DIVISION OF HEALTH:

JOHN M. DALTON
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A soft drink consisting of orange juice, water, stabilizer and preservatives, in a container labeled "Orange Blend" is not misbranded under the Missouri Food, Drug and Cosmetic Law. Definitions: "drink" "mix" and "blend."

September 3, 1953

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

J. C. Johnsen

Dear Dr. Amos:

This will acknowledge receipt of your request for an official opinion of this department, which request reads as follows:

> "We would like to have an official opinion concerning the following matter: Section 196.365, through 196.445, Revised Statutes of Missouri 1949, pertains to the laws regulating the manufacture of soft drinks and beverages. We have approached several firms in regard to the proper labeling of various drinks. Section 196.410 specifically discusses the various types of labeling which shall be used. We have contended in the past that a fruit drink or still drink manufactured by taking the fruit juices, adding water, sugar, stabilizers, color or flavor, should be labeled a drink. If the juice was orange juice, then the product would be labeled 'Orange Drink.' If the juice was grape juice, it would be labeled 'Grape Drink,' etc.
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> "One firm has recently requested that they be permitted to label such a product 'Orange Blend.' It is our feeling that since water has been added to the fruit juice, as well as stabilizers and a small amount of preservatives, that this is not a true Orange Blend, but is, in fact, an Orange Drink.
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> "In order to clarify this matter, it would be appreciated if you would give us a legal opinion or definition of the words 'Blend,' 'Mix', and 'Drink,' as used in connection with this Act."

The sections of the Food, Drug and Cosmetic Law, to which reference has been made, deal with "soft" drinks and they are defined in Section 196.365, RSMo. 1949, as follows:

> "1. * * * ******* * * * * * *
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> "2. The term 'soft drinks' as used in sections 196.365 to 196.445 shall be held to mean and include all beverages of every kind manufactured or sold in this state, which shall be understood to include those containing less than one-half of one per cent of or no alcohol, including carbonated beverages, still drinks, seltzer water, artificial or natural mineral waters and all other waters used and sold for beverage purposes."
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> "3. * * * * * * * * * * * * * *

The common and ordinary meaning of the noun, "mix" is defined in Webster's Collegiate Dictionary, Fifth Edition, as "1. Act or result of mixing; also state of being mixed or confused." "2. A mixture." The definition of the verb is stated as : "1. To unite or blend into one mass or compound, as by stirring together; mingle." A more extensive explanation of the word is set out in 5 Words & Phrases 539:

> "Word 'mix' means to cause a promiscuous interpenetration of the parts of, as of two or more substances with each other, or of one substance with others; to unite or blend into one mass or compound, as by stirring together; hence, to combine (any material or immaterial things); to mingle; blend; as to mix flour and salt; to mix wines; to form by mingling; to produce or prepare by the stirring together of ingredients; to compound; to cause to unite promiscuously into one mass, assemblage, or body; incorporate closely and indiscriminately together; mingle so as to render separately indistinguishable; as, to mix breeds of animals; to mix water with whiskey; to produce by incorporating different ingredients; make by mingling; as, to mix dough; to become promiscuously united or blended; become incorporated together into one body; as, gases, mix. 'Blend' means to unite intimately. 'Admixture' means the act of mixing, or the compound formed by mixing, different substances together; mixture. Term 'intimately mixing' is included within the dictionary definitions of the term 'mix.' James

v. Clayton, Cust. & Pat. App. 90 F.2d. 337, 343."

The common and ordinary meaning of the noun, "blend" is defined in Webster's Collegiate Dictionary, Fifth Edition, as "A thorough mixture; blending; also a product, as a tobacco or coffee, prepared by blending." The verb is there defined as "1. To mix or mingle; now, to combine or associate so that the separate things mixed, or the line of demarcation, cannot be distinguished. 2. To prepare by mingling different varieties or grades;--of wine coffee, tobacco, etc.--v.i. To unite intimately; pass or shade insensibly into each other, as colors; merge; harmonize."

While it appears from the above that "mix" and "blend" are synonymous, technically, the difference seems to be that the term "blend" denotes the mixture of like substances or the misture of substances, two or more of which are alike. This is the statutory definition under the state and federal food and drug acts, and Section 196.140(5)(b), RSMo. 1949, provides, in part, as follows:

> "* * *provided, that the term 'blend' as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients not prohibited by sections 196.125 to 196.145, and used for the purpose of coloring or flavoring only."

