HEALTH, DEPARTMENT OF:
ADULTERATED FOODS:

The offering for sale of a meat product designated as "tenderette," the advertisement of which states the ingredients contained therein, none of which ingredients are injurious to health in the proportion used in such product and none of which ingredients are prohibited by Missouri law, is not in violation of the laws of Missouri.

JOHN M. DALTON
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1-29-53

January 29, 1953

Honorable James R. Amos
Director, Division of Health
Jefferson City, Missouri

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Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request.

> "For a number of years the Division of Health has considered that ground beef, commonly known as hamburger, must contain only pure ground beef with only salt, or other spices added.
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> "A number of concerns have been in the practice of adding preservatives such as sulfites or nitrites to maintain a pleasing red color, and have also added certain cereals such as flour, potato starch, soya flour, and other materials which has increased its bulk or weight.
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> "We have, therefore, taken action against these ground meat products advertised as hamburger which contained any preservatives as added materials which increase its bulk or weight, and used as our authority Chapter 196, Section 196.070, Revised Statutes of Missouri, 1949 Edition, paragraph No. 10.
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> "Recently at the Cape Girardeau Fair we were confronted with a product manufactured by Miller & Fischer of Cape Girardeau in which they claim they are not violating the State Food and Drug Laws because they are advertising their product not as hamburger but as 'Tenderette'. They further claim that they are not violating the law because

> their sign lists the ingredients; namely, 'Pure ground beef, pork, suet, cereal, salt, sugar, spices and enough water to insure proper processing, and .018 of 1% sodium sulfite added'.
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> "I would like to call your attention to the fact that the U.S. Department of Agriculture, Bureau of Animal Industry, permits the use of artificial color and preservatives such as sodium nitrite and sodium nitrate in such products as frankfurters, bologna, and other processed meats, but they do require that these products be labeled properly and that the label contain the list of ingredients used.
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> "All of these products are also processed or cooked so that they may be eaten without further cooking, while the ground meat which we refer to above is still in the raw state and must be cooked before it can be eaten.
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> "We are attaching herewith one of the placards used with the product known as 'Tenderette'."

We will first observe that no allegation is made by you that any ingredient of "Tenderette" is harmful, or that the use of any ingredient, in the proportion used, is prohibited by Missouri law.

Rather, you rest your case upon paragraph 10 of Section 196.070, RSMo. 1949, which paragraph reads:

> "A food shall be deemed to be adulterated if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength or make it appear better or of greater value than it is."

For a definition of the word "adulterated" we turn to the case of City of St. Louis v. Jud, 236 Mo. 1. At l.c. 6, the court said:

> "* * *'Adulterate,' means to corrupt, debase, or make impure by an admixture

> of a foreign or baser substance. * * * articles are adulterated 'to improve or change their appearance or flavor in imitation of an article of higher grade or of a different kind.' Adulteration is an 'artificial concealment of defects.'"

In the light of the above definition we are unable to see that the product advertised as "Tenderette" comes within the purview of paragraph 10 of Section 196.070, supra. There is no similarity whatever between the word "Tenderette" and the word "hamburger" to which, presumably, it is most nearly akin. The advertisement plainly, and we presume correctly, states what ingredients "Tenderette" contains. Certainly nobody who read the advertisement which was displayed at the place of sale would be led into believing that when he bought "Tenderette" he was buying "hamburger" or anything but "Tenderette." Not only was there no attempt to deceive the public, but apparently every effort was made to inform the public as to just what it was getting when and if "Tenderette" was purchased.

We have examined Section 196.075, RSMo. 1949, which section is entitled, "Food, when deemed misbranded," and we fail to see that "Tenderette" violates any of the provisions of that section. We shall, however, later in this opinion refer to paragraph 3 of the above section. Neither do we see that "Tenderette" violates any of the provisions of Section 196.070, RSMo. 1949, including paragraph 10 to which you call attention and which we have discussed above.

In order to sustain our position as given in the preceding paragraph, we call attention to the case of United States v. 62 Cases More or Less, Six Jars of Jam, etc., 183 Fed. 2nd 1014.

In this case it was held that the jam in question which failed to comply with certain provisions of the Federal Food, Drug and Cosmetic Act, defining fruit jam, could not be legally represented to be, or to be used, as fruit jam, nor could it be legally sold as fruit jam. At l.c. 1017-1018, the court said:

> "It is significant that Congress in Section 343(g), in dealing with misbranding by failure to conform to the definition and standard of identity, did not permit departure from the standard, if the label disclosed that the food did not conform to the standard, whereas in

Section 343(h) (1) (2), in dealing with misbranding by failure to conform to standard of quality and standards of fill of container, Congress permitted departure from the standard if the label on the food set forth, in the manner and form specified in the regulation, a statement that it fell below the standard, thus indicating a Congressional intent to permit departure from standards of quality and fill of container, where such departure was shown by truthful labeling, but not to permit a departure from a definition and standard of identity, even though such departure was disclosed by the label.

