FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

TOMY CORPORATION

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

Docket C-3080. Complaint, Jan. 6, 1982—Decision, Jan. 6, 1982

This consent order requires a Carson, California corporation, among other things, to cease, in connection with the advertising, distribution and sale of any doll house, accessory, or other toy product, misrepresenting that any collection of products is a set, unless all the products depicted are available for purchase as a set. The firm is prohibited from misrepresenting the availability of any product; describing two or more toys in any advertisement which cannot be purchased as a set, unless accompanied by a disclosure that such products are sold separately; and failing to distribute a copy of the order to all operating divisions, including any entity engaged in the preparation of respondent's advertising.

Appearances

For the Commission: *Judith P. Wilkenfeld* and *Elaine D. Kolish.*

For the respondent: *Aaron Locker* and *Frederick Locker,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act any by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Tomy Corporation, 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. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 901 E. 233rd St., Carson, California.

PAR. 2. Respondent is now, and has been engaged in the manufacture, packaging, advertising, offering for sale, sale and distribution of toys and related products, including a dollhouse, furniture and accessories, to the public and to distributors and retailers for sale to the public.

PAR. 3. In the course and conduct of its business, respondent now causes, and continues to cause its toy products to be packaged, sold, shipped and distributed from its place of business in the State of California or from the state of manufacture to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains and at all times mentioned herein has maintained, a substantial course of trade in said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, respondent has been and is now, in substantial competition in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, with corporations, firms and individuals engaged in the sale and distribution of their respective toy products.

PAR. 5. In the course and conduct of its said business, respondent has disseminated, and caused the dissemination of certain television advertisements concerning said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which were broadcast by television studios 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 products in or affecting commerce.

PAR. 6. The respondent manufactures and assembles a dollhouse, doll family, furniture and accessories under the label "Smaller Home and Garden Deluxe Set." The Smaller Home and Garden Deluxe Set was advertised nationally. These advertisements implied that the Deluxe Set would be readily available for purchase by consumers at retail stores. In truth and in fact, the Smaller Home and Garden Deluxe Set was not available for purchase in a substantial number of retail stores.

PAR. 7. Typical and illustrative of the respondent's television advertisements for the Smaller Home and Garden Deluxe Set are the statements quoted below. In these advertisements, the exterior of an architecturally modern doll house is shown. The interior of the dollhouse is also shown, room by room. All the rooms shown are furnished. In one representative ad, as the various rooms are displayed, an announcer states:

In the Smaller Home and Garden Deluxe Set, there's a living room that has a toy stereo with tiny make-believe headphones and records, and a cozy bedroom with a roll top desk that rolls. There's also a gourmet kitchen. It's for little decorators with big ideas.

As the exterior of the dollhouse is shown a second announcer concludes the ad, by stating, "Smaller Home and Garden Deluxe Set. All this plus other pieces. You have to put it together. By Tomy."

PAR. 8. Through the use of such advertisements disseminated in various parts of the United States, respondent has represented directly and by implication:

1) That the Smaller Home and Garden Deluxe Set is readily available for purchase by consumers as an actual set which contains the dollhouse and all the furniture and accessories depicted and referenced in the advertisements;

2) That the Smaller Home and Garden dollhouse and furniture and accessories are sold together as depicted and referenced in said advertisements.

PAR. 9. In truth and in fact:

1) The Smaller Home and Garden Deluxe Set is not readily available for purchase by consumers;

2) The Smaller Home and Garden dollhouse as packaged and sold does not contain any of the furniture or accessories depicted or referenced in said advertisements.

Therefore, the advertisements referred to herein are unfair and deceptive.

PAR. 10. The use by respondent of the aforesaid false, misleading and deceptive statements, representations, acts and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 11. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted and now constitute unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

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 respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, 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 sixty (60) days, and having duly considered the comment filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Tomy Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 901 E. 233rd St., in the City of Carson, State of California.

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

For purposes of this Order, each of the terms listed below is defined as follows:

1. The term *set* shall mean any collection of products that is available for purchase as a unit by consumers or that may

reasonably be inferred to be available for purchase as a unit by consumers.

2. With regard to television advertising, the term *clearly and conspicuously disclosed* shall mean a disclosure which complies with the following requirements: (a) the disclosure shall be presented simultaneously in both the audio and video portions of the television advertisement; (b) the video portion of the disclosure shall contain letters of sufficient size so that it can be easily seen and read on all television sets, regardless of picture tube size; (c) the video portion of the disclosure shall contain letters of a color or shade that readily contrast with the background, and the background shall consist of only one color or shade; (d) no other sounds, including music, shall occur during the audio portion of the disclosure; (e) the video portion of the disclosure shall appear on the screen for a sufficient duration to enable it to be completely read by the viewer; and (f) the audio and video portions of the disclosure shall immediately follow the specific sales representations to which they relate and shall occur each time the representation is presented during the advertisement; in cases where a disclosure is required, but is not linked to a specific representation, it shall appear in immediate conjunction with the major sales theme of the advertisement. In wording the disclosure the audience to whom the disclosure is directed shall be considered in order to assure that viewers (such as children) can understand the full meaning of the disclosure.

