the "low sodium" claim as true; however, this percentage dropped to 57% for the cake with 115 milligrams of sodium. (CX-364-A.) This supports the conclusion that consumers look at absolute numbers in assessing claims. (Levy, Tr. 139.)

167. Dr. Levy of the Food and Drug Administration credibly testified that consumers perceive the actual sodium content of the Lean Cuisine line averaging 850 milligrams of sodium as high. (Levy, Tr. 149.) However, he stated that consumers viewing a less than 1 gram of sodium claim would view that claim as low. (*Id.* at 156.)

Stouffer's Knowledge

168. Stouffer knew that its products were not low in sodium. (Block, Tr. 789; Annett, Tr. 888-89, 916-17; CX-44.) Mr. Annett, Stouffer's manager in charge of the Lean Cuisine line at the time the ads ran, testified that a low sodium claim could not be used in Lean Cuisine advertising because "Lean Cuisine did not meet the FDA and USDA requirements for low sodium." (Annett, Tr. 916-17; CX-44-A; Block, Tr. 800.)

169. Mr. Brewington of the Department of Agriculture, testified that he had been involved in the labeling approval process for Stouffer's Right Course line of frozen entrees during 1989. (Brewington, Tr. 270.) At that time, the Right Course product line averaged under 600 milligrams of sodium, less than the Lean Cuisine line average of 850 milligrams, and Stouffer was seeking approval for a low sodium labeling claim for Right Course. (*Id.*) That request was never granted, according to Mr. Brewington, because the sodium level (600 milligrams) was too high. (*Id.* at 272.)

170. Stouffer knew that a low sodium claim was inappropriate for Lean Cuisine. (*Id.*; Annett, Tr. 916-17; Block, Tr. at 789.)

Materiality of Low Sodium Claims

171. The sodium claims challenged in this proceeding constitute health claims that are important to consumers. Based on medical evidence supporting a link between sodium consumption and high blood pressure, the National Academy of Sciences, the American Heart Association, and the Surgeon General of the United States recommend that people limit their daily sodium intake. (CX-117, CX-131, and CX-116.)

172. Stouffer's copy test, to the extent that it is reliable, showed that 68% of the participants considered sodium to be important in making purchase decisions about frozen entrees. (Zinkhan, Tr. 584; CX-513.)

173. Stouffer's consumer research in the spring of 1991 studied why people buy frozen dinners. (CX-65; CX-383 at 56-57 [DeVries Dep.].) The things considered were: brand name; cholesterol, fat, calories from fat; price; vitamins and minerals; and sodium. (CX-65-R; CX-383 at 58-59 [DeVries Dep.].)

174. The result reported was (CX-65-S) (emphasis in original):

[The] analysis revealed that sodium level is the dominant factor. Respondents clearly favor products with the lowest level of sodium possible.

The analysis found a strong negative reaction to products with 1000 milligrams of sodium (CX-65-S; CX-383 at 60-61 [DeVries Dep].)

175. Stouffer's consumer research in 1988 showed the importance of information about sodium to consumers. A report on focus groups conducted in the fall of 1988 stated as follows under the heading cholesterol, fat and sodium levels (CX-102-I):

These consumers are information hungry. They are serious about their problem and therefore want to know the precise cholesterol, fat, and sodium levels.

As a result of this research, Stouffer was also aware that a frozen entree containing 600 or more milligrams of sodium "could turn consumers off." (*Id.* at h; CX-382 at 48-49 [Audette Dep].)

176. Stouffer began to develop a line of nutritionally-oriented entrees in the latter part of 1988. (CX-382 at 13 [Audette Dep].)

177. Stouffer began a new line of frozen entrees called Right Course in the fall of 1989. (*Id.* at 19.) The strategic positioning for Right Course emphasized its levels of sodium, fat, and cholesterol. (*Id.* at 29.)

178. The ad agency personnel assigned to the Lean Cuisine account were aware of the importance to consumers of claims about sodium. (Block, Tr. 774, 808; CX-379 at 48 [Wood Dep.]; CX-381 at 47 [Blim Dep.]; CX-378 at 98-99 [Crain Dep].)

179. Stouffer's ad agency documents regarding brand positioning for Lean Cuisine in June 1990, stated that science and the media have been evaluating the consequences of eating habits and contained a list of six nutritional issues, the first of which was "Sodium Awareness." (CX-77-E.)

180. In a presentation to Stouffer in November of 1990, the agency said that acceptable levels of sodium, fat, and cholesterol had become a "price of entry," to get consumers to try the product (CX-378 at 67-68, 98-99 [Crain Dep.]; CX-80-C), and that people want "no bad stuff," that is, nutrients like sodium which are thought to be unhealthy, in the foods they eat. (CX-80-D; CX-378 at 96, 99 [Crain Dep].)

181. In January of 1990 Mr. Annett, the marketing manager for Lean Cuisine, sent a memorandum to Tatham instructing the agency to put health related executions "on a fast track." (CX26-A.) The memorandum also suggested using "hot buttons" or "strong 'buzz words'" about limiting sodium, fat, and cholesterol. (CX-26.)

182. Health and Diet Surveys (for the National Heart, Lung, and Blood Institute, the National Cancer Institute, the Centers for Disease Control, and the USDA) evaluate consumer awareness of nutrition. (Levy, Tr. 106, 120-21.)

183. The Health and Diet Survey in the early fall of 1990, shows consumer awareness about sodium. (Levy, Tr. 122.)

184. The survey asked if the participant had heard of anything that people eat or drink being related to high blood pressure. (CX-365.)

185. Of the participants, 44% answered sodium or salt (CX-364), the most frequently given response. (Levy, Tr. 125-26.)

186. Other questions show that 15% of the population were on a professionally recommended sodium reduction diet, 25.1% were on a self-prescribed sodium avoidance diet, and 40% of the adult population aged 18 years and over are on a sodium reduction diet, making it the most common diet restriction. (Levy, Tr. 131; CX-346-D.)

Disclosure of Milligrams

187. The print ads in this case state that Stouffer's Lean Cuisine entrees contain less than 1 gram of sodium, providing the metric equivalent in milligrams in a footnote. (CX-1-6; CX-519 and CX-525.)

188. Dr. Muehling, a professor of marketing at Washington State University, tested five ads for a fictional camera. Some of the ads had fine print footnotes, others had large print footnotes. (CX-385-89; Muehling, Tr. 27-28.) Each of the ads contained information about attributes of the camera. (CX-385-89; Muehling, Tr. 28-29.)

189. The survey was conducted on a "convenient sample of college students." (Muehling, Tr. 72.)

190. The students were tested on their recall of statements made in the ad. (Muehling, Tr. 33-34.) According to Dr. Muehling, the results indicate that individuals were generally able to recall points that are made in the body of an ad much better than the points that are

made in the fine print or the footnote statements contained in the ad. (Muehling, Tr. 36, 44.)

191. The footnotes Dr. Muehling tested in his study contained between 25 and 38 more words and more information than the footnotes in the Lean Cuisine ads. (Muehling, Tr. 67-68.)

192. The text of the camera ad was more lengthy than the texts of the Lean Cuisine ads. After reading a lengthy ad, consumers may not pay attention to footnotes. (Muehling, Tr. 82-83.)

193. To determine whether specific footnotes are comprehended, conducting a test on those ads "would be a most effective way of answering that question." (Muehling, Tr. 66-67.)

194. Most consumers do not read or recall the footnotes in the Lean Cuisine ads. Responding to open-ended questions on the Zinkhan Copy Test, for the Made Sense ad (CX-4), none of the 100 participants recalled footnoted information. For the 300 Like a Million, nine of 100 participants recalled footnoted information. And, for the Lean on Lean Cuisine ad, two of 100 participants recalled footnoted information. (Zinkhan, Tr. 532; CX-374-Z-12.)

195. The preponderance of the credible evidence shows that the footnotes in the ads in this case did not adequately disclose that 1 gram equals 1000 milligrams. (*Id.*)

196. The sodium content of food is commonly, although not uniformly, measured for consumers in milligrams. (F. 20, 23; RX-24-E; RX-25-I, J.) Although consumers are generally aware of the need to restrict sodium in their diet (F. 185-86), many are unaware of the precise recommended daily allowance for sodium (F. 160), in milligrams or grams. The failure to disclose adequately the sodium content in milligrams is, therefore, immaterial.

DISCUSSION

I. INTRODUCTION

Respondent Stouffer, a subsidiary of the Swiss corporation Nestle SA, manufactures and markets frozen foods, primarily frozen entrees. Stouffer's frozen entree products consist of two product lines: a full calorie product, "Red Box," and a reduced, low calorie product line, Lean Cuisine. Lean Cuisine sales were about two hundred million dollars in 1990-91. (F. 10.)

During the late 1980's, Lean Cuisine's leadership of frozen entrees was challenged by Weight Watchers and new brands of Budget Gourmet. Despite a growing market, Lean Cuisine's business declined 24% in four years. (CX-58-A.)

During the fall of 1989, Stouffer started a new advertising campaign for Lean Cuisine. Stouffer's advertising agency, Tatham RSCG (Tatham), found that consumers worried less about calories but had an increasing interest in nutrition and the adverse health consequences of sodium and fat, and that consumers viewed Lean Cuisine and frozen entrees in general as high in sodium. (F. 17-19, 88-89; CX-58-B, G.) Tatham created the ads at issue in this case. These ads included two, two-page print ads entitled "Lean Cuisine." (CX-1, CX-519, CX-525) and "Ole! O'lean!" (CX-6); two, one-page print ads entitled "Who can make under 300 taste like a MILLION?" (CX-2-3) and "Of all the things we make, we make SENSE!" (CX-4-5); and a radio ad entitled "Anniversary/Turkey Rev." (CX-7.)

The complaint alleged that the ads falsely represented that Lean Cuisine entrees are low in sodium through "statements contained in advertisements." (Complaint, paragraphs 4, 5.) The complaint also alleged that the ads failed to disclose adequately the material fact that "1 gram is equivalent to 1000 milligrams, which is the commonly used unit of measurement for sodium." (Complaint, paragraph 7.)

Respondent argues that its ad campaign stressed Lean Cuisine's great taste and controlled fat, calories and sodium, and that the representations about sodium content were meant to be relative, showing a reduction in the amount of sodium but not implying low sodium, which consumers associate with bland taste.

II. THE CHALLENGED ADS

A. *The Legal Standard*

The standard by which advertising is judged is whether it is likely to mislead reasonable consumers; proof of actual deception is not required. The issue is whether consumers, acting reasonably under the circumstances, would interpret the message of the advertisement to have made the alleged claims. *Kraft, Inc.*, D. 9208, slip op. at 5-8, 21 (Jan. 30, 1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*,

113 S. Ct. 1254 (1993). An ad can be deceptive even though other reasonable, truthful interpretations are just as possible. (*Id.* at n. 8.)

The Commission may rely on its own reasoned analysis to determine what “reasonably clear” implied claims are conveyed by examining the “overall net impression of an ad.” *Kraft*, 970 F.2d at 314, 319. The analysis looks at the net impression created by the interaction of all of the different elements in the ad, rather than the impact of each or a few elements. *Thompson Medical Co., Inc.*, 104 FTC 648, 793 (1984), 791 F.2d 189 (D.C. Cir. 1986).¹ The Commission does not have a license to go on a fishing expedition to pin liability on advertisers for barely imaginable, barely discernable claims. *Id.* at 319-20. But when implied claims are conspicuous, self-evident, or reasonably clear on the face of the ad, consumer surveys or other evidence beyond the ad are not required in reaching the decision. *Id.* at 320. If the implied claims may not be determined with confidence from the face of the ad, extrinsic evidence must be examined, including consumer surveys and expert testimony. *Kraft*, 970 F.2d at 318.