"Whether a food purports to be, or is represented to be, a food for which a definition and a standard of identity has been prescribed by regulation, is not to be determined solely from obscure disclosures on the label. If it is sold under a name of a food for which a definition and standard has been prescribed, if it looks and tastes like such a food, if it is bought, sold and ordered as such a food, and if it is served to customers as such a food, then it purports to be, and is represented to be, such a food.

"We conclude that the jams under seizure purported to be, and were represented to be, fruit jams, for which a definition and standard of identity had been promulgated; that they did not conform to the definition and standard of identity, and that the manufacturer could not escape the impact of Section 341 and Section 343(g) by labeling them imitations of jams and by truthfully setting

> forth on the label the proportions of sugar, fruit and other ingredients contained therein.
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> "It is urged that the effect of our discussion will be to compel the manufacturer of these jams to take such product off the market and to deprive persons of modest means of an inexpensive and wholesome food product; and that the portion of the Senate Committee Report set forth in Note 6, infra, shows the Congress did not intend the operation of Section 343(g) to produce such results. But the results envisioned will not necessarily follow. The manufacturer may market the product as syrup and fruit thickened with pectin, or syrup flavored with fruit and thickened with pectin, but the product may not be lawfully sold or served to customers under the name of fruit jam and in such a manner that it purports to be, or is represented to be fruit jam." (Emphasis ours.)

Again in this connection, we call attention to the case of Dairy Queen of Wisconsin v. McDowell, 51 N.W. 2d 34. From the statement of facts given in this case it was sought by the Department of Agriculture to stop the sale of a semi-frozen food product similar to ice cream but containing less butter fat than ice cream, on the ground that the public needed to be protected. The product was a healthful nutritive food and was not offered for sale as ice cream, and the court held that the public needed no protection under such circumstances and that the sale of the product could not be stopped. At l.c. 37 the court said:

> "It is contended that Dairy Queen is an imitation ice cream in that it resembles ice cream in taste, texture and consistency. Appellant does not concede this, but even if it were so, a resemblance to ice cream does not make the product an imitation. There is no artificiality employed in producing Dairy Queen. Its ingredients are the same natural ingredients contained in ice cream, but in different proportions. We can see where imitation and adulteration may be present and fraud perpetrated upon the public where,

as in Carolene Products Co. v. United States, 1944, 323 U.S. 18, 65 S. Ct. 1, 89 L. Ed. 15, abstracted butter fat is replaced with vegetable oil; and where, as in Day-Bergwall Co. v. State, 1926, 190 Wis. 8, 207 N.W. 959, the product was admittedly an artificial vanilla. * * *

"According to the stipulation, Dairy Queen will not be sold as ice cream. Whatever resemblance it may have to ice cream, therefore, cannot mislead the public in buying it.

"Respondent argues that in removing some of the butter fat, which is the more expensive ingredient, and adding more of the cheaper non-fat solids, the appellant manufactures an inexpensive product which would tempt retailers to pass it off as ice cream. This so-called substitution has no effect upon the wholesomeness or nutritious properties of the product, and is not sufficient reason to bar it, especially in view of the authority granted to the respondent by ch. 93, Stats., to regulate its manufacture and sale.

"Under ch. 93, Stats., the department of agriculture has the power to establish standards for food products and to prescribe regulations governing marks and tags upon such products. Those standards shall not affect the right of any person to dispose of a food product not conforming to the standards, sec. 93.09(4), Stats., 'but such person may be required to mark or tag such product, in such a manner as the department may direct, to indicate that it is not intended to be marketed as of a grade contained in the standard and to show any other fact regarding which marking or tagging may be required under this section.' The purpose is clear. The legislature does not intend to deny any person the right to make and sell a food product so long as its consumption does not endanger public health and welfare. It does intend, however, to so regulate its sale that the public is not subjected to the injury of buying a product different from that

> which is intended to be bought. See City of New Orleans v. Toca, 1917, 141 La. 551, 75 So. 238, L.R.A. 1917E, 761.
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> * * * * * * * * * *
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> "It is our conclusion that the general welfare does not require prohibition of the manufacture and sale of the product here in question, the power of regulation being sufficient to prevent any fraud upon the consuming public." (Emphasis ours.)

We again refer to paragraph 3 of Section 196.075, RSMo. 1949, which paragraph reads:

> "If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word, 'imitation,' and, immediately thereafter, the name of the food imitated."

In the light of the two cases discussed above we do not believe that paragraph 3 of Section 196.075, supra, is applicable in the instant case.

CONCLUSION

It is the opinion of this department that the offering for sale of a meat product designated as "tenderette," the advertisement of which states the ingredients contained therein, none of which ingredients are injurious to health in the proportion used in such product and none of which ingredients are prohibited by Missouri law, is not in violation of the laws of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General