I.

It is ordered, That respondent Tomy Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any dollhouse, furniture, accessories or other toy products in or affecting commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from directly or by implication:

A) Representing, in any manner, that any collection of products is a set, if any product in the collection is not included in a set available for purchase by consumers;

B) Depicting or describing in any advertisement, or other printed material disseminated to consumers, two or more non-identical products which are not available for purchase by consumers as a set, unless respondent clearly and conspicuously discloses that the products must be purchased separately;

C) Representing, in any manner, that a product or set is generally or widely available for purchase by consumers in any market area, if the product or set is not substantially available in that market area; *provided, however,* in those instances in which the product or set is not substantially available in that market area, respondent shall be permitted to advertise that the product is available on a limited basis, if the advertisement clearly and conspicuously discloses that the product or set is only available on a limited basis.

II.

It is further ordered, That respondent shall maintain written records and retain:

A) All materials that were relied upon or utilized in making any representation in advertisements, sales materials, promotional materials or post-purchase materials concerning the availability of any dollhouse, furniture and accessories or other toy product;

B) All material relating to the distribution of advertisements, sales materials, promotional materials or post-purchase materials for the above named products;

C) All material relating to the distribution of the above named products.

Such records and materials shall be retained by respondent for a period of at least three years from the date such advertising, sales materials, promotional materials, or post-purchase materials are last disseminated. Such records may be inspected by staff of the Commission upon reasonable notice.

III.

It is further ordered, That respondent shall forthwith distribute a copy of this Order to each of its operating divisions and to any consultant or agency which engages or shall engage in the preparation or dissemination of respondent's advertising.

IV.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the 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 this Order.

V.

It is further ordered, That respondent 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 manner and form in which it has complied with this Order.

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

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

Docket 8883. Complaint, April 26, 1972—Dismissal Order, Jan. 15, 1982

This order vacates in its entirety, the September 1, 1981 Initial Decision and dismisses with prejudice the Commission's April 26, 1972 complaint which charged three cereal manufacturers with engaging in practices having the effect of maintaining a highly concentrated noncompetitive market structure in the production and sale of ready-to-eat cereals.

Appearances

For the Commission: *Anthony Low Joseph, David M. Malone, Lawrence B. Berman, Claudia R. Higgins, Louis R. Monacell, Alan J. Friedman* and *Dennis F. Johnson.*

For the respondents: *Frederick P. Furth, Thomas R. Fahrner, Bruce J. Wecker, Charles P. Wolff, Michael P. Lehmann* and *George F. Bishop, Furth, Fahrner, Bluemle & Mason,* San Francisco, Calif. and *Scott R. Campbell,* Battle Creek, Mich., in-house counsel, for respondent Kellogg Company. *David C. Murchinson, Edward F. Howrey, Ralph J. Savarese, John R. Fornaciari, Margaret M. Zwisler* and *Frank P. Spinella, Howrey & Simon,* Washington, D.C. and *Clifford L. Whitehill, Robert J. Fulgency* and *John F. Finn,* Minneapolis, Minn., in-house counsel, for respondent General Mills. *Robert MacCrate, James E. Akers, Jeffrey I. Zuckerman, Richard J. Rawson* and *David Lesser, Sullivan & Cromwell,* Washington, D.C., *John F. Kovin, Clifford & Warnke,* Washington, D.C. and *Robert Y. Fox, Peter J. Deluca* and *Bruce L. Bozeman,* White Plains, N.Y., in-house counsel, for respondent General Foods Corporation. *Charles Orlove* and *Joseph M. Jacobs, Jacobs, Burns, Sugarman & Orlove,* Chicago, Ill., for intervenor American Federation of Grain Millers, AFL/CIO.

COMPLAINT

The Federal Trade Commission has reason to believe that the party respondents named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act (Title 15, U.S.C. 45). Accordingly, the Commission hereby issues this Complaint stating its charges with respect thereto as follows:

1. Respondents have been and are now engaged in, among other business activities, the manufacture and sale of ready-to-eat (RTE) cereals. RTE cereals are food products made from barley, corn, oats, rice or wheat and various combinations of such grains which are flaked, granulated, puffed, shredded or processed in other ways. RTE cereals are eaten primarily as a breakfast food requiring no cooking or heating preparation by the consumer. [2]

All of the respondents have been engaged in the cereal business for over 40 years, and in the RTE cereal business for over 30 years. Since 1950 respondents have consistently accounted for over 84 percent of the sales of RTE cereals.