B. The Low Sodium Claim

1. Facial analysis of Stouffer’s print ads

The headline of the Make Sense ads (CX-4, CX-5) states “Of all the things we make, we make SENSE!” which evokes sensible eating. The ads describe the healthy ingredients in Lean Cuisine and note:

there are some things we skimp on: Calories. Fat. Sodium. With less than 300 calories, controlled fat and always less than 1 gram of sodium* per entree, we make good sense taste great.

A footnote states “All Lean Cuisine entrees have been reformulated to contain less than 1 gram (1000 mg.) of sodium.” If the footnote is overlooked by a consumer, the ad explicitly describes the sodium content of Lean Cuisine as “1” gram, a low number. The sodium is

¹ No first amendment concerns are raised when facially apparent implied claims are found without resort to extrinsic evidence. *Zauderer v. Ohio*, 471 U.S. 626, 652-53 (1985). A facial analysis involves the net impression conveyed by the ads and does not involve the effect of individual words, phrases, or visual images. *Thompson Medical*, 104 FTC at 793. Contrary elements in the ads must be effective to dispel the net impression of the challenged claim. *Kraft*, slip op. at 10.

described as “less than” 1 gram, diminishing the quantity.² The ads state that Lean Cuisine “skimp[s] on” sodium and other undesirable ingredients. The phrase “We make good sense taste good” reinforces the sensible eating message.

The net impression of all of the elements of the ads is that Lean Cuisine entrees are low in sodium. The ad contains nothing to give a contrary impression. *Thompson Medical*, 104 FTC at 793. The footnote that a gram equals 1000 milligrams, assuming that consumers notice it,³ is ambiguous unless consumers knew their recommended daily allowance. The footnote in some of the ads stated that the product is being reformulated. This is consistent with the low sodium message. Thus, a facial analysis of the challenged ads shows that they convey the low sodium claim to reasonable consumers.⁴

2. Radio ads

The challenged radio ad described Lean Cuisine entrees (CX-77):

These babies are healthier than ever. Lower in sodium, fat and cholesterol. Read those boxes, people, these numbers are low.

“Lower in sodium” is a comparative statement, but it is consistent with, and does not contradict, the flat, absolute statement that “these numbers are low.” To prevent facial analysis and require extrinsic proof, a conflicting statement in the ad must be effective. *Kraft*, FTC slip opinion at 10. Here, the comparative statement does not conflict with “these numbers are low,” and does not derogate from the net impression that the radio ad carries the message that Lean Cuisine entrees are low in sodium.

² The phrase “less than 300 calories and most less than 1 gram* of sodium” in the 300 Like a Million ad (CX-2 and CX-3) appears in bold print. (F. 144.)

³ The footnote did not adequately disclose that 1 gram equals 1000 milligrams. (F. 195.)

⁴ The other print ads are similar although they do not use the phrase “skimp on” as the Make Sense ad does. The above analysis applies to those ads as well.

C. Extrinsic Evidence

1. Zinkhan copy test

Consumer surveys are the best extrinsic evidence of what words in an ad mean to consumers. *Kraft, Inc.*, slip op. at p. 11 n. 11, p. 13 n. 13. Copy tests must use a sound method, with a valid sample, questions that minimize bias, and correct analysis. *Thompson Medical*, 104 FTC at 790.

a. Universe

The universe for the copy test is a valid sample from the “appropriate population.”⁵ The target audience here is the group of people Stouffer tried to persuade to purchase its product with its advertising. (F. 70-71.)

Stouffer’s target audience consisted of “primarily females, though not exclusively” who were “age 25 to 54 with an opportunity in the under 25 segment.” (CX-523-Z-7 to Z-8.) Based upon data from Stouffer, Dr. Zinkhan included women ages 25 to 54, and excluded women under 25 and over 54, and men,⁶ people who had not purchased frozen dinners or entrees within the last three months, people who were on medically supervised diets, and people who wore glasses but did not have them with them at the time. (F. 69, 71.)

The “central anchor” of Lean Cuisine consists of purchases by women age 25 to 54. (Block, Tr. 792-93.) Dr. Zinkhan limited his sample to those women. (F. 71.) While omission of men and women under 25 and over 54 may diminish the certitude of the results, there is no evidence to show that the results would have differed if they would have been included, and there is no doubt that those surveyed were the bull’s eye of the target at which the ads were aimed.⁷ The test results may therefore be relied on despite this defect. *Thompson Medical Co. Inc.*, 104 FTC at 806-08.

⁵ *Thompson Medical Co., Inc.*, 104 FTC at 790.

⁶ Stouffer did not specify the percentage of men included in its target audience.

⁷ The Ross copy test, by contrast, included many who were off the edge of the target. (F. 121-22.)

b. Funneling

The copy test began by asking three open-ended questions. (F. 75; CX-374-Z-29 to Z-30.) It then asked three close-ended questions, each asking if the ad made any claim about one specific ingredient. (F. 76; CX-374-Z-30.) This pattern of questioning, called funneling, avoids suggesting answers that bias the results. *National Football League Properties, Inc. v. New Jersey Giants, Inc.*, 637 F. Supp. 507, 515 (D.N.J. 1986).⁸

Dr. Zinkhan's copy test asks "appropriate questions in ways that minimize bias . . ." *Thompson Medical*, 104 FTC at 790. Funneling questions, as used by Dr. Zinkhan,⁹ provide unbiased evidence of claims conveyed to consumers.¹⁰ *Id.* at 808.

c. Open-ended questions

Respondent argues that Dr. Zinkhan's copy test did not use a control ad to eliminate external factors affecting consumers. There is, however, no requirement of a control ad for open-ended questions. *Thompson Medical*, 104 FTC at 804-08.¹¹

⁸ Stouffer's expert witness, Dr. Ross, endorsed the funneling approach. (Ross, Tr. 172; F. 126.) He designed a copy test for Stouffer, however, with a leading opening question asking about specific ingredients. (RX 30-Z-7.)

⁹ Those questions asked (CX-374-Z-29, Z-30):

1. What point or points does the Lean Cuisine ad make about the product?
2. What reason or reasons does the ad mention or suggest for you to buy Lean Cuisine?
3. Is there anything else you can recall about the ad?

¹⁰ Open-ended questions sometimes fail to elicit all of the claims an ad conveys. *Kraft, Inc.*, slip op. at 13 n.13. Close-ended questions with a control can also provide unbiased results, and may probe deeper into consumers' memories than open-ended questions. *Thompson Medical*, 104 FTC 804-06.

¹¹ There is precedent to show that a control ad (not a cleansed ad) may be helpful. In *Thompson Medical*, the Commission approved two copy tests: the "FRC" copy test and the "ASI Theater Test." 104 FTC at 804-08. The FRC copy test did not use a control ad. *Id.* at 804. It used control questions (regarding whether Ben-Gay or Mentholatum contained aspirin) for the close-ended question "does the product in the commercial contain aspirin." *Id.* at 804. The Commission discounted responses to the open question ("name the ingredient") supporting Thompson, with only 3% recalling aspirin as an ingredient in Aspercreme; the Commission relied instead on the leading questions which showed 22% recalling Aspercreme containing aspirin while the leading control questions showed that only 6% thought aspirin was an ingredient in Ben Gay and less than 5% perceived aspirin in mentholatum. *Id.* at 804-05.

The ASI Theater Test in *Thompson Medical* did include a control ad for a competing product, Mobisyl. *Id.* at 806. Responses to open-ended questions were that aspirin was an ingredient in Aspercreme (17%) and Mobisyl (1%). The test also had control ingredients for the leading question. Despite the yea saying bias indicated by the large percentage of participants who thought the control ingredients (hydrocortisone, lanolin and menthol) were ingredients in Aspercreme and the control product, Mobisyl, the Commission relied on the result of the leading recall results indicating that the much larger percentage of those who believed Aspercreme contained aspirin than did those who saw the

Marketing experts have found that credible evidence comes in response to open-ended questions, just as in trials where the unbiased testimony comes after direct, non-leading questions. The drawback of open-ended questions is that they are not as effective when the issue is the consumer's memory rather than the consumer's reaction. That is where close-end questions are effective, since they, like leading questions at trial, suggest the desired answer. They also tend to elicit bias.

Respondent argues that using a control ad for open-ended questions eliminates the influence of participants' preconceptions about the product. Even if some participants in the copy test had a prior belief that Lean Cuisine was low in sodium, that does not mean that the ads did not convey a low sodium claim. (Kloc, Tr. 442; Zinkhan, Tr. 725, 729.) An ad that reinforces an inaccurate pre-existing notion is deceptive. (F. 91-92.) Not all consumers' pre-existing beliefs need to be removed from copy test results. *Simeon Management Corp. v. FTC*, 579 F.2d 1137, 1146 (9th Cir. 1978) (That the false belief "is attributable in part to factors other than the advertisement itself does not preclude the advertisement from being deceptive").¹²

There is no precedent mandating a control ad for open questions for a valid survey. Respondent's citations to the contrary are not persuasive.¹³ A control ad was not needed for the open-ended questions in the Zinkhan copy test. (F. 83.) There was no credible evidence that bias affected the results elicited by those questions.

Mobisyl commercial. The Commission did not subtract the control responses in its analysis of the test ad. *Id.* at 807-08. The analysis dealt with responses to both leading and open questions, comparing the percentage of respondents who said Aspercreme contained aspirin (untrue) (17%) to those who said it contained salicyin (true) (4%). *Id.* at 808.

In Kraft, Inc. the Commission discussed the results of the CWI test done for Kraft. The question suggested that a comparison had been made ("was anything 'said or shown [in the ad] that makes you think KRAFT Singles is different from other brands of individually wrapped cheese slices'"). *Id.* at 19 n.18. Refusing to rely on the results of that close-ended question, the Commission criticized the CWI copy test for not using any control. *Id.* at n. 19, citing Thompson Medical where the ASI Theater Test used controls with close-ended and open-ended questions.

¹² Most consumers' pre-existing belief about the sodium content of Lean Cuisine was that it was higher than in fact was true. (F. 87-89.) If the challenged ads changed this belief to a low sodium belief, then they must have communicated that low sodium claim. (Ross, Tr. 1260-69.)

¹³ Respondent discerns the required use of a control ad by dissecting scattered statements in the footnotes of Thompson Medical and Kraft. Reply brief at pp. 23-25. This inferred "new learning" is based, however, on misconception. Complaint counsel's reply brief at pp. 26-29.

d. Close-ended questions

The close-ended questions in Dr. Zinkhan's copy test asked whether the ads suggested anything about the amount of three ingredients: sodium, calories, and sugar. The sugar question was a control question. (F. 106.) Close-ended questions direct participants to an aspect of the ad. Some may respond based on yea saying, inattention, or preconceptions. (F. 100-04.) Close-ended questions require the use of a control. *Thompson Medical*, 104 FTC at 804-06. The results of the control question are deducted from the results of the close-ended question to eliminate such bias. *Id.* Sugar is an appropriate control ingredient. (F. 106-114.) It is not mentioned in the ad, but is associated with Lean Cuisine in consumers' minds, and is an incorrect answer. (Zinkhan, Tr. 745.)

The sequence of the close-ended questions was rotated. (F. 98-99.) Controlling for order bias is necessary to make the results of close-ended questions reliable evidence of ad communication. *R.J. Reynolds Tobacco Co. v. Loew's Theaters, Inc.*, 511 F. Supp. 867, 872 (S.D.N.Y. 1980) at 872; CX-536-Z-25 to Z-26. The close-ended questions designed by Dr. Zinkhan minimized bias.

e. Results of Zinkhan copy test

Dr. Zinkhan's copy test shows that from 43 to 60% of the participants found the low sodium claim in response to open-ended questions.¹⁴ (F. 116.) Dr. Zinkhan's close-ended questions, after the control is deducted, show from 78 to 83% of the participants took the low sodium claim from the challenged ads. (F. 119.)

