during the regular hours of the respondents' business for inspection and copying.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order file with the Commission a report, in writing, signed by such respondents, setting forth in detail the manner and form of their compliance with this order.

IN THE MATTER OF

BERGEN BRUNSWIG CORPORATION

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2463. Complaint, Oct. 4, 1973—Decision, Oct. 4, 1973.

Consent order requiring a Los Angeles, California, wholesale distributor of druggists' sundries, among other things to cease knowingly inducing or receiving discriminatory payments. Respondent is further required to provide each person or organization invited to participate in its trade shows, a copy of this order for a period of five (5) years.

Appearances

For the Commission: *John E. Passarelli, Ronald J. Dolan* and *Daniel R. Kane.*

For the respondent: *Douglas Chadwick,* Los Angeles, Calif. and *Murray J. Laulicht, Lowenstein, Sandler, Brochin, Kohl & Fisher,* Newark, N.J.

COMPLAINT

The Federal Trade Commission, pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, having reason to believe that Bergen Brunswig Corporation, a corporation, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (U.S.C., Title 15, Section 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in respect thereto as follows:

Bergen Brunswig Corporation

PARAGRAPH 1. Respondent Bergen Brunswig Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office located at 1900 Avenue of Stars, Los Angeles, California.

PAR. 2. Respondent is now, and has been for many years, engaged in the wholesale distribution of, among other products, druggists' sundries with total sales of such products in excess of $58 million for the fiscal year ended August 31, 1971.

Trade and Commerce

PAR. 3. Respondent, in the course and conduct of its business has been and is now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent purchases a great variety of products from a large number of suppliers located throughout the United States and causes such products to be transported from various States in the United States to the warehouses of its twenty-four (24) sales divisions in other states for resale to retail drugstores located throughout the United States.

PAR. 4. In the course and conduct of its business in commerce, respondent is now and has been in competition with other corporations, persons, firms and partnerships in the purchase, sale and distribution at wholesale of druggists' sundries.

COUNT I

Respondent's Trade Shows

PAR. 5. Respondent solicits suppliers of druggists' sundries to display their merchandise at respondent's trade shows which are held annually throughout the United States. Suppliers who wish to participate are required to rent booths from respondent for purposes of displaying such merchandise. A substantial number of respondent's suppliers participate in one or more of these trade shows and many rent more than one booth at each show. In 1971, suppliers who participated in respondent's trade shows paid respondent approximately $178,152 to rent booths.

PAR. 6. During respondent's trade shows, agents, employees or representatives of the participating sundries suppliers also perform valuable services, specifically, staffing the booths rented by suppliers from respondent and demonstrating and promoting

the suppliers' products. In addition, some suppliers give door prizes.

PAR. 7. Respondent's trade shows are attended by many of its retail drugstore customers who purchase the displayed merchandise from or through respondent.

Violation

PAR. 8. Some of respondent's suppliers who participated in respondent's trade shows in 1971 did not offer and otherwise make available to all their customers competing with respondent in the sale and distribution of their respective products, payments, allowances, services, or other things of value, for advertising and promoting such products on proportionally equal terms to those granted respondent in connection with its trade shows.

PAR. 9. Therefore, respondent has induced and received or received from some of its suppliers, payments, as set forth in Paragraph 5 above, and services or facilities, as set forth in Paragraph 6 above, in connection with respondent's sale, or offering for sale, of products sold to respondent by such suppliers which respondent knew or should have known were not made available by such suppliers on proportionally equal terms to all other customers of such suppliers competing with respondent, including customers who do not purchase directly from such suppliers, in the sale and distribution of such products.

Such acts and practices constitute unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. Section 45).

COUNT II

PAR. 10. The allegations of Paragraphs 1 through 7 are incorporated herein by reference.

PAR. 11. Respondent, in the normal course of business, provides volume discounts to its customers of druggists' sundries which, at customer's option, may be applied to the acquisition of points in respondent's Travelcade program under which accumulated points are applied to a vacation sponsored and paid for by respondent.

PAR. 12. In connection with respondent's 1971 trade shows respondent offered additional Travelcade points to customers making purchases at said trade shows based on their volume of purchases.

Violation

PAR. 13. Respondent's offering or granting said Travelcade bonus points to attending trade show customers, as set out in Paragraph 12, may tend to foreclose respondent's competitors in wholesale distribution of druggist's sundries from competing for the business of retail druggists who attend respondent's trade shows. Such acts and practices, therefore, constitute unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. Section 45).

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 of complaint which the Bureau of Competition 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 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 of 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 said 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 thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings.

1. Respondent Bergen Brunswig Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office located at 1900 Avenue of Stars, Los Angeles, California.

2. The Federal Trade Commission has jurisdiction of the

subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent, Bergen Brunswig Corporation, a corporation, and its officers, representatives, agents and employees, successors and assigns, directly or indirectly, through any corporate or other device, in or in connection with the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of products for resale by the respondent, or in connection with any other transactions between respondent and its various suppliers involving or pertaining to the regular business of the respondent in purchasing, promoting, advertising, distributing and selling commodities and products in commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist from:

1. Inducing and receiving, receiving or contracting for the receipt of anything of value from any supplier of druggists' sundries as compensation or in consideration for services and facilities furnished by or through respondent in connection with the processing, handling, sale or offering for sale of such supplier's products at respondent's trade shows, when respondent knows or has reason to know that such compensation is not affirmatively offered and otherwise made available by such supplier on proportionally equal terms to all of its other customers competing with respondent, including customers who purchase from intermediaries and compete with respondent in the resale of such supplier's products.

2. Inducing and receiving, receiving or contracting for the receipt of, the furnishing of services or facilities, including but not limited to inducing prizes or gifts awarded to retail druggist customers attending respondent's trade shows, connected with respondent's offering for sale or sale of such products so purchased, when respondent knows or has reason to know that such services or facilities are not affirmatively offered or otherwise made available by such supplier on proportionally equal terms to all of its customers who purchase from intermediaries and compete with respondent in the resale of such supplier's products.

It is further ordered, That respondent shall cease and desist from offering or providing to its customers, directly or indirectly,

any material inducement, monetary or otherwise, to attend its trade shows whenever such customers' receipt of the inducement depends upon their purchases or volume of purchases of merchandise from respondent.

It is further ordered, That a copy of this order shall be delivered to each person or organization invited to participate in any trade show sponsored, organized or held by respondent, at the time such invitation is extended, for a period of five (5) years from the date of service of this order.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as 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 arising out of the order.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating wholesale drug divisions.

It is further ordered, That respondent shall, within sixty (60) days of service of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order.

It is further ordered, That the effective date for compliance with this order shall commence September 1, 1973.

IN THE MATTER OF

URBAN REDEVELOPMENT, INC.

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

Docket C-2464. Complaint, Oct. 4, 1973—Decision, Oct. 4, 1973.

Consent order requiring a New Orleans, Louisiana, real estate developer, among other things to cease represeting that structures, facilities, or other improvements are in existence on any of respondent's land, when, in fact, none exist.

Appearances

For the Commission: *Donald M. VanWart.*

For the respondent: *Benjamin B. Sannders, Huddleston & Davis,* New Orleans, La.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Urban Redevelopment, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. The respondent Urban Redevelopment, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana with its principal office and place of business located at 225 Baronne Street, New Orleans, Louisiana.

PAR. 2. Respondent, using the name Chateau Estates, is now and for some time in the past has been engaged in the advertising, offering for sale and sale of real estate located in Kenner, Louisiana, to the purchasing public.

PAR. 3. In the course and conduct of its business, respondent has been, and is engaged in disseminating and causing to be disseminated in newspapers of interstate circulation, and in television broadcasts of interstate transmission, advertisements designed and intended to induce sales of its real estate. The amount expended by respondent upon such advertising is substantial.

PAR. 4. Among and typical, but not all inclusive of the statements appearing in the advertisements described in Paragraph Three are the following:

Chateau Estates is Renaissance, a rewarding experience. Majestic fountains and tumbling waterfalls play over a lush forest and gardens. Though only minutes away from central New Orleans, and many shopping areas, Chateau Estates is another world, where hurry and stress are unknown. 1973, July. A magnificent golf course, comparable to the world's most challenging fairways, offers eighteen holes surrounded by capricious hazards, lakes and sand entrapments. These grounds were constructed with the devoted player in mind by greens planner, Everett Alleman. David Nelson, the Resident Professional, already enjoys a high reputation among golfers. The glorious olympic pool gives plenty of elbow room to swimmers while at poolside, the perpetual golfer can leisurely line up practice shots on the putting green. Numerous tennis courts offer ample opportunity to achieve top form. After the gaming, luxurious spas are available with revitalizing saunas and massages for the weary sportsmen and their ladies. The spas also house enough exercise equipment for everybody to become beautiful. 1973, September. The Chauteau's Country Club is French Renaissance in opulence and design, containing a palatial grand ballroom that recalls the lavish

entertainment of the era. From the kitchen emanate tantalizing smells as the chef prepares delectable food. The diners of Chateau Estates will appreciate the swift, elegant service. Intimate dining rooms, banquet halls, the cocktail lounge and grill are all places of stimulating atmosphere. Full time catering delivers assorted delicacies to the door for private entertainment.

PAR. 5. By and through the use of the above quoted statements and representations, and others of similar import and meaning, but not expressly set out herein, respondent has represented, and is now representing, directly or by implication that:

1. Chateau Estates has existing fountains, existing waterfalls, and an existing forest and gardens.

2. Chateau Estates has an existing 18 hole golf course.

3. Chateau Estates has an existing olympic pool.

4. Chateau Estates has existing tennis courts.

5. Chateau Estates has existing saunas and spas.

6. Chateau Estates has an existing country club, containing an existing grand ballroom, an existing kitchen, and an existing cocktail lounge.

PAR. 6. In truth and in fact:

1. Chateau Estates does not have existing fountains and existing waterfalls, nor does it have an existing forest and gardens.

2. Chateau Estates does not have an existing 18 hole golf course.

3. Chateau Estates does not have an existing olympic pool.

4. Chateau Estates does not have existing tennis courts.

5. Chateau Estates does not have existing saunas and spas.

6. Chateau Estates does not have an existing country club containing existing grand ballroom, existing kitchen, and an existing cocktail lounge.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof, were and are false, misleading and deceptive.

PAR. 7. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and to enter into agreements to purchase substantial amounts of real estate by reason of said erroneous and mistaken belief.

PAR 8. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the

public and constituted, and now constitute, unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

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 of complaint which the New Orleans Office 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 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 of 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 said 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 thirty (30) days, now in further conformity with the procedures prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Urban Redevelopment, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana, with its principal office and place of business located at 225 Baronne Street, New Orleans, Louisiana.

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

It is ordered, That respondent Urban Redevelopment, Inc., a corporation, and respondent's agents, representatives, employees, successors and assigns, directly or through any corporation, sub-

sidiary, division or other device, in connection with the offering for sale, sale or distribution of real estate, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing by any means, directly or by implication that any structures, facilities or other improvements are presently in existence on any of respondent's land or in any of respondent's real estate developments when such structures, facilities or other improvements do not presently exist; *Provided however,* That this order shall not be construed to prevent the description of proposed and planned structures, facilities or other improvements where such description clearly and conspicuously discloses that such structures, facilities or improvements are not presently in existence and further, as part of the description, discloses the reasonably expected completion date for such structures, facilities or improvements.

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

It is further ordered, That the respondent distribute a copy of this order to all firms and individuals involved in the preparation, creation, or placing of advertising of respondent's real estate.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order file with the Commission a report in writing setting forth in detail the nature and form of its compliance with this order.

IN THE MATTER OF

GENERAL MILLS, INC.

DISMISSAL ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND THE FEDERAL TRADE COMMISSION ACT

Docket 8836. Complaint, Feb. 16, 1971—Order & Opinion, Oct. 5, 1973.

Order dismissing complaint against a Minneapolis, Minn. producer of packaged consumer foods which was alleged to have violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act,

by its acquisition of a processor and marketer of frozen packaged seafoods.

Appearances

For the Commission: *Joseph J. O'Malley, Murray L. Lyon* and *Harold G. Munter.*

For the respondent: *Davis Polk & Wardwell,* New York, N.Y. and *John Finn,* Minneapolis, Minn.

COMPLAINT

The Federal Trade Commission, having reason to believe that General Mills, Inc., has acquired the Gorton Corporation, in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C., Section 18), hereby issues this complaint pursuant to Section 11 of the Clayton Act (15 U.S.C., Section 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C., Section 45(b)), stating its charges in that respect as follows:

I

DEFINITIONS

1. For the purposes of this complaint the following definitions shall apply.

(a) *Food Manufacturing* describes canning, dehydrating, refrigerating and freezing preserved packaged foods customarily sold to consumers through grocery stores and food service outlets.

(b) *Food Service Outlets* are those outlets involved in serving food away from home such as hotels, restaurants, drive-ins, schools and institutions.

(c) *Frozen Packaged Seafood* consists of seafood packed for distribution in one of various types of containers including cartons and preserved by freezing and including fish and shellfish.

(d) *Frozen Fish Sticks:* An elongated piece of frozen fish flesh (generally cut from a frozen block of fillets) weighing not less than ¾ of an ounce and not more than 1¼ ounces with the largest dimension at least three times that of the next largest dimension.

(e) *Frozen Fish Portion:* A frozen piece of fish flesh generally of uniform size and generally cut from a frozen block of fillets. It has a thickness, including the batter, of ⅜ of an inch or more, and does not conform to the definition of a fish stick.

(f) *Frozen Fillet:* A flat slice of frozen fish flesh without bone.

(g) *Frozen Steak:* A cross-section slice of a frozen fish.

(h) *Frozen Breaded Shrimp:* Frozen peeled shrimp coated with breading ingredients. The product may be identified as fantail (butterfly) and round with or without tail fins and last shell segments; and as portions, sticks, steaks, etc., when prepared from a composite unit of two or more shrimp pieces, whole shrimp or a combination of both without fins or shell.

II

RESPONDENT

2. General Mills, Inc., (GMI), respondent herein, is a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business at 9200 Wayzata Boulevard, Minneapolis, Minn.

3. GMI, incorporated in Delaware in 1928, is a leading producer of packaged consumer foods, preselling customers, principally housewives, through intensive advertising and promotional efforts. GMI produces such consumer items as ready-to-eat breakfast cereals, snacks, prepared mixes and family flour, which are primarily distributed through self-service food stores under the "Big G" label.

4. GMI manufactures a number of bakery mixes and other items which are marketed to members of the food service trade such as wheat gluten, wheat starch, guar and locust bean gums, wheat germ oil, spice base and multi-vitamin enrichment compounds. It also engages in grain merchandising and manufactures and markets a number of ingredient products for the dairy and other segments of the food manufacturing industry. At the same time it operates facilities to supply its own flour requirements and for sale of flour to commercial users.

5. GMI operates eight flour mills, having an aggregate daily capacity of approximately 59,100 hundredweights of flour; a food service mix plant with a daily capacity of about 160,000 pounds; seven prepared cereal mix and other packaged consumer food product plants having an aggregate daily capacity of about 5,500,000 pounds; six plants for the manufacture of specialty chemical products with floor space of about 420,000 square feet; five terminal grain elevators and a number of warehouses. Its subsidiary, the Gorton Corporation, operates plants and warehouses in ten states and Canada with total floor space of about 514,000

square feet. As of May 25, 1969, GMI employed approximately 19,700 employees.

6. For the year ended May 31, 1963, GMI and its subsidiaries' total assets were $220,350,237, sales totaled $523,946,000, and net earnings were $14,912,196. For the year ended May 25, 1969 GMI and its subsidiaries' total assets were $622,357,000, sales $885,-242,000 and net earnings $37,547,000. During this same period the company's consumer foods products sales increased from about $288 million to approximately $600 million in annual sales. Between 1963 and 1969 the relative change in General Mills' consumer food products sales increased from 55 percent to 67.7 percent of total company sales.

7. GMI, directly and through various completely owned subsidiary corporations, ranks among the nation's leading manufacturers of brand differentiated food products. It is one of the largest flour milling companies in the United States, and is a leading producer of commercial flour. In packaged consumer foods, it ranks among the three largest companies in sales of breakfast cereals. GMI believes itself to be among the leaders in sales of cake mixes and other packaged convenience foods and is first by a considerable margin in sales of family flour. Its packaged food products are marketed largely through grocery stores and food service outlets.

8. As a multi-product producer, GMI enjoys substantial advantages in advertising and sales promotions. It features several products in its promotions, reducing the printing, mailing and other costs for each product. GMI purchases network programs on behalf of several products, enabling it to give each product network exposure at a fraction of the cost per product that a single-product firm would incur.

9. In 1968, GMI was ranked the sixteenth largest national advertiser and the third largest national advertiser of food. GMI's total advertising expenditures in 1968 totaled approximately $58 million, of which about 73 percent was spent on television advertising.

10. GMI has developed, introduced and marketed successfully several packaged food products sold under the "Big G" label which include the ready-to-eat cereal brands "Cheerios" and "Wheaties," snack product brands "Whistles" and "Bugles," "Betty Crocker" prepared mixes and "Gold Medal" flour for home use. A new ready-to-eat cereal, "Lucky Charms," was claimed by GMI to be one of the fastest growing established brands in the

industry in 1969. At the beginning of fiscal 1969–70, GMI introduced nationally a presweetened vitamin and iron fortified cereal named "Kaboom."

Among GMI's better known trade names and consumer products are the following:

Betty Crocker Bake and Other Food Products—

Cake Mixes
Pie Crust Mixes
Brownie Mixes
Cookie Mixes
Frosting Mixes
Pound Cake
Biscuit Mixes
Bisquick Mix
Muffin Mixes
Potato Buds
Noodles Romanoff
Pancake Mixes
Gingerbread Mix
SAFF-O-LIFE Safflower Oil

Snacks—

Bugles
Whistles
Daisys
Hotchas
Buttons
Bows
Pizza Spins

Breakfast Cereals—

Wheaties
Cheerios
Kix
Trix
Jets
Frosty O's
Total
Kaboom
Twinkles
Lucky Charms
Stax
Clackers
Country Corn Flakes
Cocoa Puffs
Goodness Pack

Flour—

Gold Medal
Softasilk
Purasnow
Sperry Drifted Snow
White Deer
Red Band
La Pina
Red Star

Sponges—

O-Cel-O

11. GMI was formed for the purpose of acquiring several flour milling companies. Since that time acquisitions and development of new products have played essential roles in the company's growth.

Since 1963, GMI has entered into the production and sale of additional food products through a series of acquisitions of existing food manufacturers. Among such domestic acquisitions in recent years have been the following:

Year	Company	Product or Activity
1964	Morton Foods, Inc.	Potato chips, corn chips, and other snack foods. (GMI sold most of Morton in May, 1970 keeping its pickle operation and some real estate.)
1966	Tom Huston Peanut Co.	Potato chips, corn chips, peanuts, confectionery products and other snack foods.
1967	Cherry-Levis Food Products Corp.	Sausages and pickled meat products.
1968	Jesse Jones Sausage Company	Meat Processor.
1968	The Gorton Corporation	Frozen Seafood
1969	The Donruss Co.	Bubble Gum

GMI has also diversified into other consumer related businesses by recently acquiring firms in the crafts, games, toys and clothing industries.

12. For many years prior to 1968, GMI sought entry into the frozen foods industry which is a large and expanding field. Entry into processing and marketing frozen food products is a natural evolution of GMI's steps for greater convenience to consumers, a process characterized by earlier development of prepared baked goods mixes, canned, dehydrated and refrigerated foods. GMI's leading Betty Crocker brand differentiated food products are vulnerable to inroads from frozen baked goods, entrees and convenience frozen foods. In recent years research and development in frozen and refrigerated foods has been one of the most important programs within GMI's Central Research Laboratories. New products to be developed included frozen entrees in meat, seafood and poultry.

13. At all times relevant herein, GMI sold and shipped and is now selling and shipping, products in interstate commerce throughout the United States; hence GMI was at the time of the acquisition challenged herein, and is now, engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

III

THE GORTON CORPORATION

14. Prior to August 16, 1968 when it was acquired by GMI, the Gorton Corporation ("Gorton"), was a corporation organized and existing under the laws of the State of Delaware with its principal office and place of business located at 327 Main Street, Gloucester, Mass.

15. For many years Gorton has been an established and respected New England seafood company whose brand names "Gorton's of Gloucester" and/or "Gorton's" are among the oldest seafood brands in the United States and are virtually synonymous with seafood products. Gorton was successful and growing. Its sales increased from approximately $12 million in 1958 to approximately $72 million in 1968. In 1968, Gorton earned over $1.5 million net and had assets of about $30 million.

16. Gorton processed and marketed frozen packaged foods nationally, principally fish portions, sticks and breaded shrimp, preselling customers, largely housewives, through advertising and other promotional efforts. Its products were marketed through retail outlets and food service outlets.

17. In 1967, Gorton ranked first among the independent companies in frozen packaged seafoods. In 1968, Gorton was the leading firm by a significant margin in the production of frozen packaged fish sticks and frozen packaged fish portions, major segments of the frozen packaged seafood industry.

18. Gorton had attained the position of largest independent producer in the frozen packaged fish and other seafood industry through the acquisition of a number of established manufacturers of branded seafood products including among others:

(a) Fishery Products, Inc. (now Blue Water Seafood, Inc.), Cleveland, Ohio, owner of "Blue Water," the leading seafood brand in the food service industry;

(b) Red L Foods Corporation, Providence, Rhode Island, owner of "Red L" a leading brand of frozen prepared foods and seafood dinners;

(c) Fulham Brothers, Inc., Boston, Massachusetts, owner of a full-line dominant brand of seafood, "Four Fishermen;"

(d) Florida Frozen Food Processors Inc., Miami, Florida, owners of the outstanding "Tropic Fair" brand in the institutional breaded shrimp market;

(e) Bayou Foods, Inc., Mobile, Alabama, owner of the leading "Bayou" brand of frozen crab specialties;

(f) Trans World Seafood, Inc., New York, New York, a leading importer of seafood products;

(g) Point Chehalis Packers, Inc., Westpoint, Washington, an established producer of canned and frozen crab and salmon.

19. Gorton began diversifying outside the seafood industry in 1966 with the acquisition of Freeborn Farm, Inc., a producer of

puff-pastry hors d'oeuvre products. This acquisition was the first step towards the formation of a nucleus for the development of a line of convenience foods. In 1968, in the second step toward becoming a significant diversified food products manufacturer, Gorton acquired B. B. Foods Corporation of Kentucky and B. B. Foods Corporation, Paducah, Kentucky, and Akron, Ohio, respectively, producers of frozen onion rings and frozen mushrooms.

20. Gorton was a substantial purchaser of flour products for use in its manufacturing processes. In 1967 purchases of wheat flour alone amounted to a total of 8.8 million pounds valued at approximately $500,000.

21. At all times relevant herein, Gorton sold and shipped, and is now selling and shipping, products in interstate commerce throughout the United States; hence Gorton was at the time of the acquisition challenged herein, and is now, engaged in commerce as "commerce" is defined in the Clayton Act and in the Federal Trade Commission Act.

IV

TRADE & COMMERCE

A. Generally.

22. The food manufacturing industry consists of manufacturers primarily engaged in processing and packaging food for distribution and sale through retail outlets, such as grocery stores, and/or food service outlets. Consumers spent approximately $120 billion for food in 1969, or roughly one of every five dollars of consumer disposable income. At manufacturing levels, food sales were about $97 billion in 1969.

Concentration in food manufacturing has been increasing for almost two decades with the fifty largest food manufacturers accounting for approximately 52 percent of all assets of food manufacturers in 1966 as compared with 42 percent in 1950, an increase of almost 24 percent. This trend toward concentration accelerated between 1966 and 1969 when approximately 225 acquisitions were made in the food industry. These acquisitions represent approximately one third of the more than 700 food industry mergers reported since 1958.

23. This merger movement has affected entry variables in food manufacturing in several ways. Conglomerate power of large food manufacturers may tend to discipline the competitive behavior of their smaller competitors. Entry barriers associated with brand

differentiation have been or may be increased or entrenched. Cumulatively, the continued merger movement with its attendant effects on structure has contributed to increasing concentration of various segments of the food industry into the hands of a few large firms.

B. Frozen Packaged Seafood.

24. The frozen packaged seafood industry consists of manufacturers primarily engaged in processing frozen seafood for distribution and sale through retail outlets and food service outlets. The value of industry shipments was about $384 million in 1967, of which the principal frozen products were fish portions, fish sticks and breaded shrimp.

25. (a) High levels of concentration prevail in segments of the frozen packaged seafood industry. In frozen breaded shrimp, the four and eight largest firms held 43.8 percent and 66.7 percent respectively of 1968 production; in frozen fish sticks the four and eight largest firms held 51.1 percent and 69.2 percent respectively of 1968 production; and in frozen fish portions, the four and eight largest firms held 53 percent and 70.8 percent respectively of 1968 production. Gorton ranked first in frozen fish stick and portion production and ranked among the eight largest firms in production of frozen breaded shrimp.

25. (b) At least fifteen mergers and one joint venture involving major seafood companies occurred since 1960. The impact of this merger movement and increased expenditures for product differentiation tend cumulatively to increase and entrench high levels of concentration.

V

THE ACQUISITION

26. On or about August 16, 1968, the Gorton Corporation was merged into GMI completing a transaction obligating GMI to issue 544,672 shares of common stock and pay a cash consideration of about $9.5 million. The value of this transaction, at the time, was approximately $30 million.

VI

EFFECTS OF ACQUISITION

27. The effect of the merger of Gorton into GMI has been or may be substantially to lessen competition or to tend to create a

monopoly in the manufacture, distribution and sale of frozen packaged seafood, or segments thereof, in the United States or sections thereof, separately and as a part of the cumulative tendencies toward increasing concentration in food manufacturing described in Section IV of this complaint, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C., Section 18), in the following, among other ways:

(1) GMI, a firm which possesses the capability to become a significant competitor and has demonstrated its intention and ability to expand its position in the manufacture and sale of frozen packaged seafood, has been eliminated as a potential competitor in the manufacture and sale of frozen packaged seafood.

(2) The dominant position of Gorton in the frozen packaged seafood industry has been, or may be further strengthened and entrenched *vis-a-vis* its competitors with the result that the likelihood of any reduction in such dominant position is remote.

(3) The already high levels of concentration in the manufacture and sale of food in general and frozen packaged seafood in particular have been further increased.

(4) Gorton has been eliminated as an independent user of raw materials, supplies and equipment used in processing and producing frozen packaged seafood.

(5) Members of the consuming public have been or may be denied the benefits of free and open competition in the manufacture and sale of frozen packaged seafood by the substitution of the large multi-product food manufacturer, GMI, for the single product Gorton.

(6) The strong position of Gorton and GMI in various segments of the food industry offer the opportunity to GMI-Gorton to tie the sale of various products to the sale of other products sold or distributed by GMI-Gorton.

(7) Barriers to entry into the frozen packaged seafood industry, or segments thereof, may be heightened due to the strong market position, the substantial financial resources, the established or anticipated brand differentiations, the advertising capabilities and the combining of nationally known trade names, the elimination of potential competition, the ability to cross subsidize, the ability to tie-in products, and decisive competition advantages resulting from the size of the combined GMI-Gorton achieved in major part through acquisition and merger.

VII

VIOLATION

28. The acquisition of Gorton by GMI as alleged above, constitutes a violation of Section 7 of the Clayton Act (15 U.S.C. § 18), as amended.

INITIAL DECISION BY ANDREW C. GOODHOPE
ADMINISTRATIVE LAW JUDGE
FEBRUARY 16, 1973

STATEMENT OF PROCEEDINGS

On February 16, 1971, the Commission issued its complaint against respondent charging it with violation of Section 7 of the Clayton Act, as amended (15 U.S.C. Section 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. Section 45).

A copy of the complaint and notice of hearing was served upon respondent, and respondent thereafter appeared by its counsel and filed an answer admitting certain of the allegations of the complaint but denying that it had violated Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act.

Hearings were thereafter held, at which time testimony and documentary evidence were offered in support of and in opposition to the allegations of the complaint. At the close of all the evidence and pursuant to leave granted by the administrative law judge, proposed findings of fact, conclusions of law, briefs and proposed orders were filed by counsel supporting the complaint and counsel for the respondent.

Proposed findings not herein adopted either in the form or substance proposed are rejected as not supported by the evidence or as involving immaterial matters. Having reviewed the entire record in this proceeding, including the proposed findings and briefs, the administrative law judge, based upon the entire record, makes the following:

FINDINGS OF FACT

Jurisdictional Facts[1]

1. General Mills, Inc. (GMI), respondent herein, is a corporation organized and existing under the laws of the State of Dela-

[1] The complaint alleges and the answer admits the essential jurisdictional facts. Hereafter CPF refers to complaint counsel's proposed findings and RPF to respondent's.

ware, incorporated therein in 1928, with its office and principal place of business at 9200 Wayzata Boulevard, Minneapolis, Minn.

2. Prior to August 16, 1968, when it was acquired by GMI, the Gorton Corporation (Gorton) was a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 327 Main Street, Gloucester, Mass. It was originally incorporated in Massachusetts in 1923 as the successor to Gorton-Pew Fisheries Company, and was reincorporated under Delaware law in 1966.

3. At all times relevant to this proceeding, GMI sold and shipped, and is now selling and shipping, products in interstate commerce throughout the United States; hence GMI was, and is, engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

4. At all times relevant to this proceeding, Gorton sold and shipped products in interstate commerce throughout the United States; and on August 16, 1968 and prior thereto Gorton was engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

5. On or about August 16, 1968, the Gorton Corporation was merged into GMI completing a transaction obligating GMI to issue 544,672 shares of common stock and pay a cash consideration of about $9.5 million. The value of this transaction at the time was approximately $30 million.

General Mills, Inc.

6. General Mills, Inc., was formed in 1928 to acquire several flour milling companies, including the Washburn Crosby Company, predecessors of which had been engaged in flour milling since 1866. GMI entered the packaged consumer foods business in the 1920's with the introduction of pancake flour, cake flour and a wheat flake breakfast food known as "Wheaties," but as late as 1934 the company was still basically a commodity company with some 95 percent of its sales consisting of flour milling and commercial food for livestock. (McFarland 1384–85; CX 5, p. 7; CPF 6)

7. In subsequent years, but especially in the post-World War II period, GMI expanded in the packaged consumer goods area, concentrating on ready-to-eat cereals and cake mixes. In the 1950's GMI added more dry, packaged convenience items, such as casseroles, cookie mixes and cake mixes to its line. Over the years, General Mills has developed a strong consumer franchise for its

branded breakfast cereals, and other products under the "Big G," and "Betty Crocker" labels. (complaint and answer, Par. 3; CX 5, p. 9; CPF 2)

8. GMI has supported some of its consumer products with substantial mass media advertising, especially television advertising. By the time of the subject merger in 1968 GMI was primarily producing dry packaged consumer foods such as breakfast cereals and cake mixes, which it presold to consumers through intensive advertising. These products are primarily distributed through self service retail "supermarkets" under the Betty Crocker and Big G labels. (complaint and answer, Par. 3; CX 5, p. 8; CPF 2)

9. In packaged consumer foods, GMI ranks among the three largest companies in sales of breakfast cereals, and believes itself to be among the leaders in sales of cake mixes and other packaged convenience foods. On certain of its dry grocery products GMI uses the Betty Crocker label and a pictorial representation of Betty Crocker. On other dry grocery products it uses the Big "G" symbol or the Gold Medal "Kitchen - tested" trademark. (complaint and answer, Par. 7; CX 2, p. 11; CX 5, p. 10; CX 6, p. 16; see CPF 3)

10. For the fiscal year ended May 31, 1963, GMI's and its subsidiaries' total assets were $220,350,237, sales totaled $523,946,000 and net earnings were $14,912,196. For the year ended May 25, 1969, GMI's and its subsidiaries' total assets had become $622,357,000, sales $885,242,000 and net earnings $37,547,000. During this same period the company's annual sales of consumer foods products had increased from about $288 million to approximately $600 million. (complaint and answer, Par. 6; CPF 11) For the last fiscal year prior to its acquisition of Gorton, GMI ranked 151st on the Fortune Magazine list of the 500 largest industrial corporations. As a result of its acquisition of Gorton, GMI moved to 130th on the next Fortune 500 list. (CX 144, p. 188)

11. Until 1966 the company was one of the country's largest producers of commercial flour. However, margins in the commercial flour business had been unsatisfactory. In consequence, the company closed nine of its seventeen flour mills in 1966. As a result of the sale, GMI dropped to sixth place among flour milling companies in the United States. Most of its production of flour now is for use in its own products. The reduction in activities in the commercial flour business was part of a policy to concentrate the company's manpower and financial resources in consumer

food products where profit and growth potentials for the company were greater. In line with this policy the company withdrew from the formula animal feed business in 1962, from the electronics and oilseed businesses in 1964 and from the refrigerated foods business in 1966. (McFarland 1475; CX 2, p. 11; CX 5, p. 7)

12. In order to replace the volume lost as a result of the withdrawal from its flour, refrigerated and feed businesses, GMI diversified into several new areas of consumer foods. In particular, GMI sought to add more highly prepared convenienced products to its line. In pursuance of this policy GMI acquired (CX 3, p. 6):

1964	Morton Foods, Inc.	Potato chips, corn chips, and other snack foods. (GMI sold most of Morton in May, 1970, keeping some real estate.
1966	Tom Houston Peanut Co.	Potato chips, corn chips, peanuts, confectionery products and other snack foods.
1967	Cherry-Levis Food Products Corp.	Sausages and pickled meat products.
1968	the Gorton Corporation	Frozen Seafood.
1969	the Donruss Co.	Bubble Gum.