2. A. Respondent Kellogg Company (Kellogg) was founded in 1906. It is a corporation organized and doing business under the laws of the State of Delaware, with its principal office and place of business located at 235 Porter St., Battle Creek, Michigan. Kellogg manufactures and sells, among other things, RTE cereals, tea, soup, gelatin, and pudding.

In 1970 Kellogg had assets of $347 million and sales of $614 million. In 1970 Kellogg ranked 191st in sales among the nation's 500 largest industrial corporations.

In 1969 Kellogg's domestic sales of RTE cereals were $300 million and advertising expenditures for RTE cereals were over $36 million. Kellogg is the largest producer of RTE cereals in the United States.

B. Respondent General Mills, Inc. (General Mills) was incorporated in 1928. It is a corporation organized and doing business under the laws of the State of Delaware with its principal office and place of business located at 9200 Wayzata Boulevard, Minneapolis, Minnesota. General Mills manufactures and sells, among other things, RTE cereals, flour, toys, chemicals, clothes, and jewelry.

In 1970 General Mills had assets over $665 million, and sales were over $1 billion. In 1970 General Mills ranked 116th in sales among the nation's 500 largest industrial corporations.

In 1970, General Mills' domestic RTE cereal sales amounted to $141 million and advertising expenditures for RTE cereals were $19 million. General Mills is the second largest producer of RTE cereals in the United States. [3]

C. Respondent General Foods Corporation (General Foods) was incorporated in 1922. It is a corporation organized and doing business under the laws of the State of Delaware with its principal office and place of business located at 250 North St., White Plains, New York. As the nation's largest food manufacturer, General Foods produces and sells, among other things, RTE cereals, coffee, beverages, frozen food, pet foods, and desserts.

In 1970 the total assets of General Foods were over $1.3 billion and sales were over $2 billion. In 1970 General Foods ranked 45th in sales among the nation's 500 largest industrial corporations.

In 1970, General Foods' domestic sales of RTE cereals were over $92 million and advertising expenditures for RTE cereals were over $9 million. General Foods is the third largest producer of RTE cereals in the United States.

D. Respondent The Quaker Oats Company (Quaker) was incorporated in 1901. It is a corporation organized and doing business under the laws of the State of New Jersey with its principal office and place of business located at Merchandise Mart Plaza, Chicago, Illinois. Quaker manufacturers and sells, among other things, RTE cereals, frozen food, cookies, pet foods, and chemicals.

In 1970, Quaker had assets over $391 million and sales of $597 million. In 1970 Quaker ranked 195th in sales among the nation's 500 largest industrial corporations.

In 1970 Quaker's domestic sales of RTE cereal were $56 million. Approximately $9 million was spent in 1970 to advertise Quaker RTE cereals. Quaker is the fourth largest producer of RTE cereals in the United States.

E. Nabisco, Inc. (Nabisco) is not a respondent herein. It has, however, participated in some of the acts and practices alleged herein and has contributed by acquiescence to the noncompetitive structure of the RTE cereal market, as alleged herein. Nabisco was incorporated in 1898. It is a corporation organized and doing business under the laws of the State of New Jersey with its principal office and place of business located at 425 Park Ave., New York, New York. Nabisco manufacturers and sells, among other things, RTE cereals, cookies, candy, and snack foods. [4]

In 1970 Nabisco's total assets were over $503 million and sales were over $868 million. In 1970 Nabisco ranked 140th in sales among the nation's 500 largest industrial corporations.

Nabisco's domestic sales of RTE cereals were $26 million in 1969 and advertising expenditures for RTE cereals were $3 million. Nabisco is the fifth largest producer of RTE cereal in the United States.

F. Ralston Purina Company (Ralston) is not a respondent herein. It has, however, participated in some of the acts and practices alleged herein and has contributed by acquiescence to the noncompetitive structure of the RTE cereal market, as alleged herein.

Ralston was incorporated in 1894. It is a corporation organized and doing business under the laws of the State of Missouri with its principal office and place of business located at Checkerboard Square, St. Louis, Missouri. Ralston manufactures and sells, among other things, RTE cereals, pet foods, animal feed, snack foods, and frozen food.

In 1970, Ralston's total assets were over $775 million and sales were over $1.5 billion. In 1970 Ralston ranked 71st in sales among the nation's 500 largest industrial corporations.

In 1969 Ralston's domestic RTE cereal sales were over $20 million and advertising expenditures were over $4 million. Ralston is the sixth largest producer of RTE cereal in the United States.

