EXHIBIT 1

Sanderson Farms, et. al. v.
Tyson Foods, Inc., 08CV210
PLTF 010006

Sanderson Farms, et. al. v.
Tyson Foods, Inc., 08CV210
PLTF 010041

PLTF HRG 00113

PX-015

Sanderson Farms, et. al. v. Tyson Foods, Inc., 08CV210
PLTF 010042

PLTF HRG 00114

PX-016

Sanderson Farms, et. al. v. Tyson Foods, Inc., 08CV210
PLTF 010060

PLTF HRG 00115

PX-017

EXHIBIT 2

Smarter **Takeout**

Hormones & Your Weight

Help for **Headaches**

March/April 2008

WeightWatchers

LOSE BIG
Lighten Up

50 FRESH, EASY **RECIPES**

Shape Up!
Join Our **WALKING** Clinic page 107

4 **THINGS TO DO *BEFORE* YOU LOSE**

25 *Diet-Friendly* **TRAVEL IDEAS**

U.S.A. $3.95
$3.95US
04>
0 74470 01332 7
WeightWatchers.com

The taste that *fits.*

Tyson

Great-tasting, recipe-ready chicken from Tyson – the easy way to eat healthy.

No preservatives and raised without antibiotics that create antibiotic resistance in humans.

Chicken and Sun-Dried Tomato Pasta

Prep 15 min. Cook 5 min. Total 20 min. Servings 4

- 2 (7.5 oz.) pkgs. Tyson® Grilled Chicken Breast Strips
- 8 oz. uncooked linguine
- 1 tablespoon olive oil
- 2 cloves garlic, minced
- ½ cup bottled roasted red pepper, cut into bite-size pieces
- ⅓ cup thin strips oil-packed sun-dried tomatoes
- ¼ teaspoon crushed red pepper flakes
- 3 tablespoons thin strips fresh basil
- 2 medium green onions, thinly sliced
- 2 tablespoons shredded Parmesan cheese

1. Prepare linguine in nonstick Dutch oven according to package directions. Drain; set aside and keep warm.
2. Meanwhile, heat olive oil in large nonstick skillet over medium heat. Add chicken and garlic; cook and stir 1 minute. Stir in red pepper, sun-dried tomatoes (with liquid) and pepper flakes; cook and stir 2 minutes longer. Stir in 3 tablespoons water or chicken broth.
3. Place chicken, hot pasta and remaining ingredients – except Parmesan cheese – in Dutch oven used to cook pasta. Over low heat, toss to mix. Add Parmesan cheese; toss to mix. Serve immediately.

ape up with Tyson and Denise Austin!

Get a **FREE*** Denise Austin Get Fit Fast full-length fitness DVD when you buy any *Tyson*® Frozen or Refrigerated Ingredient Meat or Canned Chicken product. Simply mail this form, one proof of purchase and a check or money order for $3.99 shipping and handling to Denise Austin DVD Offer, P.O. Box 44489, Eden Prairie, MN 55344 or for more details, visit www.tyson.com. Orders must be received by April 30, 2008. While supplies last.

Name: _____

Address: _____

_____

Zip: _____

Also look for these other Denise Austin DVDs available soon! *Yoga Body* • *Burn* • *Burn Fat Fast* • *Hit the Spot*

*Plus $3.99 shipping and handling.

Sanderson Farms et. al., v.
Tyson Foods, Inc., 08CV210
PLTF 007727

EXHIBIT 3

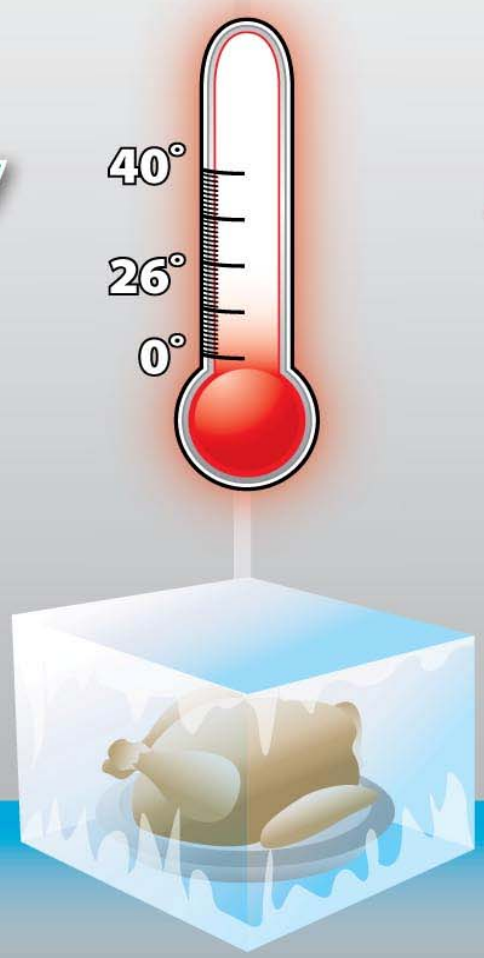
National Broiler v. Voss (9th Cir. 1994)

- Conflict b/w USDA and state
  - USDA defined "fresh" as 0-40 degrees; state advertising statute differed (prohibited advertising chicken kept at 25 or below degrees or lower)
- Holding: USDA preempted state law ONLY as to label ---- -NOT advertising
  - ***Poultry company could say "fresh" on the label -- but could NOT advertise "fresh"***
- Here even greater reason for USDA to not prevent false advertising case ---- Lanham Act is a FEDERAL statute

Nat'l Broiler Council v. Voss, 44 F.3d 740 (9th Cir. 1994)

Label

"Fresh"



Advertising

"Fresh"

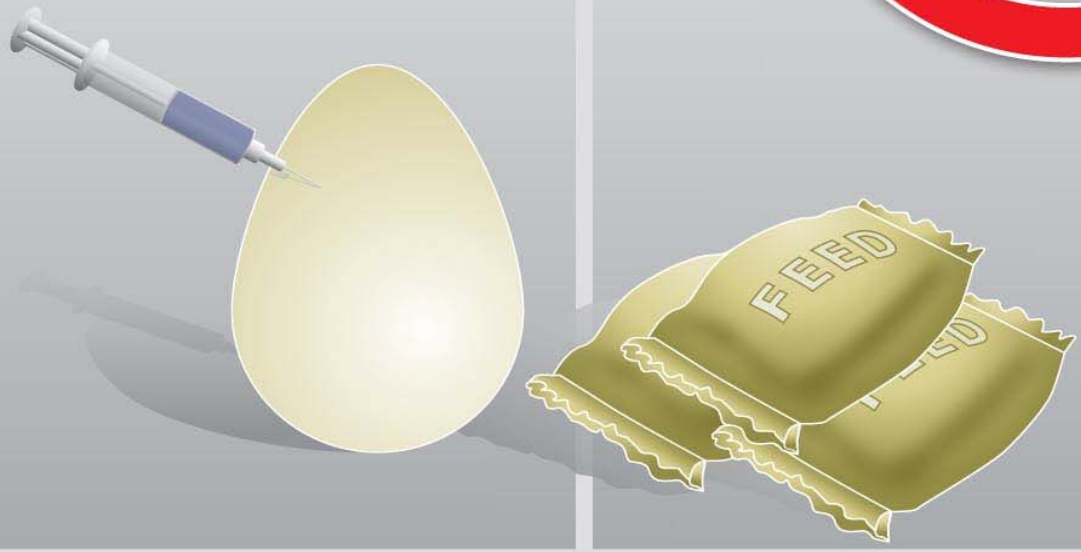
PX 202

Sanderson v. Tyson

Label

"Raised Without Antibiotics That Impact Antibiotic Resistance in Humans"

Advertising



PX 204

No "Immunity"

1. Tyson does not cite a single USDA case
2. USDA lacks jurisdiction over advertising
   - USDA power limited to the ***label*** under Poultry Act.
     - No control over non-label advertising
     - No authority to approve advertising
     - No enforcement authority to go after false advertising
   - USDA acknowledged lack of control in this case.
     - Email – "no control" over television ads

Estoppel

- Hogberg:
  - Purchased massive advertising months after USDA revocation
  - "In my mind, no one should be holding up anything because of the RWA labeling issue…GO! GO! GO!" (PX 108 at 936-37)


RAISED WITHOUT ANTIBIOTICS.
100% ALL NATURAL™ FRESH CHICKEN
Tyson
THANKS MOM.
LAMAR

EXAMPLES OF LANHAM ACT CASES

- *JTH Tax v. H&R Block* (E.D. Va. 2001)
  - H&R Block "fastest refund"
  - (**actually** a loan)
- *J&J v. Proctor & Gamble* (S.D.N.Y. 2003)
  - (Prilosec "One Pill. 24 Hours. Zero Heartburn")
  - (**actually** Prilosec does not begin working until 5 hours after ingestion)
- *Novartis v. J&J* (D.N.J. 2000)
  - (Mylanta Nighttime Strength)
  - (**actually** not uniquely formulated for nighttime use)

- *Tyson: "Raised Without Antibiotics"*
  - (**actually** the chicken is fed antibiotics and injected with antibiotics)

"Raised"

- Secret definition ("hatch to slaughter")
- No disclosure of hatchery practice
- USDA not told about it
- Mr. Hogberg did not even know about it

No reason to believe that consumers would have a clue!

Tyson's Chicken Process

Hatchery		**Embryo injected with antibiotics**
Chicken House		**Chickens fed ionophore antibiotics**
Family BBQ		**I bought this chicken because it's "raised without antibiotics."** **That's "chicken your family deserves."**

FALSE EQUIVALENCE CLAIM

- "Lumping"
- "Me too"
- Tyson lumping itself with brands like Harvestland that are "truly" antibiotic-free
- NOT FAIR COMPETITION

"me too"

Mainstream Most Chicken	Special Organic No Antibiotics Ever
Tyson	

"Raised without antibiotics that impact antibiotic resistance in humans"

Tyson pushes it

- USDA rescinds Sept. 12- Tyson buys advertising two weeks later
- USDA grants extension for label - Tyson leaves up labe**ling**
- Before qualified claim approved, Tyson runs different ads - **GO! GO! GO!**

USDA

REVOKED!

- "Ionophores are antibiotics"
- FDA and AVMA agree

Dec 19, 2007
PX 1

Transition limited to "labels"

Jan 7, 2008
PX 21

Sep 12, 2007
PX 21

SEP | OCT | NOV | DEC | JAN | FEB | MAR | APR

2007 | 2008

Sep 27, 2007
PX 2

Buy Television Ads
To Run Through January

Nov 30, 2007
PX 108

Dave Hogberg:
"No one should be holding anything up because of the RWA labeling issue...

GO! GO! GO!"

Feb 28, 2008
DX 19

"Action Notice"
Our "goal" is to "Remove" and "Destroy" by April 2008

Tyson Conduct

"Damn the Torpedoes!"

PX 200

EXHIBIT 4

-----Original Message-----
From: Stephen Gray [mailto:stephengray@fieldale.com]
Sent: Tuesday, January 22, 2008 3:16 PM
To: Charles M. Hansen, III
Subject: FW: 1-15-08.doc

I did see the ad this morning. So much for the positive development Dr.
Raymond assumes has transpired. I have not heard back from Washington.
Do you have anything new?
Stephen

-----Original Message-----
From: Dick.Raymond@usda.gov [mailto:Dick.Raymond@usda.gov]
Sent: Sunday, January 20, 2008 12:53 PM
To: Stephen Gray
Cc: Philip.Derfler@fsis.usda.gov; Charles.Gioglio@fsis.usda.gov
Subject: RE: 1-15-08.doc

Mr. Gray, I will forward your concerns and comments to the labeling division for their consideration.

It is my understanding that Tyson Foods will be pulling their television
adds that stated simply raised without antibiotics. While FSIS has no control over media advertising as that is an FTC issue, I think this is
a positive development.

_____

From: stephengray@fieldale.com [mailto:stephengray@fieldale.com]
Sent: Tue 1/15/2008 9:34 AM
To: Raymond, Dick -USDA
Cc: stephengray@fieldale.com%inter2
Subject: 1-15-08.doc

Did not go through first time

_____

From: Stephen Gray
Sent: Tuesday, January 15, 2008 10:30 AM
To: 'dick.raymond@usda.gov'
Subject: USDA newest Tyson 1-15-08.doc

I had not heard back from you since you returned from the holidays. I hope you enjoyed the time off and know you have been busy since your return. Again I have posted some of my concerns in the above document. I will be in DC Thursday if the weather permits meeting on this issue. I would like to have your thoughts on how we as an industry can remedy what we feel to be misleading statements. I can be reached at 1-800-241-5400 ext.1115 or by e-mail. Thank you for your time and consideration.

Stephen Gray

EXHIBIT 5

Press Releases

> Printer Friendly Version
<< Back to Press Releases

Tyson to Appeal Chicken Advertising Injunction; Company officials maintain they have acted properly and in compliance

Springdale, Arkansas – April 22, 2008 –Tyson Foods, Inc. (NYSE: TSN) pledges to continue providing consumers with chicken raised without antibiotics that impact antibiotic resistance in humans, despite a legal challenge by two competitors.

Tyson will appeal the ruling of a federal judge in Baltimore, who has granted a preliminary injunction against the advertising Tyson uses to promote this line of products. The company will also seek a stay to suspend the judge's instruction to remove point of sale materials in stores that sell the products.

"We strongly disagree with this decision and will appeal since we firmly believe we have acted responsibly in the way we have labeled and marketed our products," said Dave Hogberg, senior vice president of Consumer Products for Tyson Foods. The company will now take the legal dispute to the U.S. Court of Appeals for the Fourth Circuit in Richmond, Virginia.

"Our company has complied with federal regulations throughout the development of this product line and we intend to stand our ground," Hogberg said, "Our chicken raised without antibiotics that impact antibiotic resistance in humans is more than a labeling and marketing program. It also represents a change in the way our chickens are raised, as we work to provide the kind of product nine out of ten of consumers tell us they want."

After extensive consumer research and the appropriate government approvals, Tyson started marketing its retail fresh chicken under a USDA accepted "Raised Without Antibiotics" label in summer 2007. After the USDA claimed an error in its approval of a fully-disclosed antimicrobial feed ingredient under the claim, the company later sought and received approval for a modified label, which reads "Raised Without Antibiotics that impact antibiotic resistance in humans."

The preliminary injunction does not affect the USDA-approved product label used on Tyson's retail fresh chicken products. It does affect Tyson advertising of the products, however, the company is not currently running any ads and has none scheduled. Company officials were not planning to resume advertising for the campaign until just before the start of the summer grilling season. The decision also affects point of sale materials, such as posters and brochures, which are used in stores where the product is sold. Since this issue directly impacts consumers and customers, the company intends to seek a stay from the U.S. Court of Appeals to suspend the judge's order.

"We've received overwhelming customer support for this product line and intend to do everything possible to continue making it available to our customers and consumers," said Scott Rouse, senior vice president of Customer Development for Tyson Foods.

Tyson Foods, Inc. [NYSE: TSN], founded in 1935 with headquarters in Springdale, Arkansas, is the world's largest processor and marketer of chicken, beef, and pork, the second-largest food production company in the Fortune 500 and a member of the S&P 500. The company produces a wide variety of protein-based and prepared food products and is the recognized market leader in the retail and foodservice markets it serves. Tyson provides products and service to customers throughout the United States and more than 80 countries. The company has approximately 104,000 Team Members employed at more than 300 facilities and offices in the United States and around the world. Through its Core Values, Code of Conduct and Team Member Bill of Rights, Tyson strives to operate with integrity and trust and is committed to creating value for its shareholders, customers and Team Members. The company also strives to be faith-friendly, provide a safe work environment and serve as stewards of the animals, land and environment entrusted to it.

####

Contact: Gary Mickelson 479-290-6111

< < Back to Press Releases

EXHIBIT 6

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

SANDERSON FARMS, INC., et al.,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

----------/

Civil No. RDB-08-210

Baltimore, Maryland

April 22, 2008

3:30 p.m.

TRANSCRIPT OF TELECONFERENCE
BEFORE THE HONORABLE RICHARD D. BENNETT
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: Arnold and Porter LLP
By: RANDALL MILLER, ESQUIRE
NICHOLAS DePALMA, ESQUIRE
555 12th Street, NW
Washington, D.C. 20004

For the Defendant: Weil Gotshal and Manges LLP
By: HELENE JAFFE, ESQUIRE
RANDI SINGER, ESQUIRE
767 Fifth Avenue
New York, New York 10153

Court Reporter Lisa K. Bankins RMR
101 West Lombard Street
Room 5012
Baltimore, Maryland 21201

Proceedings recorded by mechanical stenography, transcript produced by notereading.

P R O C E E D I N G S

THE COURT: Good afternoon.

MS. JAFFE: Good afternoon, Your Honor.

THE COURT: Yes. We have, we're conducting this conference call on the record. I had started the conference call with taking a poll of what lawyers were on the line and realized that counsel for Tyson Food was not yet on. Just again for the record, counsel for the plaintiffs, Sanderson Farms, Inc. and Perdue Farms, Incorporated?

MR. MILLER: Yes. It's Randy Miller and Nick DePalma.

THE COURT: All right. And on behalf of the defendant, Tyson Foods, Incorporated?

MS. JAFFE: Helene Jaffe and Randi Singer.

THE COURT: All right. Ms. Jaffe and Ms. Singer. Anybody else on the line for any of the parties?

(No response.)

THE COURT: All right. The reason I wanted to put you on the line and I want this embargoed for the next hour. I'm about to file a memorandum opinion and order in this case, Sanderson Farms, Inc. and Perdue Farms, Inc. v. Tyson Foods, Inc., Civil Case Number RDB-08-210. I am going to be issuing a preliminary injunction order as requested by the plaintiff in this case for the reasons that are set forth in my memorandum opinion which is I think about thirty pages in length and we can see to it that that is provided to counsel in an email and/or faxed within probably the next 20 to 25 minutes. With respect to the preliminary injunction order, it will refer to

non-label advertisements as distinguished from labels and I'm prepared to read the preliminary injunction order to counsel. But the main

thing I want to address in this conference call is that my order will provide that this preliminary injunction order will take effect at 12:01 a.m., Thursday, May 1, 2008 so as to accord defendant an opportunity to appeal the issuance of this preliminary injunction order to the United States Court of Appeals for the Fourth Circuit. Furthermore, that time period, 12:01 a.m., Thursday May 1, 2008 will also be the time period by which the plaintiffs shall post a bond and that's what I want to go over now is we have not addressed the issue of the amount of the bond to be posted by the plaintiffs in this case. Given that Tyson Foods, Tyson Foods absent a reversal on or before midnight or 12:01 a.m. Thursday morning, May the 1st with respect to their appeal, what is the position of Tyson as to the amount of bond that should be posted in this case? And then I'll hear from the plaintiff, Sanderson Farms, Inc. and Perdue Farms, Incorporated.

MS. JAFFE: Your Honor, the amount of bond will be dependent on the scope of the injunction that you --

THE COURT: Well, why don't I read the whole thing to you? I could probably, it might be easier if I could perhaps, if either -- we can do this by email or we could quickly do this by fax to both sides. It might save some time. We can read through this together. Is that agreeable to both sides for me to do it that way?

MR. MILLER: That's fine with us, Your Honor.

25 THE COURT: Mr. Miller, give me your direct fax number and

1 we'll just fax this right this minute and Ms. Jaffe, you give me your
2 direct line fax number and we'll do this. It will just take a few
3 seconds.
4 MS. JAFFE: Okay. My fax number is 212-735-4800.
5 THE COURT: All right. And that is 212, not 202. Correct?
6 MS. JAFFE: Correct.
7 THE COURT: 735-4800.
8 MS. JAFFE: Right.
9 THE COURT: So that's your fax number in New York?
10 MS. JAFFE: Yes, it is, Your Honor.
11 THE COURT: Okay. And then, Mr. Miller, your fax number?
12 MR. MILLER: Yes, sir. It's 202-942-5999.
13 THE COURT: All right. I'm going to have this faxed. Hold
14 on one second, please. All right. If you all just stand by for one
15 second, we're putting it in the fax machine right now.

MR. MILLER: Yeah. That's our main fax line. So it has to have a cover sheet with our names on it.

THE COURT: Wait a minute. Hold on, Dave. Just a minute then. I was trying to get direct fax lines so we can do this very quickly. How long is that going to take to get to your desk, Mr. Miller?

MR. MILLER: Immediately, but it has to have my name on it.

THE COURT: All right. It will have your name on it. Hold on one second. What is quicker for you all, to e-file this immediately? We're not filing this with the clerk's office yet.

We're sending it just directly to counsel. We're not filing it.

MS. JAFFE: Understood. And Your Honor, let me just be clear. In order to address your question about the amount of bond --

THE COURT: Yes.

MS. JAFFE: -- not only do I need to look at the scope of the injunction clearly, but unfortunately, my client's computer system has been down today and I would request that we have an opportunity to

submit to you what the amount would be as early as tomorrow morning if that would work.

THE COURT: I don't think we need to go through all of that, Ms. Jaffe. I'm prepared to just address this. I mean we're not -- neither side is going to agree exactly on the matter of the nature of this bond, I'm confident, in terms of what Tyson would feel would be cost to it potentially. So we're not going to have a mini trial on this. But I wanted to make sure each side is accorded an opportunity for argument. Just hold on one second.

MS. JAFFE: Okay.

(Pause.)

THE COURT: It appears there's a problem with the fax in my chambers. I'm just going to have to read it to you. So hold on one second here. I can read it to you faster than apparently I can email or fax it from chambers. I'm just going to read it to you verbatim.