2. Ross copy test

Stouffer's copy test uses two controls to show that the claim was not communicated. The issue is whether these control procedures biased the results of the copy test in Stouffer's favor.

¹⁴ In *Thompson Medical* the claims were conveyed to 16 to 18%. *Id.* at 805. Those results were derived from close-ended questions. 104 FTC at 805. Smaller percentages are sufficient to establish that a claim is conveyed when based on open-ended results. *The Gillette Co. v. Wilkinson Sword, Inc.*, 89 CV 3586 (KMW) (S.D.N.Y. 1991), slip op. at 17 (10%); Ross, Tr. 1299 (8-10%).

a. Stouffer's cleansed control ad

Stouffer used "cleansed" ads to control: participant's prior knowledge or beliefs (Ross, Tr. 961), the manner in which the close-ended question is written (Ross, Tr. 1171-72), yea saying (Popper, Tr. 1477-79), and inattention (Popper, Tr. 1477-78). The theory is that the cleansed ad removes the elements that falsely affect the low sodium claim. Dr. Ross assumed that the cleansed ads did not convey the low sodium claim. (Ross, Tr. 1274; F. 138.)

The cleansed ads themselves, however, conveyed a low sodium claim. (F. 139-45.) The failure fully to cleanse the challenged ads, makes them invalid. The responses to those ads cannot properly be used to reduce the responses to open-ended or close-ended questions in the copy test. (Zinkhan, Tr. 573.) By using control ads that were likely to convey the challenged claim, Stouffer assured its "control over the study's outcome by the use of the control ads." *Weight Watchers Int'l v. Stouffer Corp.*, 744 F. Supp. 1259, 1275 (S.D.N.Y. 1990).

Dr. Ross' removal of the sodium content modifier "less than 1 gram," and the phrase "skimp on," fails to consider that:

[i]n evaluating advertising representations, we are required to look at the complete advertisements and formulate our opinions on them on the basis of the net general impression conveyed by them and not on isolated excerpts.

Standard Oil Co. of Calif., 84 FTC 1401, 1471 (1974), *aff'd as modified*, 577 F.2d 653 (9th Cir. 1978), *cited in*, Deception Statement, 103 FTC at 179 n. 32. "The entire mosaic should be viewed, rather than each tile separately." *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963). Analysis of one or two isolated words or phrases does not result in a proper understanding of whether an implied claim is communicated. Deception Statement, 103 FTC 176 & n. 7, 179 & n. 31-32.¹⁵

b. Cholesterol control

Stouffer employed a control using cholesterol. The attribute in the control question must be relevant to the advertised product, but not closely enough linked with claims in the ad to convey an implied

¹⁵ Consumers "perceive the commercial in its totality." (CX-540-B.)

claim about the attribute. (Zinkhan, Tr. 514-15, 744-45.) Cholesterol is linked to fat as used in the ads. (F. 150-52.) Readers infer cholesterol claims from fat claims.¹⁶ (F. 150.)

c. Results of the Ross copy test

With cholesterol, as it did with the control ads, Stouffer selected a control that assured the outcome. Furthermore, the universe was defective (F. 122), and the questions were not properly rotated. (F. 129-33.) The Ross copy test is unreliable.

III. THE DECEPTION OF THE LOW SODIUM CLAIM

During the period in which the challenged advertising ran, the Lean Cuisine line averaged 850 milligrams of sodium. (CX-6-B; CX-409-506.) This exceeds public health guidelines for “low sodium.” 21 CFR 101.13(a)(3)(1992); CX-114; CX-520; F. 153-57; *Simeon Management Corp.*, 87 FTC 1184, 1230 (1976), *aff’d*, 579 F.2d 1137 (1978); *Thompson Medical*, 104 FTC at 826.

Stouffer knew that its products were not “low in sodium.” (F.168-70.) Stouffer’s manager in charge of the Lean Cuisine line at the time the ads ran, testified that a “low sodium” claim was not possible because “Lean Cuisine did not meet the FDA and USDA requirements for low sodium.” (F. 168.)

In the context of this market, these ads convey a low sodium message. Knowing that many consumers feel that Lean Cuisine frozen entrees contained high sodium (F. 89, 160), and that most do not know the recommended daily consumption for sodium (160-62), Stouffer took an unreasonable risk in using these ads. The healthy images and statements in the ads minimizing unhealthy ingredients, and the ambiguous “less than 1 gram of sodium,” and “skimp”¹⁷ -- all lead to the impression of a low sodium message.

The disclosure in a footnote, that “All Lean Cuisine entrees have been reformulated to contain less than 1 gram (1000 mg.) of sodi-

¹⁶ The Make Sense ad expressly mentioned Lean Cuisine’s fat content. Twenty-one percent of the participants (25 of 120), responded to a close-ended question that Lean Cuisine is low in cholesterol. (RX-30-Z-17.) Less than three percent gave that response for the 300 Like a Million ad which does not mention fat. (Zinkhan, Tr. 745-46.)

¹⁷ The definition of “skimp” is “scrimp,” which is defined as “to be sparing or restrictive of or in; limit severely. . . .” Random House Dictionary of the English Language (2d Ed. 1987).

um,"¹⁸ was not noticed by most consumers (F. 195), and would not be effective to dispel the net impression. Kraft slip opinion at p. 10. Reformulation and low sodium are consistent. It is not the clear contradictory element which would change the net impression of the ad. *Thompson Medical*, 104 FTC at 799. The net message was not that sodium content was lower than it used to be, but, by clear implication, that the amount of sodium was healthfully low.¹⁹

IV. LOW SODIUM CLAIMS ARE MATERIAL

Claims that "significantly involve health, safety, or other areas with which reasonable consumers would be concerned," are presumed material. *Kraft, Inc. v. FTC*, 970 F.2d at 322-23. The calcium content claim for Kraft Singles was material because it was a health claim important to the audience. Slip op. at 24-25.

Because sodium consumption may cause high blood pressure, public health organizations recommend that Americans limit their sodium intake. The recommended daily intake of sodium is 2400 milligrams or less. (F. 158.) The sodium in a Lean Cuisine entree has one-third of that amount. (F. 159.) The low sodium claim is presumptively material to consumers of Lean Cuisine.

Most consumers consider sodium important in buying frozen entrees. (F. 172.)²⁰ Sodium content is the dominant factor consumers consider in buying frozen entrees. (F. 173-75.) Consumers want precise information about negative nutritional attributes, including sodium, in frozen foods.²¹ Over 40% of consumers are aware of the link between sodium and high blood pressure (F. 185) and they reduce their consumption of sodium. (F. 186.) Consumers relate low sodium claims to health. (F. 182-86.) A low sodium claim in a food is material to consumers and affects their purchase of frozen entrees.

¹⁸ To some consumers who read the footnote, "1000 milligrams" may connote high sodium, or, because they do not know the recommended daily allowance, it is ambiguous. (F. 160, 167, 174-75.) To other consumers, who read the full context of the ad, it apparently has a low sodium message. (F. 140-45.)

¹⁹ The other ads in the campaign also used the "less than 1 gram of sodium" language, and elements of some of the other ads may reinforce this claim of low sodium; e.g., bold type of the phrase "less than 300 calories and most with less than 1 gram* of sodium." (CX-2; CX-3.)

²⁰ This is direct evidence of the importance to consumers of claims about sodium. *Kraft, Inc.*, slip op. at 23-24; *Thompson Medical*, 104 FTC at 817.

²¹ Stouffer developed a line of frozen entrees that were promoted as having nutritionally appropriate levels of sodium. (F. 176-81.) This evidence supports the conclusion that the low sodium claim is material. *Kraft, Inc.*, slip op. at 23-28.

V. MILLIGRAMS DISCLOSURE

The complaint charges as unfair and deceptive, and as a separate violation, the failure to disclose adequately the fact that a gram equals 1000 milligrams. The sodium content of food is commonly measured in milligrams. (F. 20, 196.) The print ads in this case state that Stouffers' Lean Cuisine entrees contain less than 1 gram of sodium, with footnotes explaining that 1 gram equals 1000 mg. of sodium.²² The type size of the footnotes is smaller than the rest of the ad. Fine print disclosures generally may not cure a misimpression created by the text of an advertisement. *Giant Food, Inc.*, 61 FTC 326, 348 (1962).

Dr. Darrel Muehling's research tested the effect of print size on footnote information. (F. 188.) The footnotes in the ads he tested were more complex and contained more information than the single footnotes in the challenged ads. (F. 191-92.) This survey was insufficient evidence to support the assertion that the footnotes in the challenged ads were ineffective in communicating the information that 1 gram equals 1000 milligrams. There was some evidence in the Zinkhan survey, however, that few consumers notice or read the footnotes in the Lean Cuisine ads. (F. 194.)²³

Notwithstanding that finding, I do not believe that the failure to disclose adequately the sodium content in milligrams was unfair or deceptive. While the sodium content in milligrams is presumptively material information, the facts show that most consumers are unaware of the recommended daily allowance for sodium (F. 160-62), and knowing the precise milligrams²⁴ of sodium in an entree would be of little use. More sophisticated consumers, who are on a medically supervised diet and need precise information about sodium in milligrams, presumably read ads more carefully and would find the information in the footnote.

²² The manager for Lean Cuisine complained to the Council of Better Business Bureaus about a competitor's ad stating sodium content in grams. That ad did not mention milligrams. (F. 21.) The Lean Cuisine ads at least went a step in the right direction.

²³ The Zinkhan survey excluded those on a medically supervised diet. (F. 69.) Those persons are more knowledgeable about the sodium content in food and would read the ad more carefully.

²⁴ There is evidence that many consumers do want precise information on milligrams of sodium. (F. 175.)

VI. SCOPE OF RELIEF

Whether a broad, "fencing-in" order bears a reasonable relationship to a violation depends on: "(1) the deliberateness and seriousness of the violation, (2) the degree of transferability of the violation to other products, and (3) any history of prior violations." *Kraft, Inc.*, 970 F.2d 311 at 326. Whether a violation is serious and deliberate, depends on the cost, size, and duration of the advertising campaign, and knowledge that the challenged ads were misleading. *Kraft*, 970 F.2d at 326; *Bristol-Myers Co. v. FTC*, 738 F.2d 554, 561 (2nd Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).

While the respondent knew that the low sodium claim was deceptive (F. 168-70), the Lean Cuisine ads were not part of a long-running television campaign. The print ads and one radio spot ran one to two times over seventeen months. The "Lean on Lean Cuisine" campaign cost \$3 million (CX-523, CX-527-A, CX-528-G), far less than amounts in *Bristol-Myers*, *American Homes Products*, and *Kraft*.²⁵

Stouffer only makes frozen food products and markets one other line -- the "Red Box" line -- for which nutritional claims are not made. "Transferability" of the violation by itself is not sufficient to justify a broad fencing-in order. *Chrysler Corp. v. FTC*, 561 F.2d 357 (D.C. Cir. 1977); *Fedders Corp. v. FTC*, 529 F.2d 1398 (2nd Cir. 1976), *cert. denied*, 429 U.S. 818 (1976).

A broad fencing-in order is "reasonably related" to the violation when the respondent has a history of prior violations. *American Home Products*, 695 F.2d at 707; *Bristol-Myers*, 738 F.2d at 561-62; *In re Sterling Drug, Inc.*, 102 FTC 395, 735 (1983). Stouffer has no history of prior violations.

This was a miscalculation rather than a blatant disregard for law. Therefore, a broad order need not issue in this case. *Standard Oil Co. of Calif. v. FTC*, 577 F.2d at 662-63.

²⁵ In *Thompson Medical*, the company spent \$5 million in five years advertising Aspercreme. *Thompson Medical*, 104 FTC at 687. In *Kraft*, the company spent \$15 million a year for two and one-half years on national television of the challenged ads. *Kraft*, 970 F.2d at 325-26. In *American Home Products*, the advertising cost \$210 million over ten years. *American Home Products*, 695 F.2d at 707-08, 781.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the advertising of Lean Cuisine entrees under Sections 5 and 12 of the Federal Trade Commission Act.