3. In the course and conduct of their business, respondents now ship, and for some time past have shipped, their RTE cereals from their respective production facilities in various States to locations in various other States of the United States, and maintain and at all times mentioned herein have maintained, a substantial course of trade in RTE cereals in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. Each of the respondents is in substantial competition with each and all of the other respondents and with other cereal producers in the manufacture and sale of RTE cereals in interstate commerce, except to the extent that competition has been hindered, lessened and eliminated as hereinafter set forth. [5]

5. During the past 30 years the RTE cereal industry has experienced substantial growth. In 1940, 453 million pounds of RTE cereal were produced; 900 million pounds were produced in 1960; and in 1970 over 1 billion pounds of RTE cereal were produced. The value of RTE cereal increased from $163 million in 1950 to over $650 million in 1970.

In 1940 respondents' sales accounted for approximately 68 percent of the RTE cereal market; in 1950, for 84 percent, and in 1970, for 90 percent. In 1969 respondents controlled the following approximate shares of the RTE cereal market: Kellogg, 45 percent; General Mills, 21 percent; General Foods, 16 percent; and Quaker, 9 percent. In 1969 Nabisco and Ralston each had an approximate share of four percent of the RTE cereal market.

6. For at least the past 30 years, and continuing to the present, respondents, and each of them, have engaged in acts or have practiced forbearance with respect to the acts of other respondents, the effect of which has been to maintain a highly concentrated, noncompetitive market structure in the production and sale of RTE cereal.

During this period respondents, in maintaining the aforesaid market structure, have been, and are now engaged in, among others, the following acts and practices:

A. *Brand Proliferation, Product Differentiation and Trademark Promotion*

Respondents have introduced to the market a profusion of RTE cereal brands. During the period 1950 through 1970 approximately 150 brands, mostly trademarked, were marketed by respondents. Over half of these brands were introduced after 1960. In introducing and promoting these new brands respondents have employed intensive advertising directed particularly to children. Respondents have used advertising to promote trademarks that conceal the true nature of the product.

Respondents artificially differentiate their RTE cereals. Respondents produce basically similar RTE cereals, and then emphasize and exaggerate trivial variations such as color and shape. Respondents employ trademarks to conceal such basic similarities and to differentiate cereal brands. Respondents also use premiums to induce purchases of RTE cereals. **[6]**

Respondents have steadily increased the level of advertising expenditures for RTE cereals. During the period 1950 through 1970, respondents' aggregate annual advertising expenditures for RTE cereals tripled from $26 million to $81 million. In 1970, respondents' advertising to sales ratio for RTE cereals averaged 13 percent.

These practices of proliferating brands, differentiating similar products and promoting trademarks through intensive advertising result in high barriers to entry into the RTE cereal market.

B. *Unfair Methods of Competition in Advertising and Product Promotion*

(1) By means of statements and representations contained in their advertisements, respondents:

In advertisements aimed at children, represent directly or by implication, that their RTE cereals without any other foods enable children to perform the physical activities represented or implied in their advertisements.

In truth and in fact:

Respondents' RTE cereals do not enable children to perform the physical activities represented or implied in their advertisements. A child's ability to perform such physical activities depends on many other factors, including but not limited to general body build, exercise, rest, a balanced diet and age.

(2) By means of statements and representations contained in their advertisements respondents Kellogg, General Mills, and General Foods represent, directly or by implication, that consuming RTE cereal at breakfast:

(a) Will result in loss of body weight without vigorous adherence to a reduced calorie diet,

(b) Will result in maintenance of present body weight even if total caloric intake increases, or

(c) Will result in loss or maintenance of body weight without adherence to regular physical exercise. [7]

In truth and in fact:

(a) Consuming RTE cereal at breakfast will not result in loss of body weight without vigorous adherence to a reduced calorie diet.

(b) Consuming RTE cereal at breakfast will not result in maintenance of body weight even if total caloric intake increases.

(c) Consuming RTE cereal at breakfast will not result in loss or maintenance of body weight without adherence to regular physical exercise.

(3) By means of statements and representations contained in their advertisements respondent General Mills and Kellogg:

(a) Represent, directly or by implication, that failure to eat one of their RTE cereals results in the failure of athletes or others to perform to their full capabilities.

(b) Represent, directly or by implication, that the ingestion of one of their RTE cereals by athletes or others enables them to perform better in their repsective activities.

In truth and in fact:

(a) Failure to eat one of the RTE cereals of such respondents will not result in the failure of athletes or others to perform to their full capabilities.

(b) The ingestion of one of the RTE cereals of such respondents will not enable athletes or others to perform better in their respective activities.

(4) The use of respondents of the aforesaid unfair methods of competition in advertising and product promotion has the capacity and tendency to mislead consumers, particularly children, into the mistaken belief that respondents' RTE cereals are different from

other RTE cereals, thereby facilitating artificial differentiation and brand proliferation. These unfair methods of competition have contributed to and enhanced respondents' [8]ability to obtain and maintain monopoly prices and to exclude competitors from the manufacture and sale of RTE cereal.

C. *Control of Shelf Space*

Kellogg is the principal supplier of shelf space services for the RTE cereal sections of retail grocery outlets. Such services include the selection, placement and removal of RTE cereals and allocation of shelf space for RTE cereals to each respondent and to other RTE cereal producers.