For the reasons stated in the accompanying memorandum opinion issued this date pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, this Court having conducted a hearing over four

days between April 7, 2008 and April 10, 2008 and having considered memoranda and oral arguments as well as testimony and evidence submitted by the parties finds that plaintiffs, Sanderson Farms, Inc. and Perdue Farms, Inc. will suffer imminent and irreparable harm from non-label advertising being disseminated by defendant, Tyson Foods, Inc. unless defendant is preliminarily enjoined as set forth in this order. Accordingly, it is this 22nd day of April, 2008 hereby ordered, one, that plaintiffs' supplemental motion for preliminary injunction, paper number 44, is granted as follows: A, that defendant must remove any and all non-label advertisements as defined in paragraphs 1(c) and 1(d), containing language claiming that its chicken products are raised without antibiotics, regardless of whether the statement has qualifying language such as raised without antibiotics that impact antibiotic resistance in humans; B, that the defendant is further enjoined from using non-label advertisements as defined in paragraphs 1(c) and 1(d) containing language claiming that its chicken products are raised without antibiotics, regardless of whether the statement has qualifying language such as raised without antibiotics that impact antibiotic resistance in humans during the pendency of this case; C, That non-label advertising consists of

television commercials, radio spots, print ads, billboards, circulars and posters; D, That non-label advertising also consists of any and all labeling including point of purchase materials that contain either the raised without antibiotics or raised without antibiotics that impact antibiotic resistance in humans language in association with

other promotional language and images regardless of whether such articles are located in proximity to defendant's chicken products; and E, that defendant's labels are exempt from this order and consists of language placed immediately upon defendant's chicken products or container.

So that you understand this, counsel, this is not in the order, it simply means that the labels that are placed on the products or on the container are exempt from this order. Any other form of advertising is not exempt from the order.

Then back to reading the order. It is further, it is hereby further ordered that this order shall take effect at 12:00 a.m.

Thursday, May 1, 2008 so as to accord defendant an opportunity to appeal the issuance of this preliminary injunction order to the United States Court of Appeals for the Fourth Circuit. B, By 12:00 a.m., Thursday, May 1, 2008, plaintiffs shall post a bond in the amount of blank -- and that's to be addressed during this conference call hearing -- not to be released unless by further order of this Court. C, Upon the effective date of this order, pursuant to Rule 65(d)(2)(c), defendant shall notify all retailers and other third parties disseminating its advertising of the scope and effect of this order. This order, D, this order shall remain in effect pending a trial in this matter and, E, the clerk of this court transmit copies of this order and accompanying memorandum opinion to counsel for both parties.

Now that is the wording of the preliminary injunction order.

And so, Ms. Jaffe, I'll be glad to hear from you in terms of what you feel is an appropriate bond in this case and can certainly summarize what you think the bond should be in light of what you believe to be

the potential harm to your client in the event that your client prevails at the trial of case. And then I'll hear from you, Mr. Miller or Mr. DePalma, with respect to the plaintiffs' position. So Ms. Jaffe, go right ahead.

MS. JAFFE: Your Honor, I just received I guess the, a fax of the order.

THE COURT: Yes.

MS. JAFFE: And I just had a question before I address the bond question because it goes to the scope of the injunction --

THE COURT: All right.

MS. JAFFE: -- that you just read.

THE COURT: Yes.

MS. JAFFE: And specifically, I'm looking at paragraph 1(d) --

THE COURT: 1(d). Yes.

MS. JAFFE: -- where you talk about non-label advertising.

THE COURT: Yes.

MS. JAFFE: And you state that it can include point of purchase materials that contain the label claim and then you write quote "in association with other promotional language and images --

THE COURT: Yes.

MS. JAFFE: -- regardless of where that point of purchase

material is located."

THE COURT: Yes.

MS. JAFFE: I'm interpreting that to mean, Your Honor, that if the point of purchase material only has the label claim, the words, no imagery, no pictures, no other words, that that wouldn't fall within the scope of 1(d)?

THE COURT: No. You're not interpreting it correctly. It would fall within the scope of 1(d). So it's clear on this, Ms. Jaffe, the only thing that is not within the scope of this order is the label that was approved by the United States Department of Agriculture with the qualifying language is placed on the chicken product or the container.

MS. JAFFE: Okay. That's the 1(e) language.

THE COURT: That's exactly right.

MS. JAFFE: I'm sorry, Your Honor.

THE COURT: That's okay.

MS. JAFFE: I misunderstood the in association language. Then, Your Honor, we would ask for a bond of $120 million.

THE COURT: All right. Well, that's not reasonable. Is there any further argument you want to make? I'm not -- that's not even within the realm of possibility, Ms. Jaffe. So if you want to address it more realistically, you certainly can. I'm certainly going to require a bond and it's going to be of some considerable amount. But we're not going to have a bond of $120 million being posted. There's nothing that I've seen in four days of hearings in any way,

shape or form that would justify that. So absent any further -- Mr. Miller, let me hear from you on this because that's not very helpful to the Court to have a suggestion of $120 million. What is the position of the plaintiffs on this?

MR. MILLER: Well, we're looking at some cases, Your Honor. We would just mention two or three cases to you that might provide the Court with some guidance. There's a District of Maryland 2007 case,

Natural Lawn of America v. West Group.

THE COURT: Yes. That was Judge Davis' opinion and that had to do with certain, as I recall, it was covenants not to compete were involved in that, is that correct or some trademark violations? I actually have that opinion in here. Hold on one second.

MR. MILLER: Yeah. That was a $50,000 bond in which there was some competition-related matters including I think the Lanham Act.

THE COURT: Yes. I will tell you that $50,000 at your end is way on the low side. We're not making much progress here, but --

MR. MILLER: No. I just want to --

THE COURT: I understand.

MR. MILLER: For the record, like I have the two or three cases I would mention --

THE COURT: All right. I'm familiar with that case and that Natural Lawn of America, the opinion by my colleague, Judge Davis, which I think is at 484 F.2nd 392 -- F. Sup. 2nd. rather. 484 F.Sup. 2nd. 392. I'm familiar with that case and that had to do with franchisees and certain use of software. But go ahead. Do you have

any other cases in terms of because you have market share issues here and cost of advertising and whathaveyou. Go ahead.

MR. MILLER: There's just two other cases that would mention that we just for the purposes of the record. One is the Taceita case. It's Southern District of New York, 2001 in which there was a $100,000 bond for a Lanham Act case. Taceita is T-A-C-E-I-T-A v. Atlantic Horizon.

THE COURT: All right. Go ahead.

MR. MILLER: And I can give you the citation. That's 154 F.Sup. 2nd. 586, the Southern District of New York. The last one I just wanted to mention is I'm sure that you aren't going to find it helpful because it's on the low end. But it was a Lanham Act where the defendant asked for a $20 million bond and in a Lanham Act case and the Court set a $25,000 bond and I'll just tell you that case just so you have it.

THE COURT: All right.

MR. MILLER: It's Goto.com v. Walt Disney.

THE COURT: Right.

MR. MILLER: And the citation there is 202 F.3rd. 1199. And that's the Ninth Circuit, 2000. Now the only sort of point that, a

couple of substantive points that I would mention to the Court is that we're sort of at a sweet spot in the marketing of this, in the sense that according to the defendants, they've been really trying to eradicate sort of the naked claims in the marketplace. And as you know, we think that it's not been fast enough. But they're sort of

predicting that there's not going to be anything left to take down imminently over the 30 days or 60 days or something. So as to that part of the case, it's pretty -- the cases seem to talk about the cost of taking down the advertising, not the speculation about what might, you know, the stain or loss of market share, that kind of thing. That's something -- it's just the cost of taking it down. The qualified claim, raised without antibiotics that impact antibiotic resistance in humans, hadn't been fully launched yet. You know, our understanding is it ran in Weight Watchers, in the current issue of Weight Watchers and the only thing that we saw in the documents -- we asked for everything -- the only other thing that we saw, maybe there's more that we're not aware of, but the only other thing we saw

was some Spanish language television advertising that had the qualified claim. But I don't know the extent of the qualified claim. But I think it would be the defendant's burden to come in and say well, if you take down the qualified claim, we have it running in the various media, this is how much it would cost to take it down. And it seems like they've been, in light of probably this lawsuit and the USDA proceedings, it might be that they haven't fully launched it yet. So that we're not in a situation where there's a massive campaign running, they have to take it down. We're sort of in between the two campaigns.

THE COURT: Maybe it seems to me --

MS. JAFFE: Your Honor --

THE COURT: Yes. Go ahead, Ms. Jaffe.

MS. JAFFE: I'm sorry. I know that you reacted to the 120. Let me explain what is now that I understand your order and I'm looking at it what's involved and I don't want to focus right now on

T.V. ads and print ads, which I think is what my adversary is talking about. But rather specifically why I asked about 1(d). Right now in 8500 stores, there are dividers between our products and competitive products. All of which have to be removed under your order.

THE COURT: Yes.

MS. JAFFE: And that's going to involve people, a lot of labor. We're going to need to change the structure so that our chicken can sit in those wherever they're being put. Otherwise it will fall over on other people's chickens and we'll just have piles. So we need to quickly figure out the shelf dividers, get people into every one of these 8500 stores to pull out the existing shelf dividers and the retailers' help will be needed as well as we've explained during the course of this. We can't just go into the store and pull out the shelves, the shelving that we're talking about here which falls under the scope of your order.

THE COURT: Well, let me make a suggestion to you perhaps that might be attractive to both sides on this. It occurs to me that in my preliminary injunction order, I can note that by 12:01 a.m., Thursday, May 1, 2008, plaintiffs shall post a bond not to be released unless by further order of this Court. And I could indicate in the order today that the amount of that bond shall be noted by an attachment order after the parties have been given the opportunity to

submit briefs on this question. Is that amenable to the defendant?

MS. JAFFE: Yes, Your Honor.

THE COURT: To the plaintiffs?

MR. MILLER: That's fine, Your Honor.

THE COURT: All right. That's what I'm going to do. I'm going to re-word this as follows: That by 12:00 a.m., Thursday, May 1, 2008, plaintiff shall post a bond not to be released unless by further order of this Court. The amount of that bond will be set by this Court by 5:00 p.m. Friday, by Friday, this Friday by 5:00 p.m., Friday, April 25, 2008. Both sides can immediately submit to me and get it to me -- today is Tuesday. It's Tuesday afternoon. You all should get it to me by Thursday morning at 10:00. I'll give you until noon on Thursday. You'll have until noon on Thursday to submit your positions in terms of what an appropriate bond would be in this case. And in order to make sure we expedite this, I don't think we need to have 50-page memoranda submitted on this question. It seems to me

that you all should be -- I understand your position, Ms. Jaffe, as to the costs to be incurred. You can summarize those costs. The plaintiffs can present its position in terms of similar such injunctions which have been issued. It seems to me that you both should be able to do this in about ten pages. You both agree you can do this in ten pages?

MR. MILLER: Yes, Your Honor.

MS. JAFFE: Certainly, Your Honor.

THE COURT: All right. Okay. Then we'll indicate by, I'll

indicate, I'll follow up with a letter order that by noon on Thursday, you'll submit no more than ten pages in terms of your position as to what the bond should be. Obviously, that bond will not be posted, Mr. Miller, until the midnight hour, 12:01 a.m., Thursday, May 1, 2008 because the defendant is going to be given that time to take an appeal to the United States Court of Appeals for the Fourth Circuit. I thought that this was much more realistic to approach it this way than to deal with a bond straight up and then deal with the question of the

defendant's motion to stay and a bond for the defendant. It just seems to me that this is much more workable for everybody. Any objection from the point of view of the plaintiff on that?

MR. MILLER: No, sir.

THE COURT: From the defense?

MS. JAFFE: No, Your Honor.

THE COURT: All right. Okay. So that's what I'll do. I'll modify my order. And I would prefer if you in terms of lack of confusion as officers of the Court, I want you to embargo this until 5:00. I'm going to be filing my opinion in the next half an hour and filing this injunction order and then by 5:00 then it will be released. The press has obviously been calling us. At 5:00, I'll release this to the press. Any objection from the point of view of the plaintiffs on that?

MR. MILLER: No, Your Honor.

THE COURT: From the defense?

MS. JAFFE: No, Your Honor.

THE COURT: All right. Okay. Thank you very much. And I'll wait to get your submissions by noon on Thursday and I will indicate sometime between noon on Thursday and 5:00 on Friday, I'll set the bond to be posted by the plaintiffs in this case. All right. Anything further from the point of view of the plaintiffs?

MR. MILLER: No, sir.

THE COURT: From the defense?

MS. JAFFE: No, Your Honor.

THE COURT: Thank you all for making yourselves available.

(Proceedings concluded.)

I, LISA K. BANKINS, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____ _____
Signature of Court Reporter Date
Transcriber

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Typed or Printed Name

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EXHIBIT 7

REPORT OF NARB PANEL 141

March 14, 2007

Appeal of NAD Final Decision
Regarding Advertising for Perdue Farms Incorporated

Background

This case arose from a challenge filed by Kraft Foods Global, Inc. ("Kraft") concerning claims made by Perdue Farms Incorporated ("Perdue") on labels and in print advertising for Perdue Short Cuts poultry products.

NAD found that use of the phrase "no preservatives" was inconsistent with consumers' reasonable expectations because Perdue Short Cuts poultry products contain two ingredients that are used as preservatives. NAD similarly found that use of the phrase "Fresh Fully Cooked" was inconsistent with consumers' reasonable expectations because the products contained preservatives and were subject to high pressure processing.

Findings and Conclusions

No preservatives

Print advertising and labeling for Perdue Short Cuts poultry products states that the products have "No Preservatives."

Perdue Short Cuts poultry products contain 2% or less of sodium diacetate and sodium lactate, which the label indicates are "for flavor." However, sodium diacetate and sodium lactate can be used as both flavoring and antimicrobial agents.[1] The U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS) has adopted regulations[2] that set limits on the use of sodium diacetate and sodium lactate in meat and poultry products depending on the purposes for which they are used. The regulations approve the use of sodium diacetate and sodium lactate as antimicrobial agents up the following maximum amounts: 0.25% by weight of total formulation for sodium diacetate, and 4.8% by weight of total formulation for sodium lactate. The regulations approve their use as flavoring agents as long as they do not exceed the following amounts: 0.25% for sodium diacetate, and 2.0% for sodium lactate.

Perdue argues that, when used in the concentrations found in Perdue Short Cuts products, sodium diacetate and sodium lactate should be considered to be flavorings and not antimicrobial preservatives. Perdue relies heavily on a determination by the Director of FSIS' Labeling and Consumer Protection Staff in approving the Perdue Short Cuts product label containing the claim of no preservatives. Perdue argues that FSIS is charged with ensuring that meat and poultry labels are

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[1] Antimicrobial agents inhibit the growth of certain pathogens. Perdue did not dispute that antimicrobial agents are "preservatives," and the panel has no question that reasonable consumers would view them as such.

[2] 9 C.F.R. §424.21(c).

not false and misleading, and asks this panel to give extraordinary, if not decisive, deference to the approval of Perdue's label by FSIS staff in light of Congressional intent to place regulation of meat and poultry labels solely within the domain of FSIS.

The initial FSIS review of the Perdue Short Cuts product label focused on use of the word "fresh" on the label, and determined that "fresh" could not be used because FSIS policies prohibit using "fresh" to describe products treated with antimicrobial substances. The inspector cited to the fact that Perdue's Hazard Analysis Critical Control Point (HACCP) program[3] relied on the use of sodium diacetate and sodium lactate as instruments of antimicrobial control. Perdue subsequently modified its HACCP program to eliminate reliance on sodium diacetate and sodium lactate as antimicrobial agents, and after a series of appeals the label was found to be acceptable by FSIS' Labeling and Consumer Protection Staff.

While NAD is not required to defer to federal regulatory rulings,[4] there is no question that NAD and NARB endeavor to harmonize their decisions with applicable federal regulations and rulings. As noted by NAD, however, NAD and NARB will not automatically defer to regulatory determinations. In determining whether to defer to an agency regulatory determination, NAD/NARB decisions make it clear that NAD should consider several factors that include the extent to which the agency considered the specific claim at issue as well as the extent to which the agency issued a decision explaining its rationale and thinking.

FSIS' initial concern with the Perdue Short Cuts label was that it used the word "fresh," a term that cannot be used in products treated with antimicrobial substances, in a product that included sodium diacetate and sodium lactate. FSIS was primarily concerned with the inconsistency between Perdue's assertion that sodium diacetate and sodium lactate were used for flavorings and the fact that Perdue relied on the antimicrobial properties of these ingredients in its HACCP program. After appeals to several levels of FSIS, Perdue ultimately obtained approval from the Director of Labeling and Consumer Protection Staff after Perdue changed its HACCP program to remove reliance on the antimicrobial properties of sodium diacetate and sodium lactate. However, there is no indication that FSIS Labeling and Consumer Protection Staff addressed the question of whether consumers would be misled by a label that said "no preservatives" on a product containing ingredients that have antimicrobial properties. The record does not show that the Labeling and Consumer Protection Staff either considered the impact of the claim on consumers or explained its reasoning with regard to whether the claim of "no preservatives" was false and misleading to consumers. Thus, although respecting and considering the authority and important responsibilities of FSIS, the panel does not believe that the determination made by FSIS staff with regard to the Perdue label should be dispositive of the outcome in this case.

The FSIS staff determination turned in part on the manufacturer's intentions in using sodium diacetate and sodium lactate in its poultry products. The advertising self regulatory process and this

[3] Under FSIS regulations, manufacturers are required to establish and maintain a HACCP program to control pathogens. Manufacturers with more comprehensive HACCP programs are subject to less regulatory oversight.

[4] NAD will not review language on labels where that language is mandated or expressly approved by federal law or regulation. In this case, however, the language on Perdue's label was not mandated and was approved not by regulation but rather by FSIS staff as part of an administrative review.

panel, however, must consider consumer perceptions. No consumer perception study evidence was presented as to what consumers would reasonably take away from the "no preservative" claim. The panel must therefore put itself in the shoes of reasonable consumers to determine the likely consumer takeaway. The panel has determined that the "no preservative" claim would be reasonably interpreted by consumers as confirming the absence of any ingredients that have an antimicrobial effect as used in that product, even if that effect is secondary to other ingredient attributes.

FSIS regulations set the same limits for sodium diacetate when it is used as a flavoring agent or an antimicrobial agent. Additionally, the regulations do not specify a minimum concentration level at which sodium diacetate or sodium lactate may be used as antimicrobial agents.[5] Perdue conceded that, even in the 2.0% or lower concentrations found in Perdue Short Cuts poultry products, sodium diacetate and sodium lactate have "secondary" antimicrobial effects. The panel believes that reasonable consumers would not expect to have these ingredients in a product labeled as having no preservatives, even if these ingredients could be used at higher concentration levels to achieve greater antimicrobial effect.

Fresh fully cooked

The panel considered use of the word "fresh" in the context in which it appears on Perdue's labels, with the additional description that the product is "fully cooked."

NAD precedent indicates that reasonable consumers are likely to interpret "fresh" as meaning that a food is unprocessed and has not been frozen or subjected to other forms of preservation. In this proceeding, no consumer perception evidence was submitted with regard to how consumers reasonably interpret "fresh fully cooked." The panel believes that reasonable consumers would likely interpret this phrase as meaning that the product was fresh at the time it was cooked and was not subjected to processing other than whatever was involved in cooking. The panel agrees with NAD in this case that reasonable consumers would likely interpret "fresh fully cooked" as meaning that the product does not contain preservatives, and also that the product was not subject to processing such as the high pressure processing used as part of Perdue's efforts to decrease the growth of pathogens.[6]

Decision

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[5] The research submitted in the record does not clearly establish a minimum percentage of sodium diacetate and sodium lactate that must be present before an antimicrobial effect is achieved, although there is indication that sodium lactate at a 2.0% level has antimicrobial effects.

[6] The advertising industry self regulatory process does not enforce government labeling regulations or policies. However, it looks to these regulations and policies as useful guides. FSIS policies do not permit use of the word "fresh" to describe any product that has been treated with antimicrobial agents. And while FSIS policies do not specifically prohibit use of the word "fresh" with regard to products subject to high pressure processing, those policies are not intended to provide an exhaustive list of all processing practices that negate describing a product as "fresh." The panel believes that high pressure processing falls within the general intent of FSIS policies that prohibit use of the word "fresh" in describing processed products.

The panel recommends that Perdue discontinue use of the terms "no preservatives" and "fresh" on meat and poultry products that contain sodium diacetate and/or sodium lactate in concentrations sufficient to have any antimicrobial effects. The panel also recommends that Perdue discontinue use of the term "fresh" on meat and poultry products that have been subjected to high pressure processing.

Advertiser Statement

Perdue Farms, Inc. respectfully disagrees with the NARB decision and is particularly concerned with the ongoing uncertainty it introduces into the FSIS label approval function. Nevertheless, we respect the voluntary process and appreciate the Panel's consideration. We are proceeding with plans to reformulate the products in question and will carefully consider the decision in our development of future advertising.

EXHIBIT 8

Federal Trade Commission
Protecting America's Consumers

Enforcement Policy Statement on Food Advertising

May 1994

Introduction

The Federal Trade Commission (FTC) is issuing this statement to provide guidance regarding its enforcement policy with respect to the use of nutrient content and health claims in food advertising. The Commission believes the statement is appropriate in light of the passage of the Nutrition Labeling and Education Act of 1990 (NLEA),1 and the Food and Drug Administration's (FDA) January 6, 1993, issuance of food labeling regulations implementing the NLEA.2

The FTC, FDA, and USDA share jurisdiction over claims made by manufacturers of food products pursuant to a regulatory scheme established by Congress through complementary statutes. Section 5 of the Federal Trade Commission Act (FTC Act) (hereinafter "Section 5") prohibits "unfair or deceptive acts or practices," and, in the case of food products, Sections 12 and 15 of the FTC Act prohibit "any false advertisement" that is "misleading in a material respect."3 FDA's authority is embodied in part in Section 403(a) of the Federal Food, Drug, and Cosmetic Act (FDCA) which prohibits "labeling [that] is false or misleading in any particular."4 Since 1954, the FTC and the FDA have operated under a Memorandum of Understanding,5 under which the Commission has assumed primary responsibility for regulating food advertising, while FDA has taken primary responsibility for regulating food labeling.6 The NLEA amended Section 403 of the FDCA and effected broad changes in the regulation of nutrition claims on food labels. In addition to requiring nutrition information on virtually all food products, the NLEA directed FDA to standardize and limit the terms permitted on labels, and allows only FDA-approved nutrient content claims and health claims to appear on food labels.7 While the NLEA is designed in part to prevent deceptive and misleading claims on labels, Congress also intended that nutrient content and health claims educate consumers in order to assist them in maintaining healthy dietary practices.8 The NLEA also mandated that FDA undertake a consumer education effort to educate consumers about the new food label and the importance of diet to health.9 Therefore, in keeping with its recently expanded and unique jurisdictional mandate, the requirements set forth in FDA's regulations have a broader purpose than preventing false and misleading claims in food labeling.

The NLEA applies only to labeling and did not change the FTC's statutory authority to prohibit deceptive acts or practices under Section 5 of the FTC Act. Nevertheless, in light of the comprehensive regulatory scheme established for food labeling claims by the NLEA, the Commission is issuing this statement to clarify how its own authority relates to issues raised by FDA's food labeling regulations.

The Commission recognizes the importance of consistent treatment of nutrient content and health claims in food advertising and labeling and seeks to harmonize its advertising enforcement program with FDA's food labeling regulations to the fullest extent possible under the statutory authority of the FTC Act. The Commission also recognizes the scientific expertise of FDA in this area. The Commission has traditionally accorded great weight to FDA's scientific determinations in matters of nutrition and health and will continue to do so. In addition, as a general matter, it is unlikely that the Commission will take action under Sections 5 and 12 of the FTC Act regarding nutrient content and health claims if they comply with FDA's regulations.10

The principal elements of the Commission's authority to regulate nutrient content and health claims in food advertising are set forth below in the discussion of the Commission's legal framework in Part II of this statement. Part III of the statement addresses the Commission's approach to harmonization with the NLEA and FDA's regulations in the area of nutrient content claims in food advertising. Part IV of the statement addresses the Commission's approach to health claims in food advertising. Claims made in food advertising may raise issues addressed in more than one section of this statement. Advertisers, therefore, should comply with all relevant provisions of the statement and not simply the provision that seems most directly applicable.

In issuing this statement, the Commission recognizes that the FDA intends its regulatory approach to be dynamic, designed to respond to changes in science and consumer understanding of nutrition and diet-disease issues. Therefore, while the Commission's purpose in issuing this statement is to provide guidance on how it will enforce Sections 5 and 12 in the food advertising area, the statement is not intended to provide a comprehensive analysis of how each of FDA's regulations relates to the Commission's enforcement policy. Instead, this statement focuses on the general issues that are likely to remain relevant to the Commission's regulation of food advertising over time, as specific provisions in the FDA regulations are amended.

Legal Framework for Commission Action

As noted above, the FTC regulates food advertising under its statutory authority to prohibit deceptive acts or practices under Section 5 of the FTC Act. The Commission has set forth its interpretations of this authority in its Deception Policy Statement11 and its Statement on Advertising Substantiation.12 FTC food cases, applying the principles articulated in these statements, have also established a growing body of precedent against which food advertisers can assess the lawfulness of their claims.13

As set out in the Deception Statement, the Commission will find an advertisement deceptive under Section 5 and, therefore, unlawful, if it contains a representation or omission of fact that is likely to mislead consumers acting reasonably under the circumstances, and that representation or omission is material.14

The first step in a deception analysis is to identify representations made by an advertisement. A representation may be made by express or implied claims. An express claim directly makes a representation. The identification of an implied claim requires an examination of both the representation and the overall context of the ad,15 including the juxtaposition of phrases, images, and the nature of the claim and the transaction.16 In other words, in ascertaining the meaning of an advertisement, the Commission will focus on the ad's overall net impression.17

In addition to deception arising from affirmative representations in an advertisement, the omission of material information may also be deceptive in certain circumstances. First, deception can occur through omission of information that is necessary to prevent an affirmative representation from being misleading.18 Second, "it can also be deceptive for a seller to simply remain silent, if he does so under circumstances that constitute an implied but false representation."19 However, "[n]ot all omissions are deceptive, even if providing the information would benefit consumers."20 As with advertisements that contain affirmative representations, the test for whether an omission is deceptive is whether the overall impression created by the ad is deceptive.21

The next step in identifying deception in an ad requires the Commission to consider the representation from the perspective of a consumer acting reasonably under the circumstances.22 Finally, a representation must be material, i.e., likely to affect a consumer's choice or use of a product or service.23 Express claims and claims involving health or safety are presumptively material.24

In addition, objective claims carry with them the implication that they are supported by valid evidence. It is deceptive, therefore, to make an express or implied nutrition or health benefit claim for a food unless, at the time the claim is made, the advertiser possesses and relies upon a reasonable basis substantiating the claim.25 A reasonable basis consists of competent and reliable evidence. In the context of nutrient content or health claims, substantiation will usually require competent and reliable scientific evidence sufficient to support the claim that is made.26 Commission orders generally require that scientific evidence consist of tests, analyses, research, studies or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the relevant profession to yield accurate and reliable results.27 The substantiation must also be examined in the context of the entire body of relevant evidence, particularly if it produces results that are contrary to that body of evidence.

Nutrient Content Claims

A. Claims Describing the Absolute and Comparative Nutrient Content of Foods

As mandated by the NLEA, FDA's regulations define certain absolute and comparative terms that can be used to characterize the level of a nutrient in a food. "Absolute" terms (e.g., "low," "high," "lean") describe the amount of nutrient in one serving of a food. "Relative" or comparative terms (e.g., "less," "reduced," "more") compare the amount of a nutrient in one food with the amount of the same nutrient in another food. With very few exceptions, only these specific terms, and certain approved synonyms, may be used on food labels to characterize the level of a nutrient, although interested parties may petition FDA to authorize new nutrient content terms and synonyms.28

1. Absolute Nutrient Content Claims

Prior to the finalization of FDA's regulations, there was no comprehensive set of standardized definitions for absolute terms such as "low" and "high" to describe the level of a nutrient in a food. Now that FDA has established a standard metric to describe the nutrient content of foods, the Commission will apply FDA's definitions for absolute nutrient content terms when those terms are used in the same context in advertising. In general, the Commission will use FDA's serving size or reference amounts customarily consumed, as set forth in FDA's regulations, in its analysis of a claim. If, however, an advertiser chooses to depict a non-standard serving size in an advertisement, the Commission will require the advertiser to meet the FDA's standard both for the reference amount customarily consumed and for the serving size depicted.29

The Commission has previously indicated that where a claim is subject to the joint jurisdiction of the FTC and the FDA, it will accord significant deference to the FDA's standards.30 Consumer understanding will be improved if the agencies responsible for regulating the use of express or implied absolute nutrient content descriptors have consistent requirements for use of these terms. Multiple governmental definitions for the same terms would have the potential to mislead consumers.31

Similarly, the use in advertising of FDA-defined terms in a manner inconsistent with FDA's definitions is likely to mislead consumers. The uniform and detailed nutrient content information required on food labels, as well as the NLEA-mandated educational effort, are likely to familiarize consumers with both the FDA-defined terms and their definitions, further reinforcing consumer expectation that nutrient content terms are consistently applied.

Furthermore, the principle that certain claims may be deceptive unless they are based on a common standard of measurement or testing is well founded under Section 5.32 At the same time, statements that a food is "high" or "low" in a particular nutrient are objective product claims that imply support by a reasonable basis.33 The Commission generally determines what level of substantiation constitutes a reasonable basis by weighing the six factors set forth in Pfizer, Inc. and subsequent cases.34 Applying those factors here leads the Commission to conclude that to avoid deception, advertisers should meet FDA's definitions for absolute nutrient content claims.

Where FDA has not established any standard metric, such as "low" or "high," for a specific nutrient, the Commission will closely review claims in food advertising that characterize the level of that nutrient.35 The Commission has traditionally deferred to FDA's scientific and public health determinations, and will consult with FDA and other government and public health authorities regarding the significance of the nutrient for which such a claim is made.

2. Comparative Nutrient Content Claims

FDA's regulations also establish definitions for comparative terms that characterize the nutrient content of a labeled food relative to that of a comparison or "reference" food. These definitions require that a food bearing a comparative term meet specified minimum percentage differences in the relevant nutrient. For example, the regulations permit use of the terms "less" and "reduced" only where there is a minimum 25 percent difference in the relevant nutrient. In addition, comparative claims must disclose the reference food, the percentage difference in the nutrient between the labeled and reference food (e.g., "50 percent less fat than our regular cheese"), and quantitative information regarding the absolute amount of the nutrient in the labeled and reference foods (e.g., "fat reduced from 6 g. to 3 g. per serving").

Comparative nutrient content claims that comply with FDA's regulations will generally comply with Section 5.36 The Commission will scrutinize carefully comparative nutrient content claims that characterize nutrient differences in ways that do not comply with FDA's regulations. However, a comparative advertising claim that is accurately qualified to identify the nature of a nutrient difference and to eliminate misleading implications37 may comply with Section 5, even if the nutrient difference does not meet FDA's prescribed differences for purposes of labeling.38

In examining comparative claims, several principles are likely to be applied by the Commission. First, comparative claims should make clear the basis for the comparison.39 Claims should identify the reference food to which the product is being compared to so that the appropriate comparison is clear to consumers. Second, consistent with the position it has taken on the use of descriptors, the Commission believes that advertisers using unqualified comparative terms must meet FDA's minimum percentage difference requirements for those claims. For example, if an ad represents that a food has "less fat than Brand X," without indicating the percentage or absolute difference in fat, the Commission will rely on FDA's 25% minimum difference requirement in determining whether the claim is deceptive.

Third, comparative claims should not overstate the significance of a nutrient difference.40 For this reason, some comparative claims may need to be qualified in a manner sufficient to ensure that consumers are not misled regarding the significance of the nutrient difference. For example, a simple statement of percentage difference for a food that contains only a small amount of a nutrient, such as "our crackers have one-third less fat than Brand X," may suggest that the nutrient difference is greater in an absolute sense than it actually is. This type of claim may need further qualification to prevent the claim from creating a misleading impression (e.g., "one third less fat than Brand X -- theirs has 3 g., ours has 2 g.").

Even where nutrient differences are substantial in an absolute sense, careful qualification may be necessary for products that despite such absolute reductions, still contain appreciable amounts of a nutrient, to ensure that consumers are not misled regarding the absolute level of the nutrient. Thus, a claim such as "20% less fat in our frozen entree compared to Brand X," regarding a product that nevertheless contains a significant amount of fat, may need to identify the quantitative amount of fat in the advertised food and the reference food (e.g., "20% less fat than Brand X -- Brand X has 25 g. fat, ours has 20 g. fat"), particularly in situations where consumers are not likely to be aware that the item is generally high in fat.

In summary, the Commission ordinarily will not challenge comparative nutrient content claims that comply with FDA's regulations, and will carefully scrutinize comparative nutrient content claims that characterize nutrient differences in ways that do not comply with FDA's regulations.41

3. Synonyms for Nutrient Content Claims

In addition to authorizing the use of only a limited set of defined nutrient content terms on food labels, FDA's regulations authorize the use of only certain synonyms for these defined terms.42 The impetus behind Congress's requirement that FDA limit defined terms and synonyms may be found in the educational and public health goals of the NLEA -- to promote consumer understanding of the meaning of the terms through a limited lexicon that will allow consumers to make informed dietary choices.43

The Commission will examine advertising to ensure that claims that characterize the level of a nutrient, including those using synonyms that are not provided for in FDA's regulations, are consistent with FDA definitions. Commission precedent establishes that an advertisement that can reasonably be interpreted in a misleading way is deceptive, even though other, nonmisleading interpretations may be equally possible.44 Thus, when express or implied claims suggest that a food product meets the standard for use of an FDA-defined term, advertisers should ensure that the food actually meets the relevant FDA standard. For example, depending on the context of an ad, use of the phrases "packed with" or "lots of" to describe the level of fiber in a food could convey to some reasonable consumers that the food is "high" in fiber. Because FDA's regulations define the terms "good source" and "high" with respect to fiber,45 consumers are likely to be misled if a "high fiber" claim is implied by an ad for a food that is only a "good source" of fiber.

4. Implied Nutrient Content Claims

As defined in FDA's regulations, an implied nutrient content claim is a claim that:

i. Describes the food or an ingredient therein in a manner that suggests that a nutrient is absent or present in a certain amount (e.g., "high in oat bran"); or

ii. Suggests that the food, because of its nutrient content, may be useful in maintaining healthy dietary practices and is made in association with an explicit claim or statement about a nutrient (e.g., "healthy, contains 3 grams (g) of fat").46

Under this definition, statements about ingredients may or may not be nutrient content claims.47 FDA has generally adopted a case-by-case approach to statements about ingredients that depends on the overall context of the label. The regulations also provide, however, that certain ingredient statements will be treated as nutrient content claims whenever they appear on labels.48

The Commission's approach to implied claims also relies on an analysis of the overall context in which a claim appears. As explained above, the Commission evaluates the overall impression created by an ad, including the ad itself, the arrangement of phrases and images in the ad, and the nature of the claim being made, in order to determine whether a representation is likely to mislead reasonable consumers.49 If the net impression produced by an ad is likely to mislead reasonable consumers, the ad is deceptive and violates Section 5.

FTC food cases and consent agreements also demonstrate the principle that statements regarding ingredients may have nutrient content implications. For example, advertising may implicitly characterize the amount of a nutrient in a product through representations regarding the ingredients with which the product is made.50 An ad may imply that a food is free of a particular nutrient by suggesting that the product is free of ingredients that are essentially the same from the consumer's perspective.51

Consistent with its statutory authority and its commitment to harmonization, the Commission will look closely at advertisements that may implicitly characterize the level of a nutrient. The Commission will give great weight to any FDA determinations concerning ingredient statements in analyzing the net impression conveyed by an ad.

B. Nutrient Content Claim Disclosures

As mandated by the NLEA, FDA's nutrient content labeling regulations require a number of disclosures. These mandated disclosures include, but are not limited to: (1) a referral statement to the nutrition panel, required whenever a nutrient content claim is made;52 (2) disclosure of nutrients (fat, saturated fat, cholesterol, and sodium) present in a food at a level that FDA has concluded increases the risk of diet-related disease, required whenever a nutrient content claim is made;53 and (3) "triggered" disclosures of the amount of certain related nutrients when claims concerning fiber, saturated fat, and cholesterol appear.54

As set forth in Part II above, disclosure of material information that is necessary to prevent deception may be required under Section 5 of the FTC Act.55 For example, it is misleading to fail to disclose qualifying information necessary to prevent an affirmative statement from creating a misleading impression.56 However, a seller's silence in circumstances that do not give a particular meaning to the silence is not deceptive.57 The failure to provide nutrition information that consumers may find useful in improving their diet, while subject to challenge under the NLEA with respect to labels, therefore, is not necessarily subject to challenge as deceptive under Section 5.58 In the context of advertising that makes affirmative nutrient content claims, the Commission's analysis of deception by omission will be based on a consideration of whether a nutrient content claim gives rise to a misleading impression absent disclosure of other nutrition information.

Some of FDA's disclosures appear designed to fulfill the educational goals of the NLEA, which are beyond the scope of the Commission's law enforcement mandate. For example, all nutrient content claims on a label must be accompanied by a statement referring the consumer to the nutrition panel, where complete nutrition information regarding the product is found.59 While a complete nutrition portrait of a food may be useful to consumers, it is unlikely that the absence of this referral statement from an advertisement would render the ad deceptive to consumers.

In contrast, other disclosures mandated for food labels may also appropriately be required under certain circumstances to prevent deception in

advertising under Section 5. In determining whether such disclosures are necessary to prevent deception, the Commission will consider several factors. First, the Commission will carefully evaluate nutrient content claims for foods that contain a nutrient at a level considered by FDA to increase the risk of a diet-related disease.60 When the context of an ad as a whole conveys to consumers the net impression that the food makes only positive contributions to a diet, or does not contain any nutrients at levels that raise the risk of diet-related disease, the failure to disclose the presence of risk-increasing nutrients is likely to be deceptive.61

Second, the Commission will also scrutinize nutrient content claims for cholesterol, saturated fat, and fiber. Congress enacted "special rules"62 requiring that claims for these nutrients trigger disclosure of other nutrients.63 Consumers often may infer that certain nutrient claims imply a characterization of the amount of another nutrient. Similarly, where different nutrients are linked to the same health issue (for example, cholesterol and saturated fat, or dietary fiber and total fat), a claim regarding one of these nutrients is likely to give rise to a misleading impression regarding the benefit of the food absent disclosure of the presence of the other nutrient. Under these circumstances, the failure to correct these misimpressions through adequate disclosures is likely to be deceptive.

IV. Health Claims64

FDA's regulations for health claims in food labeling establish general standards for the use of claims that characterize the relationship of a substance in a food to a disease or health-related condition.65 These general standards include, among other things: (1) limiting authorization of health claims only to those categories for which there is "significant scientific agreement" that the relevant diet-disease relationship is supported by the scientific evidence;66 (2) establishing disqualifying levels for total fat, saturated fat, cholesterol, and sodium, above which foods are disqualified from bearing any health claims;67 (3) for the specific substance that is the subject of a health claim, setting a threshold level for the amount of such substance in the food, that is either sufficiently low or sufficiently high to support the health claim;68 (4) requiring that foods bearing health claims have some minimal nutritional value;69 and (5) requiring that health claims identify those factors, other than dietary intake of the substance, that affect the diet-disease relationship.70 In addition, as required by the NLEA, FDA's regulations provide a petition process for interested persons to seek FDA authorization of additional health claims.71

The Commission shares the concerns underlying the NLEA, and embodied in FDA's regulations, that health claims be adequately substantiated and presented in a manner that is truthful and not misleading. These same principles form the foundation of the Commission's well-established deception and advertising substantiation doctrines, described in Part II above. The Commission's approach to the regulation of health claims in food advertising and FDA's approach to such claims in labeling therefore share many basic elements.

A. Standard for Substantiation of Health Claims

The NLEA directed FDA to promulgate regulations authorizing claims about diet-disease relationships only if FDA determined,

> based on the totality of the publicly available scientific evidence (including evidence from well-designed studies conducted in a manner which is consistent with generally recognized scientific procedures and principles), that there is significant scientific agreement, among experts qualified by scientific training and experience to evaluate such claims, that the claim is supported by such evidence.72

The NLEA directed FDA to apply this "significant scientific agreement" standard in determining whether there was adequate substantiation to permit health claims for ten specific diet-disease relationships.73 After reviewing the scientific literature, FDA issued regulations authorizing a number of specific categories of health claims.

The Commission's standard for substantiation of health claims in food advertising shares many elements with FDA's approach to such claims in labeling. Like FDA, the Commission imposes a rigorous substantiation standard for claims relating to the health or safety of a product, including health claims for food products.74 The Commission's standard that such claims be supported by "competent and reliable scientific evidence" has been more specifically defined in Commission orders addressing health claims for food products to mean:

> tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.75

Thus, both the Commission and FDA look to well-designed studies, including clinical research and other forms of reliable and probative scientific evidence, in evaluating health claims for foods.

In addition, the Commission, like FDA, evaluates substantiation for health claims in the context of the surrounding body of evidence, and does not look to isolated studies, especially if those studies are unrepresentative of the larger body of evidence. However, the Commission does not require food advertisers to establish that there is scientific consensus in support of their claims. Similarly, FDA has clearly indicated that its "significant scientific agreement" standard does not require that such agreement represent a "full consensus among scientists."76

In evaluating health claims, the Commission looks to a number of factors to determine the specific level of scientific support necessary to substantiate the claim.77 Central to this analysis is an assessment of the amount of substantiation that experts in the field would consider to be adequate. The Commission regards the "significant scientific agreement" standard, as set forth in the NLEA and FDA's regulations, to be the principal guide to what experts in the field of diet-disease relationships would consider reasonable substantiation for an unqualified78 health claim.79 Thus, it is likely that the Commission will reach the same conclusion as FDA as to whether an unqualified claim about the relationship between a nutrient or substance in a food and a disease or health-related condition is adequately supported by the scientific evidence.

The Commission also recognizes the importance of the petition process, established under the NLEA and FDA's regulations, as a mechanism for authorizing health claims in food labeling. The Commission will look with particular care at any health claims not specifically considered by the FDA in this process. The absence of an FDA determination that a health claim is scientifically valid will be a significant factor in the Commission's assessment of the adequacy of substantiation for the claim.80

While the Commission's approach to evaluation of unqualified health claims will generally parallel FDA's assessment of whether there is significant scientific agreement supporting the relevant diet-disease relationship, the Commission recognizes that there may be certain limited instances in which carefully qualified health claims may be permitted under Section 5 although not yet authorized by the FDA, if the claims are expressly qualified to convey clearly and fully the extent of the scientific support. At the same time, however, the Commission believes that qualified claims based on evidence that is inconsistent with the larger body of evidence have the potential to mislead consumers, and, therefore, are likely to violate Section 5.

The Commission recognizes the need to scrutinize closely qualified claims to maintain the credibility of health claims in food advertising and labeling. The Commission will therefore be especially vigilant in examining whether qualified claims are presented in a manner that ensures that consumers understand both the extent of the support for the claim and the existence of any significant contrary view within the scientific community.81 In the absence of adequate qualification, the Commission will find such claims deceptive.82

B. Health Claims for Foods That Contain a Nutrient at a Level That Increases the Risk of a Disease

FDA's health claim regulations identify four nutrients -- total fat, saturated fat, cholesterol, and sodium -- the consumption of which has been associated with increased risk of certain diseases or health-related conditions, particularly cancer, cardiovascular disease, and hypertension. For each of these nutrients, the regulations establish levels above which foods containing the nutrient are disqualified from bearing health claims.83 The disqualifying levels set by FDA were based on an analysis of what level of these nutrients in a food would increase, "to persons in the general population, the risk of a diet-related disease, taking into account the significance of the food in the total daily diet."84

The Commission will rely heavily on FDA's scientific determination as to what levels of total fat, saturated fat, cholesterol, and sodium may increase the risk of a diet-related disease or other health condition85 and, while not necessarily prohibiting all health claims in advertising for such foods that contain such levels, will carefully scrutinize health claims for such foods to ensure that the claims are truthful and adequately qualified.86 Situations involving risk-increasing levels established by FDA should not be interpreted as an exhaustive list of instances in which a broad, unqualified health claim for a food may be found deceptive by the Commission.

Unqualified health claims in advertising for such foods are likely to be deceptive when the risk-increasing nutrient is closely related to the subject health claim. Often the presence and significance of such a nutrient will have to be disclosed.Without such disclosures, consumers could infer from the health message that the food does not present any related health risks.87 The failure to disclose the presence and significance of risk-increasing nutrients that are closely related to the health claim for such foods is likely to constitute an omission of a material fact and render the health claim deceptive.88

For example, a claim that a food will reduce the risk of one specified disease is likely to convey to reasonable consumers that the food will not increase the risk of some other health condition closely related to that disease. Thus, an unqualified claim that a food is low in saturated fat and cholesterol, and therefore compatible with a diet designed to reduce the risk of cardiovascular disease, would be deceptive if the food contained so much sodium that it might increase the risk of hypertension and thus, cardiovascular disease.89 To prevent deception, a health claim for such a food is likely to need a disclosure that clearly conveys both the presence and significance of the risk-increasing nutrient.90

Even when the risk-increasing nutrient does not bear directly on the health condition that is the subject of the health claim, it may be necessary to disclose the presence of a risk-increasing nutrient. Depending on context, a specific health claim may convey to consumers a broader message that the food is healthful in all respects. For example, a health claim describing the benefits of calcium in reducing the risk of osteoporosis, when made in advertising for a dairy product that is high in saturated fat, may create the deceptive impression among reasonable consumers that consuming the dairy product will reduce the risk of osteoporosis without increasing the risk of any other health-related condition or disease, for example, heart disease. To prevent deception, a health claim for such a food may need to include a disclosure that conveys the presence and significance of the risk-increasing nutrient.91

In those instances, as outlined above, where disclosure of a risk-increasing nutrient level is necessary to prevent deception, the Commission will carefully scrutinize the disclosure to ensure that it is adequate to convey clearly the limited nature of the health claim being asserted.

C. Nutrient/Substance Levels Sufficient to Ensure Meaningful Health Benefits

In addition to establishing levels of total fat, saturated fat, cholesterol, and sodium, above which foods are disqualified from bearing health claims, FDA's regulations also establish threshold levels for the specific nutrients that are the subject of particular health claims made in food labeling. If a health claim is about the effects of consuming a substance at decreased dietary levels (e.g., lowering saturated fat and cholesterol intake to reduce the risk of coronary heart disease), FDA sets the threshold at a level that it determines is "sufficiently low to justify the claim."92 If a claim relates to the effects of consuming the substance at other than decreased dietary levels (e.g., increasing calcium intake to reduce the risk of osteoporosis), FDA sets the threshold at a level that it determines is "sufficiently high to justify the claim."93 In establishing these "high" and "low" thresholds, FDA specifically considered both whether these levels were sufficient to advance the public health policy of assisting consumers in maintaining healthy dietary practices,94 and whether health claims for foods not meeting such thresholds would be "misleading because the nutrient levels [were] not low enough, or not high enough, to really contribute to the claimed effect."95

The Commission shares FDA's view that health claims should not be asserted for foods that do not significantly contribute to the claimed benefit. A claim about the benefit of a product carries with it the implication that the benefit is significant.96 Thus, consistent with its position on the use

of absolute nutrient content descriptors and unqualified comparative nutrient content claims, the Commission will ordinarily apply FDA's thresholds for specific nutrient levels in examining unqualified health claims for the specific nutrient levels that are the subject of the particular health claim.

The Commission recognizes, however, that there may be certain limited instances in which it is possible to craft a qualified, truthful, and nonmisleading claim comparing the relative health benefits of a food product to other products for which the food can be substituted, even if the nutrient level does not meet FDA's prescribed threshold for the food. Such comparative claims, encouraging consumers to substitute a food that is significantly lower or higher in the relevant nutrient than other foods in the same category, will be unlikely to mislead consumers if the claimed benefit from the substitution will contribute significantly to the claimed health effect.

In addition, such comparative claims must be sufficiently qualified to make clear to consumers that the benefit derives only from the substitution of the advertised food for a significantly less healthful alternative and that the subject product does not otherwise offer an overall health benefit. It may be necessary to disclose the actual level of the nutrient that is the basis for the claim and its significance to prevent deception.97

D. Minimum Nutritional Value for Foods Bearing Health Claims

Under FDA's regulations, any food bearing a health claim must not only meet the threshold level for the specific substance or nutrient that is the subject of the health claim, as discussed in Part IV, Section C., supra, but also must contain a sufficient amount of at least one of six nutrients and substances specified by FDA.98 For example, a food that is sufficiently low in total fat to meet FDA's threshold level for a health claim about dietary fat and cancer would also need to contain one or more of the six specific nutrients or substances at a sufficient quantity to ensure that the food contributed significantly to a healthful diet. Like FDA's threshold levels, this rule ensures that health claims are reserved for foods that contribute significantly to a healthy diet.99

The Commission shares FDA's view that health claims may be misleading to the extent that they encourage consumers to choose foods that provide calories but have little or no nutritional value, under the mistaken belief that their choices will contribute to a healthy diet. The Commission believes that, like claims for foods that fail to meet FDA's threshold levels, health claims for foods with little or no positive nutritional value have the potential to be deceptive since they imply that the health benefit being asserted is significant.100 Therefore, the Commission will generally give great deference to FDA's standards for minimum nutritional value for foods bearing unqualified health claims.

The Commission recognizes, however, that there may be some instances in which it is possible to craft a qualified, truthful, and nonmisleading claim comparing the relative health benefits of a food product to other products for which the food can be substituted, even if the food does not meet FDA's minimum nutritional value standards. While the food bearing such a qualified comparative health claim may not contribute in any absolute sense to a healthful diet, the substitution of such food for a less healthful food in the same category could result in a meaningful contribution toward the claimed health effect without detracting from the healthfulness of the overall diet.101

As noted in Part IV, Section C., supra, such comparative claims must be sufficiently qualified to convey clearly that the claimed health benefit derives only from the substitution of the advertised food for a significantly less healthful alternative.

E. Relevance of Dietary Factors to Claimed Health Benefit

For each category of health claims approved by FDA, the regulations present model health claim language that places the health benefits to be derived from consuming a nutrient in the context of other factors that bear on the relevant disease or health-related condition.102 For example, in authorizing claims about calcium/osteoporosis, FDA developed model language explaining how other factors like gender, age, ethnicity, and exercise bear on the relationship between calcium consumption and osteoporosis.103 FDA's model health claims are intended to ensure that health claims are complete, truthful and not misleading. The model statements therefore include reference to the fact that factors other than consumption of the food also bear on the claimed health effect.104

The Commission shares FDA's concern that health claims for food products may mislead consumers if they oversimplify the diet-disease relationship or otherwise overstate the relative significance of dietary factors in achieving certain health effects. Health claims in food advertising should therefore be sufficiently qualified to avoid implying to reasonable consumers that consumers can achieve the claimed effect simply by consuming the food and without regard to other factors, such as overall diet, exercise, age, or family history, that may either contribute or detract from the claimed effect.

However, while the Commission recognizes the desirability of educating consumers about the role of other factors that bear on the risk of disease and how such factors interact with diet, the Commission must evaluate whether the failure to disclose such qualifying information in a claim about the health effects of a food would mislead consumers. As explained above, not all omissions of information are deceptive in violation of Section 5. In assessing whether an omission is deceptive, the Commission examines whether the omitted information would be necessary to prevent an affirmative claim from creating a misleading impression.105

The Commission will not require food advertisers to include in advertising containing health claims all potentially relevant information about the specific diet-related disease, or affirmatively to disclose that the risk of the disease depends on many factors, unless such disclosure is necessary to prevent consumers from being misled about the significance of diet as one of those factors. Indeed, in many forms of advertising it would not be feasible to include all nutritional information that may be of interest to consumers. While the additional dietary and nondietary factors associated with a health condition may be of interest to consumers, in most cases Section 5 would not require full disclosure of such information to prevent consumers from being misled by statements about the contribution of a particular food to a health effect.

Footnotes

1 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 Simultaneously, the Food Safety and Inspection Service (FSIS) of the United States Department of Agriculture (USDA) issued its own nutrition labeling regulations relating to meat and poultry products. While FSIS's regulations were not mandated by the NLEA, these regulations were intended to implement the NLEA's goals for products regulated by USDA. Although the principles in this statement relate to FDA's regulations, the Commission intends to apply similar principles to consideration of claims for products regulated by USDA.

3 15 U.S.C. §§ 45, 52, 55 (1980).

4 21 U.S.C. § 343(a). USDA's authority is derived from the Federal Meat Inspection Act, 21 U.S.C. § 601(n)(1) (prohibiting labeling of meat or meat products that is "false or misleading in any particular"), and the Poultry Products Inspection Act, 21 U.S.C. § 453(h)(1) (prohibiting labeling of poultry products that is "false or misleading in any particular").

5 Working Agreement Between FTC and Food and Drug Administration, 4 Trade Reg. Rep. (CCH) ¶ 9,850.01 (1971) (hereinafter "Memorandum of Understanding").

6 The Memorandum of Understanding also reaffirms the agencies' shared commitment to prevent deception of the public, to coordinate their work to eliminate duplication of effort, and to promote consistency in handling matters of mutual concern.

7 The NLEA defines a "nutrient content claim" as any claim that expressly or by implication "characterizes the level of any nutrient." 21 U.S.C. § 343(r)(1)(A) (Supp. 1990). A "health claim" is defined as any claim that characterizes the relationship of any nutrient to a "disease or health related condition." 21 U.S.C. § 343(r)(1)(B) (Supp. 1990).

8 "Health claims supported by a [sic] significant scientific agreement can reinforce the Surgeon General recommendations and help Americans to maintain a balanced and healthful diet. Similarly, statements regarding the level of these nutrients in foods will assist Americans in following the Surgeon General's guidelines." House Committee on Energy and Commerce, Nutrition Labeling and Education Act of 1990, H.R. Doc. No. 538, 101st Cong., 2d Sess. 9-10 (1990).

9 NLEA, § 2(c).

10 The Commission notes that the manner in which such information is conveyed in advertising may differ from the way it would be presented in labeling. The Commission cautions advertisers to consider carefully the importance of the context in which they make claims. Some claims that would technically comply with FDA's labeling regulations might be deceptive in advertising if the context of the ad renders the express message of the claim misleading.

11 See Cliffdale Associates, Inc., 103 F.T.C. 110, 176 (1984), reprinting as appendix letter dated Oct. 14, 1983, from the Commission to The Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives ("Deception Statement").

12 FTC Policy Statement on Advertising Substantiation, 48 Fed. Reg. 10,471 (1984), reprinted in Thompson Medical Co., 104 F.T.C. 648, 839 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987) ("Substantiation Statement").

13 See, e.g., cases cited infra notes 26, 29, 32, 36, 50, 51, 74, 75, 81, 87, 96.

14 Deception Statement, 103 F.T.C. at 183.

15 Kraft, Inc., FTC Dkt. No. 9208, slip op. at 7 (Jan. 30, 1991), aff'd, 970 F.2d 311 (7th Cir. 1992), cert. denied, 113 S. Ct. 1254 (1993) (citing Thompson Medical Co., 104 F.T.C. at 789, 799; Cliffdale Associates, 103 F.T.C. at 164; Deception Statement, 103 F.T.C. at 176).

16 Deception Statement, 103 F.T.C. at 176. The Commission may rely on its own expertise in finding claims that are reasonably clear from the face of an advertisement. Kraft, 970 F.2d at 319, and cases cited therein. If the Commission is unable to conclude that an implied claim is conveyed based on a review of the ad itself, the Commission may rely on extrinsic evidence demonstrating that the ad implies a claim. Kraft, slip op. at 7; Thompson Medical, 104 F.T.C. at 789.

17 Kraft, slip op. at 7-8; Removatron Int'l Corp., 111 F.T.C. 206, 292 (1988), aff'd, 884 F.2d 1849 (1st Cir. 1989); Thompson Medical, 104 F.T.C. at 790.

18 Deception Statement, 103 F.T.C. at 175 n.4; see also International Harvester Co., 104 F.T.C. 949, 1057 (1984); Campbell Soup Co., FTC Dkt. No. 9223 (Aug. 18, 1992) (consent order).

19 International Harvester, 104 F.T.C. at 1058.

20 Deception Statement, 103 F.T.C. at 175 n.4; International Harvester, 104 F.T.C. at 1059.

21 Deception Statement, 103 F.T.C. at 175 n.4.

22 Deception Statement, 103 F.T.C. at 177.

23 Id. at 182.

24 Kraft, slip op. at 22-23, Thompson Medical, 104 F.T.C. at 816-17; Deception Statement, 103 F.T.C. at 182-83.

25 Substantiation Statement, 104 F.T.C. at 839.

26 See, e.g., Kraft, slip op. at 2 (scientific evidence required to substantiate calcium content claims and comparative calcium content claims); Bertolli, Inc., FTC Dkt. No. C-3396 (Aug. 17, 1992) (consent order) (scientific evidence required to substantiate claims regarding edible oil's impact on any physiologic function or risk factor for disease or other health benefit); Pacific Rice Prods., FTC Dkt. No. C-3395 (Aug. 17, 1992) (consent order) (scientific evidence required to substantiate claims regarding health benefits derived from consumption of products); see also Thompson Medical, 104 F.T.C. at 822.

27 See Bertolli; Pacific Rice.

28 21 C.F.R. § 101.69(b) (1993).

29 See, e.g., Nestle Food Co., FTC Dkt. No. C-2265 (Jan. 21, 1992) (consent order) and Presto Food Prods., Inc., FTC Dkt. No. C-3480 (Feb. 23, 1994) (consent order) (resolving allegations that low fat claims based on the small serving of nondairy creamers that might be used in coffee were deceptive when made with respect to a larger serving that might be used over cereal or fruit or in cooking).

30 See Thompson Medical, 104 F.T.C. at 826.

31 In the past, courts have upheld the Commission's position that inconsistent meanings for the same terms have the potential to mislead consumers. In FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35 (D.C. Cir. 1985), the court held that Brown & Williamson had deceptively advertised its Barclay cigarettes as "1 mg. tar." The 1 mg. tar rating was a result of the cigarettes' different design, which caused the amount of tar that Barclay cigarettes delivered to smokers to be disproportionately greater than that delivered by cigarettes that were similarly rated under the FTC rating system. Considering the claim against the background of the Commission's tar and nicotine rating system, the court affirmed the Commission's position that the claim misled consumers who had come to rely on the FTC rating system to make comparative assessments regarding cigarettes.

32 E.g., Presto Food Prods., Inc., FTC Dkt. No. C-3480 (Feb. 23, 1994) (consent order); Clorox Co., FTC Dkt. No. C-3427 (May 17, 1993) (consent order); Isaly Klondike Co., FTC Dkt. No. C-3412 (Jan. 28, 1993) (consent order); Nestle Food Co., FTC Dkt. No. C-2265 (Jan. 21, 1992) (consent order).

33 Substantiation Statement, 104 F.T.C. at 839.

34 81 F.T.C. 23, 64 (1972); Thompson Medical, 104 F.T.C. at 813, 821; Bristol-Myers, 102 F.T.C. at 321. These are: (1) the type of product advertised, (2) the type of claim, (3) the benefits of a truthful claim, (4) the ease of developing substantiation for the claim, (5) the consequences of a false claim, and (6) the amount of substantiation that experts in the field believe is reasonable.

35 Under FDA's regulations, a label claim characterizing the level of a nutrient (i.e., a nutrient content claim) is prohibited unless made in accordance with the regulations. 21 C.F.R. § 101.13(b) (1993). However, the label of a product may contain a statement of the amount of a nutrient, such as "1 g. of omega-3 fatty acids" if it does not explicitly or implicitly characterize the level of the nutrient. 21 C.F.R. § 101.13(i)(3) (1993). Thus, statements that merely note the amount of a nutrient without characterizing the level are permitted even for nutrients not approved to appear on the nutrition panel.

36 This principle is already apparent from recent Commission consent orders, which provide safe harbors for those claims specifically permitted in labeling. See, e.g., Nestle Food Co., FTC Dkt. No. C-2265 (Jan. 21, 1992) (consent order) (providing that nothing in the relevant portions of the order shall prohibit certain representations regarding total fat, saturated fat or cholesterol if such representations are specifically permitted in labeling, for the serving size advertised or promoted, by FDA regulation); Isaly Klondike Co., FTC Dkt. No. C-3412 (Jan. 28, 1993) (consent order) (providing that nothing in the Order shall prevent respondent from making representations specifically permitted in labeling for food by the NLEA regulations).

37 As it has in the past, the Commission emphasizes that truthful comparisons may need to be sufficiently qualified to remove deceptive implications. See Policy Statement in Regard to Comparative Advertising, 16 C.F.R. § 14.15 (1979) (comparative advertising regarding objective measurable attributes must have sufficient clarity or disclosures to ensure that such comparisons are not deceptive).

38 For example, a small nutrient difference that appears as part of a claim touting the multidimensional nutritional differences offered by a product is less likely to overstate the significance of that difference than would such a claim standing alone. Thus, an advertiser may seek to signal to consumers that, while it has reduced total fat and saturated fat in its product by 25%, it has also achieved a small reduction in sodium compared with other products in the category. In these circumstances, a truthful claim that makes clear that the sodium reduction is less than the 25% reduction in other nutrients and does not overstate the significance of this incidental reduction is unlikely to mislead consumers.

39 See Policy Statement in Regard to Comparative Advertising, 16 C.F.R. § 14.15 (1979). The Commission's Guides for the Use of Environmental Marketing Claims also include this requirement. 16 C.F.R. § 260.6(d) (1993).

40 See P. Lorillard Co. v. FTC, 186 F.2d 52, 57 (4th Cir. 1950) (advertising claiming that cigarette was lowest in nicotine, tar and resins challenged in part because the difference was, in fact, insignificant); Sun Co., FTC Dkt. No. C-3381 (May 6, 1992) (consent order) (challenging advertising for octane gasoline that represented gas would provide superior power that would be significant to consumers).

41 Although the term "light" is defined in FDA's regulations as a comparative descriptor, the term also has been used to describe the food itself, much like an absolute descriptor such as "low." As reflected in FDA's preamble and regulations, the term also is associated chiefly with substantial reductions in fat or calories. See 58 Fed. Reg. 2351-2358. Given the unique characteristics of the term "light" as reflected in FDA's regulations, it is unlikely that the term can be used in advertising without undue confusion unless the food meets FDA's definitions. Accordingly, the Commission will apply FDA's definition for "light" in determining whether advertising using the term is deceptive.

42 21 C.F.R. § 101.13(b) (1993). Interested parties may petition FDA to authorize additional synonyms. 21 C.F.R. § 101.69(b)(2) (1993).

43 58 Fed. Reg. 2319-20 (1993). See Nutrition Labeling and Education Act of 1990, § 403(4)(2)(A)(i).

44 Chrysler Corp. v. FTC, 561 F.2d 357, 363 (D.C. Cir. 1977); Kraft, slip. op. at 6 n.8. See also Deception Statement, 103 F.T.C at 178 n.21 ("A secondary message understood by reasonable consumers is actionable if deceptive even though the primary message is accurate").

45 21 C.F.R. § 101.54(b) and (c) (1993).

46 21 C.F.R. § 101.13(b)(2) (1993).

47 58 Fed. Reg. 2371 (1993).

48 For example, the regulations state that "a claim that a food contains oat bran is a claim that it is a good source of dietary fiber; that a food is made only with vegetable oil is a claim that it is low in saturated fat; and that a food contains no oil is a claim that it is fat free." 21 C.F.R. § 101.65(c)(3) (1993).

49 Kraft, slip op. at 7-8; Removatron, 111 F.T.C. at 292; Thompson Medical, 104 F.T.C. at 790. See also FTC v. Sterling Drug, 317 F.2d 669, 674 (2d Cir. 1963) (the Commission examines "the entire mosaic ... rather than each tile separately").

50 Kraft, 970 F.2d at 322 (upholding Commission's finding that claims about the amount of milk in processed cheese slices were, in context, implied claims about calcium content).

51 See Estee Corp., 102 F.T.C. 1804 (1983) (consent order) (advertisements that claimed that foods sweetened with high-fructose corn syrup did not contain sugar and were accepted by the American Diabetes Association implied (falsely) that the foods were appropriate for people who needed to avoid sugar).

52 21 C.F.R. § 101.13(g) (1993).

53 21 C.F.R. § 101.13(h) (1993). As discussed in Part IV, infra, these same levels of nutrients serve to disqualify foods from bearing health claims. See 21 C.F.R. § 101.14(a)(5) (1993).

54 See 21 C.F.R. § 101.54(d) (requirements for fiber claims); 21 C.F.R. § 101.62(c) (requirements for saturated fat claims); 21 C.F.R. § 101.62 (d) (requirements for cholesterol claims).

55 Deception Statement, 103 F.T.C. at 176.

56 International Harvester, 104 F.T.C. at 1057.

57 Id. at 1059.

58 Id. at 1058 ("[n]ot all omissions are deceptive, even if providing the information would benefit consumers").

59 21 C.F.R. § 101.13(g) (1993).

60 See North American Philips Corp., 111 F.T.C. 139, 177-84 (1988) (Initial Decision) (according great weight to other government agencies' determinations regarding the significance of a chemical added to drinking water by the water filter and thus whether the failure to disclose this fact was material).

61 Id. at 175 (Commission's complaint alleged, and the Administrative Law Judge found, that failure to disclose that water filter device introduced a potentially hazardous chemical into drinking water was misleading in light of representations that device would remove organic chemicals and clean the water).

62 House Committee on Energy and Commerce, Nutrition Labeling and Education Act of 1990, H.R. Rep. No. 538, 101st Cong., 2d Sess. 20 (1990).

63 21 U.S.C. § 343(r)(2)(A)(iii)-(v).

64 FDA's definition of a health claim includes two basic elements: (1) a substance or nutrient; and (2) the relationship of that substance or nutrient to a disease or health-related condition. 21 C.F.R. § 101.14(a)(1) (1993). Thus, claims on food labels are not governed by FDA's health claims regulations unless they include either express or implied references to both a substance and a disease. FDA's approach to implied health claims is similar to the Commission's in that this definition includes claims in which the disease element is implied through symbols or by other means, looking at the context of the entire label. Id.; see also discussion of FDA's definition of implied health claims, 58 Fed. Reg. 2483 (1993). Like FDA, the Commission examines food claims in the context of the entire advertisement to determine whether an implied health claim is being made. Therefore, the Commission may determine in certain instances, based on its review of the entire context of an advertisement, that a nutrient content claim, even in the absence of any express reference to a disease or health-related condition, conveys an implied health message to consumers.

65 21 C.F.R. § 101.14 et seq. (1993).

66 21 C.F.R. § 101.14(c) (1993).

67 21 C.F.R. § 101.14(a)(5) (1993).

68 21 C.F.R. § 101.14(d)(2)(vi)-(vii) (1993).

69 21 C.F.R. § 101.14(e)(6) (1993).

70 21 C.F.R. § 101.14(d)(2)(iii) (1993).

71 21 C.F.R. § 101.70 (1993). This regulation requires that FDA take final action within 190 days of the receipt of a petition, either to deny the petition or to publish a proposal to amend the regulations to allow the use of the requested health claim.

72 21 U.S.C. § 343(r)(3)(B)(i). This standard is also set forth in FDA's regulations at 21 C.F.R. § 101.14(c) (1993).

73 NLEA, § 3(b).

74 See, e.g., Pacific Rice, FTC Dkt. No. C-3395 (Aug. 17, 1992) (consent order) (claims about health benefits of consuming rice bran cereal challenged as unsubstantiated); see also Thompson Medical, 104 F.T.C. at 822 (claims involving health or safety issues require a "relatively high level of substantiation, typically scientific tests").

75 Gracewood Fruit Co., FTC Dkt. No. C-3470 (Oct. 29, 1993) (consent order); see also Pompeian, Inc., FTC Dkt. No. C-3402 (Oct. 27, 1992) (consent order).

76 58 Fed. Reg. 2505 (1993).

77 See Pfizer, Inc., supra note 34. See also Substantiation Statement, 104 F.T.C. at 840; Thompson Medical, 104 F.T.C. at 821.

78 Unqualified as used in this discussion of substantiation refers to health claims that do not include specific disclosures concerning the extent of supporting scientific evidence.

79 This approach is consistent with the Commission's approach to evaluating the substantiation for claims made for drug products and medical devices regulated by FDA. See, e.g., Removatron, 111 F.T.C. at 305 (FDA's determination of efficacy of hair removal device given substantial weight); Thompson Medical, 104 F.T.C. at 826 (recognizing importance of applying standard consistent with FDA's in evaluating safety and efficacy of a drug product subject to jurisdiction of both agencies).

80 Food marketers should not expect to circumvent FDA's petition process for health claims simply by limiting the assertion of unapproved or unreviewed claims to advertising.

81 See, e.g., National Comm'n on Egg Nutrition (NCEN), 517 F.2d 485 (7th Cir. 1975), appeal after remand, 570 F.2d 157 (7th Cir. 1977), cert. denied, 483 U.S. 921 (1978). The final Commission order in NCEN, as modified by the court, required that the advertiser, if it made any claims regarding the relationship between dietary cholesterol and heart disease, disclose that there was a controversy among experts about the scientific basis for the link between egg consumption and heart disease, and that NCEN was presenting its side of that controversy. Where NCEN characterized the level of scientific evidence, the order further required a disclosure that many medical experts believed that increasing egg consumption might increase the risk of heart disease.

82 In order to be effective, qualifications or disclosures should be sufficiently clear and prominent to prevent deception. See Deception Statement, 103 F.T.C. at 180; Thompson Medical, 104 F.T.C. at 789 n.9, 842-43; see also Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.6(a) (1993). Clarity of language, relative type size and proximity to the claim being qualified, and an absence of contrary claims that could undercut effectiveness, will maximize the likelihood that the qualifications and disclosures are appropriately clear and prominent. See, e.g., Figgie Int'l, Inc., 107 F.T.C. 313, 401 (1986), aff'd, 817 F.2d 102 (4th Cir. 1987). For example, the Commission is unlikely to find a video superscript, without accompanying audio, to be an effective method of disclosure in a television ad. See, e.g., Kraft, slip. op. at 10. As always, the Commission will also consider any extrinsic evidence of the effectiveness of qualifications and disclosures in its determination of whether a claim is deceptive. In making this determination, the Commission will consider all reasonable interpretations of the advertisement. The Commission will find an advertisement to be deceptive if it can reasonably be interpreted in a misleading way, even though other, nonmisleading interpretations may be equally possible. See Kraft, slip. op. at 6 n.8.

83 These specific disqualifying levels are set forth at 21 C.F.R. § 101.14(a)(5) (1993).

84 58 Fed. Reg. 2489 (1993).

85 The Commission has routinely accorded great weight to FDA determinations of the safety and efficacy of food and drug products. See, e.g., Removatron, 111 F.T.C. at 305; Thompson Medical, 104 F.T.C. at 826; see also Sterling Drug, Inc., 102 F.T.C. 395, 768-69, aff'd, 741 F.2d 1146 (9th Cir. 1984), cert. denied, 470 U.S. 1084 (1985).

86 For example, USDA has stated its "intention to publish a proposed rule on health claims in line with FDA's proposal." See 58 Fed. Reg. 632, 664 (Jan. 6, 1993). If so, the regulation's disqualifying level for cholesterol will preclude health claims on the labels of virtually all meat and poultry products. Notwithstanding the regulations, however, the Commission would not prohibit a truthful advertising claim that explains in a nondeceptive manner the health advantages of substituting meat or poultry items that are relatively low in fat and saturated fat for higher fat alternatives (e.g., a claim suggesting the merit of substituting skinless breast of turkey for hamburger). Such claims would assist consumers who

are trying to improve their diets but who are unwilling to forgo all meat and poultry.

87 See, e.g., Campbell, FTC Dkt. No. 9223 (Aug. 18, 1992) (consent order required disclosure of sodium content and recommended maximum daily sodium intake in advertisements making claims about heart disease for soups with more than 500 mg. of sodium per 8-oz. serving).

88 The Commission has traditionally required that material information be disclosed if its absence could mislead reasonable consumers. See Deception Statement, 103 F.T.C. at 182; see also International Harvester, 104 F.T.C. at 1057; North American Philips, 111 F.T.C. at 175, 195 (failure to disclose the fact that a water filter could introduce a harmful chemical into the water was misleading).

89 In Campbell, the Commission charged that claims that the company's soups contained little fat or cholesterol, and were heart-healthy, were deceptive because the company had failed to disclose that the soups were high in sodium. Specifically, the complaint alleged that the high level of sodium was a material fact given that a diet high in sodium can contribute to hypertension, a risk factor associated with heart disease. FTC Dkt. No. 9223 (Aug. 18, 1992) (consent order).

90 A statement indicating both the amount of the risk-increasing nutrient and the recommended maximum daily intake of that nutrient, as determined by FDA, would be one example of an acceptable disclosure, provided such information adequately conveys the health implications of the risk-increasing nutrient. See, e.g., Campbell, supra.

91 Further, the FDA's treatment of health claims in labeling for any food containing a risk-increasing level of a nutrient, as well as the NLEA-mandated educational effort, could well increase consumers' expectations concerning the scope of unqualified health claims, including expectations that the foods do not present any significant health risks.

92 21 C.F.R. § 101.14(d)(2)(vi) (1993).

93 21 C.F.R. § 101.14(d)(2)(vii) (1993).

94 58 Fed. Reg. 2514 (1993).

95 56 Fed. Reg. 60,553 (1992) (discussion of proposed regulations).

96 See, e.g., Gracewood Fruit Co., FTC Dkt. No. C-3470 (Oct. 29, 1993) (consent order). The complaint accompanying the Gracewood consent agreement challenged claims that eating grapefruit could reduce serum cholesterol levels, in part because there was no evidence that the small amount of pectin (the relevant nutrient) in grapefruit was sufficient to cause any meaningful reduction in serum cholesterol. See also Lorillard, 186 F.2d at 57 (advertising claiming that cigarettes were lowest in nicotine, tars, and resins challenged in part because the difference was so small as to be insignificant). Similarly, the Commission's Guides for the Use of Environmental Marketing Claims include the general principle that claims should not be presented in a manner that overstates the attribute or benefit of a product, and that "[m]arketers should avoid implications of significant environmental benefits if the benefit is in fact negligible." 16 C.F.R. § 260.6(c) (1993).

97 See discussion supra at Part III, Section A.2., (comparative nutrient claims).

98 21 C.F.R. § 101.14(e)(6) (1993).

99 58 Fed. Reg. 2522 (1994).

100 See discussion supra at Part IV, Section C.

101 For example, a qualified comparative health claim suggesting that consumers switch from a high fat to a fat-free salad dressing, and indicating that diets low in total fat may contribute to a reduced risk of some forms of cancer, could encourage a dietary choice resulting in a significant health benefit, even if the fat-free salad dressing did not contain sufficient levels of any of the six nutrients or substances specified by FDA.

102 FDA has stated that model health claim language can be paraphrased as long as all mandatory elements of the model statements are addressed. 58 Fed. Reg. 2510 (1993).

103 21 C.F.R. § 101.72(e) (1993). In authorizing other health claims, FDA provides alternative approaches of either expressly enumerating the relevant factors, or stating more simply that the development of the disease depends on many factors. See, e.g., 21 C.F.R. § 101.73 (1993) (governing claims about dietary fat and cancer).

104 58 Fed. Reg. 2511 (1993); see also 21 U.S.C. § 343(r)(3)(B)(iii).

105 Deception Statement, 103 F.T.C. at 176. In J.B. Williams Co. v. FTC, for example, the Commission challenged as deceptive advertising claims that a vitamin and iron supplement would reduce tiredness because the advertiser failed to disclose that those symptoms are usually caused by factors other than vitamin and iron deficiency. 381 F.2d 884, 890 (6th Cir. 1967). See also Keele Hair & Scalp Specialists, 55 F.T.C. 1840 (1959), aff'd, 275 F.2d 18 (5th Cir. 1960) (baldness cure claims challenged for failure to disclose significance of male heredity as cause of baldness, for which cure was ineffective).

EXHIBIT 9

FILED: August 19, 2002

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-1738(L)
(CA-02-240)

THE SCOTTS COMPANY,

Plaintiff - Appellee,

versus

UNITED INDUSTRIES CORPORATION,

Defendant - Appellant

and

PURSELL INDUSTRIES

Defendant.

O R D E R

Appellant United Industries Corporation has filed a motion to stay pending appeal the preliminary injunction entered against it by the district court, as well as a motion to expedite the appeal. A party seeking to stay an injunction pending appeal "must show (1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by

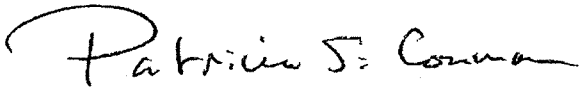
granting the stay." Long v. Robinson, 432 F.2d 977, 979 (4th Cir. 1970).

The Court believes at this point that the Appellant will likely prevail on the merits of the appeal. The Court harbors serious doubt about the sufficiency of the evidence upon which the district court relied to find consumer misunderstanding. The manner in which the focus group discussions were structured and conducted suggests that the focus group evidence should be given minimal weight, and the face-to-face interviews fail to provide insight into the critical question in this case--whether the Appellant's package conveys a message that it kills already established, mature crabgrass. Moreover, the district court's apparently incorrect determination of consumer misunderstanding infected the district court's balancing of the hardships, thus bringing into further doubt the district court's decision to grant the preliminary injunction. This Court concludes that the remaining Long factors favor the Appellant and that a stay of the preliminary injunction is therefore warranted.

Accordingly, pending appeal, the preliminary injunction issued by the district court in this matter is hereby stayed. Appellant's motion to expedite the appeal is granted, and the Clerk's Office is directed to issue a revised Briefing Order that will allow this appeal to be heard during the term of court to be held October 28-31, 2002.

Entered at the direction of Judge Traxler with the concurrence of Judge King and Judge Gregory.

For the Court



/s/ Patricia S. Connor
Clerk

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 92-5353

July 2, 1992
#A-1

CASTROL INC.,
v.
PENNZOIL COMPANY and
PENNZOIL PRODUCTS COMPANY, Appellants
(N.J. D.C. Civil No. 92-1364)

Present: BECKER and SCIRICA, Circuit Judges.

Motion by Appellants for stay of injunction, pending appeal, or, in the alternative, for an expedited appeal with proposed briefing as follows:

Appellants' brief due in two weeks,
Appellee's opposition brief due two weeks from date of filing of Appellants' brief,
Appellants' reply brief due one week from date of filing of Appellee's opposition brief; and
Oral argument to occur one week from date of filing of Appellee's reply brief.

Rita Goldon
Deputy Clerk 597-5019

ORDER

The foregoing Motion for stay of injunction pending appeal is DENIED. The motion for an expedited appeal is GRANTED to the extent that the Clerk shall list this case for disposition in late September 1992, but shall allot to Castrol the normal period of time for preparing its brief.

FILED
7-9-92
SALLY MEARS
CLERK

DATED: JUL - 9 1992

By the Court,

Circuit Judge

mgd/cc: CJAR
CMRE
CJEM
CGTS
CPRE
AMP
LRC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MCNEIL-PPC, INC.,	:	
Plaintiff,	:	04 Civ. 07684 (DC)
- against -	:	
	:	**ORDER**
PFIZER INC.,	:	
Defendant.	:	

Pending a final determination of this action, Pfizer Inc. ("Pfizer") and its officers, agents, servants, employees, representatives, subsidiaries and affiliates, are hereby ordered:

(1) To refrain from stating or communicating, in its advertising or promotional materials or activities for Listerine, any of the following claims: (i) clinical studies prove that Listerine is as effective as floss (in any respects), provides the same benefits as floss, or can replace floss; (ii) Listerine is as effective as, or can be used instead of, floss; (iii) flossing provides no health benefits beyond reducing plaque and gingivitis; and (iv) the Sharma and Bauroth Studies prove anything concerning the comparative oral health benefits of Listerine versus flossing. Pfizer is not enjoined from using the Sharma and Bauroth Studies to support the claim that Listerine fights plaque and gingivitis, as long as it does not invoke a comparison to floss.

(2) To cover (by sticker) on all Listerine bottles the shoulder label that states or communicates that Listerine is as effective as floss (in any respects), provides the same benefits as floss, or can replace floss;

(3) To remove from all Listerine bottles the neck hangers that state or communicate that Listerine is as effective as floss (in any respects), provides the same benefits as floss, or can replace floss; and

(4) To remove all in-store displays that state or communicate that Listerine is as effective as floss (in any respects), provides the same benefits as floss, or can replace floss.

IT IS FURTHER ORDERED that, by January 12, 2005, plaintiff shall file with the Clerk a bond in the amount of $2,000,000 with good and sufficient surety, and conditioned as required by Rule 65 of the Federal Rules of Civil Procedure..

IT IS FURTHER ORDERED that Pfizer shall have until January 20, 2005 to file a brief addressing modifications to this Order with respect to permissible communications, if any, to dentists and other professionals concerning the Bauroth and Sharma Studies. In the event that Pfizer submits a brief, plaintiff shall have until Jan. 31, 2005 to file a responsive brief, Pfizer shall have until Feb. 7, 2005 to file a reply brief ~~and argument on the issues raised by the briefs shall be held on ___, 2005.~~

Dated: New York, New York
January 10, 2005

Issued: 2:33 p.m.

So Ordered:

The Honorable ~~Denny~~ Chin
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SCHICK MANUFACTURING, INC., ET AL Plaintiffs	:	
	:	CIVIL ACTION NO.
v.	:	3-05-cv-174 (JCH)
THE GILLETTE COMPANY Defendant	:	MAY 31, 2005

PRELIMINARY INJUNCTION ORDER

For the reasons set forth in this court's opinion dated May 31, 2005, which grants in part the motion of plaintiffs Schick Manufacturing, Inc., Eveready Battery Company, Inc., and Energizer Battery, Inc. for preliminary injunction, it is hereby ORDERED, that pending final judgment in this action, The Gillette Company, its officers, agents, servants, employees, representatives, subsidiaries, and affiliates are enjoined from stating or communicating, directly or indirectly, by words or visual images, in any advertising packaging, promotional materials or promotional activities that:

(1) the M3 Power razor or its micro-pulses or oscillations change the angle of hair in relation to the skin; or

(2) the M3 Power razor or its micro-pulses or oscillations extend or lengthen hair by a magnitude or with a frequency that is not literally or physiologically accurate; and

IT IS FURTHER ORDERED, that within 30 days of entry of this ORDER, The Gillette Company, its officers, agents, servants, employees, representatives, subsidiaries, and affiliates:

(1) remove or cover by sticker on all packaging for the M3 Power razor any words or visual images that state or otherwise communicate that the M3 Power razor or its micro-pulses or oscillations:

(a) change the angle of hair in relation to the skin; or

(b) extend or lengthen hair by a magnitude or with a frequency that is not literally or physiologically accurate; and

(2) remove all displays, including in-store displays, that state or otherwise communicate that the M3 Power razor or its micro-pulse of oscillations:

(a) change the angle of hair in relation to the skin; or

(b) extend or lengthen hair by a magnitude or with a frequency that is not literally or physiologically accurate; and

IT IS FURTHER ORDERED that plaintiffs shall file with the Clerk a bond in the amount of $250,000, with good and sufficient surety, and conditioned as required by Rule 65 of the Federal Rules of Civil Procedure.

SO ORDERED

Dated at Bridgeport, Connecticut this 31st day of May, 2005.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge

EXHIBIT 10

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SANDERSON FARMS, INC. and PERDUE FARMS, INC.	*	
Plaintiffs,	*	
v.	*	Civil Case No. RDB-08-210
TYSON FOODS, INC.	*	
Defendant.	*	

* * * * * * * * * * * * *

MEMORANDUM OPINION SUPPLEMENTING PRELIMINARY INJUNCTION ORDER

The facts of this case have been set forth completely in this Court's Memorandum Opinion (Paper No. 78) issued on April 22, 2008. In support of the Preliminary Injunction Order entered on that date (Paper No. 79), the parties were given three days to file submissions on the amount of bond to be posted by Plaintiffs as security for the issuance of the Preliminary Injunction Order. Defendant Tyson Foods, Inc. has filed its submission under seal and has requested that Plaintiffs Sanderson Farms, Inc. and Perdue Farms, Inc. be required to post a bond in the amount of $38.5 million. Plaintiffs have suggested a bond in the amount of $100,000 or, alternatively, $400,000, and have specifically contended that a bond exceeding $1 million should not be entered. For the reasons stated below, this Court will require Plaintiffs Sanderson Farms, Inc. and Perdue Farms, Inc. to post a bond in the amount of $1 million ($1,000,000).

STANDARD FOR SETTING BOND

Rule 65(c) of the Federal Rules of Civil Procedure provides that '[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an

amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). The United States Court of Appeals for the Fourth Circuit has explained that "[i]n fixing the amount of an injunction bond, the district court should be guided by the purpose underlying Rule 65(c), which is to provide a mechanism for reimbursing an enjoined party for harm it suffers as a result of an improvidently issued injunction or restraining order." *Hoechst Diafoil Co. v. Nan Ya Plastics, Inc.*, 174 F.3d 411, 421 n.3 (4th Cir. 1999).

ANALYSIS

There is ample authority supporting the issuance of a nominal bond where the district court determines that a plaintiff is highly likely to succeed on the merits at trial. *See Hoechst Diafoil*, 174 F.3d at 421 n. 3 (4th Cir.1999) ("Where the district court determines that the risk of harm is remote, *or that the circumstances otherwise warrant it*, the court may fix the amount of the bond accordingly. In some circumstances, a nominal bond may suffice."); *Arkansas Best Corp. v. Carolina Freight Corp.*, 60 F. Supp. 2d 517, 518 (W.D.N.C. 1999) (stating that "[c]ircumstances in the instant case warrant the posting of only a nominal bond in that Plaintiffs have shown a strong likelihood of success on the merits").

Plaintiffs have cited a series of cases in which modest bonds were required in similar cases involving alleged violations of the Lanham Act, including a recent opinion of this Court. *NaturaLawn of America, Inc. v. West Group*, LLC, 484 F. Supp. 2d 392 (D. Md. 2007) ($50K bond). This Court is satisfied that more than a nominal bond must be posted in this case. In the alternative, Plaintiffs have suggested that a $400,000 bond is appropriate under the circumstances, citing in support *Schick Mfg., Inc. v. Gillette Co.*, 372 F. Supp. 2d 273 (D. Conn.,

2005). In *Schick*, the district court ordered that the plaintiff post a $400,000 bond after the defendant was required to (a) "remove or cover by sticker" all false and misleading packaging on its products and (b) "remove all displays, including in-store displays" that carried the false and misleading claims. (Pls.' Mem., Ex A.)

Plaintiffs argue further that even if a bond over $400,000 is warranted, such a bond should not exceed $1 million. This Court notes, however, that Plaintiffs have cited to *McNeil-PPC, Inc. v. Pfizer, Inc.*, 351 F. Supp. 2d 226 (S.D.N.Y 2005), a case in which the district court ordered that the plaintiff post a $2 million bond. The *Pfizer* case is instructive insofar as it provides certain factors to be considered by this Court in this case. Although the defendant in *Pfizer* was required to take steps beyond taking down non-label advertisements (the scope of the preliminary injunction in this case), there was nonetheless a requirement that defendant remove all advertising nationwide.

Defendant has noted a series of cases involving patent infringement, trademark infringement and copyright infringement. *See Pfizer, Inc. v. Teva Pharms.USA, Inc*., 429 F.3d 1364 (Fed. Cir. 2005) (patent infringement); *Bebe Stores, Inc. v. May Dep't Stores Int'l, Inc.*, 230 F. Supp. 2d 980 (E.D. Mo. 2002) (trademark infringement); *Cybermedia, Inc. v. Symantec Corp*., 19 F. Supp. 2d 1070 (N.D. Cal. 1998) (copyright infringement). In infringement cases such as the ones cited by Defendant, multi-million dollar bonds were required with entry of a preliminary injunction order. None of these cases, however, involved alleged false advertising under the Lanham Act.

Defendant has provided this Court with certain predictable direct costs associated with the preliminary injunction order. Defendant asserts that compliance with this Court's

Preliminary Injunction Order, including taking down point-of-purchase materials, could easily exceed $450,000. In addition, Defendant has also argued that it expects to lose sales and profits, but a precise amount is purely speculative. Moreover, Defendant has not submitted any precise figures involved with the cancellation of advertising, but has instead addressed the potentiality of lost profits. Finally, Defendant has suggested that damage to its customer relations with respect to it having to "return to retailers for the second time" to address advertising issues and the "repeated disruptions" resulting from the "Raised Without Antibiotics" advertising claim.

CONCLUSION

In light of the high likelihood of success on the merits, this Court finds that Defendant's interests (including, *inter alia*, direct costs, potential lost profits, and customer and consumer relations) will be secured through the duration of this Court's Preliminary Injunction Order by Plaintiff posting a bond of One Million Dollars ($1,000,000).

Dated: April 25, 2008

/s/
Richard D. Bennett
United States District Judge

EXHIBIT 11

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

SANDERSON FARMS, INC., et al.,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

---/

Civil No. RDB-08-0210

Baltimore, Maryland

April 7, 2008

1:00 p.m.

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE RICHARD D. BENNETT
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: Arnold and Porter LLP
By: RANDALL MILLER, ESQUIRE
NICK DePALMA, ESQUIRE
ROSS GOLDSTEIN, ESQUIRE
555 12th Street, NW
Washington, D.C. 20004

For the Defendant: Weil Gotshal and Manges LLP
By: HELENE D. JAFFE, ESQUIRE
RANDI SINGER, ESQUIRE
767 Fifth Avenue
New York, New York 10153

Murphy and Shaffer LLC
By: JOHN MURPHY, ESQUIRE
JOHN CONNOLLY, ESQUIRE
36 South Charles Street
Suite 1400
Baltimore, Maryland 21201

Court Reporter: Lisa K. Bankins RMR
101 West Lombard Street

Defendant's Exhibit 181, in response to specifically questions about ionophores, in the second paragraph, Perdue writes to customers that "ionophores are different from antibiotics." Doesn't it? And then it goes on to say in the last sentence of that paragraph "ionophores are not used in human medicine and do not contribute to the development of antibiotic resistance to important human drugs." Correct?

A That's correct. The difference -- there's quite a significance to the two important human drugs. It does not say -- does not develop -- I have no idea if they developed or they have a contribution to the development of antibiotic resistance. We haven't studied that. I don't know how you'd study it. It's virtually phenomenally difficult data to understand and this was meant to try to help people who are concerned with -- I would assume this was accompanied to a conversation where somebody, not a billboard, not an advertisement, but a response when somebody asked us about some of the different products that we use.

Q Doctor, so as of June 28, 2007 when these form customer letters were drafted and used by your company, Perdue took the

position on one hand that it does use ionophores and it also takes the position that it doesn't feed its birds antibiotics. Is that right?

A That's correct. There are some real problems with this wording in June of '07 as we migrated through this process. As we've described, USDA was quite confusing at the time.

Q Well, I understand, Doctor. I'm just trying to understand the position that Perdue was taking because it seems

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

SANDERSON FARMS, INC., et al.,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

Civil No. RDB-08-0210

Baltimore, Maryland

April 8, 2008

9:30 a.m.

---/

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE RICHARD D. BENNETT
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:

Arnold and Porter LLP
By: RANDALL MILLER, ESQUIRE
NICK DePALMA, ESQUIRE
ROSS GOLDSTEIN, ESQUIRE
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Washington, D.C. 20004

For the Defendant:

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RANDI SINGER, ESQUIRE
767 Fifth Avenue
New York, New York 10153

Murphy and Shaffer LLC
By: JOHN MURPHY, ESQUIRE
JOHN CONNOLLY, ESQUIRE
36 South Charles Street
Suite 1400
Baltimore, Maryland 21201

being so dynamic and things moving around, at times it's not necessarily right where the packaging is, although you'd like it to be there.

Q. Right. And you said it's put up by a third party. These are people that go into the stores and put up the displays, the point of sale --

A. Correct. You as a manufacturer would contract with that party.

Q. Right. And you'd tell the party where they're supposed to put it. Right?

A. That's correct.

Q. But I think what you're also telling me if I understand your testimony is that even though the manufacturer tells the third party where to put it in the store, that sometimes it doesn't end up where the manufacturer wants it to end up?

A. That's correct. And I said that because you said is it next to the packages and I said that's where you'd like it to be, but not necessarily the case.

Q. I just wanted to be sure I understood what your testimony was.

A. Okay.

MS. JAFFE: Thank you. No further questions, Your Honor.

THE COURT: Thank you, Mr. Bartelme. You may step down, sir.

MR. MILLER: Your Honor, we'd call our next witness which is Professor Michael Mazis. He's a survey expert from American University.

THE COURT: All right.

THE CLERK: Come forward, sir. Stand up here, please. Stand here and raise your right hand.

(Witness sworn.)

THE CLERK: Please be seated. State your name for the record. Speak directly into that microphone and spell your name, please.

THE WITNESS: Michael Bernard Mazis. M-A-Z-I-S.

MR. MILLER: Your Honor, Professor Mazis is a survey expert.

He's done a report. The pieces of the report like his CV and the questionnaire and the results are in different exhibits. I've made a compilation exhibit which I just handed to Ms. Jaffe. But we'd like to mark it as a new, you know, just to combine them all together. So it's a single document --

THE COURT: That's fine.

MR. MILLER: -- as Plaintiffs' Exhibit 129.

THE COURT: All right.

MR. MILLER: And I can hand a copy up to you.

THE COURT: That would be great. Thank you very much.

MR. MILLER: May I approach?

THE COURT: Yes.

MR. MILLER: I'll give a copy to the professor as well. And just for the record, this is a compilation including Plaintiffs' Exhibit 59, 8, 9, 10, 11, 12, and 115. Pieces of his survey.

THE COURT: Yes. Thank you very much, Mr. Miller.

BY MR. MILLER:

Q. All right. Professor Mazis, can you tell the Court where you work?

A. I'm a professor of marketing in the Kogod School of Business at American University in Washington, D.C.

Q. This document that I just handed you, Plaintiffs' Exhibit 129, do you recognize this document?

A. Yes.

Q. Okay. And what is it?

A. It's a report that I prepared based on a survey that I conducted.

Q. Okay. Let's stay on your qualifications for a moment. Have you been retained by the plaintiff to provide expert testimony in this case?

A. Yes.

Q. All right. And can you describe the general area or subject matter of the expert testimony that you're going to provide?

A. Well, I conducted a survey of about 600 consumers and I'm here to provide the findings of that survey.

Q. All right. Can you summarize for the Court your educational background?

A. I have a B.S. Degree in economics from the University of Pennsylvania, Wharton School, an MBA degree from New York University, Graduate School of Business, a PhD from Penn State University, major in -- and business administration, a major in marketing and minor fields in social psychology and statistics.

Q. Thank you, professor. Can you also summarize your

professional experience?

A. Well, I've been a professor at a couple of different universities. I've been particularly a professor and most recently at American University. I've been there over 25 years and I've also worked at one time for the Federal Trade Commission and the Food and Drug Administration. I worked there before I joined American for

three years.

Q. Do you have any relevant research or publications in the area of surveys, consumer psychology, consumer reaction to advertising?

A. Yes. I've published extensively. I published over 60 articles in referee journals and conference proceedings and I've been an editor, an associate editor for major journals.

Q. Have you qualified previously as an expert in federal court in the area of consumer surveys?

A. Yes. Many times.

Q. All right. Have you testified on behalf of the Federal Trade Commission as an expert?

A. Yes. On ten different occasions.

Q. All right. And can you tell us a little bit more about that? I mean what's the FTC have to do with advertising?

A. The FTC is the principal federal agency that regulates advertising. So they're concerned with companies disseminating false advertising messages or messages that are deceptive in some implied way and so they're involved in trying to regulate that kind of advertising and I've conducted many surveys for them both when I

worked there full time. But also over the last 25 years, I've worked as a consultant for them.

Q. Can you give an example of a type of matter that would be, that you provided such testimony?

A. Well, the most recent big case I was involved in was 2004.

It was the FTC v. Telebrands. Telebrands sold via infomercials what are referred to as ab belts. There are these devices that you put around your waist and they vibrate and they're supposed to tighten your abdominal muscles and they're supposed to cause you to lose weight and so I conducted a survey to determine whether the claims made in the ads were in fact deceptive. And the survey showed that they were and the Federal Trade Commission, they placed an order against the company and credited my survey.

Q. And who hired you to do that survey in that particular case?

A. The Federal Trade Commission.

Q. Okay. Have you ever attempted and failed to qualify as an expert?

A. No.

Q. Have you ever testified previously as an expert for any of the parties or the law firms in this case?

A. Yes.

Q. Which ones?

A. Well, I represented Tyson in a matter a couple of years ago. There was a dispute before the National Advertising Division of the Better Business Bureau. And in fact the general counsel for Tyson that I worked with is sitting in this courtroom. And I've also worked for Weil Gotshal. I conducted a survey for them a few years ago

regarding usage of Internet radio.

Q. All right. And so besides your work for the defendant law firm, Weil Gotshal and the defendant, Tyson, have you worked for any

of the plaintiff or the plaintiff law firm?

A. No.

Q. So not for Sanderson or Perdue or Arnold and Porter?

A. No.

MR. MILLER: Okay. Your Honor, at this time we would offer Professor Mazis as an expert in the field of surveys, consumer psychology and tender his qualifications as suitable for that purpose.

THE COURT: Any voir dire on this matter --

MS. SINGER: No objection.

THE COURT: Is it Ms. Singer? Is that correct?

MS. SINGER: Yes.

THE COURT: Any voir dire, Ms. Singer?

MS. SINGER: No. No. I have no objection.

THE COURT: Thank you. He'll be accepted as an expert in field of consumer surveys and consumer research.

Q. All right. Professor Mazis, we'll get into the details of your survey and how you set it up. But can you just give, just sort of so we know where we're going, a very, very high level, what's your ultimate take-away conclusion based on the work you did?

A. Well, what I concluded -- basically I had four different ads I exposed people to. I'll get to that in a minute. But basically, I found that people who were exposed to the unqualified RWA ad and people who were exposed to the qualified RWA ad that I showed them

responded in about the same way. In other words, the qualification didn't seem to make much difference in terms of consumer response.

And secondly, I found that the, all the ads, the unqualified and the two unqualified and the qualified ad, RWA ad that I showed consumers, they appeared to communicate to consumers an implied comparative safety message. That is, consumers viewed these ads as communicating that Tyson chicken was safer than other chicken and Tyson chicken was more healthful than other chicken.

Q. Okay. Let me ask you. Did you prepare Powerpoint slides in connection with the work you've done in this case?

A. Yes, I did.

MR. MILLER: All right. And, Your Honor, with your permission, Professor Mazis has written up some Powerpoint slides. I'd like to use them and he can walk us through them and explain what he did.

THE COURT: That will be fine.

MR. MILLER: Thank you. All right. Let me just --

THE WITNESS: That's my name.

THE COURT: Is this also being marked as an exhibit, Mr. Miller?

MR. MILLER: It's been provided to the other side. It's not marked as an exhibit. It's used for demonstrative to aid the direct examination.

THE COURT: All right. Okay.

Q. Does this look like the slides you prepared?

A. Yes. That's the cover slide.

Q. Let me just turn to the first slide here. Sort of an

overview slide. Can you describe what we're looking at here?

A. Well, this slide just gives some of the basics of the research design. 608 consumers were interviewed. These were all qualified as raw chicken purchasers. I'll describe that in a little bit more detail. But the consumers were interviewed during a period of February 8th through the 14th. The research took place in 28 different shopping malls spread across the country. There are actually seven shopping malls in each of the four census regions. So we have a good geographic dispersion. There were four cells in this design. By four cells I mean there were four groups of consumers. There's about 150 consumers in each cell. Consumers only saw one ad. So the RWA unqualified print ad was one of the cells. I'll get to that in a second. Then there was an RWA unqualified T.V. ad, an RWA qualified print ad and then there was a control that was also a print ad. So there are four different cells.

Q. And just so the record is clear, this February 8th to the 14th, what year?

A. This year, 2008.

Q. Okay. All right. Now is this one of the stimuluses that you showed to consumers?

A. Yes. What I did here, this is what I call the RWA unqualified print ad. It actually, it was the -- I took the billboard that Ms. Burroughs had taken a snapshot of and modified that slightly and pretty simple message, raised without antibiotics, fresh chicken, Tyson and then there's thanks, mom which is the theme they were

running at that time. That's all they saw.

Q. And that was one cell.

A. That was one cell, about 150 consumers.

Q. All right. And then you also show the television ad.

A. Right.

Q. We don't have that yet. But can you describe what that television ad showed?

A. It had the same theme. It was showing this family enjoying chicken and, you know, they said the chicken was raised without antibiotics and the people, the family was really happy and they said thanks, mom, and it was kind of that same message.

Q. All right. And is this one? Is this another stimulus?

A. This one now, what I tried to do here is to keep everything the same as the first ad that I showed you except -- in other words, it's thanks, mom is still there, fresh chicken is still there, Tyson is still there. But I changed the main message. Rather than raised without antibiotics, I put in chicken raised without antibiotics that impact antibiotic resistance in humans and I took that from some news releases that Tyson had put forth into the marketplace. So I think that was a good --

Q. All right. And then the last one is another stimulus. Why did you do this one and what does it show?

A. Yeah. The last one is just important. This is the control stimulus. You might compare this to in a medical study a placebo control. And why I say it's a placebo control is it's the absence of

the antibiotic claim. So in a medical study, you want to see if the patient gets better or claims to get better without the medicine. In this case we want to see what happens to, how do consumers respond when they don't get the antibiotic message, but they get some other message that doesn't refer to health or safety or antibiotics. So this language I pulled from the Tyson website that said the chicken with great taste, high quality and unmatched variety.

Q. Is use of control stimulus a standard in your field?

A. Yes. And it's absolutely vital because what can happen in various questioning is people can start agreeing with questions because they think that's the right thing to do or they maybe they really like Tyson and so they react favorably to any kind of Tyson ad. And what the idea of this control is it controls these external variables, external variables meaning attitudes toward Tyson or it could be something about the question that's causing them to respond in a certain way. You keep everything else the same, but you give them a placebo control and you compare their responses to the no antibiotic message to the placebo control and look at the difference.

Q. All right. Let's talk about the how you qualified these people who participated in your survey. Can you describe your screening questionnaire that qualified these people?

A. Yes. There was a whole series of screening questions. But just to make it simple, all the people are 18 years of age or older. These people were people who purchased fresh raw chicken in the past three months and they expected to purchase fresh raw chicken in the

next three months.

Q. So what if somebody hadn't purchased fresh raw chicken in the past three months?

A. They wouldn't be included in the survey.

Q. Okay. And then can you describe the main questionnaire?

A. Okay. The way this works is that there's really two parts to this process and pretty much all these types of surveys, these consumer perception surveys have these two parts. First, the consumer reads the print ad or is shown the T.V. commercial and then the print ad is, for example, removed from sight or the T.V. commercial obviously, they can't refer to that either. Then people are asked what is the name of the company that put out or sponsored the advertisement that you just looked at and that's referred to as a filter question because there's some subsequent questions that refer to Tyson and if they didn't remember the name of the company, we don't really want to ask them those questions because those people really would be guessing. So we're trying to eliminate sort of bias and guessing through this question.

Q. Would those people who didn't know the company, would they still stay in the survey for purposes of the denominator of total responded?

A. Yeah. They would stay in in terms of computing different takeaway, ad takeaway. The 608 people in the survey didn't, as a denominator in doing calculations did include all the respondents and, of course, some of those people didn't know that the sponsor was

Tyson. But they were still in the denominator, but they weren't asked

additional questions that might serve to bias them.

Q. All right. So can you tell us about the open-ended questions?

A. Okay. So we get to sort of the two main types of questions here. One I'll refer to as open-ended questions and pretty much all consumer perception surveys include open-ended questions and the first one was what is the main idea that the advertisement is trying to communicate and then that's followed up by does or doesn't the advertisement imply or state anything about Tyson chicken and antibiotics. And that's also referred to as a filter question. I'll get to that in a second. Listed options. Yes, it does. Imply or state anything about Tyson chicken antibiotics. No, it doesn't or we give them a don't know or no opinion option so they, it's clear if they really don't know, they have that option to go for. We don't want them guessing. And then the second main open-ended question is what does the advertisement imply or state about Tyson and antibiotics. So they don't get that question unless they said that it said something about Tyson chicken and antibiotics. Again we're trying to filter them so they don't get these questions that and they're just guessing and they really don't know what they're talking about.

Q. All right. How does that differ from then the close-ended questions?

A. Okay. Then again, you know, just about all these surveys

include closed-ended questions. And the way I've formulated these closed-ended questions, I'm going to read you a list of statements.

Some, all or none of these statements may have been implied by or stated in a Tyson advertisement. For each statement that I read, please tell me yes, it is implied by or stated in the Tyson ad, no, it is not implied by or stated in the Tyson ad or you don't know or you have no opinion. And the last don't know or no opinion is sometimes referred to as a quasi filter. We're trying to give people the don't know option so they're not guessing.

Q. All right. And have you used closed-ended questions of this structure in other surveys that you've done?

A. All of these consumer perception surveys have both open and closed-ended questions.

Q. All right. That's standard fare. And so from when the FTC hired you you would have used closed-ended questions?

A. Yes.

Q. And is that standard in the industry?

A. Yes.

Q. All right. What were the closed-ended questions that you asked?

A. All right. What I tried to do is include some questions that were relevant to this litigation and then I had other that I would call distracter questions. And I rotated the order of these. So there's no order bias. First statement, Tyson chicken is fresher than other chicken. They have to agree that the ad communicated this

or it didn't or they didn't know. Tyson chicken is safer than other chicken. Tyson chicken contains more protein than other chicken. Tyson chicken is better for you than other chicken. Tyson chicken tastes better than other chicken. Tyson chicken is more healthful

than other chicken. So the three in the yellow are the more health-related elements here.

Q. All right. Let's move on to your results and opinions and conclusions. Can you describe this slide results from the open-ended questions?

A. All right. One thing it I guess in a way isn't surprising. When you look and you ask people what was the main idea or what did the ad say about Tyson's chicken and antibiotics, the main thing that they say is it didn't have antibiotics, no antibiotics. I mean it's kind of not surprising that they said that. And in fact for the print ad, the unqualified print ad, 85% of the people played back the main idea was or any, you know, sort of open-ended response, about 85% of the people played that back. In the unqualified T.V. ad, it was 71%. And in the RWA qualified print ad, I basically broke up the answers into three different categories. Now the first line shows that 54.9%, over half of the people when they saw the qualified RWA claim just merely said no antibiotics. They never mentioned anything about antibiotic resistance at all. So I kind of take that as they really weren't processing the antibiotic resistance qualified part of it. They really just saw it pretty much the same as the unqualified. Then you've got the second group, 9.2%, who separated the two concepts of

no antibiotics and antibiotic resistance and in other words, they said well, there's no antibiotics and that's a good thing because it doesn't confer antibiotic resistance. But they made an affirmative statement that it had no antibiotics. And then the third group seemed to more or less get the message I assumed the way it was intended.

They said something about that it had, you know, it didn't confer antibiotic resistance. It was about 4.6%

Q. Okay. Let me -- I'm going to show you a slide next that takes this 9.2% number, breaks it and gives some examples. Can you talk about this slide?

A. Okay. So we've got about, you know, 9% of the people are in that second group are saying -- these are some examples -- these chickens were raised without antibiotics. It does not impact resistance in humans. No antibiotics in chicken. Resistance for us humans. The chicken from Tyson is raised without antibiotics. It cuts down on antibiotics resistance in humans, et cetera, et cetera. So basically they separated into this idea there's no antibiotics. This is good because humans won't get antibiotic resistance.

Q. All right. And how about the results in the open ended for healthy, healthier and safe?

A. Okay. So I also coded people who gave some kind of a health message and you can see the results are pretty similar for the three different cells of 14.9%, 17.5 and 17.6% took a healthy, healthier safe or safer was in there. I even include better for you. There was a couple of percents that said better for you which would have, you

know, pushed it up to about 20%. So if you threw in better for you also kind of the health-oriented messages, you see around 20% of the different cells taking that kind of message.

Q. Okay. And then let's move to the close-ended results.

A. Okay. Here's the results of one of the closed-ended questions, the safer question. So I asked people, I gave them this list of statements. One of the statements was Tyson chicken is safer

than other chicken. In other words, did the ad imply or state that Tyson chicken is safer than other chicken and the numbers going down in the first column, 59.1%, 65.6% and 63.4%, they're the numbers, that's the percent of people who agreed with that statement. In other words, about around 60% or so agreed that the ad communicated that Tyson chicken was safer than other chicken. However, one of the issues here is it could be argued that that question might be suggestive. Maybe they really hadn't thought about this before and this was just suggesting this idea that Tyson chicken was safer than other chicken. So what I did was I took the percent of people in the control group that also agreed with the statement. Now there the placebo control, they didn't get anything about antibiotics and we can see what percent of those people agreed with that statement. And you've got 29.9% in the control group agree with that statement which basically says even though the ad didn't say anything about antibiotics, it didn't say anything about health. About 30% of the people agreed with the statement and, you know, there's different reasons for that, it could be they were Tyson chicken users and they

liked Tyson and they thought it was a really good chicken. It could be that the question somehow prompted them to agree. There could be a lot of reasons for that. But we subtract out this what we call noise, the effect of the external factors on their answers. So subtracting out for noise, we then get 29.2%, 35.7% or 33.5% or about a third of the respondents adjusting for this noise or guessing or external factors, this noise control. And I don't have it up here, but the Tyson chicken is more healthful than other chicken, it was around 25%

as well. So for those two, you got about a third, about 25% for those two kind of health-related attributes.

Q. Okay. So let me just ask you a couple more questions about this. This is an important slide. This process of deducting or subtracting, you get sixty-some percent of people saying I agree Tyson chicken is safer based on this. But you're basically reducing it. Is that, this reduction, this subtraction, is this something that's standard in the field and other experts would do this?

A. Yes. I would hope so.

Q. Not always. Right?

A. Right.

Q. But in terms of the good scientific research that's out there -- well, let me ask you. Is this something that's been discussed in the published literature?

A. Yes. Absolutely.

Q. Okay. And the intensity of the percentages that's remaining, this 29%, 35, 33 -- well, first of all, is there any

difference between whether the person is shown a qualified raised without antibiotics or the unqualified raised without antibiotics? Is there any difference, material difference to you with between those two groups?

A. No. All three of those cells are about the same percentage. No statistical difference there.

Q. All right. Am I reading this right? In fact, the qualified 63 -- so the person that's shown Tyson raised without antibiotics that impact antibiotic resistance in humans, there are actually more of those people think that, agree that Tyson chicken is safer. Is that

what that shows?

A. More than what?

Q. More than the person that's just shown the naked unqualified claim.

A. No. I think they're all the same.

Q. Okay. So the 63, 65 and 59 are all within the statistical range of intensity. Is that what you're saying?

A. Yeah. There's no statistical difference there. They're all about the same.

Q. Is that the same you would say with the resulting percentages?

A. Yes.

Q. So it doesn't matter then which stimulus they were shown --

A. Yeah. That's one of the conclusions I had. That the qualification doesn't really seem to have any impact.

Q. Okay. All right. So I think we're at the end of your survey presentation. Can you just sort of summarize for the Court once again your high level takeaway conclusion?

A. Okay. Yeah. It says up here that there was no significant difference in a response to the Tyson qualified and unqualified RWA advertising. And this is true both in the response to the open-ended questions and to the closed-ended questions. In the open-ended questions, over half of the people that were shown the qualified RWA ad played back a no antibiotics message. That was still the principal message they were playing back even with the qualification. They didn't really seem to be paying that much attention to the

qualification. And then secondly, about a third of the respondents exposed to Tyson's qualified and unqualified RWA ad took away an implied safety superiority claim and as I said before, about 25% took away an implied healthier for you kind of message.

Q. So on this second point, it's a third of each of the cells that you tested, a third of the respondents had this implied safety superiority message?

A. Yes.

Q. All right. Now let me turn to a different subject now that we've discussed your survey. You understand that Tyson has retained a witness, Mr. Roth, who is going to present some critiques or he has presented in the form of a written witness summary some critiques. Have you seen that?

A. Yes.

Q. All right. Have you had a chance to review that statement by Mr. Roth?

A. Yes.

Q. Did Mr. Roth say anything -- let me just ask you, first of all. Has he said anything to change your opinions that you just reported?

A. No.

Q. All right. Let me go through a couple of the principal criticisms and give you a chance to respond. Now Mr. Roth has noted that there's a difference between the intensity of the response on safety between the open ended and the close ended. So he's basically saying there's a disconnect. If you ask the respondent the open end, what's the main message type question, you get one level, a very small

level and then if you ask the close-ended question, do you agree that this is a safer chicken, you get a much, much higher level. Do you remember that criticism?

A. Yes.

Q. All right. Do you have any response? What's your response to that?

A. Well, first of all, I think that's an important issue. You know, when I'm asked to critique surveys, that's one thing that I look at. I mean I look at the open ends versus the closed ends and try to make sense of that. And sort of two criterior that I use are, one, is there a logical consistency or a logical relationship between what people say in the open ends and the closed ends. In other words, you

don't want them to say one thing in the open ends and then say something diametrically opposed in the close ended, in responses to the closed-ended questions. That would be an alarm. And the second thing I look at is I look at the closed-ended questions and how they were framed and whether they actually used good controls in the closed-ended questions. If they didn't use good controls, then that's really a problem and that can be part of the reason for the disconnect between what they say to the open-ended questions and what they say to the closed-ended.

Q. All right. So applying those two standards and the logical relationship inquiry and determining whether there's a control, how does that apply to the survey that you did in this case?

A. Well, one of the things is we see in the open-ended responses to the open-ended questions, the prime thing that's

happening is when you give people, you say well, what's the main idea. Most of the people are saying no antibiotics because in these open-ended questions, people tend to play back what they see in front of them. You know, what was the main idea? Well, it was no antibiotics, they're telling you no antibiotics. So the question is is that somehow inconsistent with they're saying that Tyson's chicken is, you know, that the ad is conveying some kind of health message. And one thing I looked at is is a lot of pub -- there has been a number of published surveys out there that everyone can have access to that show that people have a lot of health concerns, a lot of safety concerns about hormones and antibiotics in their chicken and this has

been reported as Food Marketing Institute survey. There's ABC News has a, you know, couple of surveys out there. There's a lot of literature out there that shows antibiotics and hormones raise safety flags. The second thing for consumers is when you label the chicken as having no antibiotics, people associate that as a safety issue. That the chicken is safer because it doesn't have antibiotics or hormones. So and the gist of this is when they're saying no antibiotics, that's not inconsistent with they're saying there's a safety message in this ad. That the two things, at least there's a logical consistency between the two concepts.

Q. What about the control procedures? If you ask consumers what about protein, do you agree that there's more protein in this chicken versus the other and if you compare that -- that was one of the questions you asked, right, protein?

A. Right.

Q. If you compare that to say safe, it's safer than other

chicken products, were you able to discern any difference between by sort of distracter of protein? Well, that's not a distracter because it's not, you know, in the case. But the safety message which is in the case. Were you able to measure any difference between those?

A. No. There was no difference and that's kind of another indicator if, you know, in terms of the question of whether the questions are leading. If these questions are leading and you're planting these ideas in their minds, then you would expect that the RWA cells, the three RWA cells would be higher. People would agree

more on all the attributes than they would on the control. Now they did at least on the safety and the healthfulness attributes. They gave higher agreement. But on the protein, for example, they didn't. So that gives us sort of some reason to believe that these questions weren't unreasonably leading.

Q. Have you ever seen in your practice and when you've done these other cases as a survey expert, have you ever seen or run across a circumstance where there is an apparent disconnect or a difference between the open-ended responses and the close-ended responses?

A. Yes.

Q. Can you tell us about any of those examples?

A. Yeah. Well, I mean a couple of examples. One is I mentioned the Telebrands case, the ab belt case earlier. In that case when I asked people in an open-ended fashion what was the main idea, about 15% were playing back gives you tighter abdominal muscles or six-pack abs or, you know, these kind of phrases or you could lose weight. But when I went to the closed-ended questions, I got about

60% of the people were playing back that using this product called Ab Force results in or the ad communicated that using Ab Force gives you tighter abdominal muscles or using Ab Force causes you to lose weight. So I got about 60% on the closed ends, about 15% on the open ends. And so that's not unusual. And in fact the FTC credited the survey and, you know, they complimented me on the methodology and so forth.

Q. In that example, was there a logical relationship between the response and the open ended you just described versus the higher

closed ended response?

A. Yes.

Q. All right. Can you think of any other example where maybe it's not the case?

A. Yes. I had another case recently was actually Mirasant v. McNeal. It involved Splenda. And in that case I didn't conduct the survey, but I critiqued another expert's survey. And the issue had to do with natural. Did people associate after seeing a Splenda ad, did they associate Splenda with being natural? Did they take that from the ad? They got in the open ends, about 2 or 3% played back natural and in the closed ended questions, I criticized those because they didn't use proper controls. There was really, they were biased types of questions. They didn't have a good control group and so on. So I criticized that in saying well, you really can't rely on these closed ends because of the bias you created and there's a disconnect here. So, you know, you have to look at each case clearly individually, use expertise. Sometimes a disconnect is a problem. Sometimes it isn't. You really have to use expert judgment here.

Q. All right. And then finally Mr. Roth suggests that the

open-ended questions really never got at a comparative concept. It's sort of like no antibiotics. It's not like better than some other chicken. Did you remember that criticism?

A. Yes.

Q. First of all, do you have any responses? Do you have any disagreement with that statement?

A. Well, over all, there was about 10% of the people gave some kind of a comparative safety message takeaway. For example --

Q. When you say 10%, you're talking about in the open end?

A. Yes.

Q. Okay.

A. About 10% said either the ad communicated something about it being safer, safer or better for you or healthier. So you got about, you know, it's about a 10% playback on that.

Q. But then what about all these people that were saying no antibiotics? Is that consistent or inconsistent with a comparative?

A. Well, you know, there's a couple of answers to that. Is it consistent or inconsistent? I mean one of the reasons he used good control and you have that noise adjustment is to adjust for the fact that people, the question may be leading in some way. So that's one, you know, one answer. You know, I mentioned before about the protein. That's another answer in terms of, you know, they gave about the same answers on protein. But also I think in general, I mean I've done a lot of this research and what I found is that when you have a product that when you, if it has some ingredient or some feature that people don't like, they think it causes health problems. If you tell them

you're removing that health issue from the product, then people naturally take a comparative claim from that. In other words, you say it doesn't have antibiotics. They think antibiotics has health problems. So intuitively, they're going to think that the chicken must be safer than other chicken. It must be healthier than other

chicken because they didn't hear anything about this other chicken. I mean so the other chicken, they can assume still has the antibiotics and that raises issues for them. Now that of course, you don't really know that until you ask the closed-ended questions and that's why you get into that with the closed-ended. The open ends are helpful, but they don't, it's limited what they tell you.

MR. MILLER: All right. At this time, Your Honor, I'd pass the witness. No further questions at this time.

THE COURT: Thank you very much, Mr. Miller. Ms. Singer?

MS. SINGER: Do you want to do this now or do you want to take the break?

THE COURT: We're going to go until 1:00 and we'll break for lunch. Ready to go, Ms. Singer.

CROSS-EXAMINATION

BY MS. SINGER:

Q. Now Dr. Mazis, you mentioned that in the Mirasant case, you didn't do your own survey. Right? You only critiqued the survey?

A. Yes.

Q. And is that unusual that you wouldn't do your own survey?

A. No.

Q. No. Okay. You also mentioned that you represented Tyson in a N.A.D. proceeding?

A. Yes.
Q. Could you tell us what that N.A.D. proceeding involved? What kind of survey did you do in that case?

A. My recollection is I didn't do a survey.
Q. Okay. What did Tyson ask you to do in that case?
A. I think I just opined about -- it's vague. I have a vague memory of that now. They asked me to opine something about, I think it had to do with some surveys that were offered that were I guess normal course of business surveys. They asked me to comment on those and what messages were communicated. It's about all I can remember.
Q. Okay. And that was a Sanderson commercial that was at issue there. Right?
A. Correct. It was something about being jacked up on something. I forget. I forgot exactly what it was.
Q. And N.A.D. found that the Sanderson commercial was misleading. Right?
A. Yes. I think so. I think they supported the, you know, they supported my view and Tyson's view in that case.
Q. Thank you. Let's look at page 12 of your expert report, which I have as PX 59. I think you've got it up there in front of you as part of Plaintiffs, what's been marked now as Plaintiffs 129. And when I say at page 12, I'm looking at kind of the internal page 12. I think it's Plaintiffs' Hearing 479.
A. Yes. I see it.
Q. And --
A. What paragraph are you --

Q. I'm looking at paragraph 25.
A. Okay.

Q. And right there you say you explored whether respondents in the qualified cell responded differently than respondents in the two unqualified cells. Do you see that?
A. Yes.
Q. And then you concluded that the respondents in both cells actually provided similar responses. Right?
A. Yes.
Q. Now when you used the word explore, what you really meant is that you compared the number of respondents in each cell who answered a particular question yes to the number of respondents in other cells who answered the same questions yes. Right?
A. Yes.
Q. Now you testified I think that you adjusted the closed-end questions for noise.
A. Yes.
Q. Okay. And I think you defined noise as something -- in here you defined it as extraneous factors such as guessing, pre-existing beliefs or questions, wording that may advise the results. I'm on page 14, paragraph 27.
A. Yes. That sounds right.
Q. And you testified, you told Mr. Miller that it's customary to remove noise from the survey analysis. Right?
A. Yes.
Q. And that you hoped all survey experts would do that. Right?
A. Yes.

Q. And to do that, you subtracted the results of the control cell from the results of the other cells. Right?

A. Yes.

Q. Now on the open end for the control cell, I think we looked at one of Mr. Miller's slides and we said that for the control cells, 6.8 of respondents, 6.8%, I'm sorry, of respondents reported that a healthy, healthier or safe message was conveyed. Right? It's also here on page 12 in paragraph 24.

A. Yes.

Q. And the respondents in the control cell -- I'm going to test my ELMO abilities here. The respondents in the control cell were shown, were shown PX 109. This is chicken with great taste, high quality and unmatched variety. Right?

A. Yes.

Q. And you testified this doesn't say anything about antibiotics. Right?

A. Correct.

Q. And 6.8% of respondents you saw this reported anyway that healthy, healthier or safe message was conveyed.

A. Yes.

Q. Now you didn't subtract the results of this control cell from the results of your open-ended questions from the other cells, did you?

A. I didn't in the report. But certainly, the reader could do the subtraction. That would be fine.

Q. We saw that for the unqualified, you had 14.9%. Right?
A. Right.
Q. So if we subtract 6.8%, what do we get here?
A. It looks like 8.1%.
Q. Now if we were to subtract also the 6.8 from the 17.5. Right?
A. Right.
Q. And so there we get --
A. 10.7%.
Q. 10.7. And if we subtracted again from the 17.6, we get --
A. 10.8%.
Q. 10.8%. Okay. So these would be the open-ended numbers adjusted for noise. Right?
A. Yes.
Q. And I think you told Mr. Miller that these numbers included some things that were not comparative claims. Right? Some things that were healthy or safe?
A. Yes.
Q. Okay. Let's take a look at some of the verbatims. And this is the eye test portion of our proceeding here because some of these were a little unclear. I am looking at what was previously marked as Plaintiffs' Exhibit 11. I think you have it there as part of Plaintiffs' 129.
A. I'm sorry. What are you directing me to?
MR. MILLER: It's in there. I think it would be hard to

read.

Q. Yeah. I have a copy if you --

A. I can't read these.

Q. I'm so glad I'm not the only one.

A. Well, I'm a lot older than you are. My bifocals just don't do the job here.

Q. Okay. Well, why don't I try putting it up on the ELMO? I have a copy that's a little bit clearer. So why don't we try this and we'll see what we can do here. We're going to look at and --

THE COURT: Why don't you try to use the zoom lens, Ms. Singer, and see if that can rescue some of us here?

MS. SINGER: Okay. It will rescue us a little bit.

Q. We're looking at Plaintiffs' Hearing 00085 --

A. I'm sorry. I apologize. I can't read this. Can you zoom it more?

THE COURT: That's not much of use to me either.

A. It's kind of blurry.

MS. SINGER: Does that help?

THE COURT: Yeah. That's good.

MS. SINGER: Okay.

Q. All right. So we're looking at Plaintiffs' Hearing 00085. And you see at the top there it says lilac raised without antibiotics?

A. Okay. This looks like it's the, it's the first cell. Right?

Q. Right.

A. Yes. Okay. It's the unqualified print cell.
Q. Okay. And I want to direct your attention to, you can't see from this blowup, but it's the sixth column there. It says Q2 main idea from ad commercial.
A. Okay.
Q. Okay. We're going to go down here. It's Respondent 11104 here.
A. Okay.
Q. And if we move across, we see that they're saying Tyson is healthy and great tasting and family oriented. Do you see that?
A. Yes.
Q. Actually, it says family orientated, but I assume they meant family oriented.
A. Well, not all the interviewers spell that well necessarily, but --
Q. I just don't want you to correct me that I'm reading it wrong. That's all.
A. Okay. No problem.
Q. And then if we look down a little bit here, we see Respondent 11226 and we go across here and they say their chickens are healthy. Right?
A. Yes.
Q. Do you see that?
A. Yes, I do.
Q. Now these both say healthy and healthy is not a comparative

term. Right?

A. Correct.
Q. Okay. But you've heard it used as part of healthy, healthier and safe. Right?
A. Yes.
Q. Okay. Let's look briefly at another cell here. This is the yellow cell, raised without antibiotics that impact antibiotic resistance in humans. Right?
A. Right.
Q. And let's look here at Respondent 01820. You see it there?
A. Yes.
Q. If we go across here, they say that Tyson chicken is raised natural with no preservatives. It's very fresh and healthy. Right?
A. Yes.
Q. Okay. And we come down here a little bit and we see Respondent 06406 and we go across here and they say healthy food, thanking mom for buying healthy food. Right? And these would be counted as healthy, healthier or safe. Right?
A. Yes.
Q. Let me show you. This is, I'm on Plaintiffs' Hearing 00096. This is the green cell, the thanks, mom. This is the television commercial.
A. Okay.
Q. And we've got this same talking about Q2, main idea of ad or commercial. Then we see over here the next column is Q I think 3A,

what ad or T.V. commercial implied or stated anything about Tyson and antibiotics.

A. Right.

Q. And that's the question you testified came after your filter question. Right?

A. Correct.

Q. And then we see over here the last question, question 4A, what did the ad or T.V. commercial imply or state anything about Tyson and taste. Right?

A. Right.

Q. And that came after a filter question, too. Right?

A. Yes. I rotated those. So I didn't just focus on antibiotics. There's a question on taste also as well as antibiotics and they were rotated.

Q. Okay. Let's look down here. I'm looking at Respondent's 06810. Okay. We see in response to the question what was the main idea of the commercial, the person says giving thanks for the meal.

A. Yes.

Q. Okay. And then you asked them what did the ad or the T.V. commercial imply or state anything about Tyson and antibiotics and we see here there's a 1. They said yes. Right? That's what the 1 means?

A. Yes.

Q. And when you asked them what does it say, they said that it's raised without it.

A. Right.

Q. And as we go across, we see the person then says -- you asked them did it imply anything about Tyson and taste. Right?

A. Yes.

Q. And it's a 1 again. They said yes.
A. Um-hum.
Q. And then we see you asked them what did it imply or state about Tyson and taste and they say that it's healthy for you. Right?
A. Right.
Q. Okay. So it's possible that when people say healthy, it's not related to the raised without antibiotics claim. Right? I mean here we see a person who said that it's what they're saying about taste.
A. Yeah. I mean it could be because you saw 6.8% of the people in the control, there's a statement about quality, you know, it's good quality or something like that. And so yeah, I mean they could -- it isn't necessarily about the antibiotics. Some people associate that with antibiotics. Some people may associate it with something else.
Q. We just don't know. Right?
A. Yeah. Well, you know, that's why there's a test group and a control group. You want to compare the two groups.
Q. Okay. And then I just have a couple of questions about your closed-ended questions.
A. Okay.
Q. You asked a series of close-ended questions and these -- let

me see if I can zoom this. These were the six closed-ended statements and you rotated these. Right?
A. Yes.
Q. These are the statements that you read?
A. Yes.

Q. Now these just ask what it's comparing -- it's comparing Tyson to other chicken. Right?

A. Yes.

Q. So we don't know what other chicken means. We don't know what people were comparing it to, do we?

A. Well, the ad dealt with fresh chicken and so I think most people since it asks what the ad implied or stated, I think most people would take other chicken to mean other fresh chicken.

Q. We don't know if that was Sanderson chicken. Right?

A. No. Just people didn't say anything about Sanderson chicken. So I don't think people would be thinking Sanderson. They just think about other chicken in general.

Q. And we don't know if they were thinking of Perdue chicken. Right?

A. No. They were I think likely just thinking about other chicken that's on the market that they've seen. It could be Perdue. It could be store brand chicken. It could be other chicken out there in the marketplace. That's the way people are likely to think about this.

MS. SINGER: Okay. I have no further questions.

THE COURT: All right. Thank you, Ms. Singer. Any redirect, Mr. Miller?

MR. MILLER: Just a couple.

REDIRECT EXAMINATION

BY MR. MILLER:

Q. Well, let me pick up on that last question, Professor Mazis. You said you worked on the, you testified in the Splenda case?

A. Yes.
Q. Do you recall the ad slogan that was at issue in that case?
A. It was made from sugar, tastes like sugar.
Q. And that didn't mention Equal or Sweet and Low or any other competitor by name in that ad.
A. No.
Q. Okay. Do you know whether other people did surveys on both sides of that case?
A. Yes, they did.
Q. Okay. So there were surveys on both sides of the Splenda case?
A. Yes.
Q. Okay. You talked about needing to probe in on the closed ended. Get into it more I think was your phrase when you testified. What does that mean? Why do you do the closed end? Is there any benefit to doing closed ended?
A. Well, every survey in this field, people do open ended and closed ended questions. And the reason is we see in this study that

the open ends, people often play back what's on the surface. They play back more or less what's in the ad because that's the easiest thing for them. And you need the closed-ended questions to get deeper, to probe more deeply into what is involved in the litigation. So I've done over a hundred of these surveys and I've always used open and closed-ended questions and everybody relies on the open and the closed-ended questions in terms of formulating an opinion.
Q. All right. And finally then, we looked at a couple of

specific consumers. We were looking at a couple, what one or two specific people said. How many people total in the survey?

A. 608.

Q. And how many people are in each cell?

A. About 150.

Q. All right. Is there any -- could you have done a survey with ten people or is there any reason that you picked 600 versus like say 20?

A. Well, 20 wouldn't have any statistical reliability.

Q. Is there some kind of normal practice or state of the art in the survey field for is 10 enough, is 15 enough, is 20 people enough --

A. Well, there are these kind of rules of thumb. Usually, it's typically between 150 and 250 per cell is sort of the norm.

Q. Okay. In order to do what?

A. In order to draw any conclusions about statistical differences.

Q. And so the individual responses sort of become statistically significant then when you have a large enough sample?

A. Right. I mean you can't just focus on one or two or three or four individual responses. You have to look at the overall differences between the cells. How does Cell 1 overall differ from Cell 2 versus differs from Cell 3 differs from Cell 4.

Q. And just as a wrap-up then, is there anything that either Ms. Singer asked you about or Mr. Roth has stated in his summary or anything else you've heard in this case that has shaken your ultimate two conclusions?

A. No.
Q. And let me just make sure. And do these two conclusions that you talked about before, have you reached these conclusions to a degree of certainty within your field of survey experts?
A. Yes.
MR. MILLER: All right. No further questions, Your Honor.
THE COURT: Thank you very much, Professor Mazis. You may step down, sir. We'll now take our lunch break and we'll start again at 2:00.
(Luncheon Recess.)
AFTERNOON SESSION
THE COURT: I'm sorry to keep you all waiting for a few minutes. We're ready to continue, Mr. Miller.
MR. MILLER: Your Honor, we would call in our case in chief as an adverse witness, Mr. David Hogberg from Tyson and let me just

say a couple of things --
THE COURT: It's Hogberg.
MR. HOGBERG: Hogberg. Yes, Your Honor.
THE COURT: Come forward, please, sir.
MR. MILLER: And a couple of things about scheduling. Ms. Jaffe and I spoke before we started and originally she was going to do her examination of Mr. Hogberg right now after I'm finished. But in light to get some people out of town and that kind of thing, we've decided and agree that she can call Mr. Hogberg in her own case and do her own examination then. So that we can call a few witnesses out of order and we've agreed to that.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

SANDERSON FARMS, INC., et al.,
Plaintiffs,

v.

TYSON FOODS, INC.,
Defendant.

Civil No. RDB-08-0210

Baltimore, Maryland

April 9, 2008

9:00 a.m.

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TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE RICHARD D. BENNETT
UNITED STATES DISTRICT JUDGE

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chickens with a solution in the egg. Right?

A I wouldn't, I would not describe it that way. What we do similar to very, essentially everyone else in the industry, is use a vaccine injected in ovo in order to protect the chickens ultimately against the disease that's widespread, a viral disease known as Marrick's Disease. I don't consider that injecting the chickens. Just to clarify, it is in the egg about two to three days before they hatch.

Q Okay. All right. So two to three days before they hatch, you inject the chickens with something and you said the Marrick's Disease. I believe the vaccine is called the Marrick's vaccine. Isn't that right?

A Again, I don't inject the chickens. We inject the eggs

two to three days before they hatch and the injection is a Marrick's vaccine. That part is correct.

Q Okay. And when you injected the -- I'm sorry. I have in my mind that you're injecting the chickens and the egg. But let's just assume maybe you're injecting the pre-born chicken or the chicken embryo with this Marrick's vaccine. You do that with a needle. Right?

A Yes. The procedure, the procedure, one needle pokes a hole in the egg and another delivers the vaccine.

Q And when you got a hole in an egg like that in the hatchery, bacteria can get into that hole. Isn't that correct?

A Yes.

Q And to keep that bacteria from causing a yoke sac infection, you administer antibiotics to the chicken egg at this time, don't you?

A We mix a small amount of antibiotic with the vaccine solution and we do this primarily to prevent a one contaminated egg from then spreading that contamination on to other embryos.

Q So with this solution, you include a small amount of an antibiotic?

A Yes, we do.

Q This is for all Tyson's chicken? They all receive this antibiotic?

A No. The majority do. But there will be times when either seasonally or some hatcheries that do not. But it is fair

to say the majority do.

Q The majority of the chicken receives this antibiotic --

A The majority of the eggs.

Q -- in ovo?

A The majority of the eggs.

Q Okay. But these in ovo chickens eventually they hatch after they've been injected with this antibiotic?

A Most of those eggs will hatch.

Q That's the goal, right, that they hatch?

A Of course.

Q And eventually, they'll be raised and they'll become a food animal. Right?

A Yes.

Q These chickens were advertised as raised without antibiotics. Right?

A Not all of them. Again, not all of our chickens are -- not all of our product is RWA or whether it be qualified or unqualified depending on the time.

Q Let me -- oh, I'm sorry.

A Not all of those products. But yes, there are some of those chickens end up in that product channel if you will.

Q Well, let me be a little more precise. You said before the majority of chickens and I assume the vast majority are injected as part of this process and that majority makes up the majority of RWA chickens. Right?

A I'm sorry? Just --

Q Sure. Let me break it down a little more. The majority of RWA chickens had this antibiotic-injecting procedure done to them in ovo.

A That's correct.

Q Now if you injected one of these chickens instead of two to three days before it hatched the day after it hatched, would that chicken be a candidate for the RWA slogan?

A No, it would not.

Q Okay. So raised is the operative word. Right?

A I believe so.

Q And it's fair to say that Tyson interprets raised to be a post hatch.

A Well, I think that's -- I would say that's what the USDA labeling department interprets raised to mean and then we follow those guidelines.

Q So you at least concede that you agree that in this context raised means post hatch?

A Yes. Raised is from day of hatch until slaughter and I think it's, I think it's worth noting that the USDA standards for organic which are considered by many to be the most stringent raising standards that are out there, those don't begin until 24

hours of life.

Q Well, right now let's just focus on Tyson's belief and what Tyson's practices are with respect to the hatchery.

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A Okay.

Q Now I understand that this is Tyson's understanding of raised and of in ovo and post hatch and when eggs become chickens. But Tyson doesn't disclose its distinction to consumers, does it?

A I don't think I would agree with that either. I know of several cases where I have fielded questions whether that be from a internal in the company or directly with the customer asking when this, if you will, when the clock begins. And we are very clear to say or at least I have been in those circumstances that it begins at day of hatch.

Q I just want to make sure I understand. You're not saying that you advertise your chickens as injected with antibiotics in the egg, but then raised without antibiotics. You just say the second part, right, in your advertising?

A Well, I'm probably -- again, I'm probably not the one to talk about all the advertising. I'm telling you how I represented the product when asked --

Q In internal discussions with consumers?

A No. Either with Tyson employees or with customers and/or in consumers, I've always represented it as day of age until slaughter.

Q I appreciate that you've represented that in your private discussions with consumers. But I'm focusing about what the company is representing on things like billboards, on things

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like Weight Watchers' ads, on things like posters and I haven't seen the word injected with antibiotics in ovo on any of those. I mean do you disagree with that?

A I don't disagree that those words are not there. However, I believe raised believes from the time they're hatched. I personally believe that's fairly easy to understand.

Q But that's not on the fine print. Right? That's not on the fine print in the advertising for a consumer to read, is it?

A I don't think we have quote "fine print."

Q Do you have any basis to believe that consumers take away the same understanding that you do from the word, raised?

A I believe other than just personal conversations with friends. I have not, I guess I would say I have not run into situations where it is confusing to people when they've discussed it with me.

Q So you have not run into those situations?

A I have not.

Q And just to cover this, I know you said something about the USDA earlier. I just want to ask you in your May 2000 label submissions for the RWA logo initially, there was no information in there about injecting the in ovo chicken embryo with antibiotics, was there?

A Not to my knowledge. I don't recall there being --

Q Okay. I'm happy to show you the document. I mean if

you agree it's not in there, I don't need to, but --

A Well, I'll be happy to flip through it. I don't think it's in there, but I can't say to certainty.

MR. DePALMA: Your Honor, what I'm referring to is Defendant's Exhibit 65. I have a few copies here.

THE COURT: Yeah. I still have it up here. Thank you.

MR. DePALMA: Do you have a copy, Your Honor?

THE COURT: I have a copy of Defendant's Exhibit 65 in my hand right now. Yes.

MR. DePALMA: Counsel, do you have one as well on your side?

MS. JAFFE: Yes.

Q Okay. So --

A I think I've got one, too.

Q Oh, you have 65 as well?

A Yes.

Q Okay. If you could just confirm that Tyson does not mention injecting the chicken embryo in the egg with antibiotics in that application?

A No, we don't. However, we do clearly state that the growing period is defined as beginning at the time of hatch and ending at the time of slaughter.

Q Well, I understand that you state that in a confidential document to the USDA, but that's not in the advertising I think we've already established and I understand

your answer to be that you don't disclose that in this application. That's correct?

A No. In this application I was reading -- I mean I'm reading the document. We disclose that we define the growing period from beginning at time of hatch and ending at time of

slaughter. I'm sorry. I misunderstood you if we were talking about advertising.

Q I apologize. I understand that you define the growing period in a fairly narrow way at least in my opinion, but that's just my opinion. But you don't disclose what you do before the growing period, do you?

A No. There's no reference to prior to day of hatch.

Q Let's move on to ionophores. You agree that ionophores are antibiotics?

A Today I do, consistent with the current opinion of FDA.

Q The USDA agrees that ionophores are antibiotics. The United States Department of Agriculture agrees that ionophores are antibiotics.

A Today that's true. Yes.

Q The FDA agrees that ionophores are antibiotics.

A Today that's true. Yes.

Q The American Veterinary Medical Association agrees that ionophores are antibiotics.

A I don't know. I don't think I've seen an updated document of their statement.

♀

Q You are aware an updating process is taking place though to make this explicit, aren't you?

A To make what? I'm sorry?

Q To make their belief that ionophores are antibiotics explicit.

A I have not seen AVMA's if we want to call it new opinion. I have seen the FDA and I have seen USDA. I have not personally seen AVMA's.

Q Have you seen an email from AVMA saying that they were going to undertake this process to make the fact that ionophores are antibiotics explicit?

A No.

MR. DePALMA: Your Honor, I'm going to refer the witness to Plaintiffs' Exhibit 29.

THE COURT: All right.

MR. DePALMA: Now I just want to just remind this is a confidential attorney-eyes only document. So I'm not going to publish it on the ELMO. Just hang on one second, Dr. Pilkington. Your Honor, do you have a copy of that in front of you?

THE COURT: Yes.

Q Okay. Dr. Pilkington, what I want to first do is I want to call your attention to the to line of the top part of the email and I just want to point out that that's your name there on the second line of names on the bottom right where it says Pilkington, Patrick?

♀

A Yes, it is.

Q That means that you received this email. Right?

A Yes, I did.

Q And the text of the email is from Archie Shaffer looks like and he's a Tyson employee?

A That's correct.

Q And it says the latest from the AVMA and that's the American Veterinary Medical Association?

A Yes. I would understand that as so. Yes.

Q Okay. Let me call you down to the email he's forwarding that when he refers to the latest from the AVMA and let me call you down to the second paragraph and let me just

A Yes.
Q Now yesterday, I believe you were watching when Mr. Miller and Dr. Stewart-Brown walked through all those scientific articles that said or referred to ionophores as antibiotics, weren't you?
A Yes.
Q And those articles are authoritative. Right?
A I would agree.
Q And they're peer reviewed?
A Yes.
Q Primary sources?
A I can't recall if all were, but I would agree generally. Yes.
Q And they're relied on by experts in the field of veterinary science?
A Yes.
Q Okay. Let's just talk broader for a second about resistance because there's something that I want to just make sure we understand. That phrase, impact antibiotic resistance and that's why I'm asking. The fact is that bacteria can become

resistant to antibiotics. Right?
A Yes.
Q And then that bacteria can spread in various ways, can't it?
A Um --
Q Well, I'll be specific, but right now --
A Multiply. Yes.
Q And it can even spread. For example, if a human has a

bacteria, they can give it to another human. Right?

A In some cases, yes.

Q Like through a cough. Through a cough?

A Again in some -- yes.

Q Or maybe if you had the bacteria on your hands and you shook hands with another human?

A Correct.

Q Okay. And if we're talking about animal to human or maybe chicken to human, then we can be talking about a situation where the meat is undercooked. Right?

A That would be one source of transmission. Yes.

Q What about if you handled the chicken and you put it on the grill, but you don't wash your hands afterwards?

A Correct.

Q Or you take a fork and you put the chicken on the grill, but then you don't wash off that fork when you take the chicken off the grill.

A Correct.

Q And in those circumstances that we've described, it's possible, I'm not saying, you know, this happens every time. But it's possible the bacteria from the chicken can get into a human.

A That's right.

Q And if that bacteria in the chicken is antibiotic resistant and that bacteria gets into the human, well, then that bacteria in the human is antibiotic resistant. Right?

A It would be. Yes.

Q And I just want to be clear. What we're talking about is bacteria. Right?

A Yes.

Q We're not talking about resistant humans or resistant animals, are we? Just bacteria.

A Yes.

Q Now the fact is that bacteria can become resistant to ionophore antibiotics, too, right?

A Ionophores, certainly their level of effectiveness can change relative to Clostridium. I'm not sure if it's an overt resistance or not.

Q I just want to write. Level of effectiveness may change?

A Yeah.

Q Level of effectiveness. But you're not sure if it's resistance.

A I'm not sure if it's overt resistance. Correct.

Q But now the medical articles or medical studies though have referred to bacteria in the chicken becoming resistant to ionophores including manentin sodium. Right?

A Yes. I've seen that.

Q And that ionophore resistant bacteria like any bacteria that we discussed in that broad, general example before can also get into a human, can't it?

A The events that would have to for that to happen would be quite long and the reason I say that is those bacteria, those bacteria as you've said are intestinal bacteria. And I would not, I really, I would not envision that becoming a systemic infection that ultimately ends up in meat product. So I'm not excluding the possibility. But I just find it more remote than your original examples of let's say cooking on the grill when

you're primarily talking about ecoli and even salmonella.

Q So you're not excluding the possibility?

A No. I don't exclude the possibility.

Q But so it can, it can get into a human? It might?

A It might.

Q So scientifically your chicken -- Tyson's chicken, I'm sorry, Tyson's chicken is raised with ionophores.

A Yes.

Q And bacteria may become resistant to ionophores or at least that's what some studies have said.

A That's right.

Q And then that bacteria may get into a human.

A It may.

Q But this isn't something, right, that we disclose to consumers in advertising, for example, because at this time Tyson doesn't believe that this impacts human antibiotic resistance?

A No. It's not just Tyson. The medical community does not believe that ionophores affect human antibiotic resistance and the list of folks who have agreed to that including Dr. Stewart-Brown is long.

Q I'm just asking about Tyson right now, Dr. Pilkington.

A So I'm sorry. Then please repeat the question.

Q Sure. Tyson doesn't think consumers should know at this time that when it says raised without antibiotics, it's raised with ionophores because Tyson doesn't believe that ionophores impact human antibiotic resistance.

A That was a multiple part question. So I'll, forgive me, but I'll break it down.

Q I can break it down. I have a note here --

resistant to other antibiotics, not even the antibiotic that that first bacteria is resistant to.

A That does -- yes. That's noted.

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Q Okay. And I understand, I understand that you're saying there's a small possibility that that might happen with ionophores. And I'm just saying it could. Right? At some point in the future, the bacteria could cross --

A What I'm saying is it's my opinion that they do not contribute to antibiotic resistance in humans and I believe my colleagues, not only Dr. Stewart-Brown, but many in the profession will agree with me and I don't want to speculate on whether it could in a pathway that you're describing that I don't even think is plausible.

Q Okay. And so you don't want to speculate on that.

A No, I do not.

Q Do you remember this thing called fluoroquinolones?

A Yes, I do.

Q Can you just spell that for the court reporter?

A Probably not.

Q If you can't, I have it down. It's either --

THE COURT: Mr. Lawson can spell this over here.

A It's either F-L-O-U or U-R -- I always switch those -- R-O-Q-U-I-N-O-L-O-N-E.

Q I think that's right. I'm not sure.

A I thought you might.

Q No. I just typed it out. Now that used to be approved for use in poultry as an antibiotic. Right?

A That's right.

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Q For years?
A Well, it was -- it wasn't -- yes. It was years. It wasn't decades.
Q Just for years, not decades. Just years. But then people and I mean scientists realized that it was causing bacteria to become resistant to human drugs. Right?
A Yeah. That's, that's --
Q Just talking about fluoroquinolones.
A Right. Right. I know that. I think that's an accurate statement.
Q An accurate statement?
A An, an. A-N. Accurate.
Q Okay. Thank you, Doctor. And the FDA pulled that drug from approval for use in poultry. Right?
A Yes, they did.
Q Now if consumers, if you advertise this as raised with ionophores even though there's only a small possibility, at least consumers can make the call for themselves, right, whether to buy the product or not?
A I'm sorry?
Q They could evaluate the risk on their own terms, right, seeing the word, ionophore, looking it up and deciding for themselves whether an ionophore is like the next fluoroquinolone?
A Okay. Just specifically, what's the question? If a consumer can look up the word, ionophore?

Q Let's start with that question.

A Yes. Yes, they can.

Q But they can't do it if it's not on the advertising, can they?

A Yes. They can still look up the word, ionophore.

Q Well, how are they going to know to look it up?

A Maybe they hear the word, ionophore and they want to look it up. I'm sorry. I don't understand exactly what you're asking me.

Q Well, they're not going to hear it from the billboard though. Right?

A They wouldn't hear anything from the billboard. Yes.

Q They're not going to see it --

A You're right. They will not see the word, ionophore, on a Tyson billboard. You are correct.

MR. DePALMA: I have nothing further, Your Honor.

THE COURT: Thank you, Mr. DePalma. Ms. Jaffe, any redirect?

MS. JAFFE: Yes. Just very short, Your Honor.

REDIRECT EXAMINATION

BY MS. JAFFE:

Q Dr. Pilkington, are you aware that one poultry company writes on its labels quote, "no antibiotics ever"?

A Yes.

Q And do you know what company that is?

A Well, and we've heard in the last couple of days that one of Perdue's let's call it niche brands does that.

Q Do you remember the name of that?

A Harvest Land.

Q Okay. Now Tyson has never made a no antibiotic claim