See also the now repealed section of the Federal Food and Drug Act, where, in 21 U.S.C.A. 10, it was stated as follows:

> "* * *The term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only * * *."

While there appears to be no judicial construction of the above Missouri provision, the portion of the above quoted section of the federal statute has been followed by the courts without addition or subtraction therefrom. Thus, in Frank v. U.S., 192 Fed. 864, it is stated that the term "blend" is used to denote a mixture of like substances, and the term "compound" to denote a mixture of substances whether like or unlike. See also U.S. v. Sixty-Eight Cases of Syrup, 172 Fed. 781 and 26 Op. Atty. Gen. 262(1907). As to what constitutes "like substances" a liberal view has been taken in U.S. v. Sixty-Eight Cases of Syrup, supra. In that case refined canesugar and extract of maple wood were found to be like substance because both contained saccharin. The word "substance" has been defined as "Chem. Any particular kind of matter, whether element, compound, or mixture; any chemical material of which bodies are composed."(Webster's Collegiate Dictionary, Fifth Edition.)

However, as to the question of the required or permissible label on the drink in question, we do not believe the answer can be found merely in the definition of a word; and that, for the reasons hereinafter stated, the answer does not necessarily depend upon

whether or not the drink being considered is a "blend."

The statute to which the attention of this office has been directed and under which provision it is suggested that the soft drink in question should be labeled "Orange Drink" rather than "Orange Blend," is Section 196.410 RSMo. 1949, which provided as follows:

> "Artifical coloring or flavoring shall be noted on label.--Whenever artificial colors or artificial flavors are used in the manufacture of soft drinks to imitate a natural product, the bottle or other container shall be distinctly labeled '<u>artificially colored and flavored</u>' by a printed label upon the side thereof, or said words may be placed upon the metal crown or cap thereof. All other nonalcoholic ciders, fruitades, fruit juices or other similar drinks that are made in imitation of the natural product shall be properly and distinctly labeled in the manner above provided with the word 'imitation' followed by the name of the beverage. If soft drinks or beverages containing artificial coloring or artificial flavoring are sold in bulk, a label or sign containing the words '<u>artificially colored, artificially flavored</u>' or '<u>artificially colored, imitation flavor</u>,' and printed or painted in letters not less than one inch long and of appropriate comparative width shall be displayed in a conspicuous place on the counters or shelves, or on all stands, booths or other places where such drinks or beverages are sold and dispensed. When such drinks and beverages contain artificial color and natural fruit flavor, it shall be sufficient to label the same 'artificial color.' When they contain artificial flavors and no artificial color, they shall be labeled '<u>artificially flavored</u>' or '<u>imitation flavor</u>.'" (Emphasis ours.)

It will be noted that the above provision does not purport to prescribe a specific label for every conceivable soft drink and that neither the word "drink" or "blend" is incorporated in any of the labels specifically named. The regulation divides the soft drinks with which it deals, into two general classes, i.e. bottled (or other container) drinks and those sold in bulk. Not all bottle or bulk drinks are covered, but only those further classified according to their contents. Now, as to the soft drinks to which this particular provision is applicable, the following specific labels are required, <u>and these labels only</u>, to wit:(1) "artificially colored and flavored," (2) "imitation," (3) "artifically colored, artificially flavored," (4) "artificially colored,

imitation flavor," (5) "artificial color," (6) "artificially flavored," and (7) "imitation flavor." It is significant that the label "blend" or "drink" is nowhere mentioned; and we conclude that neither is prescribed or prohibited by this particular section. Consequently, while the drink in question may or may not require one of the labels specified in the statute, depending upon the ingredients, etc., this particular statute has no application so far as the labels (or additional labels), "orange drink" or "orange blend" are concerned.

Obviously, the subsequent section (196.415, RSMo. 1949) which deals with misuse of the label of another manufacturer also has no application and nowhere else in the statutes to which our attention has been invited (Sections 106.365 through 196.445, RSMo. 1949) is there any mention whatsoever of the subject of labels or misbranding.