Through such services respondents have interfered with and now interfere with the marketing efforts of other producers of RTE and other breakfast cereals and producers of other breakfast foods. Through such services respondents restrict the shelf positions and the number of facings for Nabisco and Ralston RTE cereals, and remove the RTE cereals of small regional producers.

All respondents acquiesce in and benefit from the Kellogg shelf space program which protects and perpetuates their respective market shares through the removal or controlled exposure of other breakfast food products including, but not limited to, RTE cereal products.

D. *Acquisition of Competitors*

During the past 70 years numerous acquisitions have occurred in the breakfast cereal industry. One of the effects of these acquisitions was the elimination of significant sources of private label RTE cereal. Among them are the following.

In 1943, General Foods acquired Jersey Cereal Company, a Pennsylvania corporation. Before acquisition by General Foods, Jersey Cereal Company was a substantial competitor in the sale of private label and other RTE cereal.

In 1943, Kellogg leased and controlled the manufacturing facilities of Miller Cereal Company, Omaha, Nebraska, a substantial competitor in the sale of private label and other RTE cereal. In 1958, upon termination of the said leasing agreement, Kellogg purchased the assets of Miller. [9]

In 1946, General Foods acquired the RTE manufacturing facilities of Campbell Cereal Company, Minneapolis, Minnesota, a substantial competitor in the sale of RTE cereal. Following this acquisition, General Foods dismantled the RTE facilities of Campbell and shipped said facilities to South Africa.

The aforesaid acquisitions have enhanced the shared monopoly structure of the RTE cereal industry.

7. Respondents, and each of them, have exercised monopoly power in the RTE cereal market by engaging in the following price and sales promotion practices, among others:

(a) Refrained from challenging each other's decisions to increase prices for RTE cereals, and, in general, acquiesced in or followed the price increases of each of them;

(b) Restricted the use of trade deals and trade-directed promotions for RTE cereals;

(c) Limited the use of consumer-directed promotions for RTE cereals, such as coupons, cents-off deals, and premiums.

8. Respondents' acts and practices aforesaid have had the following effects, among others:

(a) Respondents have, individually and collectively, established and maintained artificially inflated prices for RTE cereals.

(b) Respondents have obtained profits and returns on investment substantially in excess of those that they would have obtained in a competitively structured market.

(c) Product innovation has been largely supplanted by product imitation.

(d) Actual and potential competition in the manufacture and sale of RTE cereals has been hindered, lessened, eliminated and foreclosed. **[10]**

(e) Significant entry in the RTE cereal market has been blockaded for over thirty years.

(f) Meaningful price competition does not exist in the RTE cereal market.

(g) American consumers have been forced to pay substantially higher prices for RTE cereals than they would have had to pay in a competitively structured market.

9. Through the aforesaid acts and practices:

(a) Respondents individually and in combination have maintained, and now maintain, a highly concentrated, noncompetitive market structure in the production and sale of RTE cereal, in violation of Section 5 of the Federal Trade Commission Act.

(b) Respondents, individually and collectively, have obtained, shared and exercised, and now share and exercise, monopoly power in, and have monopolized, the production and sale of RTE cereal, in violation of Section 5 of the Federal Trade Commission Act.

(c) Respondents, and each of them, have erected, maintained and raised barriers to entry to the RTE cereal market through unfair methods of competition, in violation of Section 5 of the Federal Trade Commission Act.

Initial Decision by

Alvin L. Berman, Administrative Law Judge

September 1, 1981

Preliminary Statement

The Commission's complaint, issued in April 1972, charged Kellogg Company ("Kellogg"), General Mills, Inc. ("General Mills"), General Foods Corporation ("General Foods"), and The Quaker Oats Company ("Quaker") with violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

Respondents' violations were alleged to have been in connection with their manufacture and sale of ready-to-eat ("RTE") cereals, described as "food products made from barley, corn, oats, rice or wheat and various combinations of such grains which are flaked, granulated, puffed, shredded or processed in other ways. RTE cereals are eaten primarily as a breakfast food requiring no cooking or heating preparation by the consumer" (Par. 1).

Respondents were charged (Par. 6) with engaging in acts of, or with practicing, "forebearance with respect to the acts of other respondents, the effect of which has been to maintain a highly concentrated, noncompetitive market structure in the production and sale of RTE cereal." The acts and practices charged included brand proliferation, product differentiation and trademark promotion, backed by intensive and steadily increasing levels of advertising (Par. 6A); and control of shelf space to the disadvantage of competitors by acquiescing in a Kellogg shelf space program (Par. 6C). The complaint alleged further, as follows:

7. Respondents, and each of them, have exercised monopoly power in the RTE cereal market by engaging in the following price and sales promotion practices, among others:

(a) Refrained from challenging each other's decisions to increase prices for RTE cereals, and, in general, acquiesced in or followed the price increases of each of them;

(b) Restricted the use of trade deals and trade-directed promotions for RTE cereals;

(c) Limited the use of consumer-directed promotions for RTE cereals, [2]such as coupons, cents-off deals, and premiums.[1]

8. Respondents' acts and practices aforesaid have had the following effects, among others:

(a) Respondents have, individually and collectively, established and maintained artificially inflated prices for RTE cereals.

