

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.)