Therefore, if it be determined that the label "orange blend" should be denied or the label "orange drink" should be required, such conclusion must find its basis in some other enactment of the Legislature. There appears to be no question of adulteration or attempt to perpetrate actual fraud; and we assume that the firm in question stands ready, willing and able to abide with all requirements of the law and all regulations of the Division of Health, except that it insists on using the words "Orange blend" on its product and refuses to use the words "Orange drink."

Therefore, with the sole question of labels and brands in mind, we turn to a statute originally enacted in 1911, now appearing as Section 196.140, RSMo. 1949, and entitled "Nonalcoholic drink misbranded, when." The pertinent part of said section declares a soft drink to be misbranded and reads as follows:

> "(2) If it is labeled or branded or tagged so as to deceive or mislead the purchaser;
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> * * * * * * * * * * * * * * * * *
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> "(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:
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> * * * * * * * * * * * * * *

"(b) In the case of nonalcoholic beverages which are labeled, branded or tagged so as to plainly indicate that they are compounds imitations or blends, and the word 'compound,' 'imitation,' or 'blends,' as the case may be, is plainly stated on the container in which it is offered for sale; provided, that the term 'blend,' as used herein, shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients not prohibited by sections 196.125 to 196.145, and used for the purpose of coloring or flavoring only."

A federal statute (21 U.S.C.A. 10, now repealed), in almost identical language, provided that food (which, by Section 7, was construed to include soft drinks) was to be deemed misbranded, is as follows:

* * * * * * * * * *

"Second. If it be labeled or branded so as to deceive or mislead the purchaser. . . .

* * * * * * * * * *

"Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular. An article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

* * * * * * * * * * *

"Second. In the case of articles labeled, branded or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale. The term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only * * *. (June 30, 1906 c. 3915, Sec. 8, 34 Stat. 771; Aug. 23, 1912, c. 352, 37 Stat. 416; Mar. 3, 1913, c. 117, 37 Stat. 732; July 24, 1919, c. 26, 41 Stat. 271.) (Repealed, June 25, 1938 c. 675, Sec. 902(a), 52 Stat. 1059, eff. Jan. 1, 1940.)"

The legislative intent underlying the enactment of these statutes, which are the same in substance, was to protect the consuming public from misrepresentation as to the ingredients or contents of a soft drink offered for sale, by means of false or misleading labels and other means and devices of deception appearing on the container. Hebe Co. v. Shaw, 248 U.S. 297, 39 S. Ct. 125, 63 L. ed. 255; State v. Bockstruck, 38 S.W. 317, 322; State v. Murphy, 147 S.W. 520, 521.

In 26 C.J. Sec. 18, p. 762, it is stated:

> "For the purpose of preventing fraud and imposition upon the public, statutes have been enacted forbidding the manufacture or sale of any article of food which is an imitation of, or is sold under the name of, another article, or which is branded or labeled falsely, or in a manner naturally to mislead the purchaser into a belief that it is something it is not. * * * *" (Emphasis ours.)

The article need not be adulterated or deleterious to health to come within such statutes, People v. Butler, 134 App. Div. 151, 118 NYS 849. The deception sought to be prevented may result from statements not literally false and statements liable to mislead should be read favorably to the accomplishment of the purposes of the statute; Taylor v. U.S. 80 Fed. 2d. 604. On the other hand, where words in every day use are found on the label of a food product they are to be given their ordinary and popular meaning, U.S. v. 150 Cases Fruit Pudding, 211 Fed. 360, or the meaning ordinarily conveyed by them to those to whom they are addressed, Hall v. U.S. 267 Fed. 795; and so long as the words on the label are not likely to actually mislead the purchaser, there is no violation of the statute. In regard to the purpose of such statutes the following language from 26 C.J. "Food" Sec. 18, Page 762, is pertinent:

> "* * *The object, however, is not to prevent the manufacture or sale of wholesome or harmless substitutes for more expensive articles of food so long as no fraud is practiced, * * *"