13. As of 1968, GMI's packaged consumer foods consisted principally of ready-to-eat breakfast cereals; prepared mixes such as cake, frosting, cookie and biscuit mixes; snacks; packaged casseroles; potato products, and family flour. (CX 5, p. 7; CPF 23)

14. As of 1969, "Big G" ready-to-eat cereals were GMI's most important single business. It maintained a number two position nationally, with more than 20 percent of total sales. GMI brands include "Cheerios," the nation's leading children's cereal, "Wheaties," GMI's second largest brand, "Total," and "Trix." (CX 3, p. 6; CX 4, p. 6; CPF 24)

15. Betty Crocker dessert mixes are an industry leader in a retail market approaching 500 million dollars. As of 1969, Betty Crocker cake, frosting, brownie, cookie and other specialties were No. 1 or No. 2 in every category, and were growing stronger. Major gains have been made in the ready-to-spread canned frost-

ings market, in which GMI is also the leading firm. (CX 3, pp. 7–8; CPF 25)

16. GMI specialty baking products, which include Betty Crocker muffin and pie crust mixes, Softasilk Cake Flour, and Bisquick, have demonstrated growth in a market where GMI has a leading position. (CX 3, p. 8; CX 4, p. 8; see CPF 26)

17. As of 1968, GMI ranked first by a considerable margin in sales of family flour in the United States (CX 5, p. 10), selling primarily under the "Gold Medal" label. (CX 3, p. 7) Its share of this market was increasing, despite the fact that the total market for family flour had shown a declining trend in recent years. (CX 3, p. 7; Tr. 1368) It was for this reason that the company expected its flour business to remain a strong profit contributor. (CX 3, p. 7; CPF 27)

18. GMI entered the snack food business both through acquisition and through internal development of new snack food products. (CX 5, p. 7) In 1964 the company acquired Morton Foods, Inc., makers of potato chips and snack items (CX 3, p. 7; CX 5, p. 7), and in 1966 the Tom Houston Peanut Company, also makers of a broad line of snack foods, was acquired. (CX 5, p. 7) In 1969 GMI acquired the Donruss Co., a bubble gum company. (CX 3, p. 7; CPF 28)

19. Through intensive research efforts and extensive test marketing GMI has marketed several corn-based snack products packaged like ready-to-eat cereals, including "Bugles," "Whistles" and "Daisys." (CX 5, p. 8) A new chip product, "Wheat Chips," was introduced nationally in late 1968, and other products have been test marketed. (CX 4, p. 7; CPF 29)

20. GMI uses a variety of trade names on its consumers' food products. (CPF 30; complaint and answer, Par. 10)

Among these trade names are:

Betty Crocker Bake and Other Food Products—
- Cake Mixes
- Pie Crust Mixes
- Brownie Mixes
- Cookie Mixes
- Frosting Mixes
- Pound Cake
- Biscuit Mixes
- Muffin Mixes
- "Potato Buds"
- Noodles Romanoff
- Pancake Mixes
- Gingerbread Mix
- "SAFF-O-LIFE" Safflower Oil

Bisquick Mix

Snacks—
- Bugles
- Whistles
- Daisys
- Hotchas
- Buttons
- Bows
- Pizza Spins

Breakfast Cereals—

Wheaties	Twinkles
Cheerios	Lucky Charms
Kix	Stax
Trix	Clackers
Jets	Country Corn Flakes
Frosty O's	Cocoa Puffs
Total	Goodness Pack
Kaboom	

Flour—

Gold Medal	White Deer
Softasilk	Red Band
Purasnow	La Pina
Sperry Drifted Snow	Red Star

Sponges—

O-Cel-O

21. GMI manufactures a number of bakery mixes and other items which are marketed to members of the food service trade, such as wheat gluten, wheat starch, food grade gums, and wheat germ products.

22. GMI's total institutional business is in the neighborhood of $20 million, much of it in flour-based items such as muffin mixes, cake mixes, cookie mixes, etc. (McFarland 1446) This constituted only 2 percent of its total sales in the fiscal year ending May 31, 1970. (CPF 11) The total institutional food field is approximately $15–16 billion. The institutional business is characterized generally by very low margins. (McFarland 1467)

23. Food processing, GMI's major operation, accounted for over $800 million of its fiscal 1970 sales. Nearly two-thirds of total corporate sales ($647.3 million) came from consumer foods. This was almost equally divided between cereals and snacks ($333 million) and mixes, family flour, seafoods, etc. ($314 million). The only "seafood" sales were those of Gorton. (CX 4, p. 23; CPF 16)

24. The broad policies of GMI are set by the board of directors and chief executive officer with final responsibility for implementation of company policy resting with the chairman of the board and chief executive officer. (McFarland 1467; CPF 17)

25. Under General Mills' profit center operation each subsidiary or division is responsible for its profits, and the salaries of management are, to a great degree, dependent on the independent profits each subsidiary or division shows at the end of the year. (Kinney 1347)

26. Corporate officers receive their salaries from the Minneapolis general office expenses. Executive vice presidents of divisions have a portion of their salaries allocated to divisions and subsidiaries under their jurisdiction.[2] The salaries of the president, chairman, some staff people and general counsel do not get allocated, although most of the legal department's total expenses are allocated directly to divisions and subsidiaries. (McFarland 1465–66; CPF 18)

27. Gorton operates autonomously and manages its own plans, programs and budgets with its own total responsibility for sales, profits and the carrying on of the business. (Kinney 1342–3)

The Gorton Corporation

28. For many years Gorton has been an established and respected New England seafood company, having produced and marketed fish and seafood in the United States for more than 100 years. (CX 35, p. 6) Its brand names "Gorton's of Gloucester" and/or "Gorton's" are among the oldest seafood brands in the United States and are virtually synonymous with seafood products. (complaint and answer, Par. 15; CX 31, p. 9) Gorton was successful and growing at the time of the acquisition. (CX 22A–F, 31, 32, 44) Its sales increased from approximately $12 million in 1958 to approximately $72 million in 1968. In 1968, Gorton earned over $1.5 million net and had assets of about $30 million. (complaint and answer, Par. 15)

29. Gorton processes and markets frozen packaged foods nationally, principally fish portions, fish sticks, fish fillets and steaks and breaded shrimp. Sales are almost equally divided between retail outlets and food service outlets. (Kinney 1318; RX 83; CPF 34)

30. A fish stick is an elongated piece of fish flesh (generally cut from a block of fillets) weighing not less than ¾ of an ounce and not more than 1¼ ounces with the largest dimension at least three times that of the next largest dimension. Fish sticks are sold by the processor either in a cooked or uncooked state. (CX 124–A; Holas 941, 948; CPF 89)

31. A fish portion is a piece of fish flesh generally of uniform size and generally cut from a block of fillets. It has thickness, including the batter, of ⅜ of an inch or more, and does not

[2] The GMI executive vice president in charge of Gorton has part of his salary allocated to GMI and part to Gorton. (Tr. 1466; CPF 18)

conform to the definition of a fish stick. Fish portions are sold by the processor in a breaded or unbreaded state and may be cooked or uncooked. (CX 127–A; CPF 89)

32. Fish fillets are sides of fish cut lengthwise from the backbone and are practically boneless. Fish steaks are cross section slices from large dressed fish, usually about ¾ inches thick. Fillets may be sold by the processor in a breaded or unbreaded state and may be cooked or uncooked. (CX 130–A)

33. Fish sticks and portions are cut from fish blocks. A fish block is a frozen mass of between 26 to 70 pieces of boneless fish flesh, *i.e.*, fillets, formed into a rectangular block-type shape. Each fish block is composed of fillets of a particular specie. Fish of that specie are gutted, deheaded and deboned, *i.e.*, filleted, and then placed into a carton which is put into a rectangular frame where it is put into a pressure plate freezer. Once put under such pressure, the albumin in the fish causes the pieces of flesh to pull together and adhere to form a cohesive mass which does not break apart. Fish blocks are made up by the catcher of the fish who ships the frozen blocks to processors such as Gorton. (Holas 942, 988; Hansson 436; CPF 88)

34. Gorton operated its main seafood processing plants in Gloucester, Massachustts, Cleveland, Ohio, and Wilmington, California. (CX 36, p. 34) These plants were either new or recently renovated and expanded at the time of the acquisition. (CX 26–H) The capacity of the Gloucester plant was doubled in 1967, while the Wilmington plant was opened that same year. (CX 32, "Letter to the Stockholders") It also operated four additional domestic plants and three in foreign countries. (CX 36, p. 34; CPF 41) Gorton had substantial excess capacity at the time of the merger in 1968. (Gerlach 1238)

35. Two of Gorton's three major plants had cold storage capacity, at the time of the acquisition, for 22 million pounds of frozen products. (CX 26H) An adjacent public cold storage warehouse next to its seafood processing plant in Gloucester was able to hold up to nine million pounds of frozen products. The Miami and Cleveland processing plants had company owned freezer space with an aggregate capacity of six million pounds. (CX 36, p. 35) Gorton owned processing plants in other locations and leased public cold storage warehouse space in other areas to speed distribution by locating inventory near its customers. (CX 36, p. 35; CPF 43)

36. At its fish processing plants, Gorton processes the frozen fish fillets or blocks it imports into fish sticks, fish portions, breaded fillets or seafood specialties such as sole in lemon butter and sole almondine. In those cases where the process starts with blocks, the blocks are sawed, still frozen, into slabs. These slabs are then conveyed into a chopping machine which cuts the slabs into the dimensions of a fish stick or fish portion. (Holas 989) The product is then placed on conveyor belts where it is battered or breaded, sometimes deep fried, and put in adjoining cold storage facilities for distribution (LoBello 1569; CX 36, p. 34; CPF 42)

37. In some instances raw frozen fillets are packaged into individual "snap out" fillets—a process which requires that thin sheets of separating material be wound between the individual fillets so that the housewife can separate one or more fillets without thawing the entire pack. In some cases the individual fillet is separately breaded and cooked in which instance it is virtually the same as a breaded portion. Some portions are cut in an elongated shape to resemble a fillet. The leading processor of retail portions refers to its portion as a "fillet," despite the fact that the product is made from fillet blocks rather than individual fillets. In some instances raw fillets or raw unbreaded portions are used to make up specialty items such as "sole almondine" or "sole in lemon butter." (Holas 956–47; Hansson 436–39; Kulber 484–85)

38. Gorton maintains distribution warehouses at two of its three fish processing plants and at its shrimp processing plant in Miami. Gorton also utilizes public cold storage warehouse facilities in Gloucester, Atlanta and Dallas. Since its products must be kept refrigerated throughout the distribution process. Gorton ships by refrigerated truck from its distribution facilities. Less than full load truck shipments are made possible through pooling arrangements with other manufacturers of frozen products. (LoBello 1522)

39. Gorton sells its products to both the retail and food service trade through brokers. Gorton's sales force in 1968 consisted of a network of approximately 65 retail brokers and 90 food service brokers. The brokers' activities are overseen by approximately 20 regional sales managers, divided evenly between retail and food service, employed by Gorton. (LoBello 1505, 1523; see CPF 44)

40. Over the years Gorton has enjoyed substantial growth both in sales and in the number of products which it offers for sale. A

substantial portion of this growth is accounted for by mergers. The principal merger was the purchase by Gorton of Fishery Products, Inc., of Cleveland, Ohio, in early 1961. This company owned the "Blue Water" label which is still used by Gorton. Blue Water was one of the earliest successful developers of breaded fish sticks and portions and was and still is today a substantial factor in the institutional food business, selling to customers such as drive-ins, schools, restaurants, hotels, motels, universities, hospitals and other types of prepared food operations. (Tr. 499–500, 950–951; CX 25D, 38, 53B)

Geographic Market

41. Both parties and the administrative law judge agree that the geographic market in which to judge the competitive impact of the acquisition of Gorton by GMI is the United States as a whole. GMI, being a national company which distributes its products nationally, was totally committed to entering the frozen food business, or any segments thereof, on a nationwide scale. Gorton, with a nationwide frozen food brokerage network, was the largest frozen fish processor in the country. (Tr. 1451–1453) It was GMI's intent to obtain a competitive advantage in any area of frozen foods by seizing this nationwide brokerage network. (Tr. 1421–1423) The major companies in the packaged frozen fish or other seafood business compete and distribute their products nationally. (Tr. 358, 448, 489, 525–527, 574)

Line of Commerce and the Relevant Markets

42. The relevant line of commerce concerned in this proceeding is the purchase, processing and selling of packaged frozen fish. The various producers in the industry also produce frozen shrimp in various forms. The record contains no meaningful statistics on shrimp and this product is not fundamentally involved in the proceeding. GMI and Gorton were never competitors before the acquisition and no GMI products prior to the acquisition are in any way involved. Packaged frozen fish is of course a segment of the overall food industry and also a segment of the frozen food industry. The record contains no figures on either of these overall industries, and they would be meaningless in any event since they are so broad. Both counsel in support of the complaint and for respondent appear to agree that the basic issue involved is whether GMI's entry into the frozen packaged fish industry by

purchasing Gorton had the effect proscribed by Section 7 of the Clayton Act.

43. Counsel in support of the complaint emphasize the overall position of Gorton in the packaged frozen fish industry, but do recognize that the total market for such products is made up of two classes of customers, retail and institutional. As a result, their statistics emphasize Gorton's share or position in the important product lines involved, fish sticks, fish portions, fish fillets and fish steaks in the overall market. Counsel for respondent urge that the two markets, retail and institutional, must be assessed independently as to the effect which GMI's entry might have on either market, since there are substantial differences in the way each market is sold, both in technique of selling and products sold. These differences between counsel, while recognized, are not considered fundamental.

Institutional and Retail Markets

44. Frozen packaged fish and other frozen seafood are sold to retail stores for resale to consumers and to hospitals, schools, fast food service chains and other institutions. (Tr. 782–784, 440–443, 516, 587, 351)

45. Method of sale to each of the two groups differs. While almost all frozen fish is sold through frozen food brokers, the sale of the product by brokers is usually divided between retail and institutional sales persons. The basic approach to retail stores is packaging and promotion. The price must be competitive to similar products and the promotions are generally in the form of a reduction in price to the consumer which is attractive to the retail buyer. The institutional buyer is more interested in the quality and price of the product. (Tr. 356, 486–488, 493–494, 512, 513, 516, 530, 573, 762–763, 860, 928–929, 962, 970, 977, 1326; CX 53Z10–12, 55U, 56H)

46. There is no difference in source of supply, type of fish or processing between retail and institutional fish producers. The differences are in packaging equipment needed to pack at retail which requires a minimum investment; and the need for research, promotion and advertising, which requires a substantial and sustained effort.

47. The institutional and retail markets are further distinguished by type of product. Although both fish sticks and fish portions are sold in both markets, fish sticks are primarily a

retail item, while fish portions are preferred by the institutional buyer. (Tr. 511, 665, 1016; CX 53R, 56D; CPF 93, 101)

48. Of the twelve largest producers of fish sticks and fish portions, five: Coldwater, Iceland, Dolly Madison (Sea Pass), Dolphin and Frionor are almost entirely in institutional sales (Tr. 440–441, 482, 564–566, 665, 949, 952; CX 124F, 127F); seven are in both retail and institutional sales. Gorton is the largest firm in either market. (CX 124F, 127F) Only Mrs. Paul's sells fish solely at retail. (Tr. 353)

49. There is a slight overlap between institutional and retail frozen packaged fish. Recently, many supermarkets have been purchasing large institutional packages of fish and either (1) selling them as is, or (2) repackaging the fish in store tray packs. (Tr. 449, 764–765, 957)

50. Every fish processor has a production capability of entering the institutional or retail markets; six of the largest fish stick and fish portion producers are already large producers in both markets (CX 124F, 127F) and with a small investment, many of those selling institutional fish could co-pack for a firm such as GMI, desiring to enter the retail area *de novo*. (Tr. 519)

51. The retail market, nationally, is serviced in most regions of the country by only: Mrs. Paul's, Gorton, O'Donnell-Usen (Taste O'Sea), Sea-Pak, and possibly Booth's Fisheries (Consolidated Foods). (Tr. 351–353, 355–358, 525–527, 948–949)

52. The institutional market is serviced by: Gorton (Blue Water), Coldwater, Iceland, Sea Pass, Dolphin, Sea Pak, O'Donnell-Usen and Frionor. The record indicates that no new firm has entered the national market since 1967, at the latest. (Tr. 435, 441, 448, 490, 574, 948–949)

53. There has been no significant new entry into the retail frozen packaged fish market on a national scale since before the GMI acquisition of Gorton. (CX 124A–F, 127A–F) The only new entrant into retail competition nationally shown by the record in this case is Mrs. Paul's. It entered the fish stick and portion business shortly after World War II. (Tr. 349)

54. Advertising on the retail side of the packaged frozen fish market is not used extensively by any of the suppliers with the exception of Mrs. Paul's which sells fish only at retail. (Tr. 353) The total figure for advertising to sales for the entire frozen packaged seafood industry is less than 2 percent. (RX 165B) And even in the instance of Mrs. Paul's, most of its advertising is directed to nonseafood products in its line. (RX 165E) The rec-

ord is clear that there are not sufficient margins of profit on the retail side to warrant large advertising expenditures. (Tr. 359, 821, 792, 910, 965, 1017, 1025, 1330, 1542) Early in the fish stick and portion business, private labels became an important factor. As soon as the products became popular, private label brands, such as Captain John's (A&P), Captain's Choice (Safeway), Fresh Store (Kroeger) and A&P Tea Co. appeared. (Tr. 945) The private label products are displayed in the frozen food cabinet along with whatever other company's products are carried and the products are indistinguishable except for the packaging. Consequently, prices must be competitive. (Tr. 547, 1329, 804) Advertising on the institutional side of the market is minimal and consists primarily of ads in trade journals with distribution to the institutional type of buyers. (Tr. 460, 498, 977)

Market Data

55. Appendices 1 through 12, attached hereto and made a part hereof, give an accurate picture of Gorton's position in the packaged frozen fish industry by product, in both pounds sold and dollar value received, as well as Gorton's position in the overall packaged frozen fish industry. Also shown is production by the top four and top eight companies in the industry and Gorton's share compared with these market leaders. (App. 1–9) Appendices 10, 11 and 12 also show Gorton's share and trends in the retail and institutional markets separately. All of the statistics included in the appendices are based upon data submitted by counsel in support of the complaint through their economist. These figures are taken as accurate and represent a true picture of the packaged frozen fish industry. Numerous arguments are advanced by counsel in support of the complaint that these figures are understatements and very conservative; and that they are not reliable since they are overstatements or do not include imports of fillets and steaks proposed by counsel for respondent. These arguments are rejected and the figures are considered to be accurate and a representative picture of the packaged frozen fish industry.

56. Respondent's witness, Dr. Markham, testified that the weighted average of top four firms concentration in all 4 digit SIC manufacturing industries is 37 percent. (Tr. 1693[3] He also testified that one could expect a higher average the more nar-

[3] Commission economic witness Glassman apparently adopted a 55 percent level of top 4 concentration as the "critical" level of concentration. (Tr. 674)

rowly an industry is defined, as is the packaged frozen fish industry. The available data shows the top four firms concentration of the retail packaged frozen fish market was 40.7 percent (App. 10) and for the institutional packaged frozen fish market 42.8 percent (App. 10) in the year 1968. The figures shown in Appendix 8 show that in 1968, top four firms concentration of production of frozen packaged fish in pounds was 43.75 percent. This is an amount above respondent's witness Markham's estimate of top four firms concentration for all manufacturing industries, 37 percent. GMI-Gorton accounted for 20.96 percent of this total, more than 2½ times the size of the next largest producer. (App. 9; Tr. 1693) Top eight firms concentration was 62.46 percent. (App. 8) Using the dollar share of production, complaint counsel's calculated top four firms production of 47.18 percent is again higher than the 37 percent average advanced by Professor Markham. (App. 8; Tr. 1693). Gorton ranked first with 21.35 percent of total frozen packaged fish production in dollars, with more than twice the share of its largest rival. (App. 9) Top eight firms production was 64.13 percent of the total. (App. 8). In 1968, the top four firms accounted for 37.6 percent of sales of frozen packaged fish in pounds, while GMI-Gorton was the leading seller with 15.1 percent of total sales, almost twice the share of its largest rival. (App. 8–9) Top four firms concentration exceeded the average 37 percent of concentration for all manufacturing. (Tr. 1693)

57. Counsel for respondent, while conceding that Gorton is and has remained the leading producer in the combined retail and institutional packaged frozen fish markets, show that when considered separately, its share of both markets has declined. This reduction in market share is borne out by Appendix 11 which shows that Gorton's share of retail sales of frozen packaged fish in pounds has fallen from 12.7 percent in 1966 to 10.0 percent in 1969 and from 18.4 percent of sales in pounds to the institutional market in 1966 to 13.6 percent in 1969. Gorton remained the largest supplier at retail in 1969 but fell to number 2 to institutions in 1969.

58. The witness Dr. Markham's use of a 37 percent figure for top four firms concentration in 4 digit SIC manufacturing industries is apparently an attempt to use a rule of thumb guide to determine whether an industry is in a state of concentration where it can be called monopolistic or oligopolistic in the various degrees that the cases have discussed oligopoly. The packaged

frozen fish industry appears to be one which can be described as a fairly tight oligopoly, with only a limited number of manufacturers. This is especially true when one looks to the markets served. As found above, five of the top twelve producers are almost entirely in institutional sales. Seven sell to both the retail and institutional markets and one sells only at retail. (Tr. 353, 440–1, 482, 564–66, 665, 949, 952; CX 124F, 127F)

59. There have been no significant new entrants into the industry since Mrs. Paul's shortly after World War II. However, there are no insuperable barriers to entry into the industry by a new entrant. (Tr. 1569–70) The plant and machinery costs are not prohibitively expensive and a new entrant could have an existing company package frozen fish for it if it so desired. This is being done by a number of retail chains and the frozen fish are sold under private label. (Tr. 452, 519–20) Counsel for respondent make much of a shortage of ground fish as the raw product. This claimed shortage has not yet resulted in a shortage of raw product except in some species and does not appear to be an insuperable barrier to entry.

60. The industry is one of a fairly high degree of concentration. However, as the appendices show, the concentration by the top four and eight members has decreased appreciably and the Gorton share of the market has been declining even though it remains the largest producer in every category of product as well as overall. The purchase of Gorton by GMI has not noticeably increased in any way Gorton's market shares. A study of the market statistics alone does not permit a conclusion that the merger may be to substantially lessen competition or tend to create a monopoly. Consequently, it is necessary to examine whether GMI was a potential entrant into the industry which was eliminated as a result of the merger, or whether GMI's purchase of Gorton will have the effect of entrenching Gorton in its leading position to the competitive detriment of the industry.

61. In the mid-1960's GMI became interested in the frozen prepared food business since it appeared to the principal officers to be a growth area. (CX 17; Tr. 1216, 1404) A number of studies of various companies in the frozen prepared food business were undertaken which ultimately concluded in the merger under consideration. (CX 9, 11, 13, 14, 15, 17 and 17A; Tr. 1428–29) In all of these studies there was little or no consideration given to GMI entering the frozen fish business or the prepared seafood business; principal emphasis was directed to three areas of possi-

ble interest for GMI: frozen dinners, frozen baked goods and frozen specialties. (CX 9Z, 12–14)

62. The principal attraction of Gorton to GMI was its frozen food broker organization in both the retail and institutional markets. In addition, Gorton was organized to handle frozen foods. It had frozen food warehouses throughout the United States from which it distributed its packaged frozen fish and these could be used to handle additional frozen products produced by GMI. Gorton's brokers were among the best frozen food brokers in the major markets of the United States and could well handle frozen products of GMI in addition to the packaged frozen fish of Gorton. (Tr. 1415, 1333, 1214–25, 1230, 1348, 1356, 1511–18, 1526; RX 33, 52; CX 56)

63. Counsel in support of the complaint state that they "do not claim primarily that GMI exercised any disciplining force in the frozen packaged fish industry by virtue of its potentiality of entry." They do insist that the merger is anticompetitive and that had GMI wished to enter the frozen packaged fish industry, it should have done it either by internal development or by the acquisition of a much smaller company giving it a so-called toehold in the industry. This contention must be rejected since it is clear from the testimony and documents that what GMI did when it acquired Gorton was to attempt to achieve for itself a competitive standing in the frozen prepared food industry. GMI was never considered to be a potential entrant into the packaged frozen fish industry. (Tr. 994, 983, 990–91, 1033, 925–26, 1571, 515, 789, 846, 552) And its entry by the purchase of Gorton has not resulted in the elimination of a potential entrant into the packaged frozen fish industry.

64. What the merger has in fact accomplished is to bring a new and substantial entrant into the frozen prepared food industry. This industry, of course, is a much broader one than the frozen packaged seafood industry, and there are no statistics in the record upon which to evaluate what effect GMI's entry into the frozen prepared food industry might be. However, it is conjectured that it should be salutary since GMI's entry results in the introduction of a substantial competitor into that industry.

Consequently, the arguments that GMI was a strong potential entrant into the packaged frozen fish industry and eliminated itself by its purchase of Gorton must be rejected.

65. Counsel in support of the complaint urge that the result of the merger will be further entrenchment of Gorton in its domi-

nant position in the packaged frozen fish industry, and that barriers to entry into the market are further heightened. These contentions must be rejected. In the first place the discussion above of the market data in the record makes it clear that Gorton was not at the time of the merger in a dominant position in the packaged frozen fish industry. It was very strong in the frozen fish stick market, but not dominant. In the rest of the fish products and in the retail and institutional markets, Gorton certainly was a leader. However, this leading position has recently been eroded somewhat and Gorton is not as strong as it was at the time of the merger and beforehand.

66. Counsel in support of the complaint urge that the merger here involved is virtually the same as was involved *In the Matter of Procter & Gamble Co.*, 63 F.T.C. 1465 (1963), and that Gorton will enjoy the same benefits from GMI as Clorox derived from Proctor & Gamble; namely,

(1) economies in point-of-sale promotions, coupon and other promotional mailings, and in newspaper, magazine, and television advertising;

(2) the utilization of Procter & Gamble's direct sales force;

(3) additional "leverage" with retailers because of the large volume of products involved;

(4) a much greater source of capital to fund advertising, promotions, and to finance aggressive price cutting to drive out new competitors; and

(5) the benefits nationally derived from assocciation with a firm having a well regarded image in the industry. 63 F.T.C. at 1565–1568.

The difficulty with this argument is that in the *Procter & Gamble* case, it was found that Clorox was clearly the dominant firm in the liquid bleach industry. Gorton, while a leader, is not dominant in the packaged frozen fish industry. In addition, advertising to the consuming public was very substantial in the liquid bleach industry as well as in the low-priced, high-turnover household consumer items sold through grocery, drug and department stores by Procter & Gamble. Consumer advertising as found herein is of only marginal value in the packaged frozen fish industry. It is true that GMI is a well established, and highly regarded name in its industry, but the record provides no basis for finding that there will be any real rub-off of this fact to increase Gorton's position in the packaged frozen fish industry. Nor will the record permit a finding that GMI's substantial financial position will

permit price cutting to drive out competition, new or old. Gorton itself had ample resources to sustain its growth without assistance from GMI. (Tr. 1077, 1088–89, 1237–38, 1248–49) Nor does GMI have any "leverage" with retailers which will help Gorton increase its position in the retail market. (Tr. 1529–30, 1506–07)

67. The record does not permit a conclusion that Gorton will receive any substantial benefit from GMI's market and product research facilities. Prior to the acquisition Gorton used outside research firms when needed and has not increased its research since the acquisition in either marketing or product development. (Tr. 1488–90, 1774–76, 941, 948, 1490–91)

68. Counsel in support of the complaint cite as an example of GMI's ability to increase Gorton's sales over its competitors a promotion introduced by GMI and Gorton late in 1971 and during 1972 of a "Superfish" promotion. "Superfish" was a fish portion cut in the form of a fish. An ambitious newspaper advertising campaign was used and the promotion was also assisted by placing 20 million coupons offering "Superfish" T-shirts in boxes of GMI's Cheerios, the largest selling children's cereal in the United States. (CX 11, 21, 112U, 112Z 10) During 1972 while the "Superfish" campaign was in progress Gorton advertised other products each week in the food supplement of the Washington Post. (CX 153, 154, 155, 156) It was estimated that the cost of an independent mailing through the Postal Department of 20 million coupons would be about $180,000. (Tr. 363) The cost to Gorton of the coupons in the Cheerios boxes was less than $11,000. The total cost of the newspaper advertising was $36,000. (Tr. 1357–58) There was no proof of purchase of any Gorton product necessary to get the "Superfish" T-shirt and in fact it was necessary to send Gorton $1.50 to obtain the T-shirt. (Tr. 1559–60, 1596–97) This was not a cents-off promotion and no price discount or other incentive was offered as a part of the promotion. The promotion was apparently a failure since "Superfish" has not been a successful product since it is more expensive to manufacture and consequently sells at a higher price than regular frozen fish sticks and portions. (Tr. 1565, 770, 973, 837–38, 551, 1562, 1565) This is the only promotion in which Gorton and GMI have cooperated and it will not support a finding that GMI is in a position to give Gorton any substantial help or advantages in selling packaged frozen fish.

69. Counsel in support of the complaint contend that the acquisition of Gorton by GMI has eliminated Gorton as an independent purchaser of breading material for use in conjunction with such

products as breaded fish sticks and fish portions. Apparently the basis for this is the fact that in 1967 Gorton purchased about $500,000 worth of wheat flour to use in its breading material and since Gorton is a substantial user of breading material, it will purchase the flour from GMI to the exclusion of competitors of GMI. Gorton produces its own batter and has never purchased flour or batter or breading from GMI for its packaged frozen seafood products. (Tr. 1530, 1884) GMI does not make the type of flour used by Gorton for its batter or breading and the flour has regularly been bought more cheaply from other flour suppliers who vary from year to year. (Tr. 1530) The record contains no support for the claim of substantial foreclosure of Gorton as a result of the acquisition from purchasing flour from other producers than GMI.

70. Respondent contends that there is no likelihood that it will ever engage in any type of cross-couponing with Gorton or insertion of any coupon device in any of its products which refer or relate to Gorton products, since it has entered a stipulation not to engage in such activity in a private treble damage action brought by Mrs. Paul's. This contention is rejected since any stipulation entered into in that proceeding could have no bearing or effect upon this proceeding. (RPF 293–299)

CONCLUSIONS

1. The record herein does not support a conclusion that the effect of the merger of Gorton into GMI may be substantially to lessen competition, or to tend to create a monopoly.

2. The marketing data in the record does not permit a conclusion that the packaged frozen fish industry was unduly concentrated at the time of the merger nor that it became more concentrated as a result of the merger, nor that it may, in the future, become more concentrated as a result of the merger.

3. GMI at the time of the merger was a strong potential entrant into the overall frozen food industry, but not into the packaged frozen fish portion of that industry.

4. GMI is not in a position to entrench Gorton in a dominant or a leading position in the packaged frozen fish industry.

5. There has been no foreclosure of Gorton for the purchase of flour or any other products from competitors of GMI as a result of the merger.

ORDER

It is ordered, That the complaint in this matter be dismissed.

APPENDIX 1

CONCENTRATION OF THE PRODUCTION AND SALES OF FROZEN FISH STICKS, 1963–1968

Year	Top 4 Sales (pounds) RX 93	Top 4 Production (pounds) CX 126A	Top 8 Production (pounds) CX 126A	Top 4 Production (dollars) CX 126B	Top 8 Production (dollars) CX 126B
1963	____	51.51%	79.17%	57.48%	87.29%
1964	____	56.01	79.65	63.17	85.98
1965	____	58.56	81.98	63.86	87.68
1966	58.2%	58.20	83.46	64.88	89.88
1967	63.3	56.87	83.05	64.00	90.92
1968	54.8	52.84	76.70	59.01	82.55

APPENDIX 2

MARKET SHARES AND RANKS OF GMI-GORTON IN THE PRODUCTION AND SALES OF FROZEN FISH STICKS, 1963–1969

Year	% Share of Sales (pounds) RX 93	Rank*	% Share of Production (pounds) CX 126A	Rank*	% Share of Production (dollars) CX 126B	Rank*
1963	___	___	17.61%	(1)	18.82%	(1)
1964	___	___	23.19	(1)	23.77	(1)
1965	___	___	25.82	(1)	27.82	(1)
1966	20.0%	(1)	22.73	(1)	26.43	(1)
1967	21.5	(1)	22.86	(1)	26.50	(1)
1968	17.7	(1)	19.67	(1)	22.26	(1)
1969	14.1	(1)	____	___	____	___

* CX 124A–F; CX 125A–F; CX 157; RX 93.

