JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

February 23, 1973

OPINION LETTER NO. 12

Herbert R. Domke, M.D.
Director, Division of Health
Broadway State Office Building
Jefferson City, Missouri 65101

Dear Dr. Domke:

This letter is in response to your request for an opinion which asks:

> "Does a label bearing the Federally registered trade mark 'NO-CAL' and a statement containing the actual caloric content per ounce when used on a bottle of a beverage containing as many as 4, 8 or 12 calories per 16 ounce bottle violate provisions of the Non-Alcoholic Drink Law (Sections 196.125 - 196.145 RSMo)?"

The statutes to which you refer include a definition of "non-alcoholic drink" as follows:

> "That the term 'nonalcoholic drink', as used herein, shall include carbonated beverages of all flavors, sarsaparilla, ginger ale, soda water of all flavors, lemonade, orangeade, root beer, grape juice, and all other non-intoxicating drinks." Section 196.125, RSMo

The ingredient list on the label of the NO-CAL beverage indicates that it is a carbonated-flavored beverage; furthermore, the absence of an alcoholic content percentage brings the NO-CAL beverage within the scope of that part of the definition referring to "all other nonintoxicating drinks."

Another section provides that nonalcoholic drinks shall not be misbranded and reads as follows:

> "That it shall be unlawful for any person, firm or corporate body, by himself, herself, itself or themselves, or by his, her, its or their agents, servants or employees, to manufacture, sell, offer for sale, expose for sale, or have in possession with intent to sell, any article of nonalcoholic drink which is adulterated or misbranded, within the meaning of sections 196.125 to 196.145." Section 196.130, RSMo

Nonalcoholic drinks are deemed misbranded under the following conditions:

> "That, for the purpose of sections 196.125 to 196.145, a nonalcoholic drink shall be deemed to be misbranded:
>
> * * *
>
> (2) If it is labeled or branded or tagged so as to deceive or mislead the purchaser;
>
> * * *
>
> (5) If the bottle or receptacle containing it, or its label, shall bear any statement, design or device, regarding the ingredients or the substance contained therein, which statement, design or device shall be false or misleading in any particular; provided, that any nonalcoholic drink which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded under the following conditions:
>
> (a) In the case of mixtures or compounds which may be now, or from time to time hereafter, known as nonalcoholic beverages under their own distinctive names, and not an imitation of, or offered for sale under, the name of another article; . . ." Section 196.140(2) and (5), RSMo

It appears that your inquiry concerns the question whether the name "NO-CAL" constitutes a "label, brand or tag that deceives or misleads the purchaser," within the scope of subsection 2 of Section 196.140 above. An alternative consideration involves whether the NO-CAL beverage bears a ". . . statement, design or device, regarding the ingredients or the substance contained therein, which statement, design or device shall be false or misleading in any particular; . . ." as provided in subsection 5 of Section 196.140. And finally, consideration must be given to the proviso of subsection 5 that those nonalcoholic drinks not containing added poisonous or deleterious substances shall not be deemed misbranded in the case of mixtures or compounds that are known under their own "distinctive names." Relying on the list of ingredients displayed on the NO-CAL label, the beverage does not appear to contain "poisonous or deleterious" additives, and therefore the proviso of subsection 5 may apply. Whether "NO-CAL," therefore, constitutes a "distinctive name" within the meaning of said proviso may be determinative of whether a manufacturer or vendor of that product is liable for violation of the law under Section 196.145.

We also note that the provisions relating to nonalcoholic drinks (Sections 196.125 through 196.145, RSMo) are not the exclusive sections pertaining to misbranding of food under Missouri law. Section 196.010, RSMo, defines terms for the purposes of the Food and Drug Law, Sections 196.010 to 196.120, RSMo. Among these definitions is the term "food" which is defined as follows:

> "The term 'food' means articles used for food or drink for man or other animals, chewing gum, and articles used for components of any such article;" Section 196.010(7), RSMo

A nonalcoholic drink is included in this definition. State v. Lief, 154 S.W. 1133, 1134 (Mo. 1913).