As to whether or not the drink in question, with the label "Orange Blend," would be a misbrand, the ingredients thereof must be considered in the lifht of Section 196.140, above quoted. Subsections 1,2,3,4, and 5, thereof, are all inclusive and cover every type of misbrand. If the label does not fit into any of those subsections, it cannot be deemed a misbrand. Subsections (5a) and (5b)

of that statute mention certain beverages bearing certain labels that are expressly stated not to be misbrands. However, subsections(5a) and (5b) are not all inclusive; they do not attempt to cover every conceivable drink and label that is not a misbrand. These subsections are only provisos to subsection (5). In other words they state exceptions to the general rule expressed in subsection (5). Therefore, if a particular drink and label does not come within the provisions of subsection (5a) or (5b)--the expressly excepted cases, it does not necessarily follow that such drink and label does come within the prohibition of subsections (1),(2),(3),(4) or (5). Or to state it another way, even though the drink in question may or may not be a true "blend" within the meaning of subsection 5b(a mixture of like substances also permissibly including certain harmless coloring and flavoring) it does not necessarily follow that the word "blend" on the label thereof, is prohibited by the preceding subsections. While technically it may not be a true blend, it nevertheless cannot be deemed a misbrand unless the label "blend" comes within the prohibition provisions of the statute, that is to say, even though it may not be a blend in the strict sense of the word, it is not misbranded unless the label is such as "to deceive or mislead the purchaser"(subsection two) or unless it can be deemed as a "statement, design or devise, regarding the ingredients or the substance contained therein, which statement, design or device shall be false or misleading in any particular" (subsection five). These are the tests to be applied to the drink in question, regardless of what the strict and technical definition of "blend" may be.

The use of the word "blend" or "blended" following or preceeding the name of the base substance or ingredient, would clearly be misleading as applied to a label on certain products. For purposes of illustration, take the case of tobacco. It is commonly understood that blended tobacco has reference to a product consisting of two or more like substances, that is, two or more types, grades, brands, etc.,(such as Turkish and Domestic) tobaccos. Now certainly the consumer would be misled by a label "blended tobacco" applied to a product consisting of only one type of tobacco mixed with a foreign and wholly different substance such as straw. Likewise, one might expect a mixture of like substances by the label "blend" as applied to tea, coffee, whiskey, etc. But what does the consumer expect by the label "orange blend" as applied to a beverage? Does he immediately think of the strict definition of the word "blend" and expect a "mixture of like substances not excluding harmless coloring and flavoring?" If so what are the like substances that his mind dwells upon? Now certainly the consumer does not expect pure orange unmixed with any other ingredient--let us give him credit for being of average intelligence (and he is probably above average if he understands the strict, technical definition of "blend"). He, therefore, knows that he is not paying the price for pure orange juice

and that if the drink were such, the label would proudly announce the fact in no unmistakable terms. We repeat a portion of the above quotation from 26 C.J. page 762 and apply it to the drink in question because we believe it sums up the legislative intent underlying the misbrand statute and is a concise wording of the tests set out in that enactment. Is the drink in question labeled "Orange Blend" branded "in a manner naturally to mislead the purchaser into a belief that it is something it is not." As a practical matter does not the consumer get what he expects--a portion of orange juice mixed with other harmless ingredients? If he is actually led by the label to believe that the drink consists of harmless flavoring and coloring (which is included in the strict statutory definition of "blend") mixed with substances like unto orange, what does he expect--a portion of the juice of oranges mixed with the flavor of the orange peel together with other permissible ingredients? Does he expect the juice from California oranges mixed with the juice from Florida oranges together with other permissible ingredients? Does he expect the juice from bergamot oranges mixed or blended with the juice from mandarin oranges, compounded with other permissible ingredients? Does he expect the "like substances" to be juices from oranges of different orchards, varying types, grades, stages of ripeness, etc.? Does he really care? In reality, it would seem that the consumer would expect a wholesome and unadulterated drink of the flavor of oranges that is satisfying to his taste, and we deem the presumption warranted that such is what he would get. If the consumer, by the word "blend," does expect such "like substances" as mentioned above, possibly the drink in question does actually contain them or if it doesn't, it would seem that the manufacturer could very easily convert the present drink into an orange "blend," within the strict and technical meaning of that term; and after such conversion or addition of a few drops of something not presently contained in the drink, what would be accomplished? How would the public be benefited? Would the consumer know the difference? Would there be any different effect upon his health, etc.?