2. Respondent's false, misleading, and deceptive statements as herein found were likely to mislead reasonable consumers into believing that such statements were true.

3. These acts and practices were to the injury of the public and constitute false and deceptive advertisements in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

4. While respondent failed to disclose adequately that 1 gram equals 1000 milligrams, that fact is immaterial.

ORDER

I.

It is ordered, That respondent Stouffer Foods Corporation, a corporation, its successors and assigns, and its officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any frozen food product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting the sodium content of any such product.

B. Describing the sodium content of any such product except by comparing it with "low sodium," and/or the recommended daily allowance for sodium, as defined by the United States Department of Agriculture or the United States Food and Drug Administration.

II.

It is further ordered, That respondent Stouffer Foods Corporation shall, for three years make available to the Federal Trade Commission all advertisements covered by this order.

III.

It is further ordered, That respondent Stouffer Foods Corporation shall distribute a copy of this order to its operating divisions, and its officers, managers, agents, representatives, or employees engaged in advertising covered by this order and shall secure from each such person a signed statement acknowledging receipt of this order.

IV.

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

V.

It is further ordered, That respondent Stouffer Foods Corporation shall, within 60 days after service upon it of this order and at such other times as the Commission may require, file with the Commission a written report describing how it has complied with this order.

APPENDIX A

D-9250
B143468

(a smart, intelligent, sensible way to eat)

Lean.



(extraordinary tastes with style, daring, and WOW!)

Cuisine.

The advertisement is a vertical layout. At the top, a woman in a dark suit is shown from the chest up, looking towards the camera. Below her is a plate of food. To the right of the plate is a box of Lean Cuisine. Below the box is a large, dark tray of food. The text 'LEAN ON LEAN CUISINE' is written vertically in large, bold, white letters on the left side of the image. At the bottom left, there is a small logo for 'Smart' and the text 'D-9250 B143468'. At the bottom right, there is a small logo for 'Smart' and the text 'D-9250 B143468'. The background is dark.

Appendix A



Who can make under 300
taste like a MILLION?

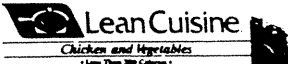
D-9250
B143468



2



Only Stouffer's Lean Cuisine® that's what nobody else knows how to create such great tasting entrees all with **less than 300 calories and most with less than 1 gram* of sodium.** But we'll gladly share the secret with you. Stouffer's recipes use only the finest ingredients at their natural peak of perfection, combined in exciting and imaginative ways. That's why our 33 different entrees taste as great as they do. So if you're looking for something smart and sensible to eat that tastes extraordinary, too, you know where to lean.



LEAN ON LEAN CUISINE

C.Y.2

Appendix B

X 2



D-9250
B143468



Who can make under 300
taste like a MILLION?



Only Stouffers Lean Cuisine®... 300 calories and most with less than 1 gram of sodium. But we'll gladly share the secret with you. Stouffers' recipes use only the finest ingredients at their natural peak of perfection, combined in exciting and imaginative ways. That's why our 33 different entrees taste as great as they do. So, if you're looking for smart, sensible meals that taste extraordinary... you know where to lean.



LEAN ON LEAN CUISINE

Appendix

3

3

APPENDIX C



D-9250
B143468

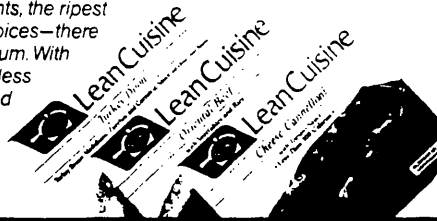


OF ALL THE THINGS WE MAKE,
WE MAKE **SENSE!**

Of all the things we at Stouffer's pack into our 34 Lean Cuisine® entrees—the freshest ingredients, the ripest vegetables and the perfect blend of herbs and spices—there are some things we skimp on: Calories. Fat. Sodium. With less than 300 calories, controlled fat and always less than 1 gram of sodium* per entree, we make good sense taste great.*

*All Lean Cuisine entrees have been reformulated to contain less than 1 gram (1000 mg) of sodium.

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LEAN ON LEAN CUISINE

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Appendix C

APPENDIX C



D-9250
B143468



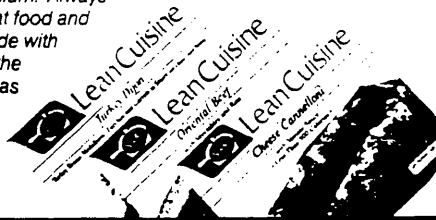
OF ALL THE THINGS WE MAKE,
WE MAKE **SENSE!** Turkey with St

Exh 6

95% fat free. Never more than a gram of sodium*. Always less than 300 calories. Lean Cuisine® makes great food and good sense. And since all our 34 entrees are made with the freshest ingredients. Ripest vegetables. With the perfect blend of herbs and spices. Good sense has never tasted so great.

*All Lean Cuisine entrees have been reformulated to contain less than 1 gram (1000 mg.) of sodium.

© 1991 Stouffers Food Corporation



95% FAT FREE Lean Cuisine.

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Appendix

STOUFFER FOODS CORPORATION

Initial Decision

APPENDIX C

746

Soups!

Introduces Mexican!

Stouffer's

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OPINION OF THE COMMISSION

BY STEIGER, *Chairman*:

Stouffer Foods Corporation, Inc. (Stouffer) appeals from the Administrative Law Judge (ALJ) James P. Timony's Initial Decision and Order holding Stouffer liable for misrepresentations regarding the sodium content of its Lean Cuisine entrees in violation of Sections 5 and 12 of the Federal Trade Commission Act (FTCA), 15 U.S.C. 45, 52. Complaint counsel cross appeal the scope of the order's coverage. We affirm liability under Sections 5 and 12 of the FTCA and modify the ALJ's order.

On October 28, 1991, the Federal Trade Commission issued an administrative complaint charging Stouffer with violating Sections 5 and 12 of the FTCA by falsely representing in its ads the sodium content of its Lean Cuisine entrees.¹ Specifically, the complaint alleged that certain of Stouffer's Lean Cuisine ads falsely represented, among other things, that Lean Cuisine entrees are low in sodium. Paragraph 4 of the complaint quoted language from an ad, attached to the complaint (CX-4),² which stated that Lean Cuisine "skimp[s] on Calories. Fat. Sodium. With less than 300 calories, controlled fat and always less than 1 gram of sodium* per entree, we make good sense taste great." Paragraph 4 also quoted a footnote that appeared in the same ad which stated: "*All Lean Cuisine entrees have been formulated to contain less than 1 gram (1000 mg.) of sodium." Paragraph 7 of the complaint alleged that Stouffer's advertising for Lean Cuisine entrees failed to disclose adequately the material fact that

¹ The conduct challenged in this complaint occurred before the effective date of the Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (codified in part at 21 U.S.C. 343(i), (q) and (r)).

² References to the record are abbreviated as follows:

IDF	Initial Decision Finding
ID	Initial Decision
Tr.	Transcript of Testimony
CX	Complaint Counsel's Exhibit
RX	Respondent's Exhibit
RAB	Respondent's Appeal Brief
CAB	Complaint Counsel's Answering and Cross-appeal Brief
RRAB	Respondent's Reply and Answering Brief
CRB	Complaint Counsel's Reply Brief

“1 gram is equivalent to 1000 milligrams, which is the commonly used unit of measurement for sodium.”

The evidentiary hearings before ALJ Timony began on February 8, 1993, and ended on March 8, 1993. Proposed findings were completed on June 21, 1993, and the Initial Decision and Order were filed on August 6, 1993. The ALJ found that the net impression of all the elements in each of the ads³ is that Lean Cuisine entrees are low in sodium and that the low sodium claims are presumptively material to consumers because they involve health, safety, or other areas with which reasonable consumers would be concerned. ID at 29, 37, citing *Thompson Medical Co.*, 104 FTC 648, 788-89 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987). The ALJ concluded that Stouffer failed to disclose adequately that 1 gram of sodium equals 1000 milligrams, but found that fact to be immaterial. ID at 39.

The ALJ's order prohibits Stouffer from misrepresenting the sodium content of any frozen food product and from describing the sodium content of any frozen food product except by comparing it with “low sodium,” and/or the recommended daily allowance for sodium, as defined by the Food and Drug Administration or the United States Department of Agriculture. The ALJ declined to extend the scope of the order beyond sodium to all ingredients and nutrients because he concluded that Stouffer did not blatantly disregard the law and had no history of prior violations. ID at 39.

Stouffer's principal argument on appeal is that the ALJ erred in relying on his own analysis of the challenged ads and complaint counsel's consumer survey to conclude that the ads conveyed a low sodium message. Complaint counsel do not appeal the dismissal of the milligram disclosure allegation, but cross appeal the scope of the order's coverage.

We affirm liability under Sections 5 and 12 of the FTCA. We agree with the ALJ's findings and conclusions to the extent that they are consistent with those set forth in this opinion, and, except as noted herein, adopt them as our own. Based on our consideration of the record in this case and the arguments of counsel for both parties, we deny Stouffer's appeal and grant complaint counsel's cross appeal.

³ The ALJ's findings of fact described five print ads (CX-1, CX-2, CX-3, CX-5, CX-6) in addition to the one attached to the complaint (CX-4) and one radio ad (CX-7). IDF 33-51. The ALJ analyzed the ad attached to the complaint (CX-4) and statements that appeared in other ads (CX-2, CX-3, CX-5, CX-7). ID at 28-29.

The order we adopt includes a provision for coverage of all nutrients and ingredients in Stouffer's frozen food products.

I. FACTUAL BACKGROUND

Stouffer is a subsidiary of the Swiss corporation Nestle SA and manufactures and markets frozen foods. There are two product lines for Stouffer's frozen entree products: a full calorie product, "Red Box," and a reduced, low calorie product, "Lean Cuisine." Responding to consumers' nutritional awareness, Stouffer twice reformulated Lean Cuisine in the late 1980's and early 1990's with new recipes and seasonings and reduced the sodium and fat content of the products. IDF 18, 31. In order to counteract the perception that Lean Cuisine was high in sodium, and because sodium was becoming a health issue in the media, Stouffer asked its advertising agency, Tatham/RSCG (Tatham), to develop ads stating the facts of the sodium content of the product. IDF 18.

II. THE CHALLENGED REPRESENTATIONS

A. Legal Framework

The Commission will find deception if there is a representation or omission of fact that is likely to mislead consumers acting reasonably under the circumstances, and that representation or omission is material.⁴ The first step in a deception analysis is to identify the claims made by looking at the ad itself.⁵ If, after examining the interaction of all the different elements in the ad, the Commission can conclude with confidence that an ad can reasonably be read to contain a particular claim, a facial analysis is sufficient basis to conclude that the ad conveys the claim. *See Kraft*, 114 FTC at 121; *Thompson Medical*, 104 FTC at 789.

If, after a facial analysis, the Commission cannot conclude with confidence that a particular ad can reasonably be read to contain a

⁴ *See Kraft, Inc.*, 114 FTC 40, 120 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993); *Cliffdale Associates, Inc.*, 103 FTC 110, 164-66, 175-76 (1984).

⁵ Advertising claims are generally categorized as either express or implied. Express claims directly state the representation at issue, while implied claims, which encompass all claims that are not express, can range from those that are virtually synonymous with express claims to very subtle language where only relatively few consumers discern that particular claim. *Kraft*, 114 FTC at 120; *Thompson Medical*, 104 FTC at 788-89.

particular implied message, we will not find the ad to have made the claim unless extrinsic evidence allows us to conclude that such a reading of the ad is reasonable. *Kraft*, 114 FTC at 121; *Thompson Medical*, 104 FTC at 789. The Commission will carefully consider any extrinsic evidence that is introduced, taking into account the quality and reliability of the evidence. *See Kraft*, 114 FTC at 122. Extrinsic evidence includes, but is not limited to, reliable results from methodologically sound consumer surveys. *Kraft*, 114 FTC at 121; *Cliffdale*, 103 FTC at 164-66. In determining whether a consumer survey is methodologically sound, the Commission will look to whether it “draws[s] valid samples from the appropriate population, ask[s] appropriate questions in ways that minimize bias, and analyze[s] results correctly.” *Thompson Medical*, 104 FTC at 790. The Commission does not require methodological perfection before it will rely on a copy test or other type of consumer survey, but looks to whether such evidence is reasonably reliable and probative. *See Bristol-Myers Co.*, 85 FTC 688, 743-44 (1975). Flaws in the methodology may affect the weight that is given to the results of the copy test or other consumer survey.

Whether examining the ad itself, extrinsic evidence, or both, the Commission considers the overall, net impression made by the ad in determining what claims may reasonably be ascribed to it. *Kraft*, 114 FTC at 122; *Thompson Medical*, 104 FTC at 790. To be considered reasonable, however, an interpretation need not be the only interpretation as long as the subset of consumers making it is representative of the group of consumers to whom the ad is addressed. *Kraft*, 114 FTC at 120-21 n.8; *Thompson Medical*, 104 FTC at 789 n.7.

The second step in a deception analysis is to determine if the claim is likely to mislead a consumer acting reasonably under the circumstances. *Cliffdale*, 103 FTC at 164-65, 175-76. Where more than one meaning is conveyed by an ad, one of which is false, the seller is liable for the false claim. *Kraft*, 114 FTC at 120-21 n.8; *Thompson Medical*, 104 FTC at 789 n.7.

The final step in a deception analysis is to determine whether the claim is material. *Cliffdale*, 103 FTC at 164-65. Information is material if it is likely to affect a consumer’s choice of or conduct regarding a product. *Id.* at 165; *Kraft*, 114 FTC at 134. There are several types of claims that the Commission presumes to be material: express claims; implied claims where there is evidence that the seller intended to make the claim; and claims or omissions involving health,

safety, or other areas with which reasonable consumers would be concerned. *Kraft*, 114 FTC at 134; *Thompson Medical*, 104 FTC at 816-17; *Cliffdale*, 103 FTC at 182-83.

B. Respondent's Advertising

From January 1990 through August 1991, Stouffer ran a series of ads, including the Make Sense ad attached to the complaint (CX-4), as well as five other print ads: Lean on Lean Cuisine (CX-1), 300 Like a Million (CX-2), another version of 300 Like a Million (CX-3), another version of Make Sense (CX-5), and Ole O'Lean (CX-6). In addition, Stouffer ran a radio ad, Anniversary Turkey (CX-7).

The Make Sense ads (CX-4 and CX-5) show a plate of chicken, vegetables, and pasta, and a man and a woman on a bicycle. The headlines state:

OF ALL THE THINGS WE MAKE, WE MAKE SENSE!

In the first Make Sense Ad (CX-4), smaller print follows this headline which states:

Of all the things we at Stouffers pack into our 34 Lean Cuisine entrees -- the freshest ingredients, the ripest vegetables and the perfect blend of herbs and spices -- there are some things we skimp on: Calories. Fat. Sodium. With less than 300 calories, controlled fat and always less than 1 gram of sodium* per entree, we make good sense taste great.⁶

The footnote in both of the Make Sense ads (CX-4 and CX-5) states in even smaller print lower in the page:

All Lean Cuisine entrees have been reformulated to contain less than 1 gram (1000 mg.) of sodium.

The radio ad, Anniversary Turkey (CX-7), contains explicit language regarding low sodium: "These babies are healthier than ever. Lower in sodium, fat and cholesterol. Read those boxes, people, these numbers are low."

⁶ The text in the other version of the Make Sense ad (CX-5) states: 95% fat free. Never more than a gram of sodium.* Always less than 300 calories. Lean Cuisine makes great food and good sense. And since all our 34 entrees are made with the freshest ingredients. Ripest vegetables. With the perfect blend of herbs and spices. Good sense has never tasted so great.

We agree with the ALJ that a facial analysis of the ads (CX-1 through CX-7) permits us to conclude with confidence that the ads can reasonably be read to convey a low sodium message.⁷ Several elements of the ads communicate this message, including the headlines, the language used, and the footnotes.

One message from the print ads (CX-1 through CX-6) is that Lean Cuisine has large quantities of healthy ingredients and small quantities of undesirable nutrients. IDF 45. The ALJ concluded, and we agree, that the words “We Make Sense” in the headline (CX-4 and CX-5) condition the reader to think that Lean Cuisine is a healthy product.⁸ The text in the body of the Make Sense ads (CX-4 and CX-5), for example, further emphasizes sensible eating with language such as: “the freshest ingredients, the ripest vegetables and the perfect blend of herbs and spices” which are “packed” into the Lean Cuisine entrees. The text in the body of the Lean on Lean Cuisine and 300 Like a Million ads (CX-1 through CX-3) also expresses the sensible eating message with such language as: “Stouffer’s recipes use only the finest ingredients at their natural peak of perfection, combined in exciting and imaginative ways.”

The ads also represent that there are low levels of undesirable nutrients. IDF 46. For example, the Make Sense ad (CX-4) represents that the negative attributes, such as “Calories. Fat. Sodium.” are “skimp[ed] on.” The additional language in the Make Sense ad (CX-4) “With less than 300 calories, controlled fat and always less than 1 gram of sodium* per entree...” also reinforces the low sodium message. These representations communicate that the negative attributes have been reduced to meager quantities. ID at 28. Similarly, the text in another version of the Make Sense ad (CX-5) provides “Never more than a gram of sodium.*”⁹

In addition, we agree with the ALJ that describing sodium as “less than” 1 gram reinforces the impression that sodium is present

⁷ The ALJ concluded that all of the print ads are similar and that the same analysis applied to them. ID at 29 n.4. The ALJ also found that the radio ad, Anniversary Turkey (CX-7), contained a low sodium message. ID at 29.

⁸ Similarly, the headline “Lean. (a smart, intelligent, sensible way to eat.)” in the Lean on Lean Cuisine ad (CX-1) evokes sensible eating.

⁹ The Lean on Lean Cuisine ad (CX-1) represents that “[e]ach of our 30 entrees has less than 300 calories and most have less than a gram* of sodium.” The 300 Like a Million ads (CX-2 and CX-3) claim that “[n]obody else knows how to create such great tasting entrees, all with less than 300 calories and most with less than 1 gram* of sodium.” The Ole O’Lean ad (CX-6) states that “[s]o each has less than 300 calories and less than one gram* of sodium.”

in only a minimal quantity.¹⁰ The language “less than” (CX-1 through CX-4 and CX-6) minimizes the sodium content, and the number “1” appears in context to be a low number. Indeed, as the ALJ noted, in the 300 Like a Million ads (CX-2 and CX-3) the phrase “and most with less than 1 gram* of sodium” was emphasized in bold print. IDF 144.

Accordingly, we find, as the ALJ did, that the net impression of the elements in each of the print ads is that Lean Cuisine products are low in sodium. ID at 29. Moreover, we find that the radio ad, Anniversary Turkey, (CX-7) also communicates that Lean Cuisine’s sodium content is low. The ad (CX-7) expressly states that Lean Cuisine products are “[l]ower in sodium, fat and cholesterol these numbers are low.”

On appeal Stouffer argues that the ALJ ignored elements in the challenged ads (1) which are contrary to a “low” sodium message, and (2) which reasonably convey that the reformulated Lean Cuisine products have a “reduced” or “lower” quantity of sodium, rather than an absolute “low” amount.¹¹ RAB at 17. We have carefully reviewed the ads in their entirety, including the elements referred to by Stouffer. We conclude that the low sodium claim is made.

Stouffer argues that since great taste was a key element in the campaign and the perceptions associated with low sodium are those of poor taste, then the taste component of the ads contradicts the low sodium message. RAB at 21. We do not disagree with respondent that the ads convey a superior taste message. Where we disagree is over respondent’s unsupported contention that such a message necessarily contradicts a low sodium claim or that the existence of a nondeceptive message precludes our finding an implied deceptive claim. RRAB at 1-3. Stouffer relies on the testimony of Irene Block, a partner at Tatham, its advertising agency, who provided conclusory testimony that the perceptions associated with low sodium are those of poor taste and that this would contradict any low sodium message. Tr. 787. Ms. Block offered no empirical support for her conclusion and her testimony. As stated above, it is well settled that an ad can

¹⁰ The ALJ concluded that the preponderance of the evidence shows that the footnotes in the ads did not adequately disclose that one gram equals 1000 milligrams. IDF 195; ID at 29. We agree with this conclusion.

¹¹ Stouffer does not appeal the ALJ’s findings that a low sodium claim was false and misleading. ID at 39. Stouffer also does not challenge the materiality of a low sodium claim. ID at 39.

convey more than one claim and that not all of the claims need be deceptive in order for the ad itself to be deceptive. *Cliffdale*, 103 FTC at 178.¹² Therefore, we see nothing inherently inconsistent between a low sodium message and a superior taste message. For those concerned about sodium consumption, a product with low sodium and great taste would be attractive.

In addition, Stouffer argues that the relative nature of the terminology used in the ads conveys a reduced, rather than low sodium claim. RAB at 23. Even putting aside the fact that much of the terminology used in the ads is absolute, not relative,¹³ we see no basis for concluding that reduced and low sodium claims are mutually exclusive. Indeed, reducing the amount of an element will often result in diminishing that element to a low level.¹⁴

Stouffer also argues that the alleged low sodium claim is neither “conspicuous” nor “self-evident” from the face of the challenged ads¹⁵ and that to find a violation premised on a facial analysis of the ads would unreasonably chill Stouffer’s exercise of its commercial speech rights. Accordingly, Stouffer argues that a methodologically valid consumer survey demonstrating that a substantial number of consumers take away the alleged low sodium claim is constitutionally required under the First Amendment. RAB at 28-29. We hold that there are no First Amendment concerns raised where, as here, facially apparent deceptive implied claims can be found without resort to extrinsic evidence.¹⁶

¹² Further, the Commission has held that an ad can make a deceptive implied claim even if the ad contains contrary elements, as long as those contrary elements do not effectively negate or qualify the implied claim. *See Kraft*, 114 FTC at 124; *Removatron Int’l Corp.*, 111 FTC 206, 294 (1988), *aff’d*, 884 F.2d 1489 (1st Cir. 1989).

¹³ *See, e.g.*, CX-2 through CX-4, CX-6; (“less than 1 gram of sodium”); CX-5 (“never more than a gram of sodium”); CX-7 (“these numbers are low”).

¹⁴ This conclusion is confirmed by the copy test results introduced by complaint counsel which specifically indicate that only a relative minority of consumers stated that the ads conveyed a reduced sodium claim. There was a specific coding category for open-ended questions in the copy test for less/lower/reduced sodium. Between 5 percent and 14 percent of the respondents to the open-ended questions stated that the ad conveyed a less/lower/reduced sodium message. As noted *infra*, 43 percent to 60 percent of respondents responded that the ad conveyed a low sodium message. CX-374z-11.

¹⁵ Stouffer appears to argue, citing *Kraft* and *Thompson*, that the absence of a visual image coupled with a written or verbal message prevents the Commission from finding an implied message in ads. RAB at 25-27. Although the Commission determines ad meaning from the ad taken as a whole, the Commission has never required a visual image before making such a determination. In addition, Stouffer argues that the ALJ erred in finding a low sodium claim on a facial analysis of the radio ad, *Anniversary Turkey* (CX-7). RAB at 30-32. In light of the express nature of the language in this ad and because of its similarity to the other ads, we reject this argument.

¹⁶ *See Zauderer v. Ohio*, 471 U.S. 626, 652-53 (1985); *Kraft*, 970 F.2d at 321.

From a facial analysis of the ads themselves we conclude that they convey a low sodium message. It would be, therefore, unnecessary to resort to extrinsic evidence. Nevertheless, consistent with our practice we have examined the extrinsic evidence offered on this issue by complaint counsel and find that it corroborates our conclusions regarding ad meaning. We turn next to a consideration of the extrinsic evidence.

C. Extrinsic Evidence

Both complaint counsel and Stouffer proffered the results of copy tests conducted for this adjudication. The ALJ found that Stouffer's copy test was unreliable. IDF at 35. Stouffer does not appeal the ALJ's rejection of its copy test evidence. Instead, Stouffer appeals the attribution of probative value to the methodologies employed in complaint counsel's copy test.

Complaint counsel engaged U.S. Research Company to conduct a copy test of three of the print ads¹⁷ to determine if they conveyed the low sodium claim. The questionnaire used was designed by Dr. George Zinkhan, a professor of marketing at the University of Houston. IDF 52. Dr. Zinkhan determined an appropriate universe for the copy test¹⁸ by relying on Stouffer's description of its target audience. IDF 70. The questionnaire contained six questions using both open-ended and closed-ended formats. An open-ended question provides copy test participants with an opportunity to provide answers phrased in their own words.¹⁹ A closed-ended question asks about a specific issue and provides a choice of answers from which the consumer selects.²⁰ IDF 53. Here, the questionnaire used a funneling approach which began with general, open-ended questions and led to more narrow, closed-ended questions on specific issues. IDF 73. The experts for both Stouffer and complaint counsel agree that funneling is the best way to ask questions on a copy test. IDF 74.

¹⁷ The three print ads tested were Lean on Lean Cuisine (CX-1), 300 Like a Million (CX-3), and Make Sense (CX-4). One hundred participants viewed each of the three ads at four shopping malls across the country. IDF 55, 57-64; CX-374b.

¹⁸ That universe consisted of women who were the principal food shoppers for their household, were between the ages of 25 and 54, had purchased a frozen entree in the last three months and were not following a medically supervised diet. IDF 69; CX-374c.

¹⁹ Zinkhan, Tr. at 478.

²⁰ Zinkhan, Tr. at 478.

The open-ended questions²¹ asked consumers what general point or points the ads made. These questions were designed so as not to prompt participants for any particular response, or to give any context in which to answer the questions. The questions permitted participants to give one answer, multiple answers or no answer. IDF 79. No control group or control question was included in this portion of the survey. IDF 77-83; CX-374.

A majority of the copy test participants responded to the open-ended questions in a way that indicated that they received a low sodium message from the ad. Specifically, 43 percent to 60 percent stated that the ad communicated that the Lean Cuisine entrees are low in sodium. IDF 116; CX-374z-11. This response rate is quite high. The Commission has found far lower response rates from open-ended questions to be significant. In Thompson Medical, for example, the Commission found that the ASI Theater test results, in which 17 percent of the Aspercreme ad viewers responded that the product contained aspirin in response to the unaided recall questions, was a sizable percentage of participants who did not perceive or remember the disclosure that Aspercreme does not contain aspirin. 104 FTC at 808. We note that even Dr. Ivan Ross, one of Stouffer's experts, testified that often a researcher must rely on open-ended responses in the magnitude of 8 percent to 10 percent as being meaningful. Tr. 1299.

The closed-ended questions²² designed by Dr. Zinkhan asked if the ad suggested anything about the amount of sodium, calories or sugar in Lean Cuisine entrees. Participants were asked specifically whether the amount of the attribute was high, low, neither high nor low, or whether they did not know or remember. The order of the closed-ended questions was rotated to minimize bias. IDF 99.

²¹ The following three open-ended questions were asked:

1. What point or points does the Lean Cuisine ad make about the product?
 2. What reason or reasons does the ad mention or suggest for you to buy Lean Cuisine?
 3. Is there anything else you can recall about the ad?
- CX-374z-29 - 30.

²² The following closed-ended questions were asked in rotating order:

1. Does the ad say or suggest anything about the amount of calories [or sugar] [or sodium] in Lean Cuisine entrees? If yes,
2. Does the ad say or suggest that Lean Cuisine entrees are:
 - high in calories [or sugar] [or sodium]
 - low in calories [or sugar] [or sodium]
 - neither high nor low in calories [or sugar] [or sodium]
 - don't know, don't remember.

See CX-374z-30.

Dr. Zinkhan incorporated several mechanisms in the design of the closed-ended question section of the copy test to minimize bias. One form of bias is “order bias,” meaning that the sequence in which the questions are asked can affect the results.²³ IDF 98. The Zinkhan copy test minimized “order bias” by rotating the order of the closed-ended questions. IDF 99. Other forms of bias include “yea saying,” which is the tendency to give the answer the participant believes the interviewer is seeking, and “halo effect,” where the participant has a favorable opinion of the product before taking the test and therefore answers questions with that favorable impression in mind. IDF 100-101. In an effort to control for yea saying, inattention, halo effect or other noise factors, Dr. Zinkhan used a control question by repeating the questions relating to sodium, and substituting the word sugar for the word sodium.²⁴ IDF 104, 106. In using a control question, the percentage of participants who responded affirmatively to the control question is deducted from the percentage of participants who responded affirmatively to the tested claim. IDF 106. In the Zinkhan copy test, after deducting the percentage of respondents who answered yes to the control question, 78 percent to 83 percent of the respondents found a low sodium claim from the ad. IDF 119. These results are unusually high and consistent with the responses to the open-ended questions.

We find that the Zinkhan copy test provides reliable and probative evidence and is methodologically sound. The results appear to be strikingly high for both the open and closed-ended questions and confirm the conclusion that we reached based on our facial examination of the ads. Indeed, Stouffer’s experts have previously relied on copy test results with much lower response rates. *See supra* at 11. Further, the Commission has likewise relied on copy test results with lower response rates. *See Thompson Medical*, 104 FTC at 808.

Stouffer contends that the methodology employed in the Zinkhan copy test is so fundamentally flawed that the ALJ erred in relying upon the test results. RAB at 33. Specifically, Stouffer argues that some number of survey respondents may have come to the test with the preexisting belief that Lean Cuisine frozen entrees are low in sodium. According to Stouffer, these “biased” participants may have

²³ The first question sets up the survey, and the results of the last question may be affected by fatigue or boredom. Zinkhan, Tr. 553-554.

²⁴ An appropriate control question asks about a product attribute that is relevant to and reasonably associated with the product, but is not too closely linked to a claim in the ad. IDF 105.

responded to the various survey questions on the basis of their pre-existing opinions, and without regard to the actual content of the advertisements. Specifically, Stouffer made this argument with regard to open-ended questions (e.g., “What point or points does the Lean Cuisine ad make about the product?”). RAB at 33, RRAB at 18. Stouffer contends that the copy test could have employed a control group exposed to a control ad in order to quantify and eliminate the effects of participants’ preexisting bias.²⁵ RAB at 36. Stouffer also argues that the use of the control question in the closed-ended questions was inadequate. RAB at 41. Since there were no adequate controls, Stouffer concludes, the Zinkhan copy test may not be given any weight whatsoever. To support its arguments, Stouffer relies on *Thompson Medical* and *Kraft*.

Perfection is not the prevailing standard for determining whether a copy test may be given any weight. The appropriate standard is whether the evidence is reliable and probative. See *Bristol-Myers*, 85 FTC at 744. The *Kraft* decision instructs that, in all cases involving contested issues of ad interpretation, “the Commission will carefully consider any extrinsic evidence that is introduced, taking into account the quality and reliability of the evidence.” 114 FTC at 122. “The quality of any consumer research offered as evidence will be evaluated in the totality of the circumstances . . .” *Id.* at 127 n.13. A study may be flawed, that is, harbor one or more sources of potential error or bias, and still be probative.²⁶ The nature and seriousness of any deficiencies will affect the weight that the Commission assigns to that piece of evidence. On the other hand, if the methodology of a consumer survey is fundamentally unsound, then that survey cannot assist the Commission in deciding whether an advertisement communicates a particular claim to consumers. *Thompson Medical*, 104 FTC at 794-95; *Sterling Drug*, 102 FTC 395, 754 (1983), *aff’d*, 741 F.2d 1146 (9th Cir. 1984). The Commission’s practice is, in this

²⁵ A control group is a group of participants who see a stimulus different from the challenged ad -- i.e., a “cleansed” Lean Cuisine ad that does not convey the hypothesized low sodium claim. The control group is then asked the same series of questions as the test group. The control group’s low sodium answers are subtracted from the low sodium results obtained from viewers of the challenged ad to control for the purported preexisting belief.

²⁶ See *Kraft*, 114 FTC at 126-27 n.13 (“Although we agree with respondent that the design of the MOR survey questionnaire is not without flaws, and that alternative or additional means could have been used to better minimize the potential for yea-saying bias inherent in using a closed-ended question format, on balance, we find the MOR survey results to be of some probative value.”); *Thompson Medical*, 104 FTC at 796-97 (survey that has “several potential sources of bias” nonetheless deemed to be “reasonably reliable extrinsic evidence”).

regard, consistent with that of most federal courts when evaluating surveys purporting to assess the meaning that consumers take from ads.²⁷

As discussed below, we find that the survey offered by complaint counsel was reliable and probative. Accordingly, it was proper for the ALJ to rely upon this extrinsic evidence, together with the facial analysis, in concluding that a low sodium claim is present in the Stouffer Lean Cuisine ads.

The ALJ found that there is nothing in Commission precedent mandating a control ad for open-ended questions, that Stouffer's reliance on Thompson and Kraft is misplaced, and that there was no credible evidence that bias affected the responses elicited by those questions. ID at 33.

We agree with the ALJ. There is nothing in Commission precedent that requires the use of a control ad for open-ended questions. The Zinkhan open-ended questions properly attempted to elicit unprompted responses in a consumer's own words describing what he or she took away from the ad.²⁸ In addition, the Zinkhan open-ended questions properly continued to probe for more responses. We therefore reject Stouffer's argument that the responses to the open-ended questions are fatally flawed because of the absence of a control ad.

We also agree with the ALJ with regard to Stouffer's argument concerning the requirement of a control ad in closed-ended questions. The Commission has long recognized that a control of some kind is necessary for closed-ended questions, and has noted, for example, that there is a potential for yea-saying inherent in the closed-ended question format. *Kraft*, 114 FTC at 126 n.13; see *Thompson Medical*, 104 FTC at 804-08. The Commission, however, has never dictated the type of control necessary in a copy test. There is nothing in Commission precedent that requires the use of a control ad for closed-

²⁷ See, e.g., McCarthy, *Trademarks and Unfair Competition*, Section 32.50 (3d. ed. 1992) ("In an extreme case, an improperly conducted survey with slanted questions or serious methodological defects may be excludable as 'irrelevant' of the true state of mind of potential purchasers. But the majority rule is that while technical deficiencies can reduce a survey's weight, they will not prevent the survey from being admitted into evidence. As one court correctly observed, 'No survey is perfect' and flaws in questions and methodology should only affect the weight accorded survey results.") (footnotes omitted) (quoting *Selchow & Righter Co. v. Decipher, Inc.*, 598 F. Supp. 1489 (E.D. Va. 1984).

²⁸ The claim at issue, low sodium, is both a simple claim and a primary one, making it particularly well suited to the open-ended format. On the other hand, open-ended questions are likely to understate secondary implied claims, particularly where, as in *Kraft*, those claims are also rather complex by virtue of being both compound and comparative.

ended questions. Dr. Zinkhan's closed-ended questions were designed in a way that minimized bias through the use of a control question and by rotating the sequence of the questions. We find that the use of sugar in a control question was appropriate.²⁹

Stouffer argues that the failure to control for preexisting beliefs is necessarily such an extreme error that a copy test that is flawed in this respect is entitled to no weight. However, the expert testimony cited by Stouffer is unconvincing, and the case law is to the contrary. Stouffer's two expert witnesses, Edward T. Popper and Ivan Ross, did opine that a control ad is needed in order to account for and eliminate the effects of preexisting beliefs. Yet, the basis for this conclusion is unclear. Neither witness cited evidence that this sort of bias is common or significant in advertising copy tests. Both admitted that they had previously designed copy tests for litigation purposes that did not include a control ad group. Both further acknowledged that they had given sworn testimony regarding ad claims based upon the results of tests that did not employ a control group. IDF 83-86. Finally, there is no record evidence that, among experts in advertising or consumer research, the use of a control group is considered a *sine qua non* of a valid copy test. In this regard, we note that complaint counsel's expert witnesses testified that the Zinkhan copy test is valid and reliable evidence of what claims the Stouffer ads communicated, without the need for a control group. IDF 81.

Copy tests are frequently evaluated by federal courts in the context of Lanham Act cases and other litigation. Stouffer has cited no case concluding that a study will not be deemed reasonably reliable unless it controls for preexisting bias. In fact, there are numerous cases relying on copy tests without any discussion of the use of a control group or the need to factor out pre-existing beliefs.³⁰ Similarly, the Commission has often relied on copy tests that did not employ a control group. *E.g.*, *Thompson Medical*, 104 FTC at 796-97; *American Home Products Corp.*, 98 FTC 136, 394 (1981), *enforced*

²⁹ Stouffer also challenges the use of a control question as insufficient to correct for those who base their responses on pre-existing belief. RAB at 41, RRAB at 5. Complaint counsel has not argued that the use of a control question is appropriate where it is necessary to control for pre-existing beliefs. Further, as noted *infra*, the record fails to establish that pre-existing beliefs affected the Zinkhan copy test results.

³⁰ *E.g.*, *McNeilab, Inc. v. American Home Products Corp.*, 675 F. Supp. 819, 825 (S.D.N.Y. 1987), *aff'd*, 848 F.2d 34 (2d Cir. 1988); *Stiffel Co. v. Westwood Lighting Group*, 658 F. Supp. 1103, 1112-14 (D.N.J. 1987); *American Home Products Corp. v. Johnson & Johnson*, 654 F. Supp. 568, 588-89 (S.D.N.Y. 1987).

as modified, 695 F.2d 681 (3d Cir. 1982); *Bristol-Myers Co.*, 85 FTC at 744 (1975).

The only Commission decision that directly addresses the issue of pre-existing beliefs is *Kraft*, and it is on this case that Stouffer principally relies. RAB at 42-43. The record in *Kraft* included reason to be concerned about the possible influence of pre-existing bias upon copy tests. The Commission evaluated two series of ads for *Kraft Singles* processed cheese. The “*Skimp*” ads were the first to be disseminated, and contained the explicit (but deceptive) representation that *Kraft Singles* contain more calcium than do most imitation cheese slices (a superiority claim). The “*Class Picture/5 ounce*” series of ads was introduced 15 months later, and “contained no explicit comparison between *Kraft Singles* and non-dairy slices.” 114 FTC at 130. As evidence that the “*Class Picture/5 ounce*” ads contained an implied superiority claim, complaint counsel offered a copy test that did not control for consumers’ preexisting beliefs regarding the relative calcium content of *Kraft Singles*. The Commission concluded that this test was not reasonably reliable, explaining that “[t]he apparent 45 percent response rate suggesting that an imitation superiority message was taken by survey participants may well be attributable to consumers’ prior exposure to the ‘*Skimp*’ ads, which did contain an explicit comparison to imitation slices, and which were disseminated extensively prior to the ‘*Class Picture/5 ounce*’ ads.” *Kraft*, 114 FTC at 131 n.19.

This passage must be read in light of the Commission’s other pronouncements on copy testing, and in particular the admonition to evaluate the “totality of the circumstances” bearing on the reliability of any consumer research. The case does not hold that consumer surveys must invariably control for preexisting beliefs.³¹ Instead, *Kraft* teaches that the failure of a consumer survey to control for preexisting beliefs about the alleged advertising claim introduces a potential for bias, and indeed that this may be a critical defect.

In any event, there must be evidence of preexisting bias to find that failure to control for such bias is a critical defect. In *Kraft*, there was evidence that (i) a large portion of consumers had a preexisting belief with regard to the superiority claim, and (ii) this preexisting belief had likely biased the consumer survey results relied upon by

³¹ Indeed, it is established that respondents may be held liable for dissemination of ads that capitalize on preexisting consumer beliefs. *Simeon Management Corp. v. FTC*, 579 F.2d 1137, 1146 (9th Cir. 1978).

complaint counsel. In the present case, the preponderance of the evidence indicates that, to the extent that consumers have any pre-existing beliefs about the sodium content of Lean Cuisine entrees, they likely believe that such products are high in sodium, not low. IDF 87-89. Further, Stouffer cites no evidence that preexisting beliefs affected the survey results attained by Dr. Zinkhan; respondent's objections to the study are wholly theoretical.

On the present record, it appears that the Zinkhan test was sufficiently reliable to constitute probative evidence on the issue of ad meaning. We therefore find that reliable and probative extrinsic evidence corroborates our conclusion, based on our facial analysis of the ads, that the Stouffer Lean Cuisine ads communicate a low sodium message.

III. ORDER COVERAGE

It is well settled that the Commission can issue orders containing fencing-in requirements. *See, e.g., FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). This discretion is limited by two constraints. First, the order must be sufficiently clear and precise to be understood. *See, e.g., FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965). Second, the order must bear a reasonable relationship to the unlawful practices. *See, e.g., Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946).

Complaint counsel argue in their cross appeal that the ALJ erred in narrowing the notice order's claim coverage because he improperly weighed and evaluated the evidence of the seriousness and deliberateness of the violations and failed to consider the transferability of the type of claims made. CAB at 73-74.

The three criteria used by the Commission to determine whether order coverage bears a reasonable relationship to a particular violation of Section 5 include: (1) the seriousness and deliberateness of the violation; (2) the ease with which the violative claim may be transferred to other products; and (3) whether the respondent has a history of prior violations.³² All of the three elements need not be present to warrant fencing-in relief. *See, e.g., Kraft*, 114 FTC at 142 (lack of history of prior violations did not make fencing-in improper).

In considering these three elements, the Commission looks both to the presence or absence of a particular element and to the circum-

³² *See Kraft*, 114 FTC at 139, 970 F.2d 311 at 326; *Thompson Medical*, 104 FTC at 833.

stances as a whole.³³ Consideration of the three elements leads us to conclude that two of them -- (1) the deliberateness and seriousness of the violations and (2) the transferability of the unlawful practices to other products -- combined with the overall circumstances justify extending the order beyond the products for which the challenged claims were made.³⁴

The ALJ articulated the proper standard for deciding whether fencing-in relief was appropriate, listing the criteria identified above. The ALJ determined that Stouffer knew that its low sodium claim was deceptive. He appears to have found more compelling, however, his assessment of the campaign as one of not long duration that cost far less than the amounts spent on other campaigns where the Commission has found serious violations, such as those in Kraft and Bristol-Myers.³⁵ Finding, in addition, that "Stouffer only makes frozen food products and markets one other line . . . for which nutritional claims are not made . . ." (ID at 39) and that "[t]ransferability of the violation by itself is not sufficient to justify a broad fencing-in order" (*Id.*), the ALJ concluded, "[t]his was a miscalculation rather than a blatant disregard for law. Therefore, a broad order need not issue in this case." *Id.* We disagree.

The seriousness of the claim stems from the overall health ramifications of any sodium claim and, particularly, of a claim that a product is low in sodium when it is in actuality relatively high in that ingredient. The seriousness of the violations here is enhanced by the fact that consumers cannot readily judge for themselves the truth or falsity of a low sodium claim. *See Kraft*, 114 FTC at 140. The seriousness of the violation is further increased by the health-related nature of the low sodium claim. There is medical evidence supporting a link between sodium consumption and high blood pressure, for some people, on which basis such organizations as the National Academy of Sciences, the American Heart Association, and the Surgeon General of the United States recommend that consumers limit their daily sodium intake. *See IDF* 171.

The cost and extensiveness of the ad campaign are not determinative, but they too may be relevant in assessing the seriousness and

³³ *Sears, Roebuck & Co.*, 95 FTC 406 (1980), *aff'd*, 676 F.2d 385, 392 (9th Cir. 1982).

³⁴ Stouffer does not have a history of prior violations.

³⁵ *Bristol-Myers Co.*, 102 FTC 21 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).

deliberateness of a violation. The Stouffer ad campaign that the Commission finds to be deceptive ran from January 1990 through August 1991. This campaign cost three million dollars and reached millions of consumers nationwide. IDF 33. The print ads at issue, (CX-1 through CX-6) appeared in eighteen different magazines from January 1990 through the first four months of 1991, including such nationally distributed periodicals as *People*, *Newsweek*, *Good Housekeeping*, and *Ladies Home Journal*. IDF 37, 39, 42. The radio advertisement, *Anniversary Turkey* (CX-7), was played on over 230 radio stations from June through August 1991. IDF 44. Such a distribution scheme would have reached approximately 70 percent of the population of the United States. Block, Tr. 797-798. While not necessarily expensive when compared to campaigns that included television advertising, the campaign was far-reaching. Both the cost and the length of an ad campaign are measures of how widely the ads were disseminated, but they are not the only such measures. Here, the publication of print ads in magazines of nationwide distribution and the broad distribution of the radio ad brought the objectionable ads to large numbers of consumers.³⁶ We believe that the ads' exposure contributed significantly to the seriousness of the violations before us. The evidence as to the success of the campaign in reaching consumers, therefore, weighs in favor of a broader order.

As the ALJ found, the record also shows that Stouffer was aware of the potential risks and benefits of focusing on sodium in its ads. As the campaign began in 1990, a Tatham memorandum reporting on a telephone conference with Richard B. Annett, Stouffer's Group Marketing Manager for Lean Cuisine, noted that Stouffer "informed [Tatham] that 'lower' sodium or 'controlled' sodium were acceptable terms but 'low sodium' was not possible." CX-44a. It appears, therefore, that Stouffer was well aware that a low sodium claim was inappropriate for Lean Cuisine (IDF 169-170) and that the characterization of sodium was a delicate matter.

Despite the delicate nature of the sodium message, however, the message projected consistently throughout the ad campaign stressed what Mr. Annett described to Tatham in a memorandum of January 26, 1990, as the "buzz words" used by competitors, such as "health" and ingredients with negative connotations like sodium, fat and cholesterol. CX-26. Mr. Annett instructed Tatham:

³⁶ See *Thompson Medical*, 104 FTC at 833-34 (analyzing dissemination of certain claims that ran only in print ads in finding that broad fencing-in was warranted).

NOTE THE STRONG 'BUZZ WORDS' [our competitor] USES IN THEIR PRINT:

HELPS YOU LIMIT CHOLESTEROL, SODIUM, AND FAT.
NO MORE THAN 10G OF FAT.
FOR SODIUM WATCHERS.

THESE ARE THE TYPES OF HOT BUTTONS WE MUST USE. THEY [competitors] HAVE TAKEN NEGATIVES AND TURNED THEM INTO POSITIVES.

Id. Mr. Annett's memorandum also critiques one of Tatham's suggested ads for the Lean Cuisine campaign, saying:

IT DOESN'T SCREAM HEALTH ENOUGH. . . . THE USE OF 'LEAN' IS EXCELLENT, *I.E.*, LEAN ON CALORIES, FAT, AND CHOLESTEROL, BUT SODIUM SHOULD ALSO BE INCLUDED.

Id. Mr. Annett's directions to Tatham provide context for the implied low sodium claims we have found deceptive and, in doing so, they enhance the seriousness of the claims by reinforcing their relationship to good health.

For these reasons, we find Stouffer knew or should have known that the ads were likely, through their words and images, to communicate a false low sodium claim. ID at 36, 39. We find that under these circumstances, Stouffer's action was deliberate. *See Thompson Medical*, 104 FTC at 835.

We also find that the risk of transferability of the violation justifies broader order coverage. False nutrient content claims regarding the amount of sodium in frozen food appear to be readily transferable to claims for other nutrients and ingredients. In *Kraft*, 114 FTC at 141, the Commission noted that "[T]he violations in this case are readily transferable to other Kraft cheese products," citing *Thompson Medical*, 104 FTC at 837, and *American Home Products*, 98 FTC 136, (1981), *aff'd*, 695 F.2d 681 (3rd Cir. 1982), where the Commission noted that "The effort to misrepresent the nature of ...[an] ingredient is a technique that could easily be applied to advertising of OTC drug products other than [this one]."³⁷ The same could be said in the present matter. Stouffer's false sodium claims could

³⁷ *Thompson Medical*, 104 FTC at 837; *American Home Products Corp.*, 98 FTC at 405.

easily be transferred to any nutrient or ingredient in its frozen food products.

Although Stouffer has no history of prior violations before the Commission, that factor alone is insufficient to overcome the factors discussed above. On balance, therefore, we believe that broader order coverage is warranted and that the order should apply to all nutrients and ingredients in Stouffer's frozen food products.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The Commission today issues a final order and opinion holding that Stouffer Foods Corporation ("Stouffer") violated Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. 45 and 52 ("FTC Act"), by making false and deceptive advertising claims concerning the sodium content of its Lean Cuisine frozen entrees. I concur in the order and, as far as it goes, in the opinion.

As the majority properly states, a decision to impose fencing-in relief ordinarily rests on consideration of three criteria, although not all three need be present to warrant fencing-in relief. Slip op. at 28. These criteria are: (1) the seriousness and deliberateness of the violation; (2) the transferability of the unlawful conduct to other products; and (3) any history of past violations. *Thompson Medical Co.*, 104 FTC 648, 833 and n.78 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *see also*, *Kraft, Inc.*, 114 FTC 40 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 1254 (1993) (absence of history of past violations did not make fencing-in improper). The majority has concluded, and I agree, that Stouffer's violations of the FTC Act are readily transferable and that they are serious and deliberate. Based on these findings, the Commission imposes broad fencing-in relief.

I write separately because I believe that it is necessary to address an issue not addressed by my colleagues before finding that the violation was deliberate and, therefore, before imposing fencing-in relief. In particular, I think it necessary to weigh the evidence surrounding Stouffer's complaint to an industry self-regulatory organization about advertisements similar to those of Stouffer that were run by one of its competitors and the organization's response to that complaint. I also rely on additional documentary evidence

reflecting Stouffer's intentions regarding sodium claims in its advertising campaign.¹

The facts cited in the majority opinion (*Id.* at 30-33) provide tenuous support for the conclusion that Stouffer's violations were deliberate. I need not decide, however, whether the evidence cited by the majority is sufficient, because additional facts in the record persuade me that Stouffer's violations were deliberate.

The majority asserts, with little explanation, that Stouffer understood the "delicate nature of the sodium message" and that, despite this delicacy, the company strongly urged Tatham/RSCG ("Tatham"), its advertising agency, to "note the strong buzz words" used by competitors, make liberal use of "hot buttons" like "HELPS YOU LIMIT . . . SODIUM" and "FOR SODIUM WATCHERS" and make sure that advertisements for Lean Cuisine "SCREAM HEALTH" by including references to the products' being "LEAN" on sodium. Slip op. at 32-33 and CX-26. A mere direction to use words and phrases likely to capture a consumer's attention, even in a sensitive context, however, does not necessarily warrant a conclusion that any misleading impressions those words and phrases might convey are deliberate. Identifying catchy language to attract the attention of consumers is fundamental to the development of an effective advertisement.

The record contains additional facts not discussed by the majority that support the Commission's finding that Stouffer's violations were deliberate. It is important to address these facts both for the purpose of supporting the Commission's decision to impose fencing-in relief and because Stouffer argues that these same facts show a lack of intention rather than a deliberate effort to mislead. Reply and Answering Br. at 5-6.²

¹ I also would reverse the conclusion of the Administrative Law Judge that "the failure to disclose adequately the sodium content in milligrams" was not "unfair or deceptive" and that "while respondent failed to disclose adequately that 1 gram equals 1000 milligrams, that fact is immaterial" (ID at 38-39), that is, important to consumers in making their decisions to purchase Stouffer's product.

Judge Timony found that Stouffer's consumer research in 1988 showed the importance of information about sodium to consumers, showing them to be "information hungry" and interested in knowing "the precise cholesterol, fat, and sodium levels." IDF 175. He also found that Stouffer knew that "a frozen entree containing 600 or more milligrams of sodium could turn consumers off." *Id.* and exhibits cited therein. In my view, this evidence demonstrates that although some consumers might not know at what level sodium consumption might be harmful, they consider information about sodium content material to their purchasing decisions and some were likely to consider levels of over 600 milligrams unhealthy.

² For example, Stouffer argues that "[i]n a transparent distortion of the record, complaint counsel omit the fact that the NAD expressly responded to Stouffer by advising that there was no basis to believe that the use of grams rather than milligrams of sodium was misleading." *Id.*

Stouffer's directions to its advertising agency did not occur in a vacuum. They followed the rejection, in April 1987, by the National Advertising Division ("NAD")³ of a complaint drafted by Stouffer's in-house counsel and submitted by Stouffer's Marketing Manager, Richard Annett, about a competitor's similar claim. Stouffer argued to NAD that a competitor's advertisements for a frozen entree were "blatantly misleading to the consuming public" because (like Stouffer's later Lean Cuisine advertisements) the competitor's advertisements stated the product's sodium content in grams rather than milligrams. Stouffer further complained that the rival firm had "intentionally misrepresented the sodium content in this product." CX-24.

NAD declined to act on Stouffer's complaint, finding "no basis to believe" that the claim "is misleading to consumers." RX-12A. NAD asked Stouffer to submit any consumer research that would support the complaint. IDF 22. Stouffer denied having any such empirical support for its complaint, and it produced none in response to NAD's invitation. It seems reasonable to assume, however, that Stouffer and its counsel would not have filed such a strongly worded complaint with NAD as a frivolous exercise and that with or without empirical basis, Stouffer must have been seriously concerned about the potential effects of the challenged claim.

Despite the concern, Mr. Annett subsequently sent the memorandum to Tatham, instructing it to emphasize the healthful aspects of Stouffer's product, particularly its "lean" sodium content. CX-26. Stouffer appears to have decided, in light of NAD's rejection of its complaint, to meet the competition and to use and capitalize on the phrase "less than 1 gram of sodium" that the company previously had argued was misleading. The advertisements at issue here were created after the memorandum was conveyed to Tatham and the instructions in the memorandum had been reinforced by discussions between Stouffer and Tatham during the development of the campaign. *See, e.g.*, CX-40.⁴

³ The National Advertising Division of the Council of Better Business Bureaus examines and issues decisions on complaints made to it by industry members against their competitors. NAD often is successful in getting advertisers to withdraw or modify claims that it has found unsubstantiated or otherwise misleading.

⁴ The record shows that in the new Lean Cuisine advertisements, Stouffer intended the "less than 1 gram of sodium" claim, which it had argued to NAD was misleading, to have a "disclaimer" (CX-40) with respect to the health-related sodium claim made in the body of the advertisements. The disclaimer presumably was intended to limit the message conveyed by the rest of the advertisement, which the Commission has found was a message of "low sodium." Tatham's conference report on one of its discussions of the disclaimer with Mr. Annett records an agreement that the disclaimer ("All Lean

Stouffer's argument on appeal suggests that it relied on NAD's decision that the "less than 1 gram of sodium" claim was not deceptive.⁵ Not only is reliance on NAD's response misplaced, but the fact that Stouffer had considered the competitor's claim sufficiently misleading to challenge it with NAD tends to show that Stouffer was on notice that, regardless of NAD's decision, a "significant minority of reasonable consumers" (*Cliffdale*, 103 FTC at 164-66) might well take a misleading "low sodium" claim from the competitor's advertisement and, more importantly, from its own advertisements for Lean Cuisine.⁶

On the basis of the evidence discussed in the Commission's opinion and this separate statement, I find that Stouffer's violation was deliberate and, therefore, that the fencing-in relief is appropriate.

FINAL ORDER

This matter has been heard by the Commission upon the appeals of respondent Stouffer Foods Corporation and complaint counsel and upon briefs and oral argument in support of and in opposition to the appeals. For the reasons stated in the accompanying Opinion, the Commission has determined to affirm the Initial Decision of the Administrative Law Judge, except as otherwise noted, and enter the following order. Accordingly,

I.

It is ordered, That respondent Stouffer Foods Corporation, a corporation, its successors and assigns, and its officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the adver-

Cuisine entrees have been reformulated to contain less than 1 gram (1,000 mg.) of sodium") would be "place[d] in mouse type." *Id.* The deliberate decision to put the explanatory material in "mouse type" suggests an intention to undermine the disclaimer's effectiveness and to leave virtually intact the overall message conveyed by the advertisement of low sodium content. This intention is further strengthened by the language in the report stating the additional agreement to "[p]lace in bold type 'Less than 1 gram of sodium.'" *Id.*

⁵ Although the Commission often agrees with the decisions of industry self-regulatory organizations such as NAD regarding whether particular claims are misleading, the decisions of such organizations are not controlling in cases before the Commission.

⁶ In both *Kraft*, 114 FTC at 140, and *Thompson*, 104 FTC at 834-35, the Commission relied on the fact that the companies had received warning from others regarding the potential that the advertisement at issue might not be true. Here, the warning originated within the respondent company and should be given at least as much weight by the Commission, if not more.

tising, labeling, offering for sale, sale, or distribution of any frozen food product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting in any manner, directly or by implication, through numerical or descriptive terms or units of measurement, or by any other means, the existence or amount of sodium or salt or any other nutrient or ingredient in any such product. Provided, however, that if any representation covered by this part either directly or by implication conveys any nutrient content claim defined (for purposes of labeling) by any regulation promulgated by the United States Food and Drug Administration or, if applicable, by the United States Department of Agriculture, compliance with this part shall be governed by the qualifying amount for such term as set forth in that regulation. Provided, further, however, that nothing in this part shall prohibit any representation as to the amount of sodium or salt or any other nutrient or ingredient in any frozen food product if such representation is specifically permitted in labeling, for the serving size advertised or promoted for such product, by any regulation promulgated by the United States Food and Drug Administration or, if applicable, by the United States Department of Agriculture.

II.

It is further ordered, That respondent Stouffer Foods Corporation, its successors and assigns shall, for three (3) years after the date of the last dissemination of the representation to which they pertain, maintain and upon request make available to the Federal Trade Commission for inspection and copying all advertisements containing any representation covered by Part I of this order.

III.

It is further ordered, That respondent Stouffer Foods Corporation shall distribute a copy of this order to its operating divisions, to each of its managerial employees, and to each of its officers, agents, representatives, or employees engaged in the preparation or placement of advertising or other material covered by this order and shall secure from each such person a signed statement acknowledging receipt of this order.

IV.

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

V.

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

By the Commission.¹

¹ Prior to leaving the Commission, former Commissioner Owen and former Commissioner Yao each registered a vote in the affirmative for the Final Order and the Opinion of the Commission in this matter.