Food is deemed to be misbranded under the following circumstances:

> "If its labeling is false or misleading in any particular;" Section 196.075(1), RSMo

It is helpful to consider the case law interpreting the provisions of the original Federal Food and Drug Act, since the Missouri Food and Drug Law is similar in purpose and often identical in its provisions. For instance, under Section 8 of the 1906 Federal Pure Food Act, the term "misbranded" is defined as follows:

> "That the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food,

> or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, . . ." 34 Statutes at Large 768, Chapter 3915, Section 8

Clearly, the 1906 Pure Food Act was the source of our misbranding law; because of that derivation, cases interpreting the Federal statute are valuable in applying the Missouri statute.

An early statement by the United States Supreme Court concerning the purposes of the Federal Act was as follows:

> "The statute upon its face shows, that the primary purpose of Congress was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated foods. The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality. . . ." United States v. Lexington Mill & Elevator Company, 232 U.S. 399, 409, 58 L.Ed. 658, 662 (1914)

A later federal court spoke thusly as to the meaning of the misbranding provisions of the Federal Act:

> ". . . The [Federal Food, Drug and Cosmetic] Act was not designed to protect the critical consumer; rather its purpose is--'to protect the public, the vast multitude which includes the ignorant, the unthinking, and the credulous who, when making a purchase, do not stop to analyze.' . . ." United States v. 30 Cases, etc., 93 F.Supp. 764, 769 (D.C. Ia. 1950)

In determining whether an article is misbranded under Section 196.140, RSMo, we must consider first if "it is labeled, branded, or tagged so as to deceive or mislead the purchaser." In attempting to identify what standard to apply in order to determine whether a product deceives or misleads, the court in United States v. 88 Cases, etc., 187 F.2d 967, 971 (3rd Cir. 1951) stated as follows:

> "The correct standard was the reaction of the ordinary consumer under such circumstances as attended retail distribution of this product. When a statute leaves such a matter as this without specification, the normal inference is that the legislature contemplated the reaction of the ordinary person who is neither savant nor dolt, who lacks special competency with reference to the matter at hand but has and exercises a normal measure of the layman's common sense and judgment. . . ."

It must be conceded that the Federal and Missouri statutes provide little flexibility in interpreting "misbranding" by requiring only that the label be "false or misleading in any particular" (emphasis ours). Section 196.140(5), RSMo, 21 U.S.C.A., Section 334. In attempting to permit some flexibility in the interpretation of this provision, the court in United States v. Article of Food Consisting of 432 Cartons, 292 F.Supp. 839, 841 (D.C. N.Y. 1968) stated:

> "The issue of whether a label is false or misleading may not be resolved by fragmentizing it, or isolating statements claimed to be false from the label in its entirety, since such statements may not be deemed misleading when read in the light of the label as a whole. . . ."

However, the court commented that even when the actual ingredients of a product are listed on the label, they may nonetheless be misleading since "a true statement will not necessarily cure or neutralize a false one contained in the label." Id. at 841.

Addressing a situation much like the present one, a federal judge expressed the following views on the relationship of misleading large print on a food label to truthful small print on the same label:

> "Conceding that the product is not deleterious to health, it certainly is not orange juice sweetened in the ordinary meaning of those words. It might as well be called sugar acidulated. The words 'Orange Juice Sweetened' are in large type. Other parts of the label fairly describing the ingredients are in very much smaller type. It is not probable that a purchaser of a drink made from the compound would notice the fine print. I consider the

> label tends to deceive and mislead the ultimate purchaser and therefore the article is misbranded within the prohibition of the Food and Drugs Act." United States v. Nesbitt Fruit Products, 96 F.2d 972, 973 (5th Cir. 1938) (dissenting opinion)