(b) Respondents have obtained profits and returns on investment substantially in excess of those that they would have obtained in a competitively structured market.

(c) Product innovation has been largely supplanted by product imitation.

(d) Actual and potential competition in the manufacture and sale of RTE cereals has been hindered, lessened, eliminated and foreclosed.

(e) Significant entry in the RTE cereal market has been blockaded for over thirty years.

(f) Meaningful price competition does not exist in the RTE cereal market.

(g) American consumers have been forced to pay substantially higher prices for RTE cereals than they would have had to pay in a competitively structured market.

9. Through the aforesaid acts and practices:

(a) Respondents individually and in combination have maintained, and [3]now maintain, a highly concentrated, noncompetitive market structure in the production and sale of RTE cereal, in violation of Section 5 of the Federal Trade Commission Act.

(b) Respondents, individually and collectively, have obtained, shared and exercised, and now share and exercise, monopoly power in, and have monopolized, the production and sale of RTE cereal, in violation of Section 5 of the Federal Trade Commission Act.

(c) Respondents, and each of them, have erected, maintained and raised barriers to entry to the RTE cereal market through unfair methods of competition, in violation of Section 5 of the Federal Trade Commission Act.

Nabisco, Inc. ("Nabisco") and Ralston Purina Company ("Ralston"), neither of which was named as a respondent, were alleged to have participated in some of the acts and practices alleged in the complaint and, by their acquiescence, to have contributed to the noncompetitive structure of the RTE cereal market (Par. 2E, F).

The complaint further alleged (Pars. 3–4) that the respondents were engaged in commerce in connection with their trade in, and manufacture and sale of, RTE cereals, as "commerce" is defined in the Federal Trade Commission Act.

On June 29, 1972, respondents filed their answers to the complaint in which they admitted engaging in commerce, but otherwise denied, in substance, the allegations of the complaint.

By order of November 16, 1979, the Commission granted the amended motion of the American Federation of Grain Millers AFL–

[1] The complaint also contained certain allegations of false and deceptive advertising (Par. 6B). These allegations are not being pursued by complaint counsel at this time.

CIO/CLC for leave to intervene for the purpose of presenting evidence relative to the relief proposed by complaint counsel.

It is significant that the complaint does not charge respondents with having conspired to monopolize. The words "conspire", "contract" or "agree" (or variants thereof) are nowhere to be found in the complaint. While respondents' acts and practices are alleged (Pars. 8(a), 9(a), (b)), individually and collectively and in combination, to have brought about certain results, no conspiratorial acts or practices are alleged. In light of the "shared monopoly" theory that is being tested by this case and the relative ease of drafting conspiracy charges when it is desired to do so, it can only be concluded that the complaint intentionally did not include the charge of conspiracy. [4]

This reading of the complaint was expressly confirmed by the position taken by complaint counsel early in these proceedings. In Reply Of Complaint Counsel To Motions By General Mills And General Foods For More Definite Statement, filed May 18, 1972, we find, "The complaint is quite clear as to the nature of the collective charge against respondents. *It does not aver conspiracy. It is simply an indictment of shared monopoly and the common course of action pursued by respondents to maintain their monopoly*" (emphasis supplied; at 1–2). This position was affirmed in Opposition Of Complaint Counsel To General Mills' Application For A Determination By The Hearing Examiner That His Ruling Denying Motion For More Definite Statement Involves Reviewable Questions:

> The original motion, which was denied by the Hearing Examiner, dealt with only five areas of the complaint and asked only one question: Should the complaint be read to charge respondents with having conspired or with having engaged in consciously parallel action in violation of Section 5 of the Federal Trade Commission Act? *One part of this question was, in fact, answered clearly and unequivocally by complaint counsel, i.e., conspiracy is not alleged* (emphasis supplied; at 3).

In their Memorandum In Support Of Opposition To General Foods Motion For Severance, dated May 18, 1972, complaint counsel explained that the "complaint charges all four respondents with engaging in certain interdependent acts and practices in order to achieve a highly concentrated, non-competitive market structure and shared monopoly power" (at 1). After noting that competitors are routinely named co-respondents in conspiracy cases, complaint counsel expressly stated, "*Although conspiracy is not alleged in this matter,* the common course of action and the interdependent acts of respondents create a common bond that provides the nexus for joinder in the instant case" (emphasis supplied; at 3). Thus, complaint counsel were justifying the joinder of respondents in a case that did not charge conspiracy.[2]

In Supplemental Memorandum of Complaint Counsel In Opposition To Severance, filed June 19, 1972, at 4, it was stated, "*Although* [5]*conspiracy is not alleged in this matter* there is a common bond that provides the nexus for joinder in the instant case. . . . The effects of respondents' common practices are actually the same as if they had engaged in a conspiracy" (emphasis supplied). Thus, complaint counsel were clarifying the complaint to the effect that it charged acts and practices to be unlawful because of their anticompetitive effects, but that a charge of conspiracy was not being made.

Complaint counsel confirmed the "no-conspiracy" aspect of the complaint at the very first prehearing conference held on June 5, 1972.

MR. LIEDQUIST:

* * * * * * *

First, there is no mention of conspiracy in the complaint, for that matter we have emphasized this in our reply to respondent's motion.

* * * * * * *

I have already made a statement there is no charge of conspiracy under the complaint. I think this is sufficient. . . .

* * * * * * *

HEARING EXAMINER HINKES: In your words, when you use words "joint", "interdependent", "combination", "collective", "acquiesce", your use of those words or any other words that are used in the complaint, there is no suggestion of conspiracy in the complaint, is that correct?

MR. LIEDQUIST: There is no conspiracy as you would normally plead it in an Anti-Trust matter under the Sherman Act or the FTC.

* * * * * * *

HEARING EXAMINER HINKES: Are you saying that when you used the words of "joint" and "combination", it was joint without a conspiracy, and a combination without a conspiracy. [6]

MR. LIEDQUIST: That is right, Your Honor, and I am saying that they did not meet together (Tr. 17, 25–26, 29).[3] [7]

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[2] This position was affirmed in complaint counsel's Reply To The Quaker Oats Company's Motion For Severance, filed June 19, 1972.

[3] Tr. is an abbreviation for Transcript of Proceeding, and is followed by the page number(s). Other abbreviations used herein include the following:

CP – Complaint Counsel's Proposed Findings of Fact, Conclusions of Law, Order, and Supporting Argument

CPF – Complaint Counsel's Proposed Finding in CP, followed by its number(s)

(Continued)

The position that conspiracy was not alleged was reaffirmed at Tr. 70–71. [8]

On August 10, 1972, Mr. Liedquist reaffirmed and restated complaint counsel's position, in part, as follows:

I said there is no conspiracy. I believe my words also pointed out that there is no conspiracy in the traditional sense of the word. We don't look upon it as generally

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KP	– Kellogg's Proposed Findings of Fact
KPF	– Kellogg's Proposed Finding in KP, followed by its number(s)
KPL	– Kellogg's Proposed Conclusions of Law
GMP	– General Mills' Proposed Findings of Fact, Conclusions of Law and Order
GMPF	– General Mills' Proposed Finding in GMP, followed by its number(s)
GFP	– General Foods' Proposed Findings of Fact, Conclusions of Law, Memorandum and Order
GFPF	– General Foods' Proposed Finding in GFP, followed by its number(s)
IP	– Intervenor's Proposed Findings of Fact, Conclusions of Law, and Supporting Argument
IPF	– Intervenor's Proposed Finding in IP, followed by its number(s)
CR	– Complaint Counsel's Reply
CRPF	– Complaint Counsel's Proposed Finding in CR, followed by its number(s)
KS	– Kellogg's Surreply
GMS	– General Mills' Surreply
GMSPF	– General Mills' Proposed Finding in GMS, followed by its number(s)
GFS	– General Foods' Surreply
GFSPF	– General Foods' Proposed Finding in GFS, followed by its number(s)
IS	– Intervenor's Surreply
CX	– Commission Exhibit
CX–K	– Commission Exhibit Secured From Kellogg
CX–GF	– Commission Exhibit Secured From General Foods
CX–GM	– Commission Exhibit Secured From General Mills
CX–Q	– Commission Exhibit Secured From Quaker
CX–R	– Commission Exhibit Secured From Ralston
CX–N	– Commission Exhibit Secured From Nabisco
CX–CI	– Commission Exhibit Secured From Cereal Institute
CX–PG	– Commission Exhibit Secured From Procter & Gamble
CX–ACN	– Commission Exhibit Secured From A.C. Nielson Co.
CX–NCFM	– Commission Exhibit Secured From National Commission on Food Marketing
KX	– Kellogg Exhibit
GFX	– General Foods Exhibit
GMX	– General Mills Exhibit
COURTX	– Court Exhibit
QX	– Quaker Exhibit
AFX	– American Federation of Grain Millers Exhibit

Exhibits are referred to by the abbreviations set forth above followed by the appropriate exhibit number(s) and, if applicable, page(s). Exhibit abbreviations are not repeated within string citations, nor are exhibit numbers repeated when more than one page is referred to.

recognized as a conspiracy. They haven't met behind closed doors. At the same time their behavior hasn't been coincidental behavior. There has been a pattern of behavior, a common course of action that has been followed for thirty years and which amounts to a combination in violation of Section 5 (emphasis supplied; Tr. 104).

Notwithstanding the absence of a charge of conspiracy in the complaint and complaint counsel's early concession to this effect, the case was tried under both a conspiracy and a shared monopoly theory. At the very outset of their Introduction And Summary to their proposed findings of fact (CPF 1–3), complaint counsel state, "In the most traditional antitrust sense, the three respondents have tacitly colluded and cooperated to maintain and exercise monopoly power—'power over price' and 'power to exclude' additional competitors." And, at CP 649, complaint counsel begin their legal argument section on conspiracy with a "TACIT CONSPIRACY" tab and the heading, "RESPONDENTS COMBINED AND CONSPIRED TO MONOPOLIZE THE READY-TO-EAT CEREAL INDUSTRY."

However, complaint counsel may not be heard to urge that a tacit conspiracy was not included in their previous disclaimers of conspiracy. A tacit conspiracy is a conspiracy normally pleaded under the Sherman and Federal Trade Commission Acts. It is still a conspiracy and all essential elements of conspiracy must be proved notwithstanding the fact that the conspiracy may be shown by evidence **[9]** other than that of an express overt agreement. *See, e.g., United States* v. *Bausch & Lomb Optical Co.,* 321 U.S. 707, 723 (1944); *American Tobacco Co.* v. *United States,* 328 U.S. 781, 809–10 (1946).

It would serve no purpose to attempt to trace the steps taken by complaint counsel in reversing their original position and construing the complaint to include a charge of conspiracy. Suffice it to say that on February 24, 1974, in an Order Denying Motion Of General Mills, Inc., For Summary Decision Dismissing Complaint, Judge Hinkes, who was then assigned to this matter, ruled, in part, as follows:

Moreover, the complaint does allege that the respondents individually *and in combination* have maintained a noncompetitive market structure and that individually *and collectively* have obtained, shared and exercised monopoly power, although complaint counsel concede that their behavior is "not a conspiracy in the traditional sense."

General Mills contends, however, that these allegations of the complaint amount to no more than conscious parallelism which, as noted earlier, is not recognized as within the meaning of the Sherman Act. General Mills does not address itself to whether or not conscious parallelism is within the meaning of Section 5 of the Federal Trade Commission Act, an Act which has been recognized as going beyond the narrow confines of the Sherman Act. Moreover, General Mills discounts the complaint's clarification expressed by complaint counsel. They explained that respondents engaged in "interdependent actions and decisions" which they defined as "ones taken with the knowledge that the action requires cooperation of each member of a group in order to minimize competition among the group and maximize the joint profits of the group's members."

General Mills equates this definition of the complaint with merely conscious parallelism. It may, however, be more nearly equated with a tacit conspiracy (emphasis in original; at 5).

On March 12, 1975, in an Order On Complaint Counsel's Motion Re Discovery, Judge Hinkes allowed depositions covering the issue of conspiracy or similar agreement, relying in part on his February 24, 1974 statement, reproduced above. He also stated, "I agree with **[10]** complaint counsel that the interrelationship among the respondents by whatever name is a relevant issue and therefore appropriate for discovery" (at 5).

Finally, on August 20, 1976, Judge Hinkes, relying on his orders of February 19, 1974 and March 12, 1975, issued an Order Denying Respondent Kellogg's Motion To Preclude Trial Of Complaint Counsel's Conspiracy Claim. Judge Hinkes concluded by stating, "The interrelationship among respondents by whatever name is an issue raised by this complaint and by respondents' answers thereto" (at 2).

Under the shared monopoly charge of the complaint, which relies upon the concentrated structure of the RTE cereal industry and the conduct of the individual respondents allegedly taken in recognition of their resulting mutual interdependence, evidence of respondents' conduct is admissible. Such evidence would not become inadmissible merely because it tended to show an actual conspiracy or agreement, express or tacit.

On the other hand, as I have already ruled, the complaint does not allege a conspiracy; and a violation of Section 5 of the Federal Trade Commission Act by reason of conspiracy is not encompassed in the shared monopoly charges that have been made. If the shared monopoly charges fail, by reason of either legal or factual insufficiency, respondents may not, under the instant complaint, be found to have violated Section 5 by reason of conspiracy.

To the extent that Judge Hinkes may be deemed to have amended the complaint to include the charge of conspiracy, such amendment would violate Section 3.15(a)(1) of the Commission's Rules. That section requires the filing of a motion for amendment and limits the authority of the ALJ to allow only such amendments that are reasonably within the scope of the original complaint. Neither requirement has been met here. Further, Judge Hinