

FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

CPC INTERNATIONAL INC.

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

Docket C-3321. Complaint, Jan. 2, 1991—Decision, Jan. 2, 1991

This consent order prohibits, among other things, an advertiser, seller and distributor of Mazola Corn Oil and Mazola Margarine from misrepresenting the effects of such oil or margarine products on serum cholesterol levels, and from making claims concerning such products' ability to reduce the risk of developing heart disease, or to reduce serum cholesterol levels, unless at the time such representations are made, they are substantiated with competent and reliable scientific evidence.

Appearances

For the Commission: *Robert C. Cheek.*

For the respondent: *Irving Scher, Weil, Gotshal & Manges, New York, N.Y.*

COMPLAINT

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

PARAGRAPH 1. CPC is a Delaware corporation with its offices and principal place of business at International Plaza, Englewood Cliffs, New Jersey.

PAR. 2. CPC has advertised, offered for sale, sold and distributed Mazola Corn Oil and Mazola Margarine (collectively referred to as "Mazola") and other "foods" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 3. CPC has disseminated or caused to be disseminated advertisements for Mazola. These advertisements have been dissemi-

nated by various means in or affecting commerce, including magazines distributed across state lines, for the purpose of inducing purchases of such foods by members of the public.

PAR. 4. The acts and practices of CPC alleged in this complaint have been in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Typical of respondent's advertisements, but not necessarily inclusive thereof, are the advertisements attached hereto as Exhibits A and B. Specifically, the aforesaid advertisements contain the following statements and depictions:

(a) [A depiction of a raw chicken leg with skin and a fried chicken leg with skin] **Add Mazola, reduce cholesterol** [in boldface headline]

[A depiction of a bottle of Mazola Corn Oil, a box of Mazola Margarine, and a can of Mazola No-Stick]

Medical studies prove it! Not only are Mazola products cholesterol-free, but Mazola corn oil and margarine also help reduce your existing serum cholesterol level. Yes, reduce your cholesterol. Because the 100% pure corn oil in Mazola acts to help remove cholesterol from your system.

Start using Mazola as part of your family's healthy diet, and you can see significant progress in as little as three weeks. And as you can see by the luscious fried chicken, you don't exactly have to suffer doing it.

So enjoy Mazola 100% corn oil, Mazola margarine and Mazola No-Stick cooking spray to your heart's content.

Adding Mazola is a great-tasting way to reduce your cholesterol. [Exhibit A]

(b) [A depiction of a man with what appears to be his granddaughter] **"Mazola does what? They said it could turn back my cholesterol. I didn't believe it til my level dropped 17%."**

CHOLESTEROL PROFILE

BEFORE MAZOLA DIET: LEVEL 225

AFTER MAZOLA DIET: LEVEL 187

"I'm stubborn. It took me a while to start doing something about cholesterol. Like listening to my doctor. He told me to start exercising and stick to a diet low in saturated fat. But when he told me that clinical studies proved that by replacing some of those saturated fats with Mazola* I could cut my cholesterol level even more, you better believe I was skeptical.

"Until I tried it. In all kinds of salads and my wife's great biscuits. I even went for a fried chicken leg or two. (I know it's O.K. to have foods fried with Mazola corn oil sometimes. And not just 'cause Mazola has no cholesterol. But because the pure Mazola corn oil helps get cholesterol down.)

"About a month or so of healthy diet with Mazola and my cholesterol went from 225 to 187. It backed off 17%. Which is great by me. 'Cause I've got too many good things ahead of me—more good meals, more grandchildren...."

[A depiction of bottle of Mazola Corn Oil, a box of Mazola Margarine, and a can of Mazola No-Stick] **TOGETHER WE CAN BEAT CHOLESTEROL.** [Exhibit B]

PAR. 6. Through the use of the statements and depictions referred to in paragraph five and others in advertisements and promotional materials not specifically set forth herein, CPC has represented, directly or by implication, that consumption of chicken legs fried in Mazola will reduce serum cholesterol levels.

PAR. 7. In truth and in fact, consumption of chicken legs fried in Mazola will not cause a reduction in serum cholesterol levels when compared to foods containing no fat or cholesterol. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. Through the use of the statements and depictions referred to in paragraph five and others in advertisements and promotional materials not specifically set forth herein, CPC has represented, directly or by implication, that adding Mazola to the diet without other dietary changes will cause a 17% reduction in serum cholesterol levels.

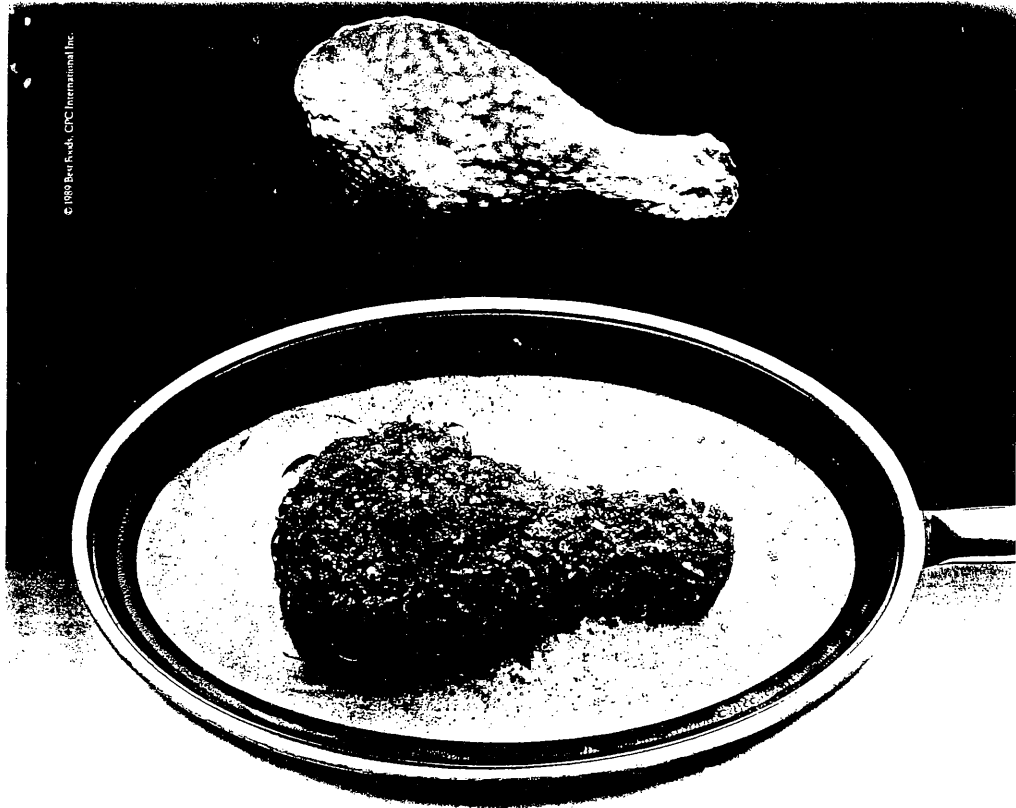
PAR. 9. Through the use of statements and depictions referred to in paragraph five, and other statements and depictions not specifically set forth herein, CPC has represented, directly or by implication, that at the time of making the representations set forth in paragraph six and eight, CPC possessed and relied upon a reasonable basis for such representations.

PAR. 10. In truth and in fact, at the time of making the representations set forth in paragraphs six and eight, respondent did not possess and rely upon a reasonable basis for such representations. Therefore, CPC's representation set forth in paragraph nine was, and is, false and misleading.

PAR. 11. The acts and practices of CPC as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce and the making of false advertisements in violation of Sections 5 and 12 of the Federal Trade Commission Act.

Commissioner Owen concurring in part and dissenting in part, and Commissioner Starek not participating.

EXHIBIT A



Add Mazola, reduce cholesterol.



Medical studies prove it! Not only are Mazola products cholesterol-free, but Mazola corn oil and margarine also help reduce your existing serum cholesterol level. Yes, *reduce* your cholesterol. Because the 100% pure corn oil in Mazola acts to help remove cholesterol from your system.

Start using Mazola as part of your family's healthy diet, and you can see significant progress

in as little as three weeks. And as you can see by the luscious fried chicken, you don't exactly have to suffer doing it.

So enjoy Mazola 100% corn oil, Mazola margarine and Mazola No-Stick cooking spray to your heart's content.

Adding Mazola is a great-tasting way to reduce your cholesterol.

EXHIBIT A

Complaint

EXHIBIT B

**"Mazola" does what?
They said it could turn back my cholesterol.
I didn't believe it til my level dropped 17%."**

CHOLESTEROL PROFILE	
BEFORE MAZOLA DIET LEVEL	225
AFTER MAZOLA DIET LEVEL	187

"I'm stubborn. It took me a while to start doing something about cholesterol. Like listening to my doctor. He told me to start exercising and stick to a diet low in saturated fat. But when he told me that clinical studies proved that by replacing some of those saturated fats with Mazola* I could cut my cholesterol level even more, you better believe I was skeptical.

"Until I tried it. In all kinds of salads and my wife's great biscuits. I even went for a fried chicken leg or two. (I know it's O.K. to have foods fried with Mazola corn oil some times. And not just 'cause Mazola has no cholesterol. But because the pure Mazola corn oil helps get cholesterol down.)

"About a month or so of a healthy diet with Mazola and my cholesterol went from 225 to 187. It backed off 17%. Which is great by me. 'Cause I've got too many good things ahead of me — more good meals, more grandchildren. And heck, who knows,

maybe even a new title — 'Racquetball Rookie of the Year.' Why not!"



*For a summary of the studies and more information on healthy eating, see Mazola, Inc., 85 Elm Street, Coventry, CT 06230. © 1989 Best Foods, International, Inc.

TOGETHER WE CAN BEAT CHOLESTEROL

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

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

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

1. Respondent CPC International Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at International Plaza, in the City of Englewood Cliffs, State of New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondent CPC International Inc., a corpora-

tion, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of Mazola Corn Oil, Mazola Margarine or any other edible oil or margarine product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication:

(a) That consumption of chicken fried in any such oil or margarine product will reduce serum cholesterol levels;

(b) That adding any such oil or margarine product to the diet without other dietary changes will cause a 17% reduction in serum cholesterol levels; or

(c) The effect of any such oil or margarine product on cholesterol levels.

II.

It is further ordered, That respondent, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of Mazola Corn Oil, Mazola Margarine or any other edible oil or margarine product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any such product can or may reduce, or help reduce, the risk of developing or otherwise affect heart disease, or that any such product can or may reduce, or help reduce, or otherwise affect serum cholesterol levels, unless at the time of making such representation respondent possesses and relies upon competent and reliable scientific evidence that substantiates such representation. For any test, analysis, research, study or other evidence to be "competent and reliable" for purposes of this order, such test, analysis, research, study or other evidence must be conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession to yield accurate and reliable results.

III.

Nothing in this order shall prevent respondent from representing

truthfully, for example, that any product covered by this order can be part of or compatible with a diet low in saturated fats and cholesterol, and that such diet can be used to reduce serum cholesterol or the risk of heart disease.

IV.

It is further ordered, That for three (3) years from the date that the representations to which they pertain are last disseminated, respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials relied upon to substantiate any representation covered by this order; and

B. All test reports, studies, surveys or other materials in its possession or control that contradict, qualify or call into question such representation or the basis upon which respondent relied for such representation.

V.

It is further ordered, That respondent shall distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees engaged in the preparation and placement of advertisements or other such sales materials covered by this order.

VI.

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

VII.

It is further ordered, That respondent shall, within sixty (60) days after service of this order upon it, and at such other times as the Commission may require, file with the Commission a report, in

writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Owen concurring in part and dissenting in part, and Commissioner Starek not participating.

STATEMENT OF COMMISSIONER DEBORAH K. OWEN
CONCURRING IN PART AND DISSENTING IN PART

In recent years, growing public awareness about the relationship of diet to health has led to an increase in advertising claims regarding the beneficial effects of various foods. I applaud Chairman Janet Steiger's policy initiatives in the area of health claims, and her commitment to ensuring that consumer interest in health and nutrition is met with truthful and non-deceptive advertising.¹ I fully support the Chairman's goal of pursuing a national advertising policy that promotes clear guidance to advertisers—a goal that has been widely supported by Congress, consumer groups, and state law enforcement officials, as well as by the business and advertising communities.

While a clear national advertising policy is an important priority, I agree with Chairman Steiger that an equally important corollary is the principle that truthful, non-deceptive claims should not be chilled. Policies that discourage truthful, nondeceptive claims can prevent dissemination of legitimate, beneficial information to a wide population of consumers who might not otherwise receive it. For instance, a landmark study of health claims in the cereal market by our Bureau of Economics found that consumer awareness of the potential nutritional benefits of fiber increased significantly as a result of advertising and labeling claims about the relation of fiber to health.² Because consumers can gain significant nutritional information through advertising, it is important that we prohibit only those claims that sound evidence shows to be false or deceptive.

The Commission may charge a violation of the FTC Act when it has "reason to believe" that a claim is false or deceptive and that a proceeding to determine the existence of such a violation would be "to the interest of the public."³ Exactly what quantity and type of

¹ See Remarks of Chairman Janet D. Steiger before the American Advertising Federation Spring Government Affairs Conference, March 6, 1990.

² Ippolito and Mathios, *Health Claims in Advertising and Labeling: A Study of the Cereal Market*, Bureau of Economics Staff Report, Federal Trade Commission, August 1989.

³ 15 U.S.C. 45(b).

evidence is necessary for the Commission to have a "reason to believe" has not been clearly articulated by the judiciary, and therefore appears to be largely within the judgment of each individual Commissioner. However, where the Commission's complaint will not be subject to a full adjudication of the facts, the Commission might reasonably wish to base its charges on a higher quantum of evidence when it agrees to accept a consent agreement, rather than just issuing a complaint.

As a practical matter, consent orders make law. This is particularly true among the cognoscenti who follow closely the Commission's decisions and look for trends and clues in every public document, in order to advise persons subject to our jurisdiction. It is therefore critical to the conscientious exercise of authority that the Commission provide as much information as possible about the bases for these decisions,⁴ and that the Commission's ultimate decision not be primarily due to the willingness of private parties and their counsel, no matter how competent or sophisticated they might be, to sign off. Consent agreements, because they eliminate the significant costs, adverse publicity, and other burdens of adjudication, can be motivated by reasons other than guilt or innocence. As the Supreme Court noted in *FTC v. Standard Oil Co. of Cal.*:⁵

The adjudicatory proceedings which follow the issuance of a complaint may last for months or years. They result in substantial expense to the respondent and may divert management personnel from their administrative and productive duties to the corporation.⁶

Thus, consent by the respondent to the issuance of an order should not alone justify the Commission's issuance of the complaint and acceptance of the consent. The Commission should require evidence based as much as possible on objective, empirical data, rather than subjective beliefs, and should require evidence beyond what would satisfy us in the decision to initially issue a complaint and commence adjudicatory proceedings.

A greater degree of objective evidence is necessary in this sort of case because of the nature of the implied claims at issue. I view

⁴ For example, in the present case, the complaint asserts that the claims were made and that they were false or deceptive, but the public is left guessing as to what in particular about the phrasing and presentation of the advertisements, or in consumers' perception thereof, was significant in the Commission's decision. This does not provide clear guidance to the advertising community. The "Analysis to Aid Public Comment," issued at the time the consent agreement was first accepted for public comment, provides little additional enlightenment.

⁵ 449 U.S. 232 (1980).

⁶ *Id.* at 246, n. 14.

implied claims as ranging over a continuum from those, on one end, that are almost express, to those on the other end, that are highly vague and almost non-existent. When a potentially deceptive claim is not clear on the face of an advertisement, the Commission prefers extrinsic evidence to inform its judgment.⁷ The quantum of evidence demanded should be directly proportional to the level of vagueness—the closer a claim is to the express end of the continuum, the less need there may be for extrinsic evidence. In those instances, reliance on the Commission's expertise is more appropriate than in cases of vaguer claims. As uncertainty rises over what implications are likely to be drawn from advertisements, so too should the type and quantum of evidence to establish a "reason to believe" and to accept a consent agreement.

As a general rule, when there is a reasonable difference of opinion concerning the existence of implied claims, I would require that the Commission be provided with greater extrinsic evidence than was originally apparent to me when this case was first presented. It simply has not been clear to me, from a bare reading of the advertisements at issue, that consumers would reasonably infer a deceptive message, rather than a non-deceptive message, of which there are several. The uncertainty over what inferences are reasonably drawn is illustrated by a variety of interpretations within my own office and elsewhere.⁸

In considering whether to vote in favor of issuing this consent agreement for public comment, I consulted a number of scholarly references in the area of marketing and consumer research to seek some quantum of extrinsic evidence that would be probative of the existence of the allegedly deceptive claims. After reviewing various articles in the areas of advertising interpretation, consumer behavior, psycholinguistics and general marketing principles, particularly those discussing the impact of headlines, I concluded that at least some reasonable consumers could infer from each of the two Mazola

⁷ *Thompson Medical Co.*, 104 FTC 648, 789 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 1289 (1987).

⁸ For instance, our former colleague, Commissioner Terry Calvani, concluded on the basis of the ads alone that he did not have reason to believe that they violated Section 5:

Each of the two ads can be read in several ways. Most of these possible readings are supportable, that is, we would not find them legally deceptive.... Staff, however, asserts that another reading is preferable, a reading for which there is no substantiation.

Noting that "there is very little evidence that supports this interpretation," and that "[s]ome of the evidence in fact contradicts that conclusion." Commissioner Calvani concluded: "[A]ll agree that the limited direct consumer research now available is methodologically unreliable, so that no strong conclusions can be drawn from it, one way or the other." Dissenting Statement of Commissioner Terry Calvani, No. 892-3176, at 1 & n.3.

advertisements the deceptive claims that are alleged in the Commission's complaint.⁹ Based on the evidence available at that point, in both advertisements, it appeared reasonable to conclude that the textual passages and images did not qualify the headlines with sufficient clarity for certain reasonable readers. This encouraged me to find reason to believe that the Commission should issue its complaint in this matter, along with the proffered consent agreement, for public comment. However, I indicated at that time that my final decision would be based on the entire record, including any probative evidence submitted during the comment period.

As anticipated, the public comments in this case proved particularly helpful in the Commission's efforts to articulate advertising guidelines in this sensitive area and, in particular, with respect to how these advertisements are reasonably interpreted. Based on these comments, I have concluded that I cannot agree with paragraphs 5(a), 6, and 7 of the complaint (including Appendix A), and paragraph I(a) of the order. I therefore dissent from the final issuance of those portions of the complaint and order. For the reasons explained below, however, I concur in the remainder of both.

After carefully considering all of the public comments that were submitted, I concluded that the outcry from the scientific community mandated a closer look at the two advertisements, because it provided further evidence that non-deceptive messages may be discouraged, to the detriment of consumers. For example, Dr. D. M. Hegsted, Professor of Nutrition Emeritus of Harvard Medical School,¹⁰ wrote that he was concerned that the consent order "might prevent advertisers from saying that consumption of a polyunsaturated fat, like corn oil, can lower serum cholesterol levels."¹¹ Professor Hegsted further commented:

It is true, of course, that consumption of single foods can rarely be shown to have a favorable effect upon serum cholesterol or anything else. The total diet must be modified. Yet the total diet consists of individual foods and the desired diet can only

⁹ If consumers could reasonably infer several claims from an advertisement, one of which is deceptive, the advertiser will be liable for the deceptive claim. Commission Policy Statement on Deception, *incorporated in Clifdale Associates, Inc.*, 103 FTC 110, 178, *citing, National Comm'n on Egg Nutrition*, 88 FTC 89, 185 (1976), *enforced in part*, 570 F.2d 157 (7th Cir. 1977); *Jay Norris Corp.*, 91 FTC 751, 836 (1978), *aff'd*, 598 F.2d 1244 (2d Cir. 1979). The deceptive claim need not be the majority interpretation. *See, e.g., Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246 (6th Cir. 1973), *cert. denied*, 414 U.S. 1112 (1973); *Rhodes Pharmacal Co., Inc.*, 49 FTC 263 (1952), *aff'd as modified*, 208 F.2d 382 (7th Cir. 1954), *rev'd on other grounds*, 348 U.S. 940 (1955) (remanded for reinstatement of Commission order).

¹⁰ Dr. Hegsted is widely recognized as one of the pioneers in the study of the effects of fats on serum cholesterol.

¹¹ Comment of D. M. Hegsted, July 24, 1990, File No. 892-3176.

be achieved by the incremental, but favorable, contributions of the appropriate individual foods and food products. The consumer must be able to identify those foods which contribute to the desired diet. Most of this information comes from food advertising. It will be a great mistake if the limitations on advertising are so severe that the consumer cannot make appropriate food selections.¹²

In light of these comments, and the others that were submitted, I reevaluated both advertisements.

The "Chicken" Ad

In this advertisement, the headline stated, "Add Mazola, Reduce Cholesterol." These words must be read in conjunction with the pictures that prominently accompany them. The imperative "Add Mazola" causes one to question, even if subconsciously, "Add Mazola to what?" The answer must logically be, "to the raw chicken leg which is pictured"—and not to anything not pictured. By adding Mazola to the raw chicken leg and getting a fried chicken leg, consumers could achieve a net reduction in serum cholesterol, over an alternative preparation, for example, of microwaving the chicken leg without Mazola. This is the type of information that is beneficial to consumers, as emphasized by the scientists who commented.

In light of the lack of hard empirical evidence regarding consumer interpretation of this particular advertisement, and the scholarly criticism of a purely subjective determination that the advertisement is deceptive,¹³ I believe that the Commission should lean toward encouraging dissemination of the beneficial information. My conclusion might be different if there were better extrinsic evidence that a

¹² *Id.* at 2. Other commenters from the scientific community made similar observations. See public comments of: Dr. Peter D. Wood, Stanford Center for Research in Disease Prevention of the Stanford University School of Medicine, August 15, 1990 ("I am concerned that a result of the Proposed Consent Agreement, and similar agreements that follow it, will be to divert the public's attention away from dietary means of cholesterol control so that they are more likely to need or request cholesterol-lowering drugs.... There is, of course, a considerable amount of epidemiological evidence suggesting that increased intake of polyunsaturated fat is associated with lower cholesterol levels and rates of coronary heart disease."); Dr. Jacqueline Dupont, Food and Nutrition Science Consulting, August 13, 1990 ("I am concerned that one of the possible outcomes of the agreement could be that advertisers will lose the option to say that an oil containing polyunsaturated fatty acids, like corn oil, can lower blood cholesterol levels.... Well designed scientific studies from the 1950's and continuing today show that the type of fat has a significant effect on serum cholesterol and that polyunsaturated fatty acids have a cholesterol-lowering effect independent of replacement of saturated fatty acids in the diet."); Dr. James M. Iacono, Agricultural Research Service, U.S. Dept. of Agriculture, July 10, 1990 ("[P]olyunsaturates are at least one-third, if not one-half as potent in lowering cholesterol as saturates are in raising cholesterol."); Dr. P. M. Kris-Etherton, College of Health and Human Development, the Pennsylvania State University, August 9, 1990 ("[D]isease specific health claims on food labels and in food advertisements have been effective in communicating important nutrition and other scientific information to the public.")

¹³ See Comment of Ivan L. Preston, Professor, School of Journalism and Mass Communication, University of Wisconsin, June 25, 1990.

reasonable number of consumers took the allegedly deceptive message. However, although it is possible that some consumers might infer a deceptive message, I believe this fact is too uncertain, and the number of potentially deceived consumers is also too uncertain,¹⁴ to justify discouraging the truthful and beneficial information within the advertisement.

The "Grandfather" Ad

Analysis of this advertisement proved more difficult due to the many competing elements within it, but I find more than enough evidence to conclude that there is reason to believe that the ad is likely to mislead, based on two factors.

First, the overall effect of the headline in this advertisement is not as ambiguous as in the "chicken" ad. The headline explicitly refers only to the role of Mazola in reducing cholesterol by 17%. Headlines of this nature, which may not require the reader to look further, can have a significant impact that may not be sufficiently qualified by subsequent smaller-type disclaimers.¹⁵ Of course, this is not to suggest that the Commission does not look at the whole ad, but merely to emphasize that headlines should be used carefully.¹⁶ Furthermore, my judgment that the headline may lead to the overall deceptiveness of the advertisement is a close call because the accompanying picture may somewhat convey the fact that exercise also contributed to cholesterol reduction. The picture shows an older man attired in sportswear, complete with headband and a raquetball raquet in his hand. Also, the numbers representing the cholesterol reduction are presented in terms of "Before Mazola Diet" and "After Mazola Diet" (emphasis added), which indicates that a particular "diet" may have been involved, not necessarily just the addition of Mazola. Nevertheless, unlike the chicken ad, these particulars are not needed to fill in any blanks left by the explicit 17% headline.

The second factor weighing in my decision is evidence that the 17%

¹⁴ See *supra* note 9.

¹⁵ In a joint comment favoring the consent agreement, ten state Attorneys General mentioned David Ogilvy, a noted advertising specialist, and his views regarding the significant impact of headlines on consumers. Comment submitted by John K. Van De Kamp, Attorney General of California, on behalf of the Attorneys General of the states of California, Florida, Iowa, Illinois, Massachusetts, Missouri, Minnesota, New York, Texas and Wisconsin, August 20, 1990, *citing* D. OGILVY, OGILVY ON ADVERTISING 71 (1983). In fact, this is one of the sources I also consulted in my original finding of a reason to believe that this ad was potentially deceptive.

¹⁶ In *Thompson Medical*, the Commission pointed to the "special significance of headlines" in finding a particular advertisement deceptive because of the failure of a textual disclosure to adequately qualify the headline. 104 FTC at 799.

cholesterol reduction stated in the ad is not a representative loss. The Commission has found that the failure to include information in an advertisement to qualify an unrepresentative quantity is deceptive.¹⁷ I have also relied on some empirical evidence for the assumption that consumers will infer typicality from express quantitative statement.¹⁸ In the present case, it is my understanding that the study on which the 17% figure was based does not support a conclusion that the average or typical consumer would also be able to achieve a full 17% reduction in serum cholesterol, and that the average reduction could be significantly lower than 17%. For consumers who made no dietary changes other than switching to Mazola (perhaps because they are misled by the advertisement), the reduction could be even lower.

While I have reason to believe that, taken as a whole, this advertisement is likely to mislead, it is easy to envision how with just a few changes, the ad would not be deceptive. Thus, information beneficial to consumers, as emphasized by the scientific community, could still be disseminated at little extra cost to business. Furthermore, I want to make clear that, aside from the portions of the Complaint and the Order from which I have dissented, I have accepted the remaining portions in part because of the language of Part III of the order and in particular, the inclusion of the phrase, "for example." Part III states:

Nothing in this order shall prevent respondent from representing truthfully, for example, that any product covered by this order can be part of or compatible with a diet low in saturated fats and cholesterol, and that such diet can be used to reduce serum cholesterol or the risk of heart disease.

The caveat, "for example," means that the stated claim is not the only

¹⁷ See, e.g., *Cliffdale Associates, Inc.*, 103 FTC 110, 173 (1984) (fuel savings claims by individuals in ads were not typical); *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 303 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980) (weight loss claims were far from typical); *National Dynamics Corp.*, 82 FTC 488, 563-64 (1973) (claims of prior earnings were extraordinary). In addition, the Commission's Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 CFR 255 (1990), state:

An advertisement employing an endorsement reflecting the experience of an individual or a group of consumers on a central or key attribute of the product or service will be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product in actual, albeit variable, conditions of use.

16 CFR 255.2(a).

¹⁸ In one study comparing various potentially misleading advertisements with control advertisements, researchers measured consumer beliefs gained from a magazine advertisement that stated that a banana has "about 85 calories." Apparently, only small bananas have 85 calories and the average banana has 101 calories. The researchers found that a statistically significant number of consumers held false beliefs about the caloric content of bananas after viewing the ad with the 85 calorie statement. Russo, Metcalf and Stephens, *Identifying Misleading Advertising*, 8 J. OF CONSUMER RESEARCH 119, 124-25 (1981).