Very recently, a federal court concluded that "All Meat" labels on frankfurters containing 15% nonmeat constituted misbranding under a statute similar in its terms to the Pure Food and Drug Act:

> ". . . In applying the 'ordinary meaning' test to the word 'all', it is clear when that adjective is used on a label with the word 'meat', the common understanding is that it describes a substance that is totally and entirely meat. The application of the 'All Meat' label to frankfurters that are 15 percent nonmeat is a contradiction in terms and is misleading within the meaning of [the Wholesome Meat Act]. . ." Federation of Homemakers v. Hardin, 328 F.Supp. 181, 184-185 (D.C. D.C. 1971)

We believe that there can be little doubt that the word NO-CAL to the ordinary consumer means "no calories," especially in connection with the words "SUGAR FREE!" displayed in bold letters above the brand name. Furthermore, on each side of the crown that appears to be part of the trademark, the legend "NO CYCLAMATES, NO SUGAR" appears. Clearly, the purchaser of this product is encouraged to conclude that the beverage contains no calories. However, on the bottom of the NO-CAL black cherry label is printed the following statement, in type considerably smaller than the various words already described:

> "No proteins, no fats, no carbohydrates and approx. 1/2 of a calorie per ounce."

The contradiction on the label is evident and confusion will surely result. Accordingly, it is our opinion that this label is misleading and constitutes a misbrand under our Food and Drug and Nonalcoholic Beverage Laws.

It remains to be considered whether NO-CAL is saved from misbranding by the "distinctive name" exception, to wit:

> ". . . provided, that any nonalcoholic drink which does not contain any added poisonous or deleterious ingredients shall not be deemed

> to be adulterated or misbranded under the following conditions:
>
> (a) In the case of mixtures or compounds which may be now, or from time to time hereafter, known as nonalcoholic beverages under their own distinctive names, and not an imitation of, or offered for sale under the name of another article; . . ." Section 196.140(5), RSMo

This proviso makes it clear that a statement, design or device on a label will not be deemed misbranded if it amounts to a "distinctive name." Although the brand "NO-CAL" has been in use for approximately twenty years, there is some authority from which we can infer that it is not a "distinctive name" within the purview of Section 196.140(5). Referring once again to interpretations of the Federal Pure Food Act, the Supreme Court in United States v. Forty Barrels, 241 U.S. 265, 36 S.Ct. 573, 60 L.Ed. 995 (1916) considered whether Coca Cola was a distinctive name under a federal statute identical to Section 196.140(5), RSMo. In order for a name to be distinctive, the court observed that the name, to public knowledge, must cease to have its original significance, and the public must recognize that the words used do not actually describe the contents of the bottle. Until such knowledge can be attributed to the public, "the name would naturally continue to be descriptive in its original sense." 60 L.Ed. at 1005. Further, the court stated:

> ". . . A mixture or compound may have a name descriptive of its ingredients or an arbitrary name. The latter (if not already appropriated) being arbitrary, designates the particular product. Names, however, which are merely descriptive of ingredients, are not primarily distinctive names save as they appropriately describe the compound with such ingredients. To call the compound by a name descriptive of ingredients which are not present is not to give it 'its own distinctive name,'--which distinguishes it from other compounds,--but to give it the name of different compound. That, in our judgment, is not protected by the proviso, unless the name has achieved a secondary significance as descriptive of a product known to be destitute of the ingredients indicated by its primary meaning." Id. at 1006

We are, therefore, of the opinion that the label NO-CAL is not a "distinctive name" within the exception to misbranding set out in Section 196.140(5), RSMo.

Herbert R. Domke, M.D.

Therefore, it is our opinion that the label bearing the brand name "NO-CAL" on a bottle of carbonated nonalcoholic beverage constitutes misbranding within the meaning of the Missouri Food and Drug and Nonalcoholic Drink Laws even though there appears in small print elsewhere on the label the actual number of calories contained in the beverage.

Yours very truly,

JOHN C. DANFORTH
Attorney General