APPENDIX 3

CONCENTRATION OF THE PRODUCTION AND SALES OF FROZEN FISH PORTIONS, 1963–1968

Year	Top 4 Sales (Pounds) RX 95	Top 4 Production (Pounds) CX 129A	Top 8 Production (Pounds) CX 129A	Top 4 Production (Dollars) CX 129B	Top 8 Production (Dollars) CX 129B
1963	___	70.73%	83.45%	69.15%	83.64%
1964	___	70.23	85.15	66.34	84.54
1965	___	63.34	78.59	62.69	78.80
1966	60.1%	59.50	76.13	56.37	74.30
1967	54.1	53.33	71.78	53.38	71.64
1968	53.8	54.75	74.89	56.05	75.76

APPENDIX 4

MARKET SHARES AND RANKS OF GMI-GORTON IN THE PRODUCTION AND SALES OF FROZEN FISH PORTIONS, 1963–1969

Year	% of Market (Rank) Sales (Pounds) RX 95	Rank*	Production (Pounds) CX 129A	Rank*	Production (Dollars) CX 129B	Rank*
1963	---	---	36.79%	(1)	36.72%	(1)
1964	---	---	40.05	(1)	36.24	(1)
1965	---	---	34.82	(1)	35.35	(1)
1966	30.6%	(1)	30.39	(1)	27.02	(1)
1967	27.1	(1)	29.03	(1)	27.43	(1)
1968	26.8	(1)	26.94	(1)	26.14	(1)
1969	21.6	(1)	----	---	----	---

* 127A–F, 128A–F, CX 157 and RX 95.

APPENDIX 5

CONCENTRATION OF THE PRODUCTION OF FROZEN FISH FILLETS AND STEAKS, 1963–1968

Year	Top 4 Production (Pounds) CX 132A	Top 8 Production (Pounds) CX 132A	Top 4 Production (Dollars) CX 132B	Top 8 Production (Dollars) CX 132B
1963	22.37%	31.24%	24.68%	34.97%
1964	22.44	33.17	23.46	35.36
1965	23.61	33.68	26.77	36.98
1966	22.71	33.80	24.74	35.98
1967	23.38	32.39	23.17	33.04
1968	31.83	47.48	30.69	44.96

APPENDIX 6

MARKET SHARES AND RANKS OF GENERAL MILLS-GORTON IN THE DOMESTIC PRODUCTION OF FROZEN FISH FILLETS AND STEAKS, 1963–1968

Year	Production (Pounds) 132A	Rank*	Production (Dollars) 132B	Rank*
1963	2.10%	(7)	2.70%	(5)
1964	2.63	(7)	3.25	(5)
1965	3.68	(4)	5.14	(4)
1966	3.34	(3)	5.20	(3)
1967	2.23	(7)	3.95	(4)
1968	7.76	(2)	10.03	(1)

* CX 130A–F and CX 131A–F.

APPENDIX 7

TOP FOUR AND GMI-GORTON SHARES OF SALES OF FROZEN FILLETS AND STEAKS, 1966–1969

Year	Top 4 Sales (Pounds) RX 97	GMI-Gorton Sales (Pounds) RX 97	GMI-Gorton Rank RX 97
1966	32.1%	7.1%	(3)
1967	35.7	8.5	(3)
1968	35.0	7.4	(2)
1969	32.3	5.7	(4)

APPENDIX 8

CONCENTRATION OF THE PRODUCTION AND SALES OF FROZEN PACKAGED FISH (FISH STICKS, PORTIONS, FILLETS AND STEAKS), 1963–1968

Year	Top 4 Production (pounds) RX 99	Top 4 Production (pounds) CX 135A	Top 8 Production (pounds) CX 135A	Top 4 Production (dollars) CX 135B	Top 8 Production (dollars) CX 135B
1963	---	39.30%	55.69%	42.32%	61.18%
1964	---	42.96	58.72	45.29	62.01
1965	---	43.80	59.45	45.87	62.35
1966	37.2%	42.70	58.22	43.35	59.76
1967	38.7	40.27	57.56	43.61	59.19
1968	37.6	43.75	62.46	47.18	64.13

APPENDIX 9

MARKET SHARES AND RANKS OF GMI-GORTON IN THE TOTAL PRODUCTION AND SALES OF FROZEN PACKAGED FISH (FISH STICKS, PORTIONS, FILLETS AND STEAKS), 1963–1969

Year	Sales (Pounds) RX 99	Rank*	Production (Pounds) CX 135A CX 133A–F	Rank*	Production (Dollars) CX 135B CX 134A–F	Rank*
1963	---	---	19.20%	(1)	20.31%	(1)
1964	---	---	23.50	(1)	22.51	(1)
1965	---	---	23.44	(1)	24.87	(1)
1966	15.7%	(1)	20.77	(1)	20.79	(1)
1967	16.5	(1)	20.76	(1)	21.09	(1)
1968	15.1	(1)	20.96	(1)	21.35	(1)
1969	12.0	(1)	----	---	----	(1)

* RX 99, CX 133A–F and CX 134A–F.

APPENDIX 10

CONCENTRATION OF SALES OF FROZEN PACKAGED FISH (FROZEN FISH STICKS, PORTIONS, FILLETS AND STEAKS) IN RETAIL AND INSTITUTIONAL MARKETS, 1966–1969

Year	Retail Top 4 (pounds) RX 103	Institutional Top 4 (pounds) RX 101
1966	39.8%	41.6%
1967	41.0	43.9
1968	40.7	42.8
1969	36.8	41.9

APPENDIX 11

MARKET SHARES AND RANKS OF GMI-GORTON SALES OF FROZEN PACKAGED FISH (FROZEN FISH STICKS, PORTIONS, FILLETS AND STEAKS) IN RETAIL AND INSTITUTIONAL MARKETS, 1966–1969

Year	Gorton's Retail Share (Pounds) RX 103, RX 124	Rank*	Gorton's Institutional Share (Pounds) RX 101, RX 126	Rank*
1966	12.7%	(1)	18.4%	(1)
1967	13.2	(1)	19.3	(1)
1968	12.3	(1)	17.3	(1)
1969	10.0	(1)	13.6	(2)

* RX 101 and RX 103.

APPENDIX 12

GMI-GORTON'S RANK IN VARIOUS MARKETS, 1963–1969

Market	1963	1964	1965	1966	1967	1968	1969
Fish Sticks—							
Sales (lbs.)	NA	NA	NA	1	1	1	1
Production (lbs.)	1	1	1	1	1	1	NA
Production ($s)	1	1	1	1	1	1	NA
Fish Portions—							
Sales (lbs.)	NA	NA	NA	1	1	1	1
Production (lbs.)	1	1	1	1	1	1	NA
Production ($s)	1	1	1	1	1	1	NA

Market	1963	1964	1965	1966	1967	1968	1969
Fish Fillets and Steaks—							
Sales (lbs.)	NA	NA	NA	3	3	2	4
Production (lbs.)	7	7	4	3	7	2	NA
Production ($s)	5	5	4	3	4	1	NA
Frozen Packaged Fish—							
Sales (lbs.)	NA	NA	NA	1	1	1	1
Production (lbs.)	1	1	1	1	1	1	NA
Production ($s)	1	1	1	1	1	1	NA
Retail Fish—							
Sales (lbs.)	NA	NA	NA	1	1	1	1
Institutional Fish—							
Sales (lbs.)	NA	NA	NA	1	1	1	2

OPINION OF THE COMMISSION

BY DENNISON, *Commissioner:*

This matter is before the Commission on an appeal by counsel supporting the complaint from the initial decision of Administrative Law Judge Goodhope who dismissed the complaint after holding evidentiary hearings.

The complaint in this matter charged respondent General Mills, Inc., with violation of Section 7 of the Clayton Act in its acquisition of the Gorton Corporation, a New England seafood company. General Mills, of course, is a leading seller of cereals (Wheaties, Cheerios, and other brands), cake mixes, and various assortments of other dry packaged food products usually sold under the Betty Crocker, Big G symbol or Gold Medal trademarks. It also has diversified into non-food lines, usually by acquisition.

Until 1966 General Mills was one of the country's largest producers of commercial flour for bakeries and institutional markets. However, in view of the fact that it viewed profit margins in the commercial flour business as unsatisfactory, it closed nine of its seventeen flour mills in 1966. As a result it dropped to sixth place among flour milling companies in the United States. Most of its flour production now is for use in its own consumer products.

In line with a new policy to concentrate General Mills' energies in food products where profit and growth potentials for the company were greater, it also withdrew from the formula animal feed business in 1962 and from the electronics and oilseed businesses.

It also withdrew from the refrigerated foods business in 1966 after unsuccessful attempts to promote a refrigerated dough product.

To replace volume lost as a result of withdrawal from these businesses, General Mills sought to add other food lines to its business. In pursuance of this policy, it acquired Morton Foods in 1964 and Tom Houston Peanut Company in 1966, both manufacturers of potato chips and other snack items; Cherry-Levis Food Products Corporation (1967), a seller of sausages and pickled meat products; the Gorton Corporation in 1967; and the Donruss Company (1969), a bubblegum manufacturer.

Also, through internal research efforts it developed new food products, including corn-based snack products ("Bugles," "Whistles," and "Daisys").

As of 1969, General Mills' annual sales of consumer food products approximated $600 million. Total sales were $885 million and total net earnings $37.5 million. In that year it ranked number two nationally in ready-to-eat cereals, ranked either number one or number two in cake mixes, frosting, and cookie mixes. It still ranked first in sales of family flour in the United States. However, the total market for packaged family flour had shown a declining trend as households consumed more and more prepared or convenient food items.

Prior to its acquisition in 1968 by General Mills, Gorton was an independent seafood company, having produced and marketed fish and seafood in this country for more than 100 years. Its brand names, "Gorton's of Gloucester" and "Gorton's," appear on its frozen packaged fish portions, fish sticks, fish fillets and steaks, and breaded shrimp sold to the consumer via grocery outlets. About half of Gorton's business is to the institutional trade, *e.g.*, restaurants, schools, hospitals, etc.

Gorton was successful and growing at the time of the acquisition. Its sales increased from about $12 million in 1958 to $72 million in 1968. It operated its main seafood processing plants in Gloucester, Massachusetts; Cleveland, Ohio; and Wilmington, California. A substantial amount of its recent growth had occurred as a result of mergers. Its principal acquisition was of the Fishery Products Company (Cleveland, Ohio) in 1961, a successful and substantial factor in the supply of frozen fish products to the institutional trade.

In August 1968 Gorton was merged into General Mills, completing a transaction obligating General Mills to issue 544,672 shares

of common stock and pay a cash consideration of about $9.5 million. The value of this transaction at the time was approximately $30 million.

On February 16, 1971, the Commission issued its complaint charging that this acquisition may substantially lessen competition in the manufacture and sale of frozen packaged seafood, or segments thereof, by eliminating General Mills as a likely and significant potential competitor in that line of commerce. The complaint also alleges that Gorton already had reached a dominant position in the frozen packaged seafood industry and that the acquisition entrenched its position in that industry by heightening entry barriers and had other adverse effects on the structure and conditions in that industry.

Evidentiary hearings were held and on February 16, 1973, the administrative law judge dismissed the charges, finding that General Mills was never considered a potential entrant into packaged frozen fish by others in that industry and that General Mills did not have plans to enter that industry outside of the instant acquisition.[1] He found that the testimony of General Mills' officials and documents preceding and contemporaneous to the acquisition showed that General Mills acquired Gorton as a vehicle for the purpose of achieving a competitive standing in frozen *prepared* foods, such as frozen dinners, frozen baked goods, frozen desserts and other specialties.

The law judge found that the principal attraction of Gorton to General Mills was its frozen food broker organization ("among the best in the major markets") and the fact that it had frozen food warehouses throughout the United States which could be used to handle frozen prepared food products to be developed by General Mills. He concluded (initial decisions, p. 20 [p. 721 herein]):

What the merger has in fact accomplished is to bring a new and substantial entrant into the frozen prepared food industry. This industry, of

[1] Complaint counsel's evidence as to market concentration of the frozen packaged fish market consisted of production and sales figures of frozen packaged fish sticks, portions, fillets and steaks. Shrimp were excluded. The retail market is served in most regions of the country by five "national," or nearly national, companies: Mrs. Paul's, Gorton, O'Donnel-Usen (Taste O'Sea), Sea-Pak, and Booth's Fisheries (owned by Consolidated Foods). The institutional market is mostly served by some eight firms. The law judge found that these markets are moderately concentrated. The production of the top four producers (in dollars) amounted to 47 percent of total U.S. sales in 1968; the top eight had 64 percent; Gorton ranked number one with 21 percent of the market (retail and institutional combined). Respondent's figures, which include imports of packaged fish and use pounds as a measurement, show the top four firms having 37.6 percent and Gorton (still number one) with 15 percent of the market in 1968.

course, is a much broader one than the frozen packaged seafood industry, and there are no statistics in the record upon which to evaluate what effect GMI's entry into the frozen prepared food industry might be. However, it is conjectured that it should be salutary since GMI's entry results in the introduction of a substantial competitor into that industry.

The law judge also dismissed charges that the acquisition had the effect of entrenching Gorton as a dominant firm in the packaged frozen fish industry, distinguishing cases such as *Procter & Gamble,* 63 F.T.C. 1465 (1963), *aff'd* 386 U.S. 568 (1967), on the ground that Gorton was not in fact "dominant" in the industry and that unlike the facts in *Procter & Gamble,* consumer advertising is only of marginal value in the frozen fish industry. He also dismissed arguments that Gorton has been eliminated as an important independent purchaser of wheat flour.

In their appeal, complaint counsel ask the Commission to reverse the administrative law judge and enter an order of divestiture.

A. ALLEGED ELIMINATION OF POTENTIAL COMPETITION

As we noted in *Beatrice Foods Co.,* Docket No. 8814, Slip Opinion, September 28, 1972, p. 15) [81 F.T.C. 481, 527] injury to competition solely by removal of a potential entrant can come about in one or both of two ways. First, the existence of what is perceived to be a significant potential competitor at the edge of a concentrated market may act as a restraint upon high prices in that market even though actual entry never occurs or has been internally rejected by management. Removal of one of a few such "perceived" entrants may dilute this competitive force. *United States* v. *Falstaff Brewing Corp.,* 410 U.S. 526 (1973).

Secondly, aside from whether it is viewed as a potential competitor by firms in the market, elimination of a potential entrant by acquisition of a leading firm in that market will eliminate the competition that would have been added had the acquiring firm entered the market *de novo* or by toehold acquisition.[2]

In their appeal complaint counsel concede that the evidence will not support any finding that the first of the above types of injury has occurred here. Indeed, executives of frozen fish companies testified that they were surprised when they learned of General Mills' acquisition of Gorton as they never viewed respondent to be

[2] As recognized in our *Beatrice* decision, both situations assume that barriers to entry are high, so that the number of likely entrants is not large. Otherwise, loss of one among a large number of potential entrants would ordinarily not be significant.

a likely entrant into the frozen fish industry. Consequently, counsel supporting the complaint are relegated to the argument that, notwithstanding lack of industry recognition of General Mills as a potential entrant into frozen fish, it was nevertheless a likely entrant and the instant acquisition removed competition it would have added had it entered as a *de novo* or by toehold-acquisition.[3]

1. Subjective Evidence

The paramount issue on this appeal is whether the record shows that General Mills was a likely entrant into the frozen fish market aside from the instant acquisition. On this issue complaint counsel rely primarily on "subjective" evidence, beginning with documents showing that in the early 1960's General Mills recognized the importance of entering some phase of the rapidly growing frozen food industry in order to maintain its competitive position among the nation's food processors, especially in view of the direct competition by some frozen foods to General Mills' products. The company's corporate development department made a number of studies of the frozen food industry and its component parts, some of which recognized internal entry and "acquisition plus development" as possible avenues of entry.[4]

According to complaint counsel's interpretation of the record, General Mills' interest in entering frozen foods had narrowed down to frozen dinners and entrees and frozen seafood by 1965 and the interest in frozen seafood continued up until the time of the acquisition.

On the other hand, we have examined these documents and find no interest expressed in frozen seafood or fish as such. Although frozen seafood was mentioned, along with frozen fruits, vegetables, poultry, meats, prepared foods, and concentrates, and sales trends in these areas were recorded, the conclusion was consistently reached that *prepared* frozen food products was the kind of business General Mills should seek to develop should it ever go into frozen foods.

The record indicates that by frozen "prepared foods," General Mills' people initially were referring to frozen dinners; frozen

[3] See *Beatrice Foods Co., supra,* and *Ekco Products* v. *Federal Trade Commission,* 347 F.2d 743, 752–753 (7th Cir. 1965). Cf. *United States* v. *Falstaff Brewing Corp., supra,* 410 U.S. at 537.

[4] On the other hand, respondent claims management never made a firm decision to enter some part of the frozen food market in one way or another. Its chief executive officer testified that shortly before the Gorton acquisition management adopted a recommendation (RX 76H) of a frozen foods committee that if it were not possible to acquire an appropriate vehicle for entry into frozen foods, efforts to enter *de novo* should be abandoned (Tr. 1427).

meat pies; frozen entrees; frozen baked goods; frozen nationality items; frozen fruit and cream pies; highly prepared frozen vegetables; prepared frozen poultry dinners; frozen soups; and prepared frozen seafood items. "Prepared seafood" consisted of items such as sole in lemon butter, lobster newburg, crab au gratin, "fish and chips"—items more specialized than the staple frozen fish items (sticks, portions, fillets, and steaks)—the items alleged in the complaint as the relevant line of commerce for this case.

A General Mills' study of the frozen food industry made in February 1965 reached the conclusion (CX 9J):

> 3. Non-prepared categories: Are mostly commodity type products; are produced by many marginal operators; have severe price competition.
> 4. This leaves prepared frozen foods: Largest single category; excellent growth (18.8% combined); greater technological requirements; more opportunity to differentiate; highest frozen food margins; easier to establish quality image.

Prepared foods was the only segment referred to in the balance of the report.

The next frozen food study was done in August of 1965 and again set out the entire frozen food universe. But it also concluded (CX 11H):

Commodity type products should be avoided—
- Relatively undifferentiated
- Severely price competitive

This leaves prepared frozen foods—
- Largest single category
- Excellent growth record
- Higher technical requirements
- More product differentiation
- Generally better margins
- Chance to establish quality image

Again the emphasis in the study was on *prepared* frozen foods. The report reiterated the attractions of this market (CX 11Q):

Frozen Prepared
- Selected areas less competitive
- Greater technology requirements
- Chance to differentiate
- Easier to build quality image

and reached the conclusion that:

> Although frozen food is very competitive, its growth and impact strongly suggest the need for GMI taking a position in selected and institutional areas.

On the page of the report devoted to answering the question: "What specific areas are best?," the study concludes that General Mills should "seek middle to high prices * * * in order to assure adequate margins, product differentiation, building quality image, reaching best market." In that connection the report identifies "preliminary areas" within the prepared food market (CX 11V):

1. Entrees —Casseroles, etc. (boil-in-bag)
2. Nationality —Italian, Chinese, etc.
3. Baked —Selected products
4. Specialties —Hi-ball, sauces, etc.
5. ISP —Consumer and institutional products
6. Institutional —Special areas

Objective: To develop areas permitting product differentiation and adequate marketing margins.

It is true that the report later mentions the Gorton Company along with seven other companies as acquisition possibilities, but the F.M. Stamper Company was the only one discussed in detail, and that company specialized in frozen prepared foods such as frozen dinners, entrees, meat pies, and dessert pies, sold under the name "Banquet." There was no discussion of the seafood or frozen fish business other than the simple notation that Gorton was in that business.

The next document dealing with the frozen food area was written in January 1966 (CX 15). Again it concentrated exclusively on *prepared frozen* foods and recommended that in any entry General Mills should concentrate on top quality products, good margins for retailers and sufficient margins for the producer (CX 15B):

* * * to aggressively advertise and establish the necessary images. This has been the pattern of such successful operations as Sara Lee, Swanson and Stouffers. It is the kind of marketing we know best. Any entry by us must follow this pattern. * * *

Although Gorton was again listed along with others such as F.M. Stamper and Stouffer as possible acquisition candidates, it seems clear from testimony later given at the hearing that Gorton was considered a possible candidate not because General Mills was anxious to get into frozen seafoods as such, but rather to gain access to frozen food cabinets in grocery stores via Gorton's established brokerage distribution system.

This was brought out by the next study and report (CX 14) which lists possible areas of "prepared foods" for development,

but stresses that plans for internal development should be made only if an appropriate major acquisition of a frozen food distributor is made. Although Gorton was again listed as one among several possible acquisition candidates, special note was taken of its low profit rate ("1.1% on sales").

The next document evincing interest in frozen food (CX 16) is a memorandum dated April 28, 1966, showing that management had authorized "an all out effort to evaluate and acquire either (1) Stouffer Foods, or (2) F.M. Stampers," the two firms that specialized in highly prepared frozen food products.

Finally, a top management memorandum dated September 7, 1966 (CX 17) sets forth the author's "rethinking of past proposals in the frozen food area:

> The relevant question * * * is not whether the total market [frozen foods] is expanding. The real question is whether there is a segment of this business that is expanding at a rate sufficient to make it attractive. The answer would appear to be "yes"—particularly in the 800 million dollar *prepared food* area, which we estimate to be growing at a compound annual growth rate of about 8% * * * this classification includes all types of meals—dinners, entrees, nationality foods, meatpies, prepared seafood, poultry and finished baked goods * * *
>
> * * * [T]here are relatively few worthwhile acquisition possibilities left in the frozen food field. Either the companies are too small, have inadequate distribution systems, or are completely lacking in management to give us any assurance that we would be getting anything worth buying. The exceptions to the above are firms such as Stamper, Stouffer, and Green Giant.
>
> * * * We feel that General Mills should concentrate its efforts in the frozen food business within the prepared food segment—an area growing most rapidly and in which there is the greatest opportunity for brand identification, product points of difference, and margins adequate to support consumer advertising programs * * *
>
> In conclusion, we recognize that we are banking heavily on our internal development program, specifically meat and cheese toastwiches, for an entry into the frozen food business."

There was no indication in this report, or in any of the other studies as to entry by internal development or toehold acquisition into the frozen fish market. The only possible basis for complaint counsel's contentions that General Mills had "narrowed its interest to * * * frozen seafood" is the fact that Gorton and Mrs. Paul's (another leading independent seller of frozen fish) were named as possible acquisition candidates along with several other companies in frozen foods. These references, however, were made in the context of recommendations that an acquisition should be made to aid in the internal development and distribution of frozen

prepared foods. As more fully discussed below, it was felt that acquisition of an established frozen food company was needed to secure brokers who could successfully handle the distribution of such items.

In 1966 General Mills tried to acquire Stouffer Foods which enjoyed high margins and a quality image as a seller of quality dinners and entrees. However, it was unable to acquire this company and it turned next to the F.M. Stamper Company. Stamper was a large privately-owned company in the frozen prepared food business, specializing in dinners, meat pies and dessert pies. Negotiations with Stamper were lengthy but eventually fell through in December 1967.

At this time, General Mills had been spending approximately $200,000–$400,000 a year on research in frozen prepared foods. Products being worked on were toaster products—toaster pizza, "toastwiches" and frozen sandwiches. Efforts to develop a skeletal brokerage network in a few test markets to handle such frozen prepared food products as it could develop had been a failure. After these unsuccessful attempts to acquire Stouffers and F.M. Stamper, the president of General Mills established an *ad hoc* frozen foods committee to determine whether there was any other vehicle by which the company could feasibly enter the frozen food business. They were to look for "an organization in the frozen food business who had a national distribution competence that could enable us to move into the prepared frozen food area involving our abilities." The committee was also asked whether it was worthwhile to continue research efforts in frozen products if a suitable vehicle could not be found.

The committee reported back that it was necessary to make an acquisition of a company with national distribution competence; otherwise internal development should be stopped. The names of three frozen food companies were presented, one of which was Gorton's. The other two were not in the frozen fish business. General Mills' officials initially were negative to the idea of entering the fish business even by acquisition. Gorton was eventually selected despite its relatively low profit margins on sales because it had an established national network of frozen food brokers, its growth potential was deemed favorable and it had sound management.

Complaint counsel suggest that the testimony that a principal reason Gorton was acquired was to serve as a vehicle for distribution of frozen prepared foods developed by General Mills should

not be believed because the notion never appeared in contemporaneous writings. This is not accurate. A General Mills' memorandum reporting favorably a meeting between the president of Gorton and General Mills on whether Gorton would be a sound investment for General Mills stressed that in addition to Gorton's having good management and record of growth, "we would have an opportunity to add new products to their line and it would aid their expansion *outside the seafood area*" (CX 25C, emphasis added). In reporting on Gorton, the president of General Mills wrote the chairman of the board that the company would "provide us with a nation-wide distribution system for any new frozen food products developed by GMI" (CX 26B). These and the other documents cited herein support the testimony by respondent's officials that Gorton was viewed as a vehicle for General Mills to distribute frozen prepared foods that were developed by it.[5]

That Gorton was to be used as a vehicle for non-seafood items was confirmed by Mr. Kinney, then president of Gorton, who testified as follows as to its pre-merger talks with respondent's officials about the kinds of frozen products General Mills indicated it was interested in developing (Tr. 1355):

> They wanted to develop products that were similar to their kind of business, only frozen. They wanted something that would marry in with their cake business because they foresaw a declining cake business, the market not growing. They are in the flour business.
>
> They had hoped to and are working currently on something that will in that division have a product that will be a baked bread, a dessert business which is a substantial part of General Mills' business. They wanted a frozen entry into the dessert business and in the breakfast business; surprisingly enough, they wanted a frozen breakfast, something you could heat in the oven, and currently they are working on a product that they hope the consumer will like and, of course, will distribute through Gorton's.
>
> And they are right because this whole business is changing. Some of these markets are not growing. The dessert business, strange as it may seem, is not growing. This flour business, as I have told you, is declining. Their thinking was all right. They also understand enough about the business to want our kind of brokerage system.

It was brought out at the hearing by witnesses for both sides

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[5] In their proposed findings, complaint counsel themselves acknowledged that a principal interest of General Mills in entering frozen foods was to protect its position with respect to food items, most of which would not compete with frozen seafood for the consumer's palate:

"GMI was facing increased competition from frozen foods during the 1960's. Frozen baked goods were competing with GMI's cake mixes and flours. GMI's casseroles were in direct competition with frozen dinners and entrees. Based on the research efforts of GMI in frozen foods, the company's executives became convinced that 'frozen breakfast-type items would replace the traditional cereals' marketed by GMI. (Tr. 1216–1217; CX 17A, 17F, 21A)." proposed finding p. 55.

that it would take four or five years to put together a national network of top-flight frozen food brokers. It is also clear that in the absence of having such frozen food brokers it is difficult to get entry into the limited freezer cabinet space of grocery stores. Evidence was adduced that it is nearly impossible to utilize dry-grocery sales personnel to gain access to the freezers. Certain brokers, on the other hand, have developed the expertise and have the manpower necessary for the intense selling effort at the retail level that is required for frozen foods (Tr. 1505–11, 964). Given the uncertainties of introducing new frozen prepared items, it seems logical (and this was supported by testimony of frozen food distributors) that a company such as General Mills, desirous of competing with new concepts of frozen prepared items, needed access to an established, self-sustaining brokerage distribution system, rather than attempt to work on an "in-and-out" basis with brokers, or on a limited regional basis. The importance of having access to a *national* brokerage network was stressed as follows by one official:

> Q. Given the types of products which you understand General Mills is introducing in the frozen prepared area—we talked about that yesterday—would it be feasible to introduce those kinds of things, the toastwich or a breakfast item? Would it be feasible to introduce those kinds of items on a regional basis for General Mills in your opinion?
>
> A. No, because these large companies are very alert. They are very sensitive to major competitors. If you linger too long in a region, what they do is that they duplicate and if it is fairly successful, what they do is duplicate the product. Since they have national distribution and sales forces, what they do is just scoop the remainder of the market.
>
> Really what they do is neutralize any benefits that you have had in that regional market.
>
> Q. They pick up your product and go national with it? A. Right. They monitor products all the time. So, it would be marketing suicide for a company to just talk in terms of regional product, regional company, with a meaningful product, a product that had substance, a product that had potential. (Tr. 1539).

Subsequent to the acquisition, respondent has used Gorton's broker network to get distribution for its frozen toaster pizzas and toastwiches. Although these products were ultimately taken off the market, this was because of lack of consumer acceptance, not because of other marketing problems. According to respondent, new frozen prepared food items are continuing to be developed for marketing through Gorton's brokers. For fiscal 1973, General Mills plans to spend $900,000 in the development of

frozen products in such areas as breakfasts, desserts, flour, and snacks (Tr. 1424–25).

2. Objective Considerations

Even if evidence of subjective intentions of corporate management show no plans to enter a particular market, examination should not stop there since testimony and documents could be self-serving or express only transitory views of management. Therefore, we have also attempted to determine from the objective facts known of the frozen fish business whether entry into that market would be a natural area of internal expansion by a firm such as General Mills. We have concluded that it is not.

Frozen fish do not appear to be in any sense complementary to General Mills' products. They are not produced or distributed in the same way, they have not been differentiated by brand in the consumer's mind to any great extent, and they are not bought by the same retail store personnel. Compared to the heavily advertised dry convenience food items usually promoted by General Mills, selling margins and profit margins in frozen fish are low. Price competition appears to be prevalent in most frozen fish products with a high portion of sales under supermarket private labels. Gorton's profit margin shortly before the merger was less than 2 percent of sales. Industry consumer advertising-to-sales ratio is 1.4 percent. Both ratios are low compared to General Mills' experience which was to sell high margin items that could be promoted through advertising.

Lack of heavy advertising and product differentiation in frozen fish does not appear to be due to lack of competitors in the market able and experienced in such marketing techniques. Booth Fisheries is a subsidiary of Consolidated Foods, one of the largest food companies in the country. Chicken-of-the-Sea is a subsidiary of Ralston Purina, another major company. Sea-Pak is a subsidiary of W.R. Grace. All of these companies surely have the capability of creating strong brand differentiation if that could be accomplished with this type of product.

In short, it appears clear that frozen fish sticks and portions were not a natural "product extension" for General Mills. Its reputation and experience as a seller of breakfast cereals and "Betty Crocker" cake mixes and casseroles would not seem to give it any predilection for the frozen fish business.

Complaint counsel contend, however, that a firm cannot enter the "frozen prepared food" business without also entering some

staple item segment of frozen foods, such as frozen fruits, vegetables, meats, seafood, etc. (This proposition is not universally true since some firms, *e.g.*, Stamper and Stouffer, specialize only in prepared frozen food items.) It is argued that General Mills should therefore be viewed as having been a potential entrant into any and all segments of the frozen food industry, including fish, since entry into one part could have led it into frozen prepared foods.

Even if this view is accepted, it does not follow that the acquisition of Gorton eliminated a potential entrant into packaged frozen fish, since we have found no reason to believe that, except for this acquisition (or perhaps an equivalent acquisition of another leading frozen fish company), General Mills would have entered the frozen fish industry. As we stated in *Sterling Drug Co.*, CCH Trade Reg. Rep. ¶ 19,962 at 21,983 (1972) [80 F.T.C. 477 at 606] :

> [I]n the absence of evidence that the acquiring company might have entered the market internally or by another [toehold] acquisition we cannot agree with complaint counsel that Section 7 of the Clayton Act prohibits *per se* the acquisition of a leading firm in a concentrated market.[6]

Or, looking at the matter from a somewhat different perspective, it appears unlikely that if we ordered divestiture of Gorton, General Mills would attempt to re-enter the frozen packaged fish industry by internal expansion or equivalent means.

B. ALLEGED ENTRENCHMENT OF GORTON

Complaint counsel argue that regardless of whether General Mills was a potential entrant into the packaged frozen fish market, the merger would still be unlawful because of (1) the elimination of potential competition from anyone else due to the raising of entry barriers, and (2) General Mills' demonstrated ability and willingness to use its power to increase Gorton's leading position in the market.

Although there may be barriers to entry into the frozen packaged fish industry, it is clear that such barriers as exist are not ones which General Mills is likely to affect by virtue of this acquisition. It appears from the record that the major obstacle to

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[6] This statement assumes, of course, that the acquiring company was not perceived by other firms to be a potential *de novo* entrant (regardless of actual intentions) and its presence had no* existing disciplinary effect on prices. As previously noted, complaint counsel conceded that this was not the case here.

* Amended pursuant to order of the Commission issued Nov. 20, 1973.

any new entry in recent years has been the difficulty of obtaining adequate supplies of fish. Intense international competition in recent years for supply has endangered the fisheries of the most popular species (Tr. 880–85; 1301–04; 978–83). Negotiation of supply arrangements poses a major problem for seafood processors. Success appears to be built on personal relationships with industry representatives built up over a period of time (Tr. 457–59; 553–54; 1499–1501, 1318–20). Thus, Gorton was able to negotiate a valuable long-term supply contract with Poland in part by teaching their fishing people how to produce frozen fish blocks and furnishing them equipment and experts (Tr. 1319–21).

There is no reason to believe that General Mills, which has no experience or contracts among fish catchers, could give Gorton any advantage which they did not have already in this area. No "heightening" of this entry barrier could result from the acquisition.

Similarly, there is no reason to believe General Mills could provide Gorton with production or distribution know-how or economies which might raise entry barriers for other firms. Frozen fish products must be distributed by frozen trucks and stored in special warehouses. General Mills did not engage in either production or distribution of frozen foods.

Nor does it appear that General Mills had advantages in the selling force area that could benefit Gorton. The record indicates that every company in the frozen fish business but one relies exclusively on specialized brokers to sell its frozen fish products. The one exception is Mrs. Paul's, and that company has recently made a major move in the direction of using brokers rather than a direct sales force. The record is replete with testimony as to the advantages which a seller with a frozen food broker network enjoys over one with a direct sales force in selling frozen packaged fish. Frozen fish are usually sold to the frozen food buyer of the retail outlet, often the meat buyer, while General Mills' previous products were sold to dry grocery buyers. The frozen food buyer operates independently with different concerns usually from those of the dry grocery products buyer. A marketing executive testified that the distributor of frozen fish must be expert in frozen food distribution techniques and must constantly service the retailer, a function he thought could not be performed by General Mills' sales staff (Tr. 1510–11).

The record shows that because freezer space is limited and so expensive to the retailer, the frozen food buyer will not waste

freezer space by, for example, authorizing promotional displays as a favor to a leading dry grocery seller, or by authorizing distribution of a product that is not likely to sell in his store. Because of this factor, we find little reason to believe that General Mills could exercise "leverage" in selling frozen products to retailers by virtue of its position in dry grocery areas.

As for preselling to consumers by way of advertising, the record is clear that product differentiation simply has not been a significant factor in this market. Frozen fish sticks, portions, and fillets are essentially "commodity" items that do not command much brand allegiance. Even if some product differentiation develops with specialized prepared frozen fish dishes, there is no reason to believe that the presence of General Mills in the market will make it difficult for others to advertise competitively. As previously inlicated, a number of Gorton's competitors are parts of large corporations such as Ralston Purina and Consolidated Foods, which are fully capable of financing advertising campaigns, should a trend in that direction develop. Similar competitive balance appears to exist as to research facilities for development of new products.[7]

Complaint counsel suggest that such a trend and heightening of entry barriers may be started by General Mills. They cite the fact that Gorton's advertising expenditures increased from $238,000 in 1968 (the year of acquisition) to $652,000 in 1969. But the record shows that Gorton was introducing a new "fish and chips" product in the American market that Gorton believed was different enough to warrant a test to determine whether advertising would help sales. It turned out that it did not, and Gorton advertising fell back to prior levels. Gorton's vice president in charge of sales testified that the idea for the advertising was Gorton's and was never discussed with General Mills' officials (Tr. 1540–42).

Also relied upon by complaint counsel was a promotion in the spring of 1972 regarding "Superfish," a fish-shaped frozen fish

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[7] Complaint counsel argue that respondent can run TV commercials featuring multiple products, enabling it to give television exposure to each product at a fraction of the cost per product that a small firm would. Although this was an important factor in our *Procter & Gamble* and *General Foods* decisions (63 F.T.C. 1465 and 69 F.T.C. 380), prior to the trial in this case the Commission made findings in another merger case that the TV networks have abandoned quantity discounts and since December 1970 offered 30-second spots, eliminating advantages of "piggy-back" commercials by large companies. *Sterling Drug Inc.*, Docket No. 8797 (April 7, 1972) [80 F.T.C. 477]. Complaint counsel has not suggested why that finding is not fully applicable here.

portion developed by Gorton. Superfish was promoted by inserts enclosed in about 13 million boxes of General Mills' Cheerios breakfast cereal. The insert was not a "cents-off" type offer, but offered a Superfish T-Shirt for $1.50. The insert did not require submission of proof of purchase of Superfish and the promotion was self-liquidating, *i.e.*, the $1.50 covered the cost to Gorton of the T-Shirt.

Although cross-couponing practices by a large multi-product firm could give the company an unfair advantage over smaller companies concentrating their efforts in one product area, we do not believe that this single instance indicates a threat that new barriers to entry are in the offing as a result of cross-couponing practices in this industry. In point of fact, Superfish was a failure in terms of sales ("a total disaster," according to one Gorton broker).

The risk that Gorton will cross-coupon with other General Mills' divisions by offering "cents-off" coupons which must be redeemed at the store seems unlikely. Margins have usually been too narrow to justify "cents-off" coupons in the frozen packaged seafood business. Neither Booth's Fisheries (Consolidated Foods), nor Chicken-of-the-Sea (Ralston Purina), have used cross-coupons despite the fact that both have large multi-product food companies for parents (Tr. 974–75, 982).

Finally, complaint counsel submit that Gorton will now have available to it the resources of a parent with access to capital at low interest rates to finance expansion. But they themselves concede that capital requirements are not high to enter the frozen fish business. What advantages Gorton might have as far as interest rates on any loans would not appear to be significant in this industry, which is not capital intensive. *Cf. Beatrice Foods Co.*, Docket No. 8814 (1972) [81 F.T.C. 481].

Furthermore, the record reveals that at the time of the acquisition Gorton already enjoyed a sound financial situation—it had completed recent plant expansions, and a representative of the financial community testified that it could easily have raised funds for additional expansion if it had so desired.[8] Contemporaneous documents show that General Mills believed Gorton had

[8] Gorton had negotiated a $1.5 million 15-year unsecured loan in 1962 and a $3.5 million 15-year loan in 1964. In 1965 it successfully issued a $3.5 million subordinated note. According to the financial institution which advanced these loans, in 1968 Gorton was qualified to incur another $3 million in long-term debt and could have raised an additional $3 million through issuance of common stock (Tr. 1088–89).

sufficient investment and working capital so that Gorton could continue to expand with internally generated foods (CX 56A). No showing has been made how General Mills' "deep pocket" would restructure this industry or give Gorton an unfair advantage over rivals.

We agree with the administrative law judge that the condition of new entry has not been adversely affected as a result of this acquisition, and the record will not permit a finding that it will "entrench" Gorton as a dominant or leading firm.

C. VERTICAL FORECLOSURE

Finally, complaint counsel appeal from the initial decision's dismissal of charges that the acquisition will lessen competition in the sale of wheat flour as the result of the fact that General Mills is a supplier of that product and Gorton is a substantial user of wheat flour as a breading material in the processing of frozen packaged fish.

The law judge's dismissal of this part of the complaint is so clearly correct we can only wonder why an appeal is taken on this point. Gorton's purchases of wheat flour in 1967 is valued at only $500,000. It is true that in the production of frozen portions and sticks (usually breaded) Gorton has about 20 percent of United States production. But there is no data as to what degree of foreclosure in a relevant market might occur *if* Gorton purchased all of its flour requirements from its new parent. Thus, there is no evidence as to whether there is a separate market for fish breading flour, what the geographic scope of the market is, or what the total production might be. In fact, Gorton has been operated as a separate and largely autonomous division of General Mills under a "profit center" method. It does not purchase flour or breading material from General Mills. According to its officials, General Mills does not make the type of flour or breading material used in Gorton's operations and cannot supply Gorton with flour as cheaply as more proximately located suppliers because of substantial differences in freight costs (Tr. 1530). Even if in the future, circumstances change and Gorton does buy its requirements from General Mills, there is insufficient data to measure any possible anticompetitive effect.

In conclusion, we find no basis to believe this acquisition violated Section 7 of the Clayton Act. An appropriate order will be entered dismissing the complaint.

FINAL ORDER

This matter having been heard by the Commission upon briefs and oral argument in support of and in opposition to the appeal of counsel supporting the complaint from the administrative law judge's dismissal of the complaint herein, and the Commission, for the reasons stated in the accompanying opinion, having concluded that the appeal should be denied and that the findings and conclusions contained in the initial decision should be adopted,

It is ordered, That the administrative law judge's initial decision be, and it hereby is, adopted as the decision of the Commission, and

It is further ordered, That the complaint in this matter be, and it hereby is, dismissed.

IN THE MATTER OF

COCA-COLA COMPANY, ET AL.

DISMISSAL ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SECTIONS 5 and 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8839. Complaint, April 14, 1971—Order & Opinion, Oct. 5, 1973.

Order dismissing the complaint issued against an Atlanta, Georgia manufacturer, seller and distributor of a fruit drink product "Hi-C" and its New York City advertising agency for alleged violations of Sections 5 and 12 of the Federal Trade Commission Act.

Appearances

For the Commission: *Gale T. Miller, Stuart B. Block* and *Ellis M. Ratner.*

For the respondents: *George M. Lawson,* General Counsel, Coca-Cola Company, Atlanta, Ga. and *Arnold & Porter,* Wash., D.C. for the Coca-Cola Company; *Covington & Burling,* Wash., D.C. and *Monroe S. Singer,* New York, N.Y. for the Marschalk Company, Inc.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Coca-Cola Company, a corporation and the Marschalk Company, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Com-

mission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent the Coca-Cola Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 310 North Avenue, N.W., Atlanta, Ga.

PAR. 2. Respondent the Marschalk Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at Time & Life Building, Rockefeller Center, New York, N.Y.

PAR. 3. Respondent the Coca-Cola Company is now, and for some time last past has been, engaged in the manufacture, sale and distribution of a fruit drink product designated "Hi-C" which comes within the classification of a "food," as said term is defined in the Federal Trade Commission Act.

PAR. 4. Respondent the Marschalk Company, Inc., is now, and for some time last past has been, an advertising agency of the Coca-Cola Company, and now and for some time last past, has prepared and placed for publication and has caused the dissemination of advertising material, including but not limited to the advertising referred to herein, to promote the sale of the Coca-Cola Company's "Hi-C" fruit drink, which comes within the classification of "food," as said term is defined in the Federal Trade Commission Act.

PAR. 5. Respondent the Coca-Cola Company causes the said product, when sold, to be transported from its place of business in one State of the United States to purchasers located in various other States of the United States and in the District of Columbia. Respondent the Coca-Cola Company maintains, and at all times mentioned herein has maintained, a course of trade in said product in commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 6. In the course and conduct of their said businesses, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said fruit drink by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, advertisements inserted in magazines and other advertising media, and by means of television broadcasts

transmitted by television stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product; and have disseminated, and caused the dissemination of, advertisements concerning said product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said fruit drink in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. Typical of the statements and representations in said advertisements, disseminated as aforesaid, but not all inclusive thereof, are the following:

a) A series of frequently repeated television commercials present live action dramatizations of parents and children in healthy, wholesome activities together. They go to the zoo, go kite flying, go hiking, have a party for the neighborhood children, and prepare lunch for each other on mother's day out. These dramatizations culminate in jokes on the central male figure. The father is squirted by an elephant he tries to feed at the zoo. The father trips and falls trying unsuccessfully to fly a kite. Although the father had struggled carrying a heavy knapsack on a hiking trip, apparently thinking it contained a big meal for lunch, all that weight turns out to be only many, many cans of Hi-C and one bag of pretzels. The uncle conducting a magic show for the neighborhood children has his magic trick spoiled by his nephew sneaking up and pushing a release button prematurely. The father allowing his children to get lunch for themselves on mother's day out is tricked into believing that every day the children have cookies, cakes and potato chips for lunch. After such humorous incidents at the expense of the central male figure, parents and children happily turn to food and drink. They consume various foods, including cookies, cupcakes, cakes, pretzels, hotdogs, hamburgers, fried chicken, pizza and potato salad. Hi-C is always the only beverage used with the foods. During this closing family eating and drinking scene, which is usually described as lunch, the narrator repeats, with slight variation, the basic selling message of the commercials: "Hi-C is made with fresh fruit and it's high in Vitamin C. That's why they named it Hi-C. Hi-C tastes good and it's good for you. That's why it's called the Sensible Drink."

b) One such television commercial pictures a father supervis-

ing lunch for his children because the mother is out for the day. The children volunteer to get their own lunch in mother's absence. They bring out cookies, cakes, potato chips and other similar foods, plus Hi-C to drink. The father questions whether the children usually have these foods for lunch. The children very innocently reply that is so. "Some lunch!" states the narrator, as everyone eats happily, adding the basic sales message, "But Dad knows the only sensible thing about it is ice-cold Hi-C. Hi-C's made with real fruit and it's high in Vitamin C. That's why they named it Hi-C. Hi-C tastes good and it's good for you. Hi-C makes the craziest lunch a lot less crazy. That's why it's called The Sensible Drink."

c) One such television commercial pictures a father carrying a heavy knapsack on a hiking trip with his son and some other children. The narrator states that the knapsack contains the lunch for the trip, which was packed by the son. When the group stops for lunch the father is surprised to discover that the knapsack contains eight 46 ounce cans of Hi-C and some smaller cans of Hi-C. There is nothing for lunch except for the Hi-C and one bag of pretzels, which is apparently for Dad. Nevertheless, father and children happily consume this lunch as the narrator repeats the basic selling message: "Oh, well. Hi-C is delicious. Nine great flavors made from fresh fruit. It has natural sweetness and lots of Vitamin C. It's good for you. Eat up, Dad." The commercial ends with the singing of the lyrics, "Hi-C, The Sensible Drink."

d) A television commercial is built around the lyrics "Anytime, anyplace, Hi-C, The Everyplace Drink," which are sung three times throughout the commercial as the visual portion cuts back and forth from bicycling scenes of children and parents and boating scenes of children and parents. Flashes of foods like pizzas and hamburgers are interspersed with these scenes as the announcer says "Hi-C is good for you. Made from fresh fruit. Naturally sweetened. It comes in nine delicious flavors and in easy open little cans and big cans. So Hi-C's the Sensible Drink for Everyplace."

e) One television advertisement pictures a little girl playing by herself at home. She takes a can of Hi-C from the refrigerator, pours a glass, drinks it and sighs, "I'm just no good until I get my first drink of Hi-C." As two Kelloggs Pop Tarts Pastries pop out of a nearby toaster, the announcer states "Pop Kellogg's Pop Tarts Pastries and pour Hi-C fruit drinks. Hi-C comes in seven real

fruit flavors that taste good and are good for you. It's as easy as Pop and Pour."

f) A television advertisement pictures a family intently watching a television show. At a dramatic moment the father reaches into a fruit bowl beside his chair. The bowl contains apples, oranges and other fruits. The father selects an apple and takes a bite of it. The loud crunching noise of his chewing the apple disturbs the rest of the family. He tries unsuccessfully to muffle the sound with a decorator cushion. Then his daughter brings him a tray containing a large can of Hi-C and a glass of Hi-C that has a straw in it. The father exchanges the uneaten apple for the glass of Hi-C. As he sips the beverage through the straw the announcer gives the selling message, "Hi-C is the easy way to enjoy the good taste of fruit, and it's quiet. Hi-C comes in nine delicious flavors. Made from fresh fruit and naturally sweetened. Lots of Vitamin C, too. Enjoy Hi-C in big or easy open little cans. It's The Sensible Drink." The commercial ends on a humorous note as the father, having finished his glass of Hi-C, makes a loud noise through the straw.

g) A television commercial depicts a clown sitting in an apparently empty circus ring and about to open a large can of Hi-C. As he does so children begin appearing from everywhere. The clown pours Hi-C for each of the children. "Hi-C and fun and kids, they all go together," explains the announcer. Lyrics sung with the theme music interpose "Hi-C, The Sensible Drink." As the clown continues pouring and the happy children continue drinking, the announcer says, "Hi-C is delicious. Nine fabulous flavors made from fresh fruit, naturally sweetened." Then again the lyrics are sung, "Hi-C, The Sensible Drink." As the clown finishes pouring all of the remaining Hi-C and the children fade away, the announcer says, "It's good for you, so you can pour all the fun you want to. But make sure you have enough Hi-C in big cans or little ones because Hi-C and fun and kids go together." The commercial ends as the clown, again in an empty circus ring, sadly inspects his empty can of Hi-C.

h) In one television commercial a little girl explains one of the reasons she and her father like Hi-C, "We love Hi-C because it tastes full of fruit."

i) A magazine advertisement suggests using Hi-C in food recipes instead of fruit juice called for by the recipe.

j) Newspaper advertisements proclaim that Hi-C is "The Sensible Drink * * * Because it has lots of Vitamin C, so kids can

drink as much as they like because Hi-C is good for them."

k) The trademark "Hi-C."

l) Point of purchase advertising describes Hi-C as "Rich in Vitamin C."

PAR. 8. Through the use of said advertisements and others similar thereto not specifically set out herein, disseminated as aforesaid, respondents have represented and are now representing, directly and by implication, that:

a) Said drink is the beverage that is uniquely suitable for use by children with regular meals, light meals and food eaten between meals.

b) Nutritionally unbalanced meals that are consumed with said drink constitute healthy dietary practices for children and families.

c) Said drink is the beverage that is "The Sensible Drink," nutritionally and economically, as a source of vitamin C.

d) Said drink is made with fresh fruit and has a high fruit content comparable to fresh fruits and fruit juices.

e) Said drink is unqualifiedly good for children and children can drink as much of it as they like without adverse health or nutritional implications.

f) Said drink is particularly high in vitamin C content even as compared to other beverages widely known as high in vitamin C content, specifically citrus fruit juices.

PAR. 9. In truth and in fact:

a) Said drink is not the beverage that is uniquely suitable for use by children with regular meals, light meals and food eaten between meals.

b) Nutritionally unbalanced meals consumed with said drink do not constitute healthy dietary practices for children and families.

c) Said drink is not a beverage that can accurately be termed the Sensible Drink, nutritionally and economically, as a source of vitamin C. Orange juice is more sensible nutritionally because it contains significantly more vitamin C in the same quantity as well as supplying other essential nutrients in greater amounts. Orange juice is more sensible economically because it is often less expensive as a source of vitamin C.

d) Said drink is not made with fresh fruit nor does it have a high fruit content comparable to fresh fruits and fruit juices.

e) Said drink is not unqualifiedly good for children. Children

cannot drink as much of said drink as they like without adverse health or nutritional implications.

f) The said drink is not high in vitamin C content as compared to citrus fruit juices.

Therefore, the advertisements referred to in Paragraph Seven were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act, and the statements and representations set forth in Paragraphs Seven and Eight were, and are, false, misleading and deceptive.

PAR. 10. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent the Coca-Cola Company has been, and now is, in substantial competition, in commerce, with corporations, firms and individuals in the sale of food products of the same general kind and nature as that sold by respondents.

PAR. 11. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent the Marschalk Company, Inc. has been, and now is, in substantial competition, in commerce with other advertising agencies.

PAR. 12. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices and the dissemination of the aforesaid "false advertisements" has had and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent the Coca-Cola Company's product by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondents including the dissemination of "false advertisements," as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute, unfair and deceptive acts and practices in commerce and unfair methods of competition in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

INITIAL DECISION BY WILLIAM K. JACKSON,
ADMINISTRATIVE LAW JUDGE

SEPTEMBER 15, 1972

PRELIMINARY STATEMENT

This proceeding was commenced by the issuance of a complaint

on April 14, 1971, charging the respondents with unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act by making certain false, misleading and deceptive claims with respect to the nature, content and nutritive value of a fruit drink product designated "Hi-C" manufactured, distributed and sold by the Coca-Cola Company. Specifically, it is alleged in Paragraph 8 of the complaint that through the use of certain advertisements, respondents have represented, directly and by implication, that:

a) Said drink is the beverage that is uniquely suitable for use by children with regular meals, light meals and food eaten between meals.

b) Nutritionally unbalanced meals that are consumed with said drink constitute healthy dietary practices for children and families.

c) Said drink is the beverage that is "The Sensible Drink," nutritionally and economically, as a source of vitamin C.

d) Said drink is made with fresh fruit and has a high fruit content comparable to fresh fruits and fruit juices.

e) Said drink is unqualifiedly good for children and children can drink as much of it as they like without adverse health or nutritional implications.

f) Said drink is particularly high in vitamin C content even as compared to other beverages widely known as high in vitamin C content, specifically citrus fruit juices.

After being served with the complaint, respondents appeared by counsel and filed on May 24, 1971, their respective answers admitting a number of the specific allegations of the complaint, but denying each and every allegation of Paragraph 8 of the complaint and any violation of law. Thereafter, on June 16, 1971, November 5, 1971, and January 28, 1972, prehearing conferences were held pursuant to pretrial orders of the undersigned for the purposes of simplification of the issues, obtaining admissions of fact, authentication of documents, discovery of relevant material, exchanging lists of exhibits and names of witnesses, together with a summary of their proposed testimony to be used at the trial, and the preparation of a concise statement of the contested issues of law and fact. In accordance with a pretrial order issued in this matter, both parties prepared and submitted a pretrial memorandum.

Hearings for the presentation of testimony and other evidence by complaint counsel began in Washington, D.C. on April 17, 1972, and concluded on April 28, 1972. Oral argument on respondents' motion to dismiss was held on May 1, 1972. Respondents commenced their defense on May 8, 1972, and concluded on May 16, 1972. Complaint counsel requested and presented rebuttal evidence and testimony on June 16, 1972, and the record was closed on June 16, 1972.

Proposed findings of fact and briefs in support thereof were filed by complaint counsel on July 17, 1972, by respondents on July 27, 1972, and a reply brief by complaint counsel on August 3, 1972.

Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this initial decision, are hereby denied.

This proceeding is before the undersigned upon the complaint, answers, testimony and other evidence adduced herein, proposed findings of fact and conclusions and briefs filed by counsel supporting the complaint, and by counsel for the respondents. The proposed findings of fact, conclusions and briefs in support thereof submitted by the parties have been carefully considered and those findings not adopted either in the form proposed or in substance are rejected as not supported by the evidence or as involving immaterial matter.

References to the record are made in parentheses, and certain abbreviations, as hereinafter set forth, are used:

CX—Commission's Exhibits

RX—Respondents' Exhibits

CPF—Complaint Counsel's Proposed Findings and Conclusions

RCCPF—Respondent Coca-Cola's Proposed Findings and Conclusions

RMPF—Respondent Marschalk's Proposed Findings and Conclusions

CRB—Complaint Counsel's Reply Brief

The transcript of the testimony is referred to with either the last name of the witness and the page number or numbers upon which the testimony appears or with the abbreviation Tr. and the page.

Having heard and observed the witnesses and after having carefully reviewed the entire record in this proceeding, together with the proposed findings, conclusions and briefs submitted by

the parties, as well as replies, the undersigned makes the following.

FINDINGS OF FACT

I. Identity of Respondents

1. Respondent the Coca-Cola Company (hereinafter referred to as Coca-Cola) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 310 North Avenue, N.W., Atlanta, Ga. (complaint, Par. 1; answer of the Coca-Cola Company, Par. VI-1)

2. Respondent the Marschalk Company, Inc. (hereinafter referred to as Marschalk), is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1345 Avenue of the Americas, New York, N.Y. (complaint, Par. 2; answer of the Marschalk Company, Inc., Par. 2)

3. Respondent Coca-Cola, through the Coca-Cola Company Foods Division, is now, and for some time last past has been, engaged in the manufacture, sale and distribution of a fruit drink product designated "Hi-C" which comes within the classification of a "food," as said term is defined in Section 15(b) of the Federal Trade Commission Act. (complaint, Par. 3; answer of the Coca-Cola Company, Par. VI-3)

4. Respondent Marschalk is now, and for some time last past has been, an advertising agency employed by Coca-Cola, engaged in the preparation of advertising material, including but not limited to the advertising referred to herein (with the exception of point-of-purchase advertising), to promote the sale of Coca-Cola's "Hi-C" fruit drink. (complaint, Par. 4; answer of the Coca-Cola Company, Par. VI–4; answer of the Marschalk Company, Inc., Par. 4)

5. Respondent Coca-Cola causes the said product, when sold, to be transported from its place of business in one State of the United States to purchasers located in various other States of the United States and in the District of Columbia. Respondent Coca-Cola maintains, and at all times mentioned herein has maintained, a course of trade in said product in commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial. (complaint, Par. 5; answer of the Coca-Cola Company, Par. VI-5)

6. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Coca-Cola has been, and now

is, in substantial competition, in commerce, with corporations, firms and individuals in the sale of food products of the same general kind and nature as that sold by respondent. (complaint, Par. 10; answer of the Coca-Cola Company, Par. VI-10; Joint Prehearing Statement No. 2, p. 41)

7. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Marschalk has been, and now is, in substantial competition, in commerce with other advertising agencies. (complaint, Par. 11; answer of the Marschalk Company, Inc., Par. 11; Joint Prehearing Statement No. 2, p. 42)

II. The Challenged Commercials and Advertisements

8. In the course and conduct of their said businesses, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said fruit drink by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, advertisements inserted in magazines and other advertising media, and by means of television broadcasts transmitted by television stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product; and have disseminated, and caused the dissemination of advertisements concerning said product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said fruit drink in commerce as "commerce" is defined in the Federal Trade Commission Act. (complaint, Par. 6; answer of the Coca-Cola Company, Par. VI-6; answer of the Marschalk Company, Inc., Par. 6; Joint Prehearing Statement No. 2, pp. 6–8)

A. Hi-C Television Commercials

9. Typical of the scenes, statements and representations in said TV commercials, disseminated as aforesaid, but not all inclusive thereof, are the following:

a) A series of frequently repeated television commercials present live action dramatizations of parents and children in healthy, wholesome activities together. They go to the zoo, go kite flying, go hiking, have a party for the neighborhood children, and prepare lunch for each other on mother's day out (CX 41E–41F, RX

149J–149L; CX 41C–41D, RX 149D–149F; CX 41K–41L, RX 149S–149U; CX 41A–41B, RX 149M–149N; CX 41G–41H, RX 149O–149Q). These dramatizations culminate in jokes on the central male figure. The father is squirted by an elephant he tries to feed at the zoo. The father trips and falls trying unsuccessfully to fly a kite. Although the father had struggled carrying a heavy knapsack on a hiking trip, apparently thinking it contained a big meal for lunch, all that weight turns out to be only many, many cans of Hi-C and one bag of pretzels. The uncle conducting a magic show for the neighborhood children has his magic trick spoiled by his nephew sneaking up and pushing a release button prematurely. The father allowing his children to get lunch for themselves on mother's day out is tricked into believing that every day the children have cookies, cakes and potato chips for lunch. After such humorous incidents at the expense of the central male figure, parents and children happily turn to food and drink. They consume various foods, including cookies, cupcakes, cakes, pretzels, hotdogs, hamburgers, fried chicken, pizza and potato salad. Hi-C is always the only beverage used with the foods. During this closing family eating and drinking scene, which is usually described as lunch, the narrator repeats, with slight variation, the basic selling message of the commercials: "Hi-C is made with fresh fruit and it's high in Vitamin C. That's why they named it Hi-C. Hi-C tastes good and it's good for you. That's why it's called the Sensible Drink."

b) One such television commercial pictures a father supervising lunch for his children because the mother is out for the day. The children volunteer to get their own lunch in mother's absence. They bring out cookies, cakes, potato chips and other similar foods, plus Hi-C to drink. The father questions whether the children usually have these foods for lunch. The children very innocently reply that is so. "Some lunch!" states the narrator, as everyone eats happily, adding the basic sales message, "But Dad knows the only sensible thing about it is ice-cold Hi-C. Hi-C's made with real fruit and it's high in Vitamin C. That's why they named it Hi-C. Hi-C tastes good and it's good for you. Hi-C makes the craziest lunch a lot less crazy. That's why it's called The Sensible Drink." (CX 41G, 41H; RX 149O, 149P, 149Q)

c) Another television commercial pictures a father carrying a heavy knapsack on a hiking trip with his son and some other children. The narrator states that the knapsack contains the lunch for the trip, which was packed by the son. When the group

stops for lunch the father is surprised to discover that the knapsack contains eight 46-ounce cans of Hi-C and some smaller cans of Hi-C. There is nothing for lunch except for the Hi-C and one bag of pretzels, which is apparently for Dad. Nevertheless, father and children happily consume this lunch as the narrator repeats the basic selling message: "Oh, well. Hi-C is delicious. Nine great flavors made from fresh fruit. It has natural sweetness and lots of Vitamin C. It's good for you. Eat up, Dad." The commercial ends with the singing of the lyrics, "Hi-C, The Sensible Drink." (CX 41K–41L; RX 149S–149T, 149U)

d) A further television commercial is built around the lyrics "Anytime, anyplace, Hi-C, The Everyplace Drink," which are sung three times throughout the commercial as the visual portion cuts back and forth from bicycling scenes of children and parents and boating scenes of children and parents. Flashes of foods like pizzas and hamburgers are interspersed with these scenes as the announcer says "Hi-C is good for you. Made from fresh fruit. Naturally sweetened. It comes in nine delicious flavors and in easy open little cans and big cans. So Hi-C's the Sensible Drink for Everyplace." (CX 41S–41T; RX 149A–149C)

e) Also, one television advertisement pictures a little girl playing by herself at home. She takes a can of Hi-C from the refrigerator, pours a glass, drinks it and sighs, "I'm just no good until I get my first drink of Hi-C." As two Kelloggs Pop Tarts Pastries pop out of a nearby toaster, the announcer states "Pop Kellogg's Pop Tarts Pastries and pour Hi-C fruit drinks. Hi-C comes in seven real fruit flavors that taste good and are good for you. It's as easy as Pop and Pour." (CX 41I; RX 149R)

f) A television advertisement pictures a family intently watching a television show. At a dramatic moment the father reaches into a fruit bowl beside his chair. The bowl contains apples, oranges and other fruits. The father selects an apple and takes a bite of it. The loud crunching noise of his chewing the apple disturbs the rest of the family. He tries unsuccessfully to muffle the sound with a decorator cushion. Then his daughter brings him a tray containing a large can of apple flavor Hi-C and a glass of apple flavor Hi-C that has a straw in it. The father exchanges the uneaten apple for the glass of Hi-C. As he sips the beverage through the straw the announcer gives the selling message, "Hi-C is the easy way to enjoy the good taste of fruit, and it's quiet. Hi-C comes in nine delicious flavors. Made from fresh fruit and naturally sweetened. Lots of Vitamin C, too. Enjoy Hi-C in big or

easy open little cans. It's The Sensible Drink." The commercial ends on a humorous note as the father, having finished his glass of Hi-C, makes a loud noise through the straw. (CX 41Q, 41R; RX 149X, 149Y, 149Z)

g) Another such television commercial depicts a clown sitting in an apparently empty circus ring and about to open a large can of Hi-C. As he does so children begin appearing from everywhere. The clown pours Hi-C for each of the children. "Hi-C and fun and kids, they all go together," explains the announcer. Lyrics sung with the theme music interpose "Hi-C, The Sensible Drink." As the clown continues pouring and the happy children continue drinking, the announcer says, "Hi-C is delicious. Nine fabulous flavors made from fresh fruit, naturally sweetened." Then again the lyrics are sung, "Hi-C, The Sensible Drink." As the clown finishes pouring all of the remaining Hi-C and the children fade away, the announcer says, "It's good for you, so you can pour all the fun you want to. But make sure you have enough Hi-C in big cans or little ones because Hi-C and fun and kids go together." The commercial ends as the clown, again in an empty circus ring, sadly inspects his empty can of Hi-C. (CX 41M-41N; RX 149V-149W)

B. Hi-C Magazine Advertisements

10. The complaint describes and challenges one Hi-C magazine advertisement that "suggests using Hi-C in food recipes instead of fruit juice called for by the recipe" (complaint, Par. 7 (i)). This allegation refers to one advertisement run in one issue of Reader's Digest in 1969, featuring a collection of "Patio Party" recipes (CX 42B). Other Hi-C magazine advertisements were received in evidence and were identified as CX 42A and CX 42C through 42E.

C. Hi-C Newspaper Advertisements

11. The complaint describes and challenges unidentified newspaper advertisements insofar as they state:

> Hi-C is "The Sensible Drink * * * because it has lots of vitamin C, so kids can drink as much as they like because Hi-C is good for them." (complaint, Par. 7 (j))

12. Two Hi-C newspaper advertisements which ran in October–November 1969 were received in evidence and were identified as CX 43A and 43B.

D. The Hi-C "Trademark"

13. Paragraph 7 (k) of the complaint identifies the trademark "Hi-C" as a "statement" or "representation" contained in Hi-C advertising that is challenged in this proceeding.

E. Hi-C Point-of-Purchase Advertising

14. The complaint generally describes and challenges unidentified point-of-purchase advertising for Hi-C which "describes Hi-C as 'rich in Vitamin C' " (complaint, Par. 7 (1)).

15. A portion of a corrugated shipping container for Hi-C, undated, was admitted in evidence. The phrase "rich in Vitamin C" appears on a portion of this corrugated container (CX 44A).

16. Additional point-of-purchase advertising materials for Hi-C fruit drinks were received in evidence and were identified as:

CX 44B—a point of purchase advertisement bearing the words "Summer Fun Treats."

CX 44C—a point of purchase advertisement bearing the words "Mini SSP Super Sonic Power."

CX 44D—a point of purchase advertisement bearing the words "Snack Time Podners."

CX 44E—a point of purchase advertisement bearing the words, "Snack Time Partners."

CX 44F—a point of purchase advertisement bearing the words, "Free Saucer Tosser."

CX 44G—a point of purchase advertisement bearing the words, "Casper's Party Goodies for Ghosts and Goblins."

CX 44H—a point of purchase advertisement bearing the phrase "Easter Center, shaped like an egg."

CX 44I—a point of purchase poster advertisement bearing the phrase "Casper's Party Goodies for Ghosts and Goblins."

CX 44K—a point of purchase advertisement bearing the phrase "Enjoy Hi-C Fruit Drinks," for wildberry drink.

CX 44L—a point of purchase advertisement bearing the phrase "If you've had fun, tell us about it."

CX 44M—a point of purchase advertisement bearing the phrase "Easter Center," with photograph of eggs.

CX 44N—a point of purchase advertisement bearing the phrase "Free, Fun and Exciting Games and Puzzles."

CX 440—a point of purchase advertisement bearing the phrase "Free Player Photo."

17. Certain of the point-of-purchase advertising materials contain some of the same or similar phrases as are found in the challenged TV commercials, particularly the phrase "The Sensible

Drink" (CX 44C, 44F, 44G, 44I). These point-of-purchase advertising materials present Hi-C fruit drinks as a snack time refreshment beverage, as a beverage to be consumed at Halloween parties and Easter parties and promote Hi-C by means of various offers of toys, games, puzzles and sports photos (CX 44B–44I; CX 44K–44O).

18. Several posters depicting large cans of various flavors of Hi-C fruit drinks were also received in evidence and were identified as CX 45A through 45E. These posters are enlarged reproductions of the respective Hi-C labels found on the 46-ounce cans of Hi-C of the various flavors depicted (CX 45A–45E).

19. The complaint does not challenge the labels contained on Hi-C fruit drinks. Nevertheless, because Hi-C cans are displayed in most of the challenged Hi-C commercials, print advertisements, and point-of-purchase advertisements, certain Hi-C labels were received in evidence and were identified as CX 46A–46F and RX 150–153.

20. Specific representations made in the challenged television, magazine, newspaper and point-of-purchase display advertisements material to this proceeding may be summarized as follows:

Title CX#/ Script RX#	Fruit Language and Depictions	Vitamin C Language	Other Representations
The Magic Show (30-second version) CX 41B/ RX 149M	Audio: "Hi-C's made with real fruit." Superimposed writing: "MADE WITH REAL FRUIT."	Audio: "And it's high in Vitamin C." Superimposed writing: "HIGH IN VITAMIN C."	Audio: "It's good for you. That's why it's called the sensible drink." Superimposed writing: "THE SENSIBLE DRINK."
The Magic Show (60-second version) CX 41A/ RX 149N	Same as 30-second version.	Audio: "And it's high in Vitamin C. That's why they named it Hi-C." Superimposed writing: "HIGH IN VITAMIN C."	Same as 30-second version.
Flying Kites (30-second version) CX 41D/ RX 149D	Audio: "Hi-C's made with real fruit." Superimposed writing: "MADE WITH REAL FRUIT." Grapes, oranges and pineapples are shown on labels of Hi-C cans.	Audio: "And it's high in Vitamin C." Superimposed writing: "HIGH IN VITAMIN C."	Audio: "It's good for you. That's why it's called the sensible drink." Superimposed writing: "THE SENSIBLE DRINK."

RX 149D

Title CX#/ Script RX#	Fruit Language and Depictions	Vitamin C Language	Other Representations
Flying Kites (60-second version) CX 41C/ RX 149E–F	Same as 30-second version, plus: picnic scene displays for 1.7 seconds arrangements of oranges, apples and grapes adjacent to cans of Hi-C.	Audio: "And it's high in Vitamin C. That's why they named it Hi-C." Superimposed writing: "HIGH IN VITAMIN C."	Same as 30-second version.
Going to the Zoo (30-second version) CX 41F/ RX 149J	Audio: Hi-C's made with real fruit." Superimposed writing: "MADE WITH REAL FRUIT."	Audio: "And it's high in Vitamin C." Superimposed writing: "HIGH IN VITAMIN C."	Audio: "It's good for you. That's why it's called 'The Sensible Drink.' " Superimposed writing: "THE SENSIBLE DRINK."
Going to the Zoo (60-second version) CX 41E/ RX 149 K–L	Language is same as 30-second version. Also, while writing "MADE WITH REAL FRUIT" is shown, a bowl of grapes, bananas, apples, and oranges is shown for 2 seconds on table next to cans of Hi-C.	Audio: "And it's high in Vitamin C. That's why they named it Hi-C." Superimposed writing: "HIGH IN VITAMIN C."	Same as 30-second version.
Mother's Day Out (30-second version) CX 41H/ RX 1490	Audio: "Hi-C's made with real fruit." Superimposed writing: "MADE WITH REAL FRUIT." When child opens refrigerator door, two kinds of grapes and a bowl of oranges are shown for 1.2 seconds on a refrigerator shelf next to cans of Hi-C. Cherries, grapes, and cut oranges are shown on Hi-C labels.	Audio: "It's high in Vitamin C." Superimposed writing: "HIGH IN VITAMIN C."	Audio: "Dad's going to give the kids their lunch * * * Some lunch! The only sensible thing is the ice cold Hi-C * * * It's good for you. That's why it's called 'the sensible drink.' " Superimposed writing: "THE SENSIBLE DRINK."
Mother's Day Out (60-second version) CX 41G/ RX 149P–Q	Same as 30-second version.	Audio: "It's high in Vitamin C. That's why they named it Hi-C." Superimposed writing: "HIGH IN VITAMIN C."	Audio: "Some lunch. But Dad knows the only sensible thing about it is ice cold Hi-C * * * it's good for you. Hi-C makes the

Title CX#/ Script RX#	Fruit Language and Depictions	Vitamin C Language	Other Representations
			craziest lunch a lot less crazy. That's why it's called 'the sensible drink.' " Superimposed writing: "THE SENSIBLE DRINK."
Kids (Hi-C version) CX 41I/RX 149R	Audio: "7 real fruit flavors." A portion of some oranges are shown for .3 of a second in a refrigerator. Grapes are shown on a Hi-C label.		A child says, "I'm just no good 'til I get my first drink of Hi-C."
Hiking (30-second version) CX 41L/ RX 149S	Audio: "Made from fresh fruit." Brief showing of 46-ounce cans of Hi-C Orange-Pineapple Drink, Apple Drink, Cherry Drink, etc. with depiction of said specific fruit on label of can.		Audio: "* * * lunch. The kids packed it. Lunchtime! * * * Nothing but big cans of Hi-C and little ones? just pretzels * * * Hi-C, the sensible drink." Superimposed writing: "THE SENSIBLE DRINK."
Hiking (60-second version) CX 41K/ RX 149T–U	Audio: "Made from fresh fruit." Brief showing of cans of Hi-C with same labels on cans as in 30-second version.	Audio: "lots of Vitamin C."	"Lunchtime * * * Nothing but big and little cans of Hi-C? Just pretzels * * * Oh, well * * * It's good for you * * * Hi-C, the sensible drink." Superimposed writing: "THE SENSIBLE DRINK."
Clown (30-second version) CX 41N/ RX 149V	Audio: "Hi-C is made from fresh fruit."		Audio: "Hi-C, the sensible drink." Superimposed writing: "THE SENSIBLE DRINK."
Clown (60-second version) CX 41M/ RX 149W	Audio: "made from fresh fruit."		Audio: "The sensible drink. It's good for you. So you can pour all the fun you want to." Super-

Title CX#/ Script RX#	Fruit Language and Depictions	Vitamin C Language	Other Representations
			imposed writing: "THE SENSIBLE DRINK."
Little Girl (30-second version) CX 41P/ RX 149G	Audio: "Hi-C tastes full of fruit." Cherries are shown on label of 46-ounce can of Hi-C Cherry Drink.	Audio: "* * * lots of Vitamin C."	Audio: "Dad says it's the sensible drink * * * (singing) The sensible drink." Superimposed writing: "THE SENSIBLE DRINK."
Little Girl (60-second version) CX 410/ RX 149H–I	Audio: "it tastes full of fruit." Cherries are shown on label of 46-ounce can of Hi-C Cherry Drink.	Audio: "has Vitamin C."	Same as 30-second version.
Apple (30-second version) CX 41R/ RX 149X	Audio: "the good taste of fruit." A bowl of apples and oranges is depicted on table to the right of the father at the beginning. Also, father noisily eats an apple before it is taken away from him and Apple Hi-C is given him to reduce noise of his eating the apple which has been distracting the family's TV watching. Apples are shown on label of Hi-C Apple Drink can.	Audio: "with lots of Vitamin C."	Audio: "It's the sensible drink." Superimposed writing: "THE SENSIBLE DRINK."
Apple (60-second version) CX 41Q/ RX 149Y–Z	Same as 30-second version.	Audio: "Lots of Vitamin C, too."	Same as 30-second version.
Magazine ad (Family Circle, Woman's Day, Good Housekeeping, Parents, TV Guide) CX 42A	"It's made from real fruit." Cherries are shown on Hi-C label.	"It's got Vitamin C in it."	"Mom says it's sensible and I need some sensible.
Magazine ad (Reader's Digest) CX 42B	"Whenever your recipe calls for a juice, use your favorite Hi-C	"High in Vitamin C. That's why we call it Hi-C, 'the sensible drinks.' "	"Hi-C fruit drinks are good enough to eat."

Title CX#/ Script RX#	Fruit Language and Depictions	Vitamin C Language	Other Representations
	fruit flavor instead." Grapes are shown on a plate and on a Hi-C label.		
Magazine ad (Family Circle, TV Guide, Good Housekeeping, Parents, Woman's Day) CX 42C	"* * * The fresh fruit it's made from * * *" Grapes are shown on a Hi-C label.	"* * * all that Vitamin C * * *"	"Hi-C is the sensible drink * * * it makes sense for everyone."
Magazine ad (Parents) CX 42D			"Two new fun flavors * * * And both are good for you. That's why we call Hi-C 'The sensible drink.' "
Magazine ad (Woman's Day, Family Circle) CX 42E	"made from fresh fruit"	"lots of Vitamin C"	"It's the sensible drink"
Newspaper ad CX 43A	"made from fresh fruit." Oranges are shown on a Hi-C can label.	"lots of Vitamin C"	"kids can drink as much as they like because Hi-C is good for them."
Newspaper ad CX 43B	"made from fresh fruit." Oranges are shown on a Hi-C can label.	"lots of Vitamin C"	"kids can drink as much as they like because Hi-C is good for them."
CX 44A (display box)		"Rich in Vitamin C"	
CX 44B (poster)	Oranges are shown on a Hi-C can label.		
CX 44C (poster)	Oranges are shown on a Hi-C can label.		"The Sensible Drink"
CX 44D (poster)	Oranges and grapes are shown on Hi-C can labels.		
CX 44E (poster)	Oranges and grapes are shown on Hi-C can labels.		
CX 44F (poster)	Oranges are shown on a Hi-C can label.		"The Sensible Drink"

Title CX#/ Script RX#	Fruit Language and Depictions	Vitamin C Language	Other Representations
CX 44G (poster)	Oranges and foliage as on the standard Hi-C label are shown on a depiction of a can that bears the writing "Hi-C FRUIT DRINKS" at the place where actual cans of specific flavors of Hi-C bear the names of specific flavors.		"The Sensible Treat"
CX 44H (poster)	½ of a cut orange is shown on a Hi-C label.		
CX 44I (poster)	Same as Poster CX 44G.		"The Sensible Treat"
CX 44K (poster)	Berries are shown in a basket and near a glass of red liquid.		
CX 44L (poster)	Grapes are shown on a Hi-C label.		
CX 44M (poster)	½ of a cut orange is shown on a Hi-C label.		
CX 44N	½ of a cut orange is shown on a Hi-C label.		
CX 44O (poster)	Same as Poster CX 44G.		
CX 45A–E (posters)	Various fruits are shown on large representations of Hi-C labels depicting on which of the 9 Hi-C fruit are advertised. flavors are advertised.		

21. The basic messages communicated through respondents' advertising may be summarized as follows:

a) Hi-C's made from fresh fruit. Hi-C's made with real fruit.

b) Hi-C's high (rich) in Vitamin "C." That's why they named it "Hi-C."

c) Hi-C's good for you. That's why it's called "The Sensible Drink."

d) Hi-C's delicious * * *. Nine great flavors.

e) Hi-C is suitable for use by children with regular meals, light meals, and snacks.

22. Respondents' aforesaid advertising was directed primarily to the grocery purchaser of the home, usually the mother (Keough 1158, 1161; RX 1Q–1R). It is stipulated that it was intended by Coca-Cola and Marschalk that the Hi-C television commercials challenged in this proceeding were to be viewed by a target audience composed of 80 percent women between the ages of 18 and 49 and 20 percent children between the ages of 6 and 11. During the period of time from January 1, 1969 through March 1, 1971, when the challenged advertisements were disseminated and for which data is available, it is stipulated that these goals were achieved (RX 1Q–1R).

III. The Product

23. During the period of time relevant to this proceeding, from January 1, 1969 through March 1, 1971, the trademark "Hi-C" was the designation of a line of fruit drinks and fruit flavored drinks, manufactured and distributed by the Foods Division of the Coca-Cola Company, packaged in 46-ounce cans and so-called flip-top 12-ounce cans, and labelled and flavored in the following 10 fruit flavors:

Apple Drink
Cherry Drink
Citrus Cooler
Florida Punch
Grape Drink
Cherry Flavored Drink
Orange Drink
Orange-Pineapple Drink
Pineapple-Grapefruit Drink
Wild Berry Flavored Drink

(Keough 1158, 1189; CX 4A–4E; CX 46A–46F; RX 1Y–1Z–2; RX 150, 151, 152, 153; RX 16A–16G).

24. The Coca-Cola Foods Division also manufactures and sells Minute Maid and Snow Crop Frozen Concentrated Orange Juice and various brands of coffee in addition to Hi-C fruit drinks (Keough 1158).

25. Hi-C was first marketed in 1948 and was the first fruit drink to be fortified with vitamin C among all brands of fruit drinks on the market (Keough 1159–61; RX 1Y–1Z–8).

26. The line of Hi-C drinks is sold primarily through food stores and consumed primarily by children (Keough 1158).

27. During the period of time from January 1, 1969 through March 1, 1971, each Hi-C flavor contained an average of 49 milligrams of vitamin C (ascorbic acid) in a 6 fluid ounce serving at the time of manufacture and packing (RX 1Z–2). Due to some losses of vitamin C occurring during storage and distribution of Hi-C drinks, each Hi-C flavor contained an average of 44 milligrams of vitamin C at the time of retail sale to the consumer (RX 1P; RX 1Z–2). Pursuant to regulations promulgated by the Food and Drug Administration, the label of each Hi-C can stated that a 6-ounce serving of Hi-C provided 30 milligrams of vitamin C or 100 percent of the adult Minimum Daily Requirement for vitamin C (RX 16A–16G; RX 150–153; CX 46A–46F). Official notice is taken that during the relevant time period, the Minimum Daily Requirement was the only standard of measurement for declaration of vitamin content imposed by the Food and Drug Administration for labelling of all fortified food products, including fruit drinks (see 21 C.F.R. §§ 125.1–125.3).

28. The approximate percentages by volume of fruit juices contained in each of the flavors of Hi-C was as follows (CX 47A–47B):

Apple Drink	30%
Pineapple-Grapefruit Drink	24%
Orange-Pineapple Drink	23%
Cherry Drink	10%
Florida Punch	10%
Grape Drink	10%
Orange Drink	10%
Cherry Flavored Drink	2%
Wild Berry Flavored Drink	2%
Citrus Cooler	1%

A. The Claim That Hi-C is "High" in Vitamin C

The Allegations

29. Paragraphs 8 (f) and 9 (f) of the complaint allege that:

Respondents have represented * * * that: * * *

(f) Said drink [Hi-C] is particularly high in Vitamin C content even as compared to other beverages widely known as high in Vitamin C content, specifically citrus fruit juices.

Paragraph Nine: In truth and in fact * * *

(f) The said drink [Hi-C] is not high in Vitamin C content as compared to citrus fruit juices.

30. Complaint counsel advanced several theories during the course of trial as to why the claim that Hi-C is "high in Vitamin C" was false; however, their post hearing findings and brief rely on an alleged false comparison of the vitamin C content of Hi-C to that of orange juice and grapefruit juice (CPF 106–115). Respondents maintain that Hi-C is in fact high in vitamin C, but deny that any comparison to, or assertation of equivalence with, the vitamin C content of orange juice or any other citrus juice is made in the advertising in issue.

The Actual Representations Made

31. There are no explicit representations comparing Hi-C in any respect to orange juice or other citrus fruit juices in any of the challenged Hi-C television commercials (CX 41A–41T; RX 149A–149Z), print advertisements (CX 42A–42E), newspaper advertisements (CX 43A–43B), point-of-purchase sales displays (CX 44A–44I, 44K–44O; CX 45A–45E) or labels (CX 46A–46F; RX 150–153; Smith 1379–81; Robinson 1635, 1640–41).

32. Coca-Cola, which is itself a major distributor of orange juice through its Minute Maid and Snow Crop brands of frozen concentrated orange juice, did not intend that its advertising for Hi-C should make any comparison with orange or any other citrus fruit juice (Keough 1174).

33. There is no statement, suggestion or implication in any of the Marschalk advertising plans or other evidence introduced by complaint counsel that any Hi-C advertising was intended to communicate any comparison of Hi-C to orange juice or any other citrus juice (CX 10–20B).

34. Complaint counsel assert that the claim "high in Vitamin C," as well as the trademark "Hi-C" and several other representations and depictions used in the challenged advertising, constitute an implicit comparison to orange juice. Based on the evidence of record, none of the representations in the challenged Hi-C advertisements, whether explicit or implicit, and whether considered independently or in conjunction with each other constitute such a representation for each of the several reasons set out below:

A. There is no basis upon which it can be concluded that consumers would understand the phrase "high in Vitamin C" to compare the vitamin C content of Hi-C with orange juice. The

claim "high in Vitamin C" has not been preempted for use only by orange juice or by food products which have as much vitamin C as orange juice. There is no evidence in this record that consumers regard orange juice as the exclusive reference point in determining the amount of the vitamin C in a food product, nor is there any basis for precluding the use of the claim "high in Vitamin C" in connection with a product which is an excellent source of that vitamin when measured against established nutritional standards (see Findings 46–50, *infra*).

B. In asserted support of their contention that the claim that Hi-C was high in vitamin C communicated a comparison to orange juice, complaint counsel introduced the results of a survey of consumer attitudes concerning orange juice and other beverages conducted by the Drossler Research Corporation for the State of Florida, Department of Citrus (CX 3A–3C). This survey involved telephoning 3,000 consumers every 3 months (Drossler 372) and it was stipulated that the survey techniques employed were reliable (RX 1Z–13) so that the results are projectable nationally to the 300 largest metropolitan areas in the continental United States (Drossler 373). Complaint counsel rely on the fact that consumers in the survey were asked to identify the beverage which they believed best fit the phrase "highest in Vitamin C," and that, in June 1971, 85 percent of those surveyed named orange juice (CX 3B). However, this survey result does not support complaint counsel's challenge to advertising for Hi-C.

(1) There is a substantial difference in meaning between the superlative term "highest" employed in the survey, the comparative term "higher," and the term "high" used in Hi-C advertising.

(2) There is no basis for inferring that, because consumers believe orange juice is "highest" in vitamin C, that they would believe that a product "high" in vitamin C has the same vitamin C content as orange juice.

(3) The fact that consumers may understand two or more products to be "high" in vitamin C does not mean, and no evidence has been produced to the contrary, that consumers would believe that these products have an equivalent or comparable amount of that nutrient. More than one product may appropriately be considered a "high" or "rich" or "excellent" source of vitamin C, even though they contain differing amounts of that nutrient (Stare 1525; Briggs 748–55).

(4) The Drossler survey indicates that consumers are well

aware of the differences in vitamin C content and other attributes of orange juice as compared to fruit drinks.

(i) In the same Drossler data relied on by complaint counsel indicating that 85 percent of the consumers surveyed regarded orange juice as "highest in Vitamin C," only 1.8 percent of the consumers answered that they considered "fruit drinks" as "highest in Vitamin C" (RX 45A); Hi-C is included in the Drossler "fruit drink" category (Drossler 429).

(ii) In response to the question as to which beverage best fits the phrase "best for breakfast," from 43 percent to 51.3 percent of the consumers surveyed by Drossler between the first quarter of 1969 and June 1971 named orange juice as "best for breakfast," while only from 1.4 percent to 0.6 percent during the same period listed fruit drinks in this category (RX 41A).

(iii) In response to the question of what beverage best fits the phrase "most natural drink," from 30.8 percent to 38.3 percent of the consumers surveyed by Drossler from the first quarter of 1969 through June 1971 named orange juice, while only 1 percent to 0.4 percent in the same period named fruit drinks (RX 39A).

C. Hi-C is a line of fruit drinks composed of 10 different flavors (Finding 23, *supra*). The challenged advertising does not emphasize or give any undue prominence to the Hi-C orange flavor as distinguished from the other nine Hi-C flavors. Hi-C Orange Drink is depicted in only one of the 10 challenged television commercials, "Mother's Day Out" (60- and 30-second versions) (CX 41G–41H); the other challenged commercials depict Hi-C flavors other than orange (CX 41A–41F, 41I–41T). Even in the "Mother's Day Out" commercial, Hi-C Orange Drink is depicted along with Hi-C Cherry and Grape Drink flavors (CX 41G–41H).

D. The Hi-C television commercials depict parties (CX 41A–41B), picnics (CX 41C–41D, 41E–41F, 41K–41L), various snack occasions (CX 41I–41J, 41M–41N, 41O–41P, 41Q–41R, 41S–41T) and atypical lunches (CX 41G–41H). These are not the types of occasions or scenes which are associated with the consumption of orange juice (Smith 1381). None of these commercials expressly or implicitly suggest that Hi-C be consumed in lieu of orange juice.

E. None of the television commercials or print advertisements promote the use of Hi-C for breakfast, which complaint counsel assert is normally associated with the consumption of orange juice. None of the challenged commercials depict breakfast scenes. Complaint counsel urge that only one of the challenged

commercials—the "Kids" commercial (CX 41I–41J)—involves a breakfast scene. However, even this commercial is a snack occasion, and not a breakfast scene. The commercial depicts a little girl cleaning up her toys who is joined by a little boy with baseball equipment and would not be construed as a breakfast scene by consumers (see Findings 134–138, *infra*). Even if the commercial were construed as a breakfast scene, *Hi-C Grape Drink* is the only flavor depicted in the commercial (CX 41I–41J) and, thus, would not suggest consumption of Hi-C in lieu of orange juice.

F. Complaint counsel contend that Hi-C advertising suggested a comparison to the vitamin C content of orange juice because several of the challenged Hi-C television commercials include the phrase "made with real fruit" or "made from fresh fruit" (CX 41A–41T) and also depict real oranges, among other types of fruit (CX 41G, 41H, 41Q, 41R). They also contend that this comparison is made in representations of the labels of Hi-C Orange Drink, which include a depiction of an orange, which are found on a few of the Hi-C print advertisements and point-of-purchase materials (CX 43A, 43B, 44B-F) as well as in two of the challenged television commercials (CX 41G, 41H). This contention is not supported by the record.

(1) The oranges which are depicted are only in two television commercials; they are not emphasized and appear only briefly, and in conjunction with other fruits including grapes and apples (CX 41G–41H, 41Q–41R).

(2) Incidental depictions of this sort, appeearing only briefly in the advertisements, would not be meaningful to consumers (Smith 1364, 1373, 1390–91).

(3) In this context, the representations "made with real fruit" or "made from fresh fruit" and the depiction of oranges in the commercials support the representation that real or natural fruit is used in the manufacture of Hi-C. Such representations and depictions do not constitute any suggestion that the claim that Hi-C is "high in Vitamin C" involves a comparison to orange juice.

(4) The depiction of pictures of oranges on the labels of orange flavored Hi-C found in one of the television commercials and in certain of the print and point-of-purchase materials serves to identify the orange flavor of Hi-C and is not a representation that Hi-C is comparable to orange juice in vitamin C content.

(5) All of the Hi-C commercials prominently emphasize that Hi-C is a "drink" and, according to Mr. Eugene Holeman, com-

plaint counsel's own expert witness, consumers are well aware that fruit *drinks* are not equivalent to single strength fruit *juices* such as orange juice (Holeman 905; see RX 38A, 39A, 41A).

G. There is no evidence of record which supports the contention that consumers who actually viewed or saw the challenged Hi-C advertisements understood them to be comparing Hi-C with orange juice. Indeed, the evidence is overwhelmingly to the contrary.

(1) Throughout all times herein relevant, Audits & Surveys, Inc., an independent consumer market research company, performed monthly consumer surveys for respondent Coca-Cola concerning its line of Hi-C drinks (Neadle 216–17). These surveys, known as the Continuing Foods Study, involved questioning 1500 randomly selected consumers per quarter by telephone (Neadle 221; CX 39Z–5). Results were tabulated on computers and reported quarterly to respondent (Neadle 220). It is stipulated that the survey techniques employed in the Continuing Foods Study were reliable (RX 1Z–12); the results of the Study are nationally projectable within the continental United States (CX 39Z–3; Neadle 217). Substantial portions of the Continuing Foods Study, together with the questionnaires used in obtaining the tabulated data, were introduced in evidence by complaint counsel (CX 39A–39Z–39).

(2) From January 1, 1969 through March 1971, the period of the challenged advertisements, questions in the Continuing Foods Study conducted on behalf of respondent Coca-Cola by Audits & Surveys, Inc., asked consumers to state and describe all messages they recalled from contemporaneous Hi-C advertising (Neadle 237, 1217; CX 39Z–6–39Z–38). These questions asked consumers who recalled seeing Hi-C advertising "What do you remember about the advertising for [Hi-C]? What did it say? What did it show?" and "What was the main point they were trying to get across about [Hi-C]?" (*E.g.*, CX 39Z–13). Interviewers recorded all responses given by consumers to these questions on individual questionnaire forms (Neadle 1219). Approximately 13,000 questionnaires were prepared in this manner from January 1, 1969 through March 30, 1971 (Neadle 1225).

(3) After this proceeding commenced, each of these 13,000 questionnaires were examined and every comment concerning Hi-C advertising was analyzed by Audits & Surveys, Inc. Each response indicating that any consumer said that he recalled that Hi-C advertising suggested a comparison between Hi-C and any

other beverage in any respect, was tabulated by Audits & Surveys, Inc. (Neadle 1225).

(4) The result of this analysis showed that, of the 13,000 persons questioned in the survey, only one individual throughout the 2¼-year period in question said that he got the impression that the Hi-C advertising compared Hi-C to orange juice in any respect (RX 23B; Neadle 1227). This one response out of the total of 13,000 responses is the statistical equivalent of zero (Neadle 1227).

35. While complaint counsel propose findings concerning the vitamin C content of grapefruit juice in comparison to that of Hi-C (CPF 112), they have not offered a theory as to how the challenged advertising would evoke a comparison to grapefruit juice.

36. The claim in the challenged advertising that the Hi-C line of fruit drinks is "high in Vitamin C" constitutes a representation that, as a source of vitamin C, Hi-C is high in that nutrient in relation to the normal nutritional needs of human beings. This is the reasonable meaning of the claim in the context of the challenged advertising and there is no extrinsic evidence which would indicate that consumers would not interpret this claim in this ordinary manner.

The Ocean Spray Case

37. While the hearing in the instant case was in progress, the Commission approved a consent order pursuant to which the manufacturer of Ocean Spray Cranberry Juice Cocktail would be required to run so-called "corrective advertising." Docket No. 8840, *In the Matter of Ocean Spray Cranberries, Inc., et al.* Pursuant to its consent order procedure, the terms of the consent order were placed on the public record for 30 days for public comment. After considering these comments, the Commission accepted the agreement containing the consent order. See Decision and Order in Docket No. 8840, dated June 23, 1972 [80 F.T.C. 980].

38. Ocean Spray Cranberry Juice Cocktail, the beverage which was the subject of the above-noted consent order, contains 30 milligrams of vitamin C per 6-ounce serving, one-third less vitamin C than is contained in Hi-C and two-thirds less vitamin C than is contained in orange juice (oral stipulation by complaint counsel 1151).

39. The corrective advertisement approved by the Commission in the *Ocean Spray* case concludes with the following representation:

> And Ocean Spray Cranberry Juice Cocktail gives you and your family Vitamin C plus a great wake-up taste. It's * * * the other breakfast drink.

This representation and other explicit references to "orange juice" and "other breakfast drinks" in this same corrective advertisement was approved by the Commission upon the recommendation of complaint counsel in the *Ocean Spray* case, including one attorney who is also complaint counsel in this proceeding.

40. The consent order approved by the Commission in the *Ocean Spray* case established that it is permissible—and indeed required—to link explicitly in Ocean Spray advertising the vitamin C content of Ocean Spray Cranberry Juice Cocktail with the slogan, "The Other Breakfast Drink." Thus, a slogan which specifically evokes a comparison to orange juice is permitted in juxtaposition to a vitamin C claim, even though the Ocean Spray product contains less vitamin C than orange juice, and, for that matter contains one-third less vitamin C than does Hi-C.

41. It would be highly inconsistent to permit the manufacturers of Ocean Spray, pursuant to the order of the Commission, to link a vitamin C claim for that product with a slogan clearly evocative of orange juice while prohibiting respondents from advertising Hi-C as "high" in vitamin C even though they have made no reference to orange juice. If, as the Commission has recognized, consumers would not take a vitamin C comparison to orange juice from the Ocean Spray corrective advertisement, there is no basis for concluding that they would take such a comparison from the challenged Hi-C advertising.

The Validity of the Claim as Made

42. The record establishes that Hi-C is high in vitamin C in the context in which the claim was actually made, *i.e.*, in relation to human nutritional needs.

43. The parties have stipulated that, at all times relevant to the allegations of the complaint, every one of the 10 flavors of Hi-C contained an average of 44 mg. of vitamin C per 6-ounce serving at the time of retail purchase (Stipulation RX 1P, 1Z–2). The parties have also stipulated that Hi-C contained a "nutritionally significant" quantity of Vitamin C at all times relevant to the allegations of the complaint (Stipulation RX 1–I).

44. The frame of reference used by the nutritionists who testified in this proceeding for assessing the substantiality of the stipulated vitamin C content of Hi-C was the Recommended Dietary Allowance for vitamin C adopted by the Food and Nutrition Board, a division of the National Research Council/National Academy of Science. This organization consists of many of this country's leading medical and nutritional experts and advises various governmental agencies on matters of health and nutrition. (Sebrell 1422–23)

45. The Recommended Dietary Allowances are designed to measure the nutrient intake of a given nutrient from all food sources on a daily basis. The allowances are intended to provide goals for providing adequate nutrient intakes for practically all normal people in the United States (Sebrell 1423). As such, the RDA's are set at a level in excess of average physiological need in order to take into account differences in individual requirements (Sebrell 1423; CX 7B, 7C). Thus, in establishing the RDA levels for vitamin C, the Food and Nutrition Board relied on studies showing that the mean utilization of that nutrient by healthy adult males was 21.5 mg. per day, with a standard deviation of ± 8 mg., whereas the RDA for vitamin C for adult males is 60 mg. (RX 80B). The Food and Nutrition Board noted that the RDA level for vitamin C "provides a generous increment" above actual utilization in order to take into account variability in individual needs and to provide a "surplus" to compensate for the fact that some of the vitamin C found in certain foods is lost during the cooking and preparation of those foods (RX 80B; Sebrell 1424–33, 1461–62). The RDA for vitamin C is considered "exceedingly generous" for all normal conditions (Briggs 747).

46. The RDA for children between the ages of 2 and 12, who are the primary consumers of Hi-C, is 40 mg. (CX 7D). A single serving of Hi-C, containing 44 mg. of vitamin C, provides 110 percent of the RDA for vitamin C for children. Thus, one serving of Hi-C provides more vitamin C than the amount recommended by the Food and Nutrition Board as the appropriate daily dietary intake for healthy children from *all* food sources. Such a product is "high" in vitamin C, or an excellent source of vitamin C, in relation to the nutritional needs of children (Graham 1484, 1474; Sebrell 1443, 1445; see also, Stare 1525; Hodges RX 1Z–18).

47. There is no accepted scientific evidence that the daily ingestion of quantities of vitamin C in excess of RDA levels is of any benefit to the maintenance of good health (Sebrell 1442, 1454,

1457; Graham 1501–03; Briggs 747). In promulgating the RDA for vitamin C, the Food and Nutrition Board concluded that "efforts to demonstrate beneficial effects resulting from large doses of ascorbic acid have been unproductive" (Sebrell 1435; RX 80B). Thus, a single serving of Hi-C would supply all of the vitamin C that a child would normally need daily.

48. The RDA for vitamin C for adult men is 60 mg. per day and 55 mg. for women. A single 6-ounce serving of Hi-C would supply 80 percent of the RDA for vitamin C for adult women and 75 percent of the RDA for vitamin C for adult men (CX 7D). The weight of the expert testimony established that if a single serving of a food provides approximately one-half of the applicable RDA level it is considered to be an "excellent" or "high" source of vitamin C (Sebrell 1445; Graham 1484; Stare 1525). For example, one-half of the adult male RDA would be 30 mg. as compared to the 44 mg. in a 6-ounce serving of Hi-C. Accordingly, Hi-C is correctly described as high in vitamin C in the case of both adult men and women since the vitamin C content in a single serving is well in excess of one-half of the RDA levels established for either group.

49. Hi-C was also characterized as an "excellent source" of vitamin C by Dr. Van Itallie, an expert witness appearing on behalf of complaint counsel as follows:

> HEARING EXAMINER JACKSON: * * * there is on the record now as I have stated and summarized it, evidence through you.
>
> I will repeat it again, first that a food that contains 90 calories is marginally significant to the overall caloric intake. Secondly, you have developed the same item contained more than 100 percent of the daily requirements of vitamin C.
>
> Thirdly, you have stated that it contained vitamin A, it contains potassium, it contains folic acid. Now, evaluate it in terms of those?
>
> THE WITNESS: In terms of those parameters, I would say that Hi-C within its caloric contribution to the diet was an excellent source of vitamin C. (Van Itallie 1027–28)

This opinion was also confirmed by other expert nutritionists who testified in the proceeding (see Findings 46 and 48, *supra*). The phrases "high" or "rich" or "excellent" are used interchangeably by nutritionists in referring to the nutrient content of foods (Sebrell 1445).

50. A textbook coauthored by complaint counsel's own witness, *Nutrition and Physical Fitness* (Briggs 685), refers to foods with less vitamin C than Hi-C as "rich" sources of that nutrient (Briggs 748, 749–52). They include such foods as a half of grape-

fruit which contains 38 mg. of vitamin C, less than the 44 mg. of vitamin C in a 6-ounce serving of Hi-C. This same textbook characterizes certain foods such as kale (51 mg. per serving) and turnip greens (52 mg. per serving) as having "high Vitamin C value" even though a serving of these foods has only slightly more vitamin C per serving than the 44 mg. in a serving of Hi-C (Briggs 752–55).

B. The Claim That Hi-C is the Sensible Drink

Allegations

51. Paragraphs 8 (c) and 9 (c) of the complaint allege that:

> Paragraph Eight * * *.
> Respondents have represented that: * * *
> (c) Said drink is the beverage that is "The Sensible Drink," nutritionally and economically, as a source of vitamin C; * * *.
> Paragraph Nine: In truth and in fact * * *
> (c) Said drink is not a beverage that can accurately be termed The Sensible Drink, nutritionally and economically as a source of vitamin C. Orange juice is more sensible nutritionally because it contains significantly more vitamin C in the same quantity as well as supplying other essential nutrients in greater amounts. Orange juice is more sensible economically because it is often less expensive as a source of vitamin C.

52. Complaint counsel assert that Paragraphs 8 (c) and 9 (c) of the complaint raise two separate issues: (1) whether the phrase "The Sensible Drink" constitutes a representation that Hi-C is "sensible" nutritionally and economically as a source of vitamin C when compared with orange juice; and (2) whether the phrase "The Sensible Drink" constitutes a representation that Hi-C is the sole beverage which is "sensible" nutritionally and economically as a source of vitamin C (complaint counsel's Pretrial Brief, pp. 20, 23). The provisions of Paragraphs 8 (c) and 9 (c) do not track since Paragraph 9 (c) appears to center the challenge on the assertion that the slogan "The Sensible Drink" somehow involves a comparison of Hi-C to orange juice.

Actual Representations Made

53. The phrase "The Sensible Drink" is included in each of the challenged Hi-C television commercials (CX 41A–41T) and in some of the challenged Hi-C print advertisements (CX 42A–42E, 43A–43B, 44C, 44F, 44G, 44I).

54. Complaint counsel's allegation that the phrase "The Sensible Drink" constitutes a representation that Hi-C is sensible be-

cause it is the nutritional equivalent of orange juice in all respects is outside the scope of Paragraph 8 (c) of the complaint. Paragraph 8 (c) of the complaint alleges only that the challenged advertisements represented that Hi-C was sensible as a source of vitamin C.

55. Even if this allegation were within Paragraph 8 (c) of the complaint, nothing in the phrase "The Sensible Drink" or the challenged advertisements constitutes or would be understood to constitute a representation that Hi-C was sensible because it was the nutritional equivalent of orange juice or contained any nutrient found in orange juice in the same amount as orange juice (see Findings 31–34, *supra*).

56. The phrase "The Sensible Drink" does not constitute a representation that Hi-C was the sole beverage which was sensible as a source of vitamin C.

a. There is no *explicit* representation in any Hi-C advertisement which either separately or in conjunction with the phrase "The Sensible Drink" indicated that Hi-C was the sole beverage that was sensible, nutritionally and economically, as a source of vitamin C.

b. The use of the word "The" in "The Sensible Drink" does not constitute and would not be understood by consumers to constitute a representation that Hi-C was the sole beverage which was sensible with regard to these attributes (Smith 1385–86).

c. According to the Audits & Surveys, Inc., data introduced in evidence, there was extremely low recall of this slogan (CX 39E–39F; Neadle 312–13). This is indicative that no complex meanings were attached to the slogan by consumers.

57. To the extent that consumers took a meaning from the phrase "The Sensible Drink," the evidence indicates that it would be understood to mean that Hi-C was a natural, good tasting product which carried a nutritional benefit—vitamin C.

a. The phrase "The Sensible Drink" was explicitly defined in this way in a number of the challenged advertisements and television commercials:

> Hi-C's made with real fruit. And it's high in Vitamin C. It's good for you. That's why it's called * * * The Sensible Drink. (RX 1490)
>
> * * * * * * *
>
> Hi-C tastes good, and it's good for you. That's why it's called * * * The Sensible Drink. (RX 149N)

b. Respondents intended the phrase "The Sensible Drink" to summarize the specific attributes of Hi-C which were explicitly

described in the commercials—that Hi-C had "natural sweeteners," was "made from fresh fruit," was "good for you" and was "high in vitamin C" (CX 12, 11B, 14A).

Hi-C as a "Sensible" Source Nutritionally of Vitamin C

58. As previously noted, the record establishes that Hi-C is "high" in, or an "excellent" source of, vitamin C (Findings 46–50, *supra*).

59. In addition, a beverage, such as Hi-C, which has an appealing taste and which can be purchased in a variety of flavors, would be likely to be highly acceptable to a significant number of children. Vitamin C is not common to the types of convenience and snack foods, such as carbonated beverages, pizza, hamburgers, etc., which are attractive to children and which are becoming an increasing part of the diet of American children. Because of these factors, Hi-C, which supplies the entire RDA for vitamin C for children in a single serving, is considered "a good food" for children (Graham 1481–84).

60. Nonetheless, complaint counsel contend that "The Sensible Drink" slogan is deceptive because the caloric content of Hi-C is excessive and hence Hi-C cannot be termed a "sensible" source of vitamin C (CPF 120).

61. This contention must be rejected because it is contrary to the weight of the evidence in this record. Calories measure the energy supplied by food and are essential to sound nutritional growth (Van Itallie 1008–09; Stare 1525). The Food and Nutrition Board has established RDAs for calories which vary with age and sex (Van Itallie 1008–09; CX 7D).

62. A 6-ounce serving of Hi-C, in addition to providing 44 mg. of vitamin C, provides 85 to 90 calories, depending upon the Hi-C flavor which is consumed (CX 4C; Sebrell 1443; Graham 1473; Stare 1524; Van Itallie 1011; Briggs 693).

63. Dr. Theodore Van Itallie, director of medicine at St. Luke's Hospital in New York City and associate director of the Institute of Human Nutrition at Columbia University, testified for complaint counsel concerning the caloric content of Hi-C and its relationship to the vitamin C content of that product. Dr. Van Itallie was chairman of the subcommittee of experts which drew up the recommendations ultimately embodied in the Food and Nutrition Board's RDAs for calories (Van Itallie 1009).

64. Dr. Van Itallie testified that a food which makes a "significant" contribution in terms of the RDAs for calories, should also make a significant nutritional contribution (Van Itallie 1006–07). He defined "significant" caloric contribution by reference to a "rule of thumb" figure of 5 percent of the RDA (Van Itallie 1007–08).

65. Hi-C, containing 85 to 90 calories per serving, would provide approximately 5 percent of the 1800 calories which constitutes the RDA for calories for a 6-year-old child (Van Itallie 1009, 1011–12). Dr. Van Itallie described the caloric level of Hi-C as being "marginally significant" for a 6-year-old child (Van Itallie 1025). At another point, he stated that the 85 to 90 calories in a serving of Hi-C "borders on being a significant contribution" to the diet of a 6-year-old child and was "a lower level of what I would consider to be significant" for such a child (Van Itallie 1012). Using Dr. Van Itallie's 5 percent measure, the 85 to 90 calories in a serving of Hi-C would be even less than "marginally significant" to the diet of children between the ages of 7 and 12, since the RDA for calories for children of these ages is higher, varying from 2000 to 2600 (CX 7D).

66. Dr. Van Itallie evaluated Hi-C as a source of Vitamin C in light of his analytical framework and method of evaluating food content described above. Specifically, Dr. Van Itallie was asked to consider the nutritional content of Hi-C in relation to its caloric content and to evaluate the product on this basis as a source of vitamin C. He testified:

> In terms of those parameters, I would say that Hi-C within its caloric contribution to the diet was an excellent source of vitamin C. (Van Itallie 1027–28)

67. This testimony, *adduced through complaint counsel's expert witness,* completely refutes complaint counsel's contention that Hi-C is not a "sensible" source of vitamin C because of its caloric content.

68. Respondents' well-qualified nutritional experts unanimously corroborated Dr. Van Itallie's opinion that Hi-C was an excellent source of vitamin C when evaluated in the light of its minimal caloric content (Sebrell 1445, 1449; Stare 1524–27; Graham 1474; Hodges RX 1Z–18). Accordingly, respondents did not make a deceptive or misleading claim in referring to Hi-C as a "sensible" source of vitamin C.

69. This evidence far outweighs the testimony of Dr. Briggs, another witness for complaint counsel, that Hi-C was not a good source of vitamin C in light of its caloric or sucrose content. Among other things, Dr. Briggs' testimony did not set forth the frame of reference by which he considered Hi-C to be excessive in this respect (Briggs 704).

The Ocean Spray Case

70. As previously noted, a 6-ounce serving of Hi-C contains 85 to 90 calories and 44 milligrams of Vitamin C. Ocean Spray Cranberry Juice Cocktail, the beverage which was the subject of the above-noted consent order contains 30 milligrams of vitamin C and *124* calories per 6-ounce serving (oral stipulation by complaint counsel 1151; Ocean Spray complaint, Paragraph 9B). Accordingly, Hi-C is a better source of vitamin C than the Ocean Spray product, when both products are judged in light of their vitamin C and caloric content (Graham 1498–99).

71. Notwithstanding the caloric content of Ocean Spray Cranberry Juice Cocktail, the corrective advertisement approved by the Commission as part of the consent order authorizes the manufacturer of that product to make the following representation:

> If you've wondered what some of our earlier advertising meant when we said Ocean Spray Cranberry Juice Cocktail has more food energy than orange juice or tomato juice, let us make it clear: we didn't mean vitamins and minerals. Food energy means calories. Nothing more.
>
> Food energy is important at breakfast since many of us may not get enough calories, or food energy, to get off to a good start. Ocean Spray Cranberry Juice Cocktail helps because it contains more food energy than most other breakfast drinks.

Thus, Ocean Spray has been ordered by the Federal Trade Commission to include in its advertising a reference to the affirmative nutritional benefit of its caloric content, "since many of us may not get enough calories * * *," notwithstanding the fact that the Ocean Spray product contains more calories and less vitamin C than does Hi-C. If Ocean Spray is allowed—indeed required—by the Commission to advertise the fact that "it contains more food energy than most other breakfast drinks," as a positive selling point, it would be highly inconsistent to prohibit respondents from referring to Hi-C, which has fewer calories than Ocean Spray, as "The Sensible Drink" because of an allegedly excessive caloric content.

Folic Acid in Orange Juice

72. Complaint counsel contend that "The Sensible Drink" slogan implies a claim that Hi-C is as nutritious as orange juice with respect to nutrients in orange juice other than vitamin C and that such claim is false because Hi-C does not contain folic acid supplied by orange juice (CPF 131). This theory of violation is far beyond the scope of Paragraph 8(c) of the complaint and, moreover, there is nothing in this record which would support a finding that "The Sensible Drink" slogan implies any comparison of Hi-C to orange juice, to say nothing of a comparison to orange juice with respect to folic acid.

73. Complaint counsel offered expert testimony aimed at establishing that orange juice contains significant quantities of a nutrient called folacin, also known as folic acid.

74. There is no representation that Hi-C contains folic acid in any of the challenged Hi-C advertising and complaint counsel does not so suggest.

75. Dr. Richard Streiff testified that he began assays of orange juice for its folic acid content in December of 1970, after being requested to do so by complaint counsel (Streiff 598). Dr. Streiff concluded, on the basis of these assays which were completed during the spring and summer of 1971, that orange juice contained a significant level of folacin (Streiff 571, 583–84). Dr. Victor Herbert, another witness called by complaint counsel, testified that he believed Dr. Streiff's assays to be reliable and that he believed orange juice to be a very good source of folic acid (Herbert 649–50).

76. Grapefruit juice, another citrus fruit juice recommended by nutritionists as an important source of vitamin C (Briggs 748), does not make a significant contribution to the diet insofar as its folic acid content is concerned (Streiff 609; Stare 1530). Similarly, tomato juice, another "rich" source of vitamin C (Briggs 748, 750), has a "low" folic acid content (Streiff 616). Since these other foods are recognized as appropriate sources of vitamin C despite their lack of folic acid, the fact that Hi-C also lacks significant quantities of folic acid cannot form the basis for a finding that Hi-C was not a "sensible" source of Vitamin C.

77. Numerous scientific tables and publications, including several publications issued by expert government agencies, such as the Department of Agriculture and the Department of Health, Education & Welfare, either omit any mention of orange juice

from lists of significant sources of folic acid or set forth values for the folic acid content of orange juice which were significantly lower than the levels found by Dr. Streiff in his recent assays (Streiff 617–27; RX 11A, 11B, 11D, 97A-B, 107B, 107C, 107H, 55A–55E).

78. As late as October 1968, even Dr. Streiff, an expert specializing in this nutrient, was aware of only one article which even mentioned orange juice as a source of folic acid (Streiff 594–95).[1] This article contains a passing reference (actually three lines in a lengthy table of folic acid values for various foods) to the folic acid content of orange juice (CX 34D).

79. The general nutritional community was unaware, prior to Dr. Streiff's assays, which were performed over a period of time from December 1970 through the summer of 1971, that orange juice was a good source of folic acid (RX 118A, 118B, 118D, 97A–97B, 197B, 197C, 197H, 55A–55E; Stare 1529).

80. In view of the above evidence, the significance of the folic acid content of orange juice was not an established scientific fact at the time the challenged Hi-C advertising was disseminated.

The Ocean Spray Case

81. The corrective advertisement approved by the Commission and specifically made a part of the consent order in the *Ocean Spray* case concludes with the representation

> And Ocean Spray Cranberry Juice Cocktail gives you and your family Vitamin C plus a great wake-up taste. It's * * * the other breakfast drink.

This representation was approved by the Commission, upon the recommendation of complaint counsel therein, including one attorney who is also complaint counsel in this proceeding.

82. Dr. Streiff also assayed the Ocean Spray product for its folic acid content. His assays showed that the Ocean Spray product has less folic acid than does Hi-C (CX 31 A-G; RX 82C; Streiff 600; see also, Tr. 1151). Complaint counsel stipulated that the label declaration of the contents of the Ocean Spray product does not include any reference to folic acid (Tr. 1151).

83. The consent order approved by the Commission in the *Ocean Spray* case established that it is permissible to advertise, expressly, that Ocean Spray supplies vitamin C and is "the other

[1] Even this one article did not state whether the folic acid found in orange juice was the form of that nutrient which is most biologically available to man (Streiff 577–78, 607–08).

breakfast drink," *i.e.*, an alternative to orange juice, even though Ocean Spray does not contain significant quantities of folic acid.

84. To permit the manufacturers of Ocean Spray to advertise their product as a source of vitamin C and as "the other breakfast drink," notwithstanding its lack of folacin, while prohibiting respondents from advertising Hi-C's vitamin C content in conjunction with its innocuous slogan "The Sensible Drink" because Hi-C lacks significant quantities of folic acid would hardly be consistent.

Evidence Concerning the Vitamin A Content of Orange Juice

85. In their proposed findings, complaint counsel would have the undersigned find that orange juice contains "significant quantities" (CPF 138) of vitamin A. There is nothing in the challenged Hi-C advertisements which explicitly or implicitly compares the vitamin A content of Hi-C with that of orange juice. The same reasoning as applies to folacin also applies to vitamin A and will not be repeated (see Finding 72, *supra*).

86. Nevertheless, complaint counsel contend that the RDA of vitamin A activity for children between the ages of 6 to 10 is 3500 International Units (IU) (CPF 133) and that 6 ounces of reconstituted frozen concentrated orange juice contains "about 340IU" or "about 10% of the RDA of Vitamin A activity for a child of ages 6 to 10 * * *." (CPF 137).

87. The only evidence even remotely relevant to the vitamin A content of orange juice is a single question and answer wherein Dr. Van Itallie stated that vitamin A is a significant nutrient (Van Itallie 1023) and a chart from a Government technical publication (CX 21) which gives the vitamin A value of 100 grams of various foods, including orange juice (200IU of vitamin A, CX 21).

88. The introduction of a chart from a Government technical publication, unexplained by expert testimony, cannot form the basis for technical findings such as those proposed by complaint counsel.

89. Respondents assert that failure to introduce expert testimony concerning the significance of the vitamin A content of orange juice precludes the undersigned and the Commission from making any findings on the subject. Respondents contend that had expert testimony been adduced, it would have established that the amount of vitamin A alleged by complaint counsel to be present in

6 ounces of orange juice (less than 10 percent of the *child's* RDA for vitamin A and less than 7 percent of the *adult* RDA for vitamin A) is not significant nutritionally. The record therefore does not contain a sufficient factual basis for any findings on the significance of the vitamin A content of orange juice which is less than 10 percent of the RDA.

Hi-C as a "Sensible" Source of Vitamin C

90. The phrase "The Sensible Drink" in no way implied an economical comparison of Hi-C with orange or other citrus juices. There is no reference whatever, express or implied, to the price or economical value of Hi-C in any of the challenged Hi-C advertisements. The Hi-C television commercials which define the phrase "The Sensible Drink" (see Finding 57) do not mention any economic factors. Assuming, *arguendo*, however, as complaint counsel contend, the phrase, "The Sensible Drink" implied an economical comparison of Hi-C to other beverages as a source of vitamin C—which respondents deny—the following findings are relevant.

91. It is stipulated that at all times herein relevant, Hi-C was, at retail, the lowest priced brand among all national brands of canned fruit drinks and that its retail price was lower than the average for all canned fruit drinks (RX 1G, 1H; Keough 1168).

92. It is stipulated that all of the 10 flavors of Hi-C contained 44 mg. of vitamin C per 6-ounce serving (RX 1P; RX 1Z–2). It is further stipulated that no other brand of canned fruit drink contained, in its entire line of flavors, more vitamin C than Hi-C (RX 1Z–2—RX 1Z–7).

93. Since the line of Hi-C flavors contained as much as or more vitamin C than each line of competitive brand of canned fruit drink and Hi-C was lower in retail price than competitive canned fruit drinks, Hi-C was, in fact, a sensible source, economically, of vitamin C.

94. Based on or derived from the stipulated price per ounce and the amount of vitamin C per ounce of Hi-C and various citrus fruit juices (RX 1N–10; RX 1K), the cost of obtaining the child's Recommended Dietary Allowance of vitamin C by means of Hi-C fruit drinks as compared to the cost by means of various forms of citrus fruit juices was as follows:[2]

[2] The price per ounce of Hi-C and the citrus fruit juices was stipulated by the parties (RX 1K). The vitamin C per ounce of Hi-C and citrus fruit juices can be derived from a stipulation setting out the vitamin C levels in these beverages per 6-ounce serving (RX 1N–10).

	Cost of 40 mg. of Vitamin C as Supplied by Each Beverage
All Hi-C Flavors	3.82¢
Frozen concentrated orange juice	2.44¢
Frozen concentrated grapefruit juice	3.83¢
Canned orange juice	4.06¢
Canned grapefruit juice	4.57¢
Chilled orange juice	4.64¢
Fresh oranges	6.25¢
Fresh grapefruit	8.09¢

95. Even though the challenged Hi-C advertisements did not so represent, Hi-C is a sensible source, economically, of vitamin C when compared with citrus fruit juices since it costs less to secure the child's Recommended Dietary Allowance of vitamin C from Hi-C than with all but one form of citrus fruit juice.

96. Hi-C was a sensible source, economically, of vitamin C.

C. The Claim That Hi-C is "Made From Fresh Fruit"

97. The complaint alleges in Paragraphs 8 (d) and 9 (d) that:

Respondents have represented that: * * *

(d) Said drink is made with fresh fruit and has a high fruit content comparable to fresh fruits and fruit juices * * *.

Paragraph Nine: In truth and in fact: * * *

(d) Said drink is not made with fresh fruit nor does it have a high fruit content comparable to fresh fruits and fruit juices.

The Actual Representations Made

98. The only representation in the Hi-C advertisements which is challenged by Paragraphs 8 (d) and 9 (d) of the complaint are the statements that Hi-C is "made from fresh fruit" contained in the "Hiking" (CX 41K, 41L), "Clown" (CX 41M, 41N), "Apple" (CX 41Q) and "Everyplace" (CX 41S, 41T) television commercials; two of the print advertisemens (CX 42C, 42E); and he two newspaper advertisements (CX 43A, 43B). The statements "made with real fruit" or "real fruit flavors" contained in a number of the commercials and advertisements are not challenged.

99. Incidental depictions of real fruit are briefly included in certain of the challenged Hi-C television comercials and print advertisements (CX 41A–41T, 42B, 42K). Those television commercials in which fruit is depicted are (see also Finding 20, *supra*):

Commercial	Depiction
CX 41C "Flying Kites" (60-second version)	A bowl of oranges, apples and grapes is shown during a picnic for 1.7 seconds.
CX 41E "Zoo" (60-second version)	A bowl of grapes, bananas, apples and oranges is shown during a picnic for 2 seconds.
CX 41G, 41H "Mother's Day Out" (60- and 30-second versions)	A bowl of oranges and grapes is shown inside a refiregator when it is opened for 1.8 seconds in the 60-second version and 1.2 seconds in the 30-second version.
CX 41Q, 41R "Apple" (60- and 30-second versions)	A bowl of apples and oranges is shown on a table for 21 seconds in the 60-second version and 6 seconds in the 30-second version, and an apple is involved in the story line of the commercial.
CX 41I "Kids"	A fractional part of what appears to be oranges stored in the refrigerator door is shown for .3 of a second.

100. The paper labels on 46-ounce cans of several of the Hi-C flavors contain drawings of whole or cut fruit corresponding to the Hi-C fruit flavor contained in the can (CX 46A–46F; RX 150, 151). Cans of Hi-C are depicted in several of the challenged Hi-C television commercials, and, in some instances, the pictures of fruit on their labels are briefly visible during the commercial (CX 41C–41D, 41H–41I, 41K–41L, 41O–41R).

101. Paragraphs 8(d) and 9(d) of the complaint raise two distinct issues concerning the "made from fresh fruit" claim:

(1) whether the phrase falsely claimed that Hi-C's fruit juice component was unprocessed (see CPF 97–100); and

(2) whether the phrase falsely claimed that Hi-C contained an amount of fruit or fruit juice "comparable to pure fruit or pure fruit juices." (CPF 101–105).

Whether the Hi-C Advertising Represented that Hi-C Contained "*Unprocessed* Fruit or Fruit Juices"

102. In manufacturing each flavor of Hi-C, the first step is the extraction of single strength juice from fresh fruits picked from the vine or tree (CX 4B; Briggs 728). Single strength fruit juice is whole, natural, fruit juice composed of 88–90 percent water, 8 percent sugar, and proteins, minerals and nutrients in varying

amounts (Briggs 735, 738). The single strength juice, once it is extracted from a fruit, is retained in either that form or is concentrated by removal of the water from the juice (CX 4B; Briggs 729–30).

103. The evidence of record supports the conclusion that the "made from fresh fruit" claim would be understood as a representation that natural fruit components were used in the manufacture of Hi-C, as opposed to artificial or synthetic fruit flavorings found in a number of other refreshment beverages (Smith 1396–97). Hi-C is purchased by consumers in unrefrigerated 46-ounce and 12-ounce cans from supermarket shelves (CX 4B; Keough 1158). Consumer understanding of canned, unrefrigerated products, such as fruit drinks, is such that a claim that the product was "made from fresh" ingredients would not be interpreted as meaning that the product contained unprocessed fruit or fruit juice (Smith 1397).

104. Complaint counsel have conceded that the Hi-C advertisements would not lead consumers to believe that fresh fruit is physically present in the can at the time of sale (CPF 16). Consistent with this concession, and the evidence of record, it appears that consumers would understand that all of the ingredients in Hi-C, including the fruit component, are at some point processed. Nevertheless, complaint counsel contended in the aforesaid post trial Proposed Finding 16 that consumers would construe the challenged advertising to mean that the fruit juice components of Hi-C did not undergo any processing until the moment in time when Hi-C was canned. There is no evidence whatever that consumers would construe this claim in this manner. There is likewise no evidence that consumers would have any concern as to the particular stage when the fruit components in Hi-C underwent processing.

105. Even if it is assumed, as complaint counsel assert, that the claim "made from fresh fruit" would be understood by consumers to mean that Hi-C was "made with fresh fruit," this would not alter the basic conclusion that consumers would understand the claims to mean that the product contains natural fruit rather than artificial flavoring ingredients.

106. The claim "made from fresh fruit is true, Complaint counsel's own witness recognized that the fruit components of Hi-C are "derived from," or made from, fresh fruit (Briggs 728; see

also, Keough 1158). No artificial or synthetic fruit ingredients are included (CX 4B; Keough 1158).

Whether the Advertising Represented that Hi-C Contains an Amount of Juice "*Comparable* to Fresh Fruit Juices"

107. Complaint counsel assert that the Hi-C advertisements represented that Hi-C had a "high" fruit juice content "comparable" to fresh fruit juices. They have also advanced the theory, not embodied in the complaint, that the Hi-C advertising was misleading because it led consumers to believe that some flavors of Hi-C contained at least 25 percent juice.

108. The statement "made from fresh fruit" and the incidental depiction of fruit in the Hi-C advertising does not constitute a representation that Hi-C contains an amount of juice comparable to undiluted 100 percent pure fruit juices (Smith 1398–99).

a. Each of the advertisements in which the claim "made from fresh fruit" is made and each of the Hi-C labels contains statements prominently and clearly identifying Hi-C as a "fruit *drink*" or "fruit flavored *drink*."

b. Complaint counsel's witness, Mr. Eugene Holeman, testified that consumers do not expect much juice in a product labeled a "drink" and that consumers know that a product which is labeled and called a "drink" is a diluted product which does not contain 100 percent single strength fruit juice (Holeman 906–07).

c. Complaint counsel introduced no evidence indicating that any consumer understood the phrase "made from fresh fruit" to represent that Hi-C contained an amount of juice comparable to pure fruit juices.

d. The representation that Hi-C is "made from fresh fruit" is made in commercials or advertisements depicting situations where pure juices are not normally consumed. Each of the commercials represents a refreshment situation when products such as fruit drinks or other refreshment beverages, such as carbonated beverages, would normally be consumed (Smith 1398).

e. In view of the identification of Hi-C as a "fruit drink" in all Hi-C advertisements, consumers viewing the Hi-C advertisements would know that the product is a diluted product and not pure juice.

109. One challenged Hi-C print advertisement run in one 1969 edition of Reader's Digest (CX 42B) states that:

Hi-C fruit drinks are good enough to eat.

Our grape mold, for instance, was made with gelatin and Hi-C grape drink. So whenever your recipe calls for a juice, use your favorite Hi-C fruit flavor instead. Hi-C drinks taste great. And they're high in Vitamin C. That's why we call Hi-C "the sensible drinks."

A 46-ounce can of Hi-C grape drink is displayed in this advertisement.

110. This advertisement constitutes a representation that Hi-C can be used in place of fruit juices in recipes for gelatins in order to secure, "fruit flavor." It does not constitute a representation that Hi-C is comparable to fruit juices in terms of juice content.

111. In support of their theory that consumers would take Hi-C advertising to mean that some of the flavors contained 25 percent juice, complaint counsel's expert witness, Mr. Eugene Holeman, testified that depictions of cut fruit on the labels of some flavors of Hi-C would cause consumers to believe that these Hi-C flavors contained 25 percent and not 10 percent juice (Holeman 882). As noted, complaint counsel's theory is beyond the scope of the complaint. Moreover, Mr. Holeman's testimony in this regard is not entitled to great weight since he also testified that this view was based on an arbitrary classification policy for fruit beverage labeling adopted by the Association of Food and Drug Officials of the United States (AFDOUS) which that organization had hoped to have the Food and Drug Administration promulgate in uniform regulations (Holeman 855, 860–61, 903). However, the AFDOUS classification policy was *not* adopted by the Food and Drug Administration. Mr. Holeman further stated that new regulations had been issued in this area by the Food and Drug Administration which permitted a product with from 10 percent to 35 percent orange juice to be labeled a "drink" and which, contrary to the AFDOUS standards, did not prohibit such beverages from including depictions of cut fruit on their labels (Holeman 904). Accordingly, Mr. Holeman testified that the AFDOUS policy which formed the basis for his opinion about cut fruit on Hi-C labels would be abandoned in the light of the new regulations of the Food and Drug Administration (Holeman 904–05).

112. On March 11, 1972, the Food and Drug Administration promulgated final regulations governing the labeling of *orange* beverage products, including canned orange fruit drinks such as Hi-C Orange Drink (37 Fed. Reg. 5224). These regulations specify that orange beverage products with from 10 percent to 35 percent single strength orange juice may be labeled orange

"drinks" and with from more than 0 percent to less than 10 percent single strength orange juice, orange "flavored drinks" (37 Fed. Reg. 5228, 5229, March 11, 1972). All Hi-C drinks are labeled in conformity with the scheme for diluted orange beverage products established by the Food and Drug Administration.

113. Complaint counsel further assert that three of the 10 flavors of the "Hi-C" line contain 2 percent or less fruit juice (CRB p. 3). These three are: Cherry Flavored Drink, 2 percent; Wild Berry Flavored Drink, 2 percent; and Citrus Cooler, 1 percent. The other seven flavors, including Orange Drink, contain between 10 percent and 30 percent fruit juice. Orange Drink, which is the main target of this proceeding, contains at least 10 percent fruit juice. (See Finding 28, *supra*).

Under the Food and Drug Administration regulations, any orange beverage containing less than 10 percent but more than 0 percent equivalent single strength orange juice may be called an orange flavored drink (37 Fed. Reg. 5229, March 11, 1972). Hence, "Hi-C" Cherry Flavored Drink and Wild Berry Flavored Drink are labeled in conformity with the scheme for diluted orange beverage products established by the Food and Drug Administration. In adopting these regulations, the FDA's stated purpose was to establish "standards of identity for diluted fruit juice beverages" (21 Fed. Reg. 5224).

The undersigned finds, therefore, that the use of the terms "Fruit Drink" and "Fruit Flavored Drink," prominently featured on the label of respondent's cans in conformity with the Food and Drug Administration regulations, serves to adequately apprise the consuming public of the fruit content of the beverage and the representation "made from fresh fruit" and the incidental depictions of fresh fruit used in conjunction therewith is not misleading.

114. Complaint counsel also assert that the claim that Hi-C is "naturally sweetened" in some of the challenged advertisements (CX 41K–41N, 41Q–41T, 42C–42E, 43A–43B) implies that Hi-C is sweetened solely by its fruit juice component (CPF 20). The claim that Hi-C is "naturally sweetened" has never been challenged in this proceeding and its injection into the case at this stage of the proceeding is beyond the scope of the complaint, the Joint Prehearing Statement and complaint counsel's case-in-chief. In any event, the claim would not be so construed. (See Findings 127–28, *supra*).

D. The Claim That Hi-C is "Uniquely Suitable"

The Allegations

115. Paragraphs 8(a) and 9(a) of the complaint allege that:

> Respondents have represented that: * * *
> (a) Said drink is the beverage that is uniquely suitable for use by children with regular meals, light meals and food eaten between meals.
> Paragraph Nine: In truth and in fact * * *
> (a) Said drink is not the beverage that is uniquely suitable for use by children with regular meals, light meals and food eaten between meals.

116. Neither the complaint nor complaint counsel have ever clearly articulated the meaning of these paragraphs of the complaint or the specific elements in the challenged advertisements which these paragraphs of the complaint challenge (see CPF 89–96; 156–160). Complaint counsel have stated that these paragraphs of the complaint charge Hi-C with representing that, among all of the beverages children consume, Hi-C is different from all others for children's use with regular meals, light meals and food eaten between meals in that Hi-C has a combination of ingredients which give it taste and nutritional qualities which are extraordinarily well suited to the needs and desires of children. In fact, complaint counsel allege Hi-C is not different from other beverages for children in any material respects of taste or nutrition which mould make it uniquely suitable for such uses by children (Joint Prehearing Statement No. 2, pp. 18–19).

117. On the other hand, complaint counsel have further stated that the "uniquely suitable" allegation is *not* intended to create an issue as to whether Hi-C is or is not exactly identical with respect to other fruit drinks in taste, composition or price. (Joint Prehearing Statement No. 2, p. 20).

The Actual Representations Made

118. The phrase "uniquely suitable" does not appear in any Hi-C advertisement or television commercial. No claim for "uniqueness" appears anywhere in respondent's advertisements.

119. Nothing in the challenged Hi-C advertisements or commercials states or implies that Hi-C is "uniquely suitable" in that it is different from all other beverages consumed by children for use with regular meals, light meals and food eaten between meals. As previously found, none of the commercials compare "Hi-C" to orange juice or any other fruit beverages. (See Findings 31–35.)

120. The use of the word "The" in the phrase "The Sensible Drink" contained in Hi-C advertising relied upon by complaint counsel to imply uniqueness would not be understood by consumers to constitute a representation that Hi-C was "uniquely suitable" for use by children with regular meals, light meals and food eaten between meals or to imply that Hi-C is different from all other beverages consumed by children for such uses.

121. Complaint counsel introduced in evidence several documents prepared by respondent Marschalk which recommended that the "creative objective" in Hi-C advertising should be to "assert the brand's leadership as an unique and wholesome" beverage (CX 16A, 17A, 18, 19, 20A). These documents do not indicate that respondents intended Hi-C advertisements to depict that Hi-C is "uniquely suitable" in that it is different from all other beverages consumed by children for use with regular meals, light meals or food eaten between meals.

122. At best, the challenged Hi-C advertisements represent that Hi-C is suitable for consumption by children. This representation is true since Hi-C is an "excellent" source of vitamin C (see Findings 46–50, 66, *supra*). Hi-C is substantially more suitable for children than many beverages consumed by children for refreshment and with meals, such as carbonated beverages, ades, powdered drinks, and a number of other leading brands of canned fruit drinks (RX 1P, 1Z–2–1Z–8).

E. The Claim That Children Can "Drink As Much As They Like"

The Allegation

123. The complaint alleges in Paragraphs 8(e) and 9(e) that:

Respondents have represented that: * * *

(e) Said drink is unqualifiedly good for children and children can drink as much of it as they like without adverse health or nutritional implications * * *.

Paragraph Nine: In truth and in fact * * *

(e) Said drink is not unqualifiedly good for children. Children cannot drink as much of said drink as they like without adverse health or nutritional implications.

124. The issue posed by these paragraphs of the complaint is whether the challenged advertisements represent that Hi-C can be consumed by children to the exclusion of all other foods, with no adverse nutritional impact (Joint Prehearing Statement No. 2, p. 37).

The Representations

125. The only representations in the challenged Hi-C advertisements which are relevant to Paragraphs 8(e) and 9(e) of the complaint are as follows (Joint Prehearing Statement No. 2, pp. 35–36):

Advertisement	Representation
a. CX 43A Newspaper Advertisement	*Now it makes more sense than ever.* Hi-C, the Sensible drink. *Today, more than ever before,* it makes good sense to serve your family Hi-C, the Sensible Drink. Why do we call Hi-C the Sensible Drink? Hi-C is sensible because it is naturally sweetened. In fact, we have always used natural sweeteners in Hi-C. Hi-C is sensible because it is made from fresh fruit. Hi-C has natural fruit flavor and that's why kids really love Hi-C. Hi-C is sensible because it has lots of Vitamin C, so kids can drink as much as they like because Hi-C is good for them. (Emphasis supplied.)
b. CX 43B Newspaper Advertisement	*Today it makes the most sense.* Now its makes more sense than ever to serve your family Hi-C, the sensible drink. Why do we call Hi-C the sensible Drink? Hi-C is sensible because it is naturally sweetened. In fact, we have always used natural sweeteners in Hi-C. Hi-C is sensible because it is made from fresh fruit. Hi-C has natural flavor and that's why kids really love Hi-C. Hi-C is sensible because it has lots of Vitamin C, so kids can drink as much as they like because Hi-C is good for them. (Emphasis supplied.)
c. CX 41M; RX 149W "Clown" (60-second version)	It's good for you so you can pour all the fun you want to.

The Meaning of the Newspaper Advertisements

126. There are no explicit or implicit representations in the challenged Hi-C advertisements that Hi-C is unqualifiedly good for children.

127. The two newspaper advertisements (CX 43A, 43B) were placed in newspapers by respondents for the purpose of informing consumers that Hi-C was made from natural sweeteners and did not contain cyclamates (RX 11A-11D, 12A; Keough 1175–77; complaint counsel's Pretrial Brief, p. 12).

a. The two newspaper advertisements (CX 43A, 43B) appeared in a number of newspapers in October–November 1969 (RX 11A–11D; Keough 1175–77).

b. In October 1969, the Food and Drug Administration issued a ban on sales of products which contained cyclamates (Keough 1175).

c. As a result of the ban on products which contained cyclamates, substantial confusion developed in the minds of consumers as to whether different brands of fruit drinks did or did not contain cyclamates (RX 12A; Keough 1175). One brand of fruit drinks which competed with Hi-C contained cyclamates (Keough 1175).

128. Within the context of the advertisements and of the ban on cyclamates, the challenged phrase in the newspaper advertisements that "kids can drink as much as they like" constitutes a representation that since Hi-C does not contain cyclamates, consumption of Hi-C would not have to be limited as in the case of beverages which contained cyclamates (Smith 1392–93, 1395).

a. The statements in the newspaper advertisements that "Now it makes more sense than ever" (CX 43A), "Today, more than ever before" (CX 43A), and "Today it makes the most sense" (CX 43B) appear in large letters at the beginning of each advertisement and are indirect references to the ban on cyclamates by the Food and Drug Administration. These statements would have been so understood by consumers in 1969 (Smith 1392).

b. The newspaper advertisements emphasize in their text that Hi-C is "naturally sweetened" and that Hi-C has "always used natural sweeteners" (CX 43A–43B).

129. It is conceded by complaint counsel that the challenged representations in the newspaper advertisements do not constitute representations that advocate the gluttonous consumption of Hi-C (Joint Prehearing Statement No. 2, p. 36).

130. The challenged representations do not constitute and would not be understood to constitute a representation that Hi-C can or should be consumed in place of or to the exclusion of all other beverages without adverse nutritional impact.

a. The representations and advertisements challenged in this portion of the complaint make no explicit mention of any other beverage or recommend using Hi-C instead of any other beverage.

b. Within the context of the ban on cyclamates, the advertisements represent only that, since Hi-C is not made from cyclamates, parents need not worry if their children consume Hi-C (Smith 1392–93).

The "Clown" Commercial

131. The challenged representation in the "Clown" commercial (CX 41M; RX 149W) that "It's good for you so you can pour all the fun you want to" does not constitute a representation and would not be understood by consumers to imply that children can drink unlimited quantities of Hi-C or could drink Hi-C in lieu of other beverages without adverse nutritional impact.

a. The "Clown" commercial takes place in a circus tent and depicts a clown pouring one glass of Hi-C from one 46-ounce can of Hi-C for each of a number of children who appear in the circus tent until, when the children leave, there is no Hi-C left in the can for the clown to drink. In this light-hearted context, the statement "pour all the fun you want to" would not suggest that Hi-C should be consumed in unlimited quantities or used to replace other more nutritious beverages or foods.

b. The "Clown" commercial neither states nor implies that unlimited quantities of Hi-C can or should be consumed to the exclusion of any other beverage (RX 149W). It is conceded by complaint counsel that the challenged claim in the "Clown" commercial does not advocate the gluttonous consumption of Hi-C (Joint Prehearing Statement No. 2, p. 36).

F. The Claim that the Hi-C Commercials Advocate Unbalanced Meals as Healthy Dietary Practices

132. The complaint alleges in Paragraphs 8 (b) and 9 (b) that:

> Respondents have represented that: * * *
> (b) Nutritionally unbalanced meals that are consumed with said drink constitute healthy dietary practices for children and families.

Paragraph Nine: In truth and in fact * * *

(b) Nutritionally unbalanced meals consumed with said drink do not constitute healthy dietary practices for children and families.

133. The television commercials entitled "Mother's Day Out," "Hiking" and "Kids" are the only challenged advertisements which complaint counsel contend make the claim that it is affirmatively healthy for children and families to make a practice of eating nutritionally unbalanced meals, when they do so with Hi-C (Joint Prehearing Statement No. 2, pp. 23–25). Respondents do not contend that the foods depicted in these three commercials would, with the addition of Hi-C, constitute balanced meals which could be consumed as a regular dietary practice. Rather, respondents contend that the "Kids" commercial depicts a snack scene and not, as complaint counsel contend, a breakfast scene,[3] and that "Mother's Day Out" and "Hiking" depict humorous and clearly a typical situation which the consumer would understand to be making a joke of the very fact that the foods depicted would be nutritionally inadequate if consumed on a regular basis.

The Actual Representations in the "Kids" Commercial

134. "Kids" depicts a little girl imitating her mother by pretending to clean the kitchen while she picks up her toys. Her younger brother enters from outdoors wearing a baseball cap and carrying a baseball bat and glove. The young girl takes a can of *grape* flavored Hi-C from the refrigerator, pours a glass and drinks it. The girl, again imitating her mother, wipes her brow and states:

I'm just no good till I get my first drink of Hi-C.

Two Kellogg's Pop Tarts pastries are depicted popping out of a nearby toaster and the announcer states:

Pop Kellogg's Pop Tarts Pastries and pour Hi-C fruit drinks. Hi–C in 7 real fruit flavors that taste good and are good for you. And it's as easy as pop and pour. (RX 149R)

135. The "Kids" commercial (CX 41I–41J) was prepared as part of a joint promotion between the Coca-Cola Company Foods Division and the Kellogg Company in order to "promote a snack consisting of Kellogg's Pop Tarts and Hi-C Fruit Drink" (RX

[3] Complaint counsel concede that if no breakfast or other regular meal is depicted in the "Kids" commercial, no issue is raised with respect to this commercial under Paragraphs 8 (b) and 9 (b) of the complaint (Joint Prehearing Statement No. 2, p. 24).

3B). The commercial was intended to depict a " 'young housewife cleaning' episode" (RX 2) and to depict a little girl "acting like her mother, doing the housework" while a little boy "comes in alter he has been playing ball and they enjoy the treat" (Keough 1178). A snack scene, rather than a breakfast or other mealtime scene, was intended as part of the overall effort to promote Hi-C and Pop Tarts as a snacktime combination (Keough 1178, 1183).

136. While complaint counsel contend that this scene would be understood to be a breakfast scene by a substantial number of consumers, there is no direct or indirect reference to breakfast. Unlike the Ocean Spray commercial approved by the Commission, Hi-C is never referred to as a breakfast drink.

137. The principal symbols which are associated with breakfast and which one would expect to be present in a television commercial depicting a breakfast scene are lacking from the "Kids" commercial (Smith 1388). The typical breakfast scene shown in television commercials—the father reading a newspaper while the mother makes breakfast and the children hurry off to school—is in no way depicted (Smith 1388–89). Moreover, it is relevant to note that Hi-C *grape* drink, and not Hi-C orange drink, is the flavor consumed by the children.

138. Consumers would not understand the "Kids" commercial to be a breakfast or other mealtime scene. Even if this were to be considered a breakfast or other mealtime scene, there is nothing in the commercial which advocates that Hi-C and Pop Tarts should be consumed as a regular practice at mealtime.

The Actual Representations in "Mother's Day Out" and "Hiking"

139. These two commercials are appropriately considered together since they have many common elements and themes.

140. There is no explicit representation in either "Mother's Day Out" or "Hiking" that the foods depicted constitute balanced meals or are suitable for consumption on a regular basis, so long as Hi-C is consumed with them.

141. There are no implicit representations in either "Mother's Day Out" or "Hiking" that the foods depicted constitute balanced meals or are suitable for consumption on a regular basis, so long as Hi-C is consumed with them.

a. As was true in the "Kids" commercial, the "Hiking" and "Mother's Day Out" commercials also depict scenes in which the family's "nutritional watchdog" (Smith 1375), the mother, is

absent. The scenes depicted—a hike and a meal which is served under the supervision of the father, rather than the mother—are atypical situations which are not suggestive of approved regular dietary practices.

b. The reactions of the father, the children, and the announcer all convey an understanding that the foods depicted are not healthy dietary practices. In "Mother's Day Out," the father incredulously asks whether this is what the children usually have for lunch and the announcer remarks, "Some lunch!" For their part, the children are quite obviously enjoying the joke they are playing on their father by combining foods which are attractive to them and which, as their manner and attitude reveal, they obviously do not usually consume at lunchtime.

c. The announcer in "Mother's Day Out" reinforces the message that this is not the usual lunch, and indeed is not a nutritional lunch, by stating that Hi-C makes "the craziest lunch a lot less crazy" and by stating that "the only sensible thing" is Hi-C.

d. Similarly, in "Hiking" the same elements are present. Once again, the reactions of both the children and the father clearly convey the message that the children have played a joke on their father by packing a meal they would not ordinarily consume.

e. Dr. Joseph Smith characterized as a "baroque expectation" the allegation that consumers would understand these two commercials to claim that the foods depicted were healthy regular dietary practices, when consumed with Hi-C (Smith 1387). To the contrary, Dr. Smith stated, "[t]he whole idea is a joke on a non-nutritionally balanced meal, and the language supports that" (Smith 1387).

f. In the "Hiking" commercial, respondents consciously chose to display prominently several 46-ounce cans of Hi-C, in addition to 12-ounce cans, in order to "reflect the absurdity of the kind of lunch that was packed." (CX 11B). Thus, far from attempting to convey the message that the foods depicted when consumed with Hi-C constitute healthy dietary practices, respondents sought to emphasize the "absurdity" of the lunch depicted.

142. "Hiking" and "Mother's Day Out" would convey a message quite opposite from the alleged by complaint counsel. Rather than advocating healthy dietary practices, these two commercials would reinforce the consumer's belief that the foods depicted are not nutritionally balanced meals which are appropriate for regular consumption (Smith 1387–88).

The Nutritional Significance of the Addition of Hi-C to the Foods Depicted in "Mother's Day Out" and "Hiking"

143. While Paragraphs 8 (b) and 9 (b) of the complaint do not raise the issue, it may be relevant to an assessment of the "Hiking" and "Mother's Day Out" commercials to consider whether Hi-C makes a significant nutritional contribution to the foods consumed.

144. As previously noted, a single serving of Hi-C provides 110 percent of the RDA for vitamin C for children. Moreover, Hi-C is an excellent source of vitamin C when judged in light of its minimal caloric content (Findings 61–68, *supra*). In view of the fact that Hi-C is an "excellent" source of vitamin C, it cannot be considered an empty calorie food (Stare 1527; see also, Sebrell 1445). Accordingly, the addition of Hi-C to the foods depicted in "Mother's Day Out" and "Hiking" would improve it by the addition of vitamin C even though the "meals" depicted would not be balanced (Graham 1485–86; Sebrell 1451–52; Stare 1528). Moreover, the occasional consumption of the foods depicted in these commercials is not inconsistent with good nutrition (Sebrell 1451–52).

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of and over respondents and the subject matter of this proceeding.

2. Complaint counsel have failed to sustain the burden of establishing, by substantial, reliable and probative evidence, that respondents have used unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act. Specifically, complaint counsel have failed to sustain the burden of establishing, by substantial, reliable and probative evidence that respondents have made false, misleading and deceptive claims with respect to the nature, content and nutritive value of the fruit drink product designated "Hi-C" as alleged in Paragraphs 8a–8f and 9a–9f of the complaint herein.

3. Due to the failure of complaint counsel to sustain the burden of proof, no order against respondents is warranted by the evidence.

ORDER

It is ordered, That the complaint herein be, and the same hereby is, dismissed.

DISSENTING STATEMENT OF COMMISSIONER JONES

Advertising is communication * * * The color of the print, the music in the commercial, the kind of people in the advertisement, the situation depicted: all communicate product characteristics * * * Advertising people know this and use the more common stereotypes to create their effects quickly.[1]

The Hi-C commercials are, in my view, a classic example of a message conveyed by words, ambiance and picturization using suggestion, ambiguous comparison and subtle innuendo and choosing specific words which are known to carry certain meanings for consumers or word formulations which will carry several connotations to consumers. The Commission's job here, therefore, is to read the whole message which is being conveyed to consumers by these commercials and not rest simply on the literal words used.

The Commission's Hi-C opinion does not do this. It totally ignores the pictorial elements in these ads and concentrates solely on the verbal portion of the message which I am convinced is calculatedly ambiguous and made up of words which are deliberately designed to evoke several kinds of messages for consumers to interpret in the light of their own backgrounds, values and concerns.

The Hi-C claims, "High in Vitamin C" and "The Sensible Drink," in a literal sense are "non-claims," or incomplete claims. For these claims to have meaning, consumers must fill them in with their own perceptions. Standing by themselves, they are neither true or false. If consumers fill them in and complete them in their own minds as making comparisons between Hi-C and other fruit juices, they are false.

Complaint counsel relied on the Hi-C ads themselves as well as on several surveys searching consumer perceptions of Hi-C to support their contentions that the Hi-C commercials would cause consumers to associate Hi-C with citrus fruits and particularly orange juice and to assume that drinking Hi-C was equivalent to or interchangeable with consuming orange juice or other citrus fruits. One of these surveys, the Drossler survey, conducted by the Florida Citrus Fruit Department, ascertained that 84.2 percent of the consumers when asked which beverages they associated with the phrase "Highest in Vitamin C" responded orange

[1] Leroy E. Purris, "How Many Get the Message," *Printer Ink*, Vol. 283, p. 329 (June 14, 1963).

juice. Respondents' efforts to disparage the survey because the question was asked in terms of products "Highest" rather than "High in Vitamin C," to me, miss the point. All the survey suggests is the connotation which consumers are likely to have when they hear the words vitamin C or are asked to think about vitamin C. This connotation which the survey shows consumers make between vitamin C and citrus fruit is directly relevant to how the seemingly ambiguous and partially truthful statement about Hi-C will be misconstrued by consumers as making an equivalency claim between Hi-C and citrus fruit. Thus the survey results help us to "read" or "hear" the Hi-C commercial as consumers are likely to.

The entire thrust of the ad, its ambiance and nonverbal symbols, are designed to suggest and evoke this comparison. There was no Hi-C commercial which did not refer to or depict fresh fruit or juice along with Hi-C. Every Hi-C commercial contained pictures of fresh fruit; and every commercial message was peppered with words "fresh fruit," "real fruit," "*naturally* sweetened" flavor, 'good for you." Two commercials actually make an express reference to interchangeability between fresh fruit and Hi-C. In the apple commercial, Dad is given Hi-C in place of an apple. The recipe commercial tells the housewife to use Hi-C instead of fruit juice for her gelatin recipe. Respondents did not prepare these commercials using pictures of fresh fruit and words connoting fresh fruit by chance. These were deliberate symbols designed to cause their audience to draw certain inferences and make certain assumptions about Hi-C.

The Commission opinion displays a gross naiveté and begs the real question when it reasons that consumers will not be misled by the ads because they understand the difference between fruit juices and fruit drinks. Obviously respondents' ads for Hi-C were designed to blur this difference insofar as Hi-C was concerned and to persuade consumers that *Hi-C* as a fruit drink *was in fact* similar to fruit juices regardless of how they might—absent the commercial—have regarded Hi-C or regardless of how they in fact regard other fruit drinks.

The Commission opinion tries to bolster this rationale by reference to one market survey in which only one person out of 13,000 people questioned about which fruit drinks they associated with vitamin C, said he got the impression that Hi-C was being compared to orange juice and 13 who found only comparisons with soft drinks. The only trouble with this argument is that the

survey questionnaire itself specifically instructed the interviewees to consider only fruit drinks in their answer and *not* to include any references to fruit juices in their answers. Moreover, the vice president of the survey organization which designed the survey confirmed that the survey was carefully designed *not* to search for consumer impressions gained from the ads, that it did not ask whether the Hi-C ads make fruit juice equivalency claims and that it simply asked the interviewees to rate four specific named fruit drink brands on specific product attributes of vitamin C, taste, natural fruit flavor, good for children, quick energy, etc.

To me, the obvious implication of the Hi-C Vitamin C—Sensible Drink theme with its picturizations of fresh fruit and its constant use of words such as natural flavor, fresh, etc., is to cause the consumer himself to make the equivalency claim or association between Hi-C and citrus fruits. The evidence makes clear that these equivalency claims are totally untrue and that drinking Hi-C is not the equivalent of drinking either citrus fruits or orange juice which is the most commonly regarded source of vitamin C.

The same ambiguities and deliberate misinterpretations about the properties of Hi-C, I believe are present in respondents' Hi-C slogan, The Sensible Drink.

If housewives are exhorted to treat their families "sensibly" then it is reasonable to assume that an ad which tells them that Hi-C is The Sensible Drink will be perceived by them in terms of what sensible purchasing means to them. To some, sensible purchases will have a health connotation. To others, it will connote price or value which might be a function of both health and budget. Some consumers may have heard the Hi-C sensible drink claim as saying Hi-C makes more sense to drink or to buy than other fruit drinks. Others undoubtedly heard the same slogan as saying, Hi-C is a sensible buy in terms of all fruit juices or vitamin C sources.

The point is the Commission cannot and should not make a choice and say that *only* one message could have been conveyed to consumers through these words and pictures and general setting. It is obvious that the capsulated message "The Sensible Drink" held some meaning for consumers or the advertiser would not have made it a central focus of its advertising message and campaign. Indeed Hi-C's advertising agency told Hi-C that the express purpose of the claim was to capsulate in the consumer's mind all of the vitamin and nutrient claims previously made for

Hi-C into this simple phrase and imply more than all these other claims standing alone.[5] I believe, therefore, that on our own reading of the message we must conclude that a reasonable interpretation of this message to consumers is that drinking Hi-C will benefit them nutritionally and economically.

Hi-C's own surveys tend to support this likely interpretation of the slogan by consumers. They demonstrate that consumers, when asked what they remembered about Hi-C, marked the following characteristics: best tasting, *economical,* high in vitamin C content, thirst quenching, *highest in quality,* quick energy, *natural fruit flavor,* good for children (emphasis added). I believe that complaint counsel is right in his assertion that the phrase is deceptive because in fact drinking Hi-C is neither nutritionally nor economically sensible when compared to the nutritional value of frozen orange juice which is a substantial segment of the fruit juice market.

I believe that based on the ads themselves and on the record, the Commission could only conclude that a significant number of consumers are likely to have heard and understood the Hi-C commercials as claiming an equivalency—nutritional and economic—between drinking Hi-C and consuming fresh fruit or citrus juices. The record demonstrates that no such equivalency exists.

The Commission's opinion ignores or perhaps reverses the standard model of the consumer as "the ignorant, the unthinking and the credulous consumer" which the Commission has been commanded to use in determining whether a particular act or practice is unfair or deceptive. (*Aronberg* v. *FTC,* 132 F.2d 165, 167 (7th Cir. 1942)) Instead, without any record evidence to support it the Commission implicitly adopts a new consumer model as its standard for interpreting whether a claim is likely to deceive. This

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[5] See CX 42C which asks:

What makes Hi-C the sensible drink? The fresh fruit it's made from? The fact that it's naturally sweetened? Or is it all that Vitamin C? *It's all this. And more* * * *

The advertisement then states:

Hi-C is loved by the *whole* family. No wonder Hi-C is the sensible drink * * * it makes sense for everyone.

In addition the letter from Mr. Douglas Wise of the Marschalk Advertising Agency to Mr. Wayne Jones, of the Coca-Cola Co. (CX 12) states:

The attached article concerning Mrs. Consumer's increasing demand for "products that are fresh, flavorful and nutritionally natural" gives more reasons to "The Sensible Drink" campaign as it currently exists. Yes, Vitamin C is an important element in the product and is mentioned in our advertising. However, the beauty of "The Sensible Drink" approach is that it encompasses natural sweeteners, flavorful, fresh fruit and nutritional—all in one simple phrase, which is being reinforced in different ways.

standard is actually one portraying the consumer as discriminating, sophisticated and highly knowledgeable as well as skeptical and unbelieving. This consumer knows that fruit drinks are not the same as citrus juices *despite what Hi-C's* ads said.

The Commission's opinion is discouraging. It suggests that the lawyer's tools are no match for the skills of the advertiser and communicator. I do not believe this must necessarily be the case. It unfortunately seems to be the case here.

OPINION OF THE COMMISSION

BY DENNISON, *Commissioner:*

This case is before the Commission on appeal from the initial decision of the administrative law judge dismissing the complaint for failure to sustain the burden of proof.

I.

The complaint was issued by the Commission on April 14, 1971, against the Coca-Cola Company, manufacturers of a fruit drink product sold under the trademark "Hi-C," and the Marschalk Company, Inc., an advertising agency of the Coca-Cola Company engaged in the preparation and dissemination of advertising materials promoting the sale of Hi-C. Respondents were charged with unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act,[1] stemming from allegedly having made certain false, misleading, and deceptive claims for the product "Hi-C."

The product involved in this litigation is a line of fruit drinks and fruit flavored drinks sold in 46 ounce cans and 12 ounce "flip-top" cans. Included in the line are ten flavors, of which one is Hi-C Orange Drink.[2] Hi-C was first marketed in 1948,[3] and is the leading entrant in the fruit drink market.[4] It was the first line of fruit drinks to be fortified with vitamin C.[5] During the period of time relevant to this proceeding, a six fluid ounce serving of each Hi-C flavor contained an average of 44 milligrams of vitamin C at

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[1] 15 U.S.C. §§ 45, 52.

[2] Initial decision, Finding 23; transcript, p. 1158. Currently consisting of 10 flavors, the Hi-C line grew from 7 to 9 flavors during 1969.

[3] Finding 25; transcript, p. 1159.

[4] Transcript, pp. 846–847, CX 39A.

[5] Finding 25; transcript, pp. 1160–61; RX 1Y–1Z–8.

the time of retail sale to consumers,[6] and provided between 85 and 90 calories, depending upon the flavor consumed.[7]

A comparable serving of frozen reconstituted orange juice, a product to which complaint counsel frequently sought to compare the Hi-C line, would supply some 90 milligrams of vitamin C, with a caloric content similar to that of Hi-C.[8]

The Hi-C advertising challenged in this proceeding was run during the period of January 1, 1969, through March 1, 1971, and includes a series of television commercials of 60 and 30 second duration, magazine and newspaper advertisements, as well as point-of-purchase materials.[9] While the labels themselves are not challenged in the complaint, their appearance in advertisements was considered relevant to the proceeding,[10] and the trademark "Hi-C" was itself identified in the complaint as a challenged "statement" or "representation." [11]

Indications of the marketing and advertising strategies pursued by respondents in the promotion of Hi-C appear in stipulations of the parties, in testimony, and in internal memoranda of respondents received in evidence.[12] While children are seen as the primary consumers of Hi-C drinks, the brand's advertising efforts were directed largely to the grocery purchaser of the household, usually the mother.[13] The dispute in this litigation arises in relation to the messages intended to be conveyed by respondents in their advertising, and focuses on the ultimate question of the representations reasonably likely to have been communicated to viewers of those advertisements.

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[6] Findings 27, 43. Pursuant to Food and Drug Administration regulations, Hi-C labels stated that a six ounce serving provided 30 milligrams of vitamin C, or 100 percent of the Minimum Daily Requirement for adults.

In March 1971, the vitamin C content of Hi-C was increased; thereafter, labels indicated that the product provided 100 milligrams of vitamin C per six ounce serving, or 333 percent of the adult Minimum Daily Requirement. This reformulation represented at least a 250 percent increase over the 44 milligrams formerly contained in a six ounce serving at the time of retail sale (see appeal brief, p. 8, citing answer of respondent Coca-Cola Company, p. 2). In evaluating the Hi-C advertising challenged in this case, the Commission makes its decision with reference to the Hi-C product as sold, and advertised, prior to the March 1971 reformulation.

[7] Finding 62; CX 4C.

[8] RX 1N; transcript, pp. 1499–1500.

[9] Finding 22. See Findings 9–12 and 14–18 for descriptions of the challenged advertisements.

[10] Finding 19.

[11] Complaint, Para. 7k.

[12] See, *e.g.*, RX 1Q–1R; transcript, pp. 1158, 1161, 1169, 1173–1186; CX 10–12, 14–20; RX 11, 12. Statements of objectives and strategy include references to Hi-C's overall advertising campaigns, as well as to specific advertisements prepared for promotional tie-ins and in response to the October 1969 ban on the sale of products containing cyclamates.

[13] Findings 22, 26; RX 1Q–1R; transcript, pp. 1158, 1161.

II.

Six distinct allegations of misrepresentations were contained in the complaint.[14] After a full hearing, the administrative law judge dismissed the complaint in its entirety, concluding that:

* * * complaint counsel have failed to sustain the burden of establishing, by substantial, reliable and probative evidence that respondents have made false, misleading and deceptive claims with respect to the nature, content and nutritive value of the fruit drink product designated "Hi-C" as alleged in paragraphs 8a–8f and 9a–9f of the complaint herein.[15]

We agree. In affirming the administrative law judge's determination, however, the Commission has reviewed carefully the advertising challenged in this case and the full record developed below, in order to satisfy itself that the representations alleged in the complaint are not likely to have been conveyed to consumers viewing these advertisements. In so doing, we have been unable to find persuasive evidence of the comparisons and claims of equivalent, between Hi-C and citrus juices in general, and between Hi-C and orange juice in particular, which complaint counsel throughout this proceeding have urged are present in Hi-C's advertising messages.[16]

III.

In their appeal, counsel supporting the complaint ask the Commission to find that the administrative law judge applied erroneous standards in evaluating the deceptive tendency and capacity of the challenged advertising. Specifically, they urge (1) that his initial decision appears to have assigned but a single reasonable interpretation to each of the challenged representations, (2) that it has given consideration only to the explicit representations contained in the advertisements, and (3)) that it reflects a misconception of complaint counsel's burden of proof in that it requires presentation of extrinsic evidence of actual consumer deception.[17]

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[14] See p. 9 and footnote 25, *infra* [p. 810 herein] for text of the six charging paragraphs of the complaint.

[15] Initial decision, filed September 15, 1972, Conclusion 2. In addition, the administrative law judge found that elements of complaint counsel's theories were "highly inconsistent" with the consent order reached in a contemporaneous case, *In the matter of Ocean Spray Cranberries, Inc.*, Docket 8840, June 23, 1972 [80 F.T.C. 925] (Findings 37–41, 70, 71, 81–84). Complaint counsel on this appeal ask the Commission to find that the initial decision "improperly relied on *Ocean Spray* as dispositive of factual issues in this proceeding" (appeal brief, p. 55; reply brief, p. 23). We do not reach this issue, since we affirm the dismissal of the complaint on the merits.

[16] See, *e.g.*, complaint, Para 8c, 9c, 8d, 8f; appeal brief, pp. 18–27, 31–36, 37–46; reply brief, pp. 9–19; oral argument, pp. 4–9, 20–24, 60–61. During oral argument, complaint counsel continued to refer to the alleged comparison to orange juice as "the heart of this case" (see p. 20).

[17] Appeal brief, pp. 11–13, 13–15, and 15–16, respectively.

We find no merit in these contentions. Rather, we see them as evidencing a far too selective reading of the findings. Read in their entirety, the findings of fact in the initial decision clearly indicate that the administrative law judge (1) considered and then rejected alternative interpretations of the advertising claims advanced by complaint counsel, (2) carefully considered possible suggested or implied representations, and (3) merely recognized the absence of extrinsic evidence that would support the interpretations of the advertising urged by complaint counsel.[18] At the same time, the administrative law judge recognized also the presence of extrinsic evidence, derived from consumer surveys, tending to refute meanings attributed to Hi-C advertising by complaint counsel.[19]

Reference to the presence, or absence, of extrinsic evidence produced during the hearings does not constitute abdication of the responsibility to evaluate the challenge advertising; reference is not tantamount to exclusive reliance. While we agree that the administrative law judge and the Commission possess the expertise to find deception "merely from an examination of the advertisements, without recourse to extrinsic materials," [20] this does not preclude consideration of relevant and helpful evidence.

Nor can we agree with complaint counsel's corollary argument that the administrative law judge, in citing the testimony of respondents' key witness on the question of how the challenged advertising might be understood by consumer,[21] "merchanically weighed the evidence in the record relating to consumer interpretation of the advertisements in lieu of exercising his duty to study the advertisements themselves and to interpret their meaning by employing his own expert judgment." [22] We find that in the initial decision, and throughout the eighteen days of hearings held in this case, the administrative law judge fully recognized and discharged his responsibility to interpret the challenged Hi-C advertisements and to determine their capacity to convey deceptive meanings to consumers.[23]

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[18] See, *e.g.*, Findings 31–35, 90, 120, 126–131, 141.

[19] Finding 34G, referring to "The Continuing Foods Study" conducted by Audits and Surveys, Inc. See p. 17, *infra* [p. 815 herein], for further discussion of this survey evidence.

[20] Appeal brief, p. 16.

[21] Dr. Joseph Smith, whose testimony appears at pp. 1349–1411 of transcript. In many respects, Dr. Smith's testimony confirms the Commission's own interpretation of meanings reasonably likely to be attributed to Hi-C advertising.

[22] Appeal brief, pp. 16–17.

[23] See thorough review and summary of explicit representations made in Hi-C's advertising, appearing in Findings 20, 21. See also Findings cited in footnote 18, *supra*, relating to im-

We have reviewed the nature and extent of the administrative law judge's analysis of the advertising challenged in this case, as well as his consideration of relevant testimony and survey data. We test the initial decision's findings by their relevance and adequacy, not by a tally of the number derived from the proposed findings of either party to this litigation, and we find them to be helpful to the Commission in reaching its decision in this case.[24]

IV.

The ultimate questions before the Commission on this appeal are factual ones, involving the determination, first, of whether or not certain representations were made in the advertising of Hi-C, and, second, whether any representations found to have been made had the tendency or capacity to deceive.

In examining these issues, the administrative law judge considered each of the six separate allegations of misrepresentation appearing in the complaint, sought to determine the actual representations reasonably likely to have been communicated to consumers, and then addressed the validity of those claims.

Appeal from the dismissal of the complaint has been taken with respect to four of the six allegations of false and misleading advertising.[25] These appear in Paragraphs 8c–8f, respectively, of the complaint and allege that Hi-C advertisements represent that:

c. Said drink is the beverage that is "The Sensible Drink," nutritionally and economically, as a source of vitamin C.

d. Said drink is made with fresh fruit and has a high fruit content comparable to fresh fruits and fruit juices.

e. Said drink is unqualifiedly good for children and children can drink as much of it as they like without adverse health or nutritional implications.

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plied claims. Throughout the hearings, the administrative law judge recognized frequently his responsibility, and that of the Commission, to determine the meanings conveyed by the challenged advertisements (see, *e.g.*, transcript, pp. 478, 663, 707–708, 726, 737, 900, 1034–1035, 1179, 1181, 1277–1278).

[24] The *Grand Caillou* opinion, relied upon by complaint counsel, does not question the propriety of using proposed findings submitted by one party; it questions rather the use of such proposed findings to the exclusion of independent reasoning, at the expense of providing findings relevant to the issues and helpful to the Commission. *In the matter of Grand Caillou*, 65 F.T.C. 799, 806–07, 814–15 (1965).

[25] Appeal brief, pp. 2–3. No appeal is taken from the administrative law judge's findings concerning Paragraphs 8a and 8b of the complaint, which alleged that Hi-C advertisements represent that:

"a. Said drink is the beverage that is uniquely suitable for use by children with regular meals, light meals and food eaten between meals.

"b. Nutritionally unbalanced meals that are consumed with said drink constitute healthy dietary practices for children and families."

Nor is appeal taken from the administrative law judge's failure to order the corrective advertising relief originally requested in the complaint.

f. Said drink is particularly high in vitamin C content even as compared to other beverages widely known as high in vitamin C content, specifically fruit juices.

The initial decision has provided us with useful details and summaries of the express representations contained in the individual Hi-C advertisements and in the advertising campaign(s) seen as a whole.[26] Four such express, literal, claims appear in the phrasing of the complaint's allegations as well as in certain of the advertisements: "the sensible drink," "made with fresh fruit," [27] children "can drink as much* * *as they like," and "high in Vitamin C."

Much of the testimony given by some twenty witnesses appearing in these hearings focused on the meanings and validity that could be assigned to these phrases, seen alone and in conjunction with companion elements found in the advertisements. Of that testimony, some of the most significant dealt with the meanings attributable to the presence of the declarative adjectives "high" and "sensible" appearing in these express claims. It was here that the search for an implied comparison to citrus juices, specifically orange juice, was concentrated.

A. The Express Representations

Reviewing first the four express representations, we find that the administrative law judge's rulings as to their validity were amply supported in the record.

Thus, for example, in relation to the claim that Hi-C is "the sensible drink" as a source of vitamin C, the testimony of five nutritionists supports the conclusion that Hi-C is "an excellent source" of vitamin C, judged in terms of its nutritional, and minimal caloric, content.[28] A six ounce serving of Hi-C would provide 110 percent of the Recommended Dietary Allowance for vitamin C for children,[29] while making only a "marginally significant" contribution to the Recommended Dietary Allowance for

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[26] Findings 20, 21. We refer to campaign(s) in recognition of the fact that more than one advertising campaign may be involved in the challenged advertisements, as indicated, *e.g.*, by the newspaper advertisements prepared in the fall of 1969 after the announcement of a ban on the sale of products containing cyclamates (see footnote 12, *supra* [p. 807 herein]).

[27] The wording "made *with* fresh fruit" appears in the complaint only. The following phrasing is found in Hi-C advertisements: "made *from* fresh fruit" and "made with real fruit." See Findings 21, 98.

[28] Findings 46–50, 58–69; transcript, pp. 1027–1028, 1445, 1449–1450, 1476, 1524–1527; RX 1Z17–18.

[29] Finding 46; CX 7D.

calories for a six year old child.[30] Within these nutritional parameters, this record fails to support an allegation that Hi-C is not a nutritionally sensible source of vitamin C. Nor do we find convincing evidence in the record to support the allegation that Hi-C was not an economically sensible source of vitamin C, relative to other brands of fruit drinks as well as to citrus juices.[31]

The express claims "made from fresh fruit" and "made with real fruit" appear in several of the Hi-C advertisements. They are challenged by complaint counsel as communicating the misrepresentation that Hi-C is made with fresh fruit, in the specific sense that unprocessed fruit was used in the manufacturing process.[32] We endorse the initial decision's findings that consumers would not be reasonably likely to take this meaning from these words. The claims are true in the sense that the fruit components of the product are made from fresh fruit rather than from artificial or synthetic ingredients,[33] and consumers are likely to so interpret the representation, based upon their understanding of canned, unrefrigerated fruit drinks.[34]

Similarly, we find no merit in the allegations concerning the explicit claim that children "can drink as much as they like," appearing in two newspaper advertisements and, in a different phrasing, in the 60 second version of one television commercial.[35] These words have been challenged throughout this proceeding as contributing to a misrepresentation that Hi-C can be consumed by children in unlimited quantities, to the exclusion of other foods, without adverse health or nutritional implications.[36] We do not see that meaning as reasonably to be derived from these advertisements.

We turn now to the fourth express claim found in the advertisements and specifically challenged in the complaint: that Hi-C is "high in Vitamin C." Much of the testimony of the nutritionist

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[30] Findings 64, 65; transcript, pp. 1007–1012, 1025.

[31] Findings 91–95. One form of orange juice, frozen concentrated, was found to provide the Recommended Dietary Allowance for vitamin C at less cost than Hi-C. See p. 14, *infra* [p. 813 herein], for discussion of complaint counsel's reliance on this single comparison.

[32] Appeal brief, pp. 29–30.

[33] Finding 106; CX 4B; transcript, p. 1158.

[34] See Finding 103.

[35] Finding 125 describes the representations made in these advertisements. Headline elements of the newspaper advertisements include the phrases "Now it makes more sense than ever" and "Today it makes the most sense." The television commercial, featuring a clown, uses the phrase "* * * you can pour all the fun you want to." (CX 43A, CX 43B, CX 41M, RX 149W).

[36] Complaint, Para. 8e; Finding 124; appeal brief, p. 47. See Joint Prehearing Statement of June 14, 1971, p. 37, for agreement of the parties that the representation concerning "consumption to the exclusion of other foods" was at issue.

witnesses supporting the claim that Hi-C is a sensible source of vitamin C serves also as evidence for the validity of the claim that the product is "high" in vitamin C.[37] Using the Recommended Dietary Allowance for vitamin C as a frame of reference, these witnesses established Hi-C as "high" in vitamin C in relation to human nutritional needs. Their judgment was based upon the fact that a single six ounce serving of Hi-C contains 44 milligrams of vitamin C, compared to the Recommended Dietary Allowance of 40 milligrams for the primary consumers of the product, children between the ages of two and twelve.[38]

The initial decision determined the validity of the "high in Vitamin C" claim "in relation to human nutritional needs." [39] The Commission agrees with the reasonableness of this criterion, but notes with interest the fact that the administrative law judge had to evaluate the claim in relation to a standard. The same is true of consumers viewing these advertisements, and it is true despite the absence of express comparisons to any standards.

B. The Issue of Implied Comparisons

Having determined that no misrepresentations were contained in the challenged express claims made in Hi-C's advertising, the Commission recognizes the far more vital task now before it: an analysis of the representations that reasonably may have been implied or suggested by these advertisements.

A common and critical thread running throughout the allegations of the complaint and the conduct of the hearings centered on the contention that these advertisements in some way compared Hi-C to citrus juices in general, and to orange juice in particular.

In the complaint itself, for example, the advertising is charged specifically with having represented that Hi-C is "particularly high in vitamin C content even as compared to * * * citrus juices," and that Hi-C "has a high fruit content comparable to fresh fruits and fruit juices;" similarly, the complaint alleges that Hi-C cannot "accurately be termed The Sensible Drink" because "Orange is more sensible * * *." [40]

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[37] See footnote 28, *supra* [p. 811 herein].

[38] See Findings 46, 49, 50; Transcript references in footnote 28, *supra*. In addition to supplying 110 percent of the Recommended Dietary Allowance (RDA) for vitamin C for children, a six ounce serving of Hi-C would provide 80 and 75 percent of the RDA for vitamin C for adult women and men, respectively. The weight of the expert testimony established that a food providing approximately 50 percent of the RDA in a single serving would be considered an "excellent" or "high" source of vitamin C (see Finding 48).

[39] Finding 42.

[40] Complaint, Para 8f, 8d, 9c, respectively.

The progress of the hearings served to focus this central issue even more specifically on the content and nutritional value of Hi-C *vis-a-vis* orange juice. Thus, for example, even though Hi-C was shown to be more economical as a source of Vitamin C than other brands of fruit drinks, other citrus juices, and other forms of orange juice, complaint counsel have urged that Hi-C is not "the sensible drink" as a source of vitamin C because frozen concentrated orange juice, accounting for some 69 percent of orange juice consumption, provides the Recommended Dietary Allowance for vitamin C at slightly less cost than does Hi-C.[41] This is but one example of the many contentions advanced in this case whose persuasiveness depends ultimately upon a finding that Hi-C advertising would have conveyed a comparison to orange juice.[42]

A central element in the search for such a suggested comparison is to be found in the interpretation to be given to the adjectives "high" and "sensible" as used in claims for Hi-C. We look to them now, not as parts of explicit phrases and of isolated express claims, but rather as possible elements contributing to the potential communication of a comparison to orange juice within the context of a Hi-C advertisement viewed in its entirety.

The alleged deception envisioned in the claim that Hi-C is "high" in vitamin C is premised directly upon the communication of a comparison of the product's vitamin C content to a selected standard: orange juice. In an attempt to establish that consumers necessarily would refer to orange juice as the frame of reference against which to interpret a "high in Vitamin C" claim, complaint counsel introduced into evidence portions of the results of a survey conducted by the Drossler Research Corporation for the Department of Citrus of the State of Florida.[43] Primary reliance is placed by complaint counsel upon the indication in this survey of consumer attitudes that some 85 percent of consumers canvassed by telephone in June of 1971 named orange juice when asked to identify the one beverage which they believed best fit the phrase "highest in Vitamin C." [44]

Further portions of the same survey, introduced by respondents, indicate that only 1.8 percent of these same consumers named fruit drinks as "highest in Vitamin C." [45] Equally dra-

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[41] Findings 94, 95; appeal brief, p. 44; RX 1Z9.

[42] See footnote 16, *supra* [p. 808 herein].

[43] "National Consumer Survey," June 1971. CX 3A–C; Finding 34B.

[44] CX 3B.

[45] RX 45A.

matic differences in consumer attitudes toward orange juice and fruit drinks are reflected in responses concerning the beverage seen to be "best for breakfast" and the "most natural drink." [46] We agree that the consumer attitudes reflected in this survey provide further indication that consumers are aware of differences between orange juice and fruit drinks, particularly as related to vitamin C content.[47]

The initial decision takes note of the substantial difference in meaning between the superlative degree "highest" used in the Drossler Research Corporation's survey, and the positive degree "high" appearing in Hi-C advertising.[48] On appeal, complaint counsel contend that stricken testimony of Mr. Drossler would have established that a majority of the people surveyed would have named orange juice had the question been rephrased less selectively to ask that they identify those beverages that fit the phrase "high in Vitamin C." [49] We find that even if this testimony had been admitted, it would not have provided reason to infer that Hi-C's representation of high vitamin C content would convey to consumers a claim of comparability or equivalence to orange juice. There is nothing in the record to persuade us that several products with differing vitamin C content could not quite properly be identified as "high" in that nutrient; orange juice has not preempted the right to make a representation of high vitamin C content.

Primarily as a means of supporting the remedy of corrective advertising originally sought in this proceeding, complaint counsel introduced portions of periodic consumer research surveys conducted by Audits and Surveys, Inc., for the Coca-Cola Company during the period of time in which the challenged advertisements were run.[50] After issuance of the complaint in this case, Audits and Surveys, at the instance of respondents, re-examined all of the questionnaires received in an effort to determine the

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[46] RX 41A, RX 45A.

[47] Finding 34B(4); RX 45A.

[48] Finding 34B (1–3).

[49] Appeal brief, p. 21. See transcript, pp. 416–422, for discussion of reasons for use of the superlative "highest" rather than the positive degree "high" in phrasing of questions in the survey.

[50] "The Continuing Foods Study," conducted from January 1, 1969 through March 1971. CX 39A–Z39; Finding 34G. During oral argument (see pp. 58–59), complaint counsel stated that these survey data had been introduced solely for the purpose of supporting the complaint's request for corrective advertising, no longer urged in this appeal. Complaint counsel asked, therefore, that the surveys now be given no weight in determining consumer impressions of Hi-C advertising.

extent to which consumers might have indicated recalling a comparison of any kind having been made by Hi-C advertising. Out of over 13,000 questionnaires completed from January 1, 1969, through March 30, 1971, including responses from 6,386 fruit drink users and 1,469 recallers of Hi-C advertising, only one individual stated that he got the impression of a comparison to orange juice from Hi-C advertisements.[51] We note also that a total of only 31 individuals were recorded as having recalled a comparison to any beverage suggested in Hi-C advertising; of these, 18 saw the implied comparison as involving soft drinks.[52] These results lend support to the contention that Hi-C advertising did not suggest comparisons to any beverages, let alone to orange juice.

The closely related misrepresentation alleged to be conveyed by the claim that Hi-C is "the sensible drink" is similarly grounded in the underlying theory that Hi-C advertising contains a comparison to orange juice.

Complaint counsel's focus on this specific comparison is well evidenced by the attempts to establish throughout this case that Hi-C is not as nutritious as orange juice, not only in terms of vitamin C content, but with respect to other nutrients as well.[53] Thus, for example, it has been argued that Hi-C contains less folic acid than orange juice, that it provides less vitamin A than orange juice, and that, as a result of containing fewer essential nutrients, Hi-C is therefore a less "sensible" drink than orange juice.[54] Complaint counsel rely heavily on testimony seeking to evaluate Hi-C, and the truth of its claims, on the basis of its total nutritional composition.[55] They urge on this appeal that stricken testimony of Dr. Van Itallie would have helped establish that Hi-C is not a "satisfactory food," in view of its relative lack of more than one nutrient.[56] We find that even if this testimony had been received, it would not have related clearly to Hi-C, since the testimony referred to foods that provide "a great many calories and only one nutrient;" Dr. Van Itallie's own testimony already

[51] Finding 34G; RX 23B; transcript, pp. 1225–1227.

[52] RX 23B.

[53] See discussion at p. 14, *supra* [p. 814 herein], of the companion contention that Hi-C is not as economical as one form of orange juice in providing the Recommended Dietary Allowance for vitamin C.

[54] See complaint, Para 9c; Findings 72–80, 85–89; appeal brief, pp. 39–40.

[55] See, *e.g.*, reply brief, pp. 17–18.

[56] Appeal brief, pp. 40–42. Dr. Van Itallie stated: "* * * if a food provides a great many calories and only one nutrient, then that does not make a satisfactory food." (transcript, p. 1025).

had established that Hi-C provided at most a marginally significant contribution to the Recommended Dietary Allowance for calories.[57] More important, however, we are persuaded that all such testimony concerning the relative nutritional composition of Hi-C and orange juice is relevant to this case only insofar as we are able to find a comparison to orange juice, a claim of nutritional equivalence, in the advertising.

In interpreting suggested meanings that might be conveyed by Hi-C advertisements, we cannot ignore the fact that the challenged express claims recurring in the advertising are phrased invariably in the positive degree, *i.e.*, "high" and "sensible," rather than in the comparative or superlative degree. Notwithstanding this fact, complaint counsel, in addition to having urged the presence of comparisons in these advertisements throughout the hearings, now raise on appeal the contention that Hi-C advertising contains a superlative claim of uniqueness as well. Specifically, we are asked to find that the representation of Hi-C as "the sensible drink" implies that Hi-C is a unique product in the sense of being superior to all other sources of vitamin C.[58]

The Commission is willing to recognize that even express claims phrased merely in the positive degree such as "high" and "sensible" can convey comparative, and even superlative, meanings. They can do so, for example, if the advertisement's net impression serves to support such a comparison, or if the consumers viewing the advertisements bring to them the requisite expectations and frame of reference. In finding implied comparisons and claims of uniqueness in such situations, the Commission recognizes also that care must be taken not to prevent advertisers from making truthful and informative declarative statements.

With these thoughts in mind, the Commission has reviewed carefully the Hi-C advertisements involved in this litigation. To interpret fully the possible implied or suggested meanings conveyed, we have considered each Hi-C advertisement in its entirety.[59]

In reviewing Hi-C's advertising, we have looked at the nutritionally oriented claims singly and in the context of the prominent representations, as well as overall mood and ambience, con-

[57] See footnote 30, *supra* [p. 812 herein].

[58] Appeal brief, pp. 45–46.

[59] As urged by complaint counsel (see appeal brief, p. 32), citing *F.T.C.* v. *Sterling Drug Inc.*, 317 F.2d 669, 674 (2d Cir. 1963), it is normally necessary "to consider the advertisement in its entirety and not to engage in disputatious dissection."

veying messages of appealing taste, enjoyment, fun, refreshment, convenience, and variety of flavors. Thus, for example, in light of the comparisons alleged to have been made to orange juice, we note the absence in Hi-C advertising of breakfast scenes so generally associated with the consumption of orange juice.[60]

Having completed a review of the advertisements challenged in this case, the Commission finds that the advertising representations made in behalf of Hi-C are not reasonably likely to have communicated the comparisons and claims of equivalence to citrus juices, and to orange juice, so critical to the allegations advanced by complaint counsel.

V.

Aware of the importance of nutrition and of the relative inability of consumers to test for themselves the validity of nutritional claims made in advertising, the Commission has reviewed fully the advertisements and the record in this case.

We find that the false and misleading representations alleged to have been made in Hi-C's advertising are not reasonably likely to have been conveyed to consumers. Neither the advertisements themselves, nor the evidence produced in the hearings, serve to sustain the challenges to respondents' advertising advanced in this proceeding. This finding was made after considering each advertisement in its entirety, including its overall mood and ambience. The Commission carefully avoided confining its inquiry to the literal meaning of the advertisement, and we have not attributed to the consumer a heightened level of sophistication or knowledge. Thus, our finding simply reflects a deficiency in the evidence in the record.

The decision of the administrative law judge is therefore affirmed, and the complaint dismissed.

FINAL ORDER

This matter is before the Commission on the appeal of complaint counsel from the initial decision of the administrative law judge issued on September 15, 1972, dismissing the complaint. Upon examination of the record, the initial decision, and the briefs and oral argument in support of this appeal and in opposition thereto, the Commission has concluded, for the reasons set forth in the accompanying opinion, that the initial decision of the

[60] See Findings 34D, E.

administrative law judge should be adopted and issued as the decision of the Commission. Accordingly,

It is ordered, That complaint counsel's appeal from the initial decision of the administrative law judge be, and it hereby is, denied.

It is further ordered, That the initial decision of the administrative law judge be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the complaint in the captioned matter be, and it hereby is, dismissed.

Commissioner Jones dissenting.

IN THE MATTER OF

WARNER-LAMBERT COMPANY

Docket 8850. Interlocutory Order, Oct. 5, 1973.

Order granting appeal of complaint counsel; instructing the law judge that on question of whether a firm should be considered a potential entrant into a market because of research activity, he should limit the evidence and discovery to companies where research activity has at least reached the stage for filing of New Drug Application; and remanding case to law judge for further proceedings consistent with order.

Appearances

For the Commission: *Paul R. Teetor, Thomas P. Athridge, Robert R. Jacobs* and *Donald A. Lofty.*

For the respondent: *Mudge, Rose, Guthrie & Alexander,* New York, N.Y. and *Bergson, Borkland, Margolis & Adler,* Wash., D.C.

ORDER RULING ON INTERLOCUTORY APPEAL

Before the Commission is an application filed by complaint counsel under Rule 3.23(a) requesting the Commission to entertain an interlocutory appeal from a ruling by the administrative law judge directing complaint counsel to turn over to respondent's counsel, as part of a prehearing discovery order, a copy of a 527-page Food and Drug Administration (FDA) computer print-out entitled "Alphabetic List of IND Generics."

The FDA computer print-out lists all Investigational New Drug notices (IND's) filed with the agency.[1] The print-out was given to

[1] Under FDA procedures, prior to marketing most new drugs, the manufacturer must complete a series of tests demonstrating safety and efficacy. After substantial completion of laboratory and animal testing, an IND notice must be filed and accepted by the FDA. An IND is

complaint counsel during the pre-complaint stage of this matter by the FDA. The FDA claims the print-out was given only on a confidential basis and it objects to the turnover of the document to respondent's counsel.

The law judge ruled that the list is discoverable because it may contain exculpatory material that would aid respondent in defending against the "potential competition" part of complaint counsel's case. In this connection, complaint counsel contends that the merger violated Section 7, not only because it eliminated existing competition between the two companies in an overall "drug" market and "ethical drugs" segment thereof (as well as some seven product submarkets), but also because potential competition was eliminated in numerous other submarkets. As a result of "Complaint Counsel's Limitation of Proof" dated March 8, 1973, and earlier concessions, the merger remains subject to challenge in the two broad markets and in 23 products listed in Appendix A to complaint counsel's Limitation of Proof.

In addition, there are 22 "Appendix B" submarkets as to which complaint counsel intend to offer proof as to the existence of competition or potential competition "to show the breadth of competition between the merging parties in the complaint's two major markets (all drug and all ethical drugs), as bearing on the issue of violation and on the issue of relief." However, complaint counsel do not intend to argue that a violation occurred in any Appendix B market standing alone.

It appears that complaint counsel intends to offer evidence of potential competition between the merging firms as to 16 "Appendix A" submarkets. They have indicated that they would rely on pre-NDA research by one or the other of the merging firms to show the existence of potential competition in some of these submarkets. In addition, they intend to show violation of Section 7 in a total of nine markets because of elimination of actual competition between the two firms.

Although respondent denied that pre-clinical or IND-level research was sufficient to establish Warner-Lambert or Parke, Davis as likely potential entrants into a drug product line, it argued that it should have access to the list in question since it may show, or lead it to evidence that will show that there were

a prerequisite to the clinical use of the drug on humans in tests designed to demonstrate efficacy and safety in order to support a New Drug Application ("NDA"). Frequently, supplemental testing is required by the FDA after the filing of an NDA. Many drugs given IND clearance never receive approval for marketing and may never even be the subject of an NDA filing by the company.

numerous other firms engaged in pre-NDA research. If so, respondent contended this would support an argument that any loss of potential competition resulting from the merger was not significant.[2]

Prehearing conferences were held to consider the claim of confidentiality of the list in question as well as some other computer print-outs which complaint counsel had obtained from FDA. As a result of these conferences, at which the FDA was represented by counsel, the administrative law judge ordered that the "Alphabetic List of IND Generics" be produced subject to a protective order which would limit access to respondent's outside counsel and independent medical or scientific experts.[3] The law judge indicated that if the print-out was not produced, he would have to dismiss all of the submarkets in the complaint in which elimination of potential competition is alleged. Both aspects of his ruling are challenged in complaint counsel's petition which was filed with the Commission on June 22, 1973.

In their appeal complaint counsel state in part that:

> [NDA's] are infintely more significant to the question of potential competition, since many drugs that are the subject of Investigational New Drugs [IND] testing never mature into the stage of New Drug Applications, approval of which is *sine qua non for marketing*. It is for this reason that complaint counsel nowhere allege that the mere fact that one of the parties to the acquisition had an IND on file by itself signifies that serious potential competition has been eliminated in any particular submarket.

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[2] It appears that if respondent's counsel were given the "Alphabetic List of IND Generics" they could, through some effort, tell who the sponsoring manufacturer is. This would involve comparing the entries on the Alphabetic List with manufacturer entries on another FDA print-out in complaint counsel's possession (which FDA is willing to have disclosed). Respondent's counsel further assert that they believe a knowledgeable pharmacologist could ascertain from the generic names the probable therapeutic uses for which many of the drugs were tested. Although complaint counsel question that respondent's counsel and expert could glean pertinent information from the list, respondent's argument is supported by FDA objections to disclosure on the grounds, *inter alia*, that information on the list "is a matter of great secrecy and value in the drug industry because it indicates those chemical compounds that have been successfully tested at the preclinical stage * * *" * * * "Disclosure of such information would enable a person to assemble a picture and assessment of the reearch activities of drug investigators * * *" Affidavit of Mr. Sam D. Fine, Associate Commissioner for Compliance, FDA, p. 5, attached as Exhibit 2 to complaint counsel's petition.

[3] Some six other FDA print-outs (which include print-outs of lists of NDA manufacturers and generic names)—not directly involved in this appeal—were also given to complaint counsel by the FDA during the early stages of the investigation and were ordered to be turned over to respondent's counsel. Although originally confidential in FDA's eyes, pursuant to a new policy on disclosure of information proposed in the Federal Register (37 Fed. Reg. 9128), FDA informed the law judge and complaint counsel that the entire contents of these print-outs may be disclosed publicly except for a small portion of one concerning inactive ingredients which should be the subject of the law judge's proposed protective order. However, it maintains its objection to turnover of the IND Generics print-out even under a protective order, citing long-standing policy and statutory provisions.

In view of this statement, the Commission on July 26, 1973, directed the parties to brief the Commission on whether the Commission, "in the interest of keeping the scope of the record within reasonable bounds and confined to evidence clearly probative," should limit both parties' evidence and discovery to research activity that has at least reached the stage of the filing of a New Drug Application.[4]

Although complaint counsel state that such a limitation would be undesirable, we are not persuaded from their submission that this is so. They describe only 4 submarkets out of the 23 "Appendix A" submarkets that would be affected or eliminated by such limitation.[5] Our purpose in suggesting such limitation of proof in this case was not, as complaint counsel seem to assume, based on the view that pre-NDA research could never be "relevant" as to the question of whether a firm is a potential entrant, but out of concern that inquiry into facets of research at the pre-NDA stage—usually regarded as highly confidential by drug houses—might not be essential in this case given the fact that complaint counsel have indicated that post-NDA activity and other evidence will be shown to establish potential competition in many submarkets and that they acknowledge that NDA's "are infinitely more significant to the question of potential competition."

Respondent in its brief in response to our order reiterates its position that pre-NDA research activity is "too remote from ultimate competitive entry to be significant for Section 7 purposes," but argues that the proposed limitation would nevertheless unduly restrict its ability to rebut the possibility that complaint counsel might rely solely on expressions of "marketing interest" to demonstrate likely potential entry by Warner-Lambert or Parke, Davis. Assuming such a bare bones approach was made by complaint counsel, we fail to see how evidence, which respondent itself argues is not probative on the question of potential entry, would be necessary for effective rebuttal in such eventuality.

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[4] The order also directed complaint counsel to submit an affidavit showing to what extent, if any, they have used the print-out in preparing their case-in-chief. Complaint counsel's affidavit makes it clear that although they retained the print-out in question, along with other print-outs, "on the basis of a general feeling that such information might prove useful in the course of the pending investigation," they have not used nor intend to use the IND list for preparing their own case.

[5] Complaint counsel state that these four are not the only ones that would be affected, but fail to spell out what other markets would be affected. The purpose of our order directing further briefing was to find out the probable impact on the case by such limitation of proof. We cannot be left to speculate as to how many additional unnamed markets might be affected or to what extent.

The Commission in the past has recognized its responsibility in seeing that hearings in Section 7 cases do not reach unnecessarily large proportions with detailed inquiry into every possible economic ramification of a merger:

> [T]he danger is acute that if proceedings under Section 7 are allowed to become top-heavy with masses of economic and business data which are not strictly probative, the statute will become useless as an enforcement tool. * * * Clear and relatively simple rules, and the rigorous exclusion of evidence which bears only remotely upon the central concerns of the statute, are essential if Section 7 is not to become a judicial and administrative nullity. *Procter & Gamble*, 63 F.T.C. 1465, 1559 (1963).

See also, *United States v. Philadelphia National Bank*, 374 U.S. 321, 362 (1963): "[W]e must be alert to the danger of subverting Congressional intent by permitting a too-broad economic investigation."

It is apparent to us that pre-NDA research is not crucial to complaint counsel's case and lacks the probative force of evidence that complaint counsel intend to rely on with respect to other markets. We note this case has been in the pre-hearing stage for two years, and it would appear that access to the IND listing might in turn lead to further attempts to inquire into highly-guarded research by drug firms and needlessly threaten further delay in the proceeding. Accordingly, we grant the appeal and instruct the administrative law judge that on the question of whether a firm should be considered a potential entrant into a market because of research activity, he should limit the evidence and discovery to companies where research activity has at least reached the stage of the filing of a New Drug Application.[6]

The matter is remanded to the law judge for further proceedings consistent with this order.

It is so ordered.

IN THE MATTER OF

LOVE TELEVISION & STEREO RENTAL, INC., ET AL.

Docket C-2245. Order, Oct. 9, 1973.

Order denying respondent's petition for modification of consent order in lieu

[6] In the case of certain products such as biologicals, where the regulatory mechanisms do not include "NDA" filings, the law judge should endeavor to limit the evidence in an equivalent fashion. Also, our disposition of this interlocutory appeal should not be regarded as removing from him authority to deal fully with other questions that may arise that bear on the subject to research evidence or other motions directed to simplification of issues.

of Commission's proposed modification, and directing compliance with the consent order issued July 11, 1972, 81 F.T.C. 86.

Appearances

For the Commission: *Lewis H. Goldfarb.*
For the respondents: *Henning, Chambers & Mabry,* Atlanta, Ga.

ORDER IN RESPONSE TO PETITION FOR MODIFICATION

On January 23, 1973 [82 F.T.C. 263], the Commission issued a proposed modification of its July 11, 1972 order in this matter granting in part and denying in part respondents' August 7, 1972 petition for modification. The proposed modification was conditioned upon respondents' acceptance thereof and submittal of a signed agreement containing a consent order which contained a new "Paragraph One." Respondents rejected the proposed modification and instead, on April 3, 1973, filed a petition for modification requesting that the following language be added after Paragraph 1(b) of the July 11, 1972 order:

Provided, however, that the requirements of this Paragraph 1 shall not apply to respondents' individualized oral responses to spontaneous telephone or in-store inquiries initiated by customers.

Respondents contend that it was never intended nor contemplated by the parties to the consent agreement that the provisions of Paragraph 1 would be applicable to oral responses to spontaneous inquiries made by customers. They also contend that the requested modification will adequately protect the public interest.

The Commission does not agree, however, that its decision to accept the proferred consent order contemplated that Paragraph 1 disclosures should be limited to representations or advertisements initiated by respondents. It was also the intent of the Commission to require the disclosures in every instance, regardless of who initiated the conversation. The present language of Paragraph 1 reflects the intent of the Commission in this regard. Accordingly,

It is ordered, That respondents' petition herein be denied and that respondents comply with the Commission's consent order issued July 11, 1972.