In concluding that the particular mixture in question would not be misbranded if labeled "Orange Blend," we rely in part on Section 196.010(13) 2, RSMo. 1949, where the above stated intention of the Legislature is indicated in the following language:

* * * * * * * *

"2. If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the labeling is misleading, there shall be taken into account, among other things, not only representations made or suggested by statement, word, design, device,

> sound, or in any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual;" (Emphasis ours.)

We also find support in U.S. v. Sixty-Eight Cases of Syrup, (D.C. 111, 1909) 172 Fed. 781, construing the provisions of the Federal Food, Drug and Cosmetic Act, quoted above, and where it was held that syrup consisting of refined cane sugar flavored with an extract of maple wood and sold under a label describing it as "Western Reserve Ohio Blended Maple Syrup," was not misbranded, since the word "blend" indicated that the article was a mixture and imitation.

A noteworthy case is U.S. v. Nesbitt Fruit Products, 96 Fed.2d. 972, where it was held that the evidence authorized a finding that an orange juice preparation containing over 50% added sugar was not misbranded, so as to authorize condemnation and forfeiture, by being labeled "orange juice sweetened" as against the contention that such label indicated a smaller sugar content. The Court said that the natural meaning of "sweetened" contained no implication of any particular percentage of sugar. It would seem that such drinks so labeled would be as much apt to mislead as "Orange Blend" applied to the drink in question.

We deem the label "Orange Blend" would not be as apt to mislead the consumer as to the ingredients of the drink in question as much so as would the label "Fruit Wild Cherry Compound" used to describe a product containing no "fruit wild cherry" nor any added poisonous or deleterious ingredients, and which was held not to be misbranded in Weeks v. U.S. 224 Fed. 64, certiorari granted 36 S.Ct. 452, 241 U.S. 664, 60 L. Ed. 1227 and affirmed 39 S.Ct. 219, 245 U.S. 618, 62 L. Ed. 513.

On the other hand, an examination of the cases in which articles were held to be misbranded, will disclose an element of deceit or some matter on the label or container apt to actually mislead, which does not appear to exist in this case. See for instance, U.S. v. Ninety-Five Barrels of Vinegar, 265 U.S. 438, 44 S.Ct. 529, 68 L.Ed. 1094; W.B. Wood Mfg. Co. v. U.S.,286 Fed. 84; U.S. v. Two Hundred Cases, More or Less, of Canned Salmon, 289 Fed. 157; U.S. v. Seventy-five Boxes of Alleged Pepper, 198 Fed. 934; U. S. v. Five Cases of

Champagne, 205 Fed. 817; U.S. v. Schider, 38 S.Ct. 369, 246 U.S. 519, 62 L.Ed. 863; People v. Treichler, 165 N.Y.S. 453, 178 App. Div. 718; U.S. v. One Hundred and Fifty Cases of Fruit Pudding, 211 Fed. 360; U. S. v. Ten Barrels of Vinegar, 186 Fed. 399; State v. Intoxicating Liquors, 106 Me. 135, 76 A. 268.

A regulation of the Secretary of Agriculture requiring canned peas prepared from mature, soaked dry peas to bear the legend, "Below U. S. Standard. Low Quality But Not Illegal. Soaked Dry Peas," was held unreasonable in Nolan v. Morgan (C.C.A. Ind. 1934) 69 Fed. 2d. 471. Cannot the same be said of a denial of an "Orange Blend" label on the drink in question or the requirements of "Orange Drink." Is not the word "drink" as applied to the present "orange" drink more apt to mislead than the word "blend?"

We cannot say, as a matter of law, that this drink would be misbranded if labeled "Orange Blend;" and as a matter of fact, such finding by court or jury seems unlikely. Nor can we conceive of a conviction under the statute in question solely on these facts.

It logically follows that if the label, "Orange Blend" would not be in violation of Section 196.140, supra, then there rests no authority in the Division of Health to prohibit it; the power conferred upon the Division to make rules and regulations is not that broad.

CONCLUSION

We conclude, therefore, from the facts presented, that the words "orange blend" are permissible on the label of the drink in question; and that if all other statutes, rules and regulations have been complied with, the manufacturer in question, is entitled to the license contemplated by Section 196.370, RSMo. 1949.

This opinion which I hereby approve, was written by my assistant, Mr. James A. Vickrey.

Yours very truly,

JOHN M. DALTON
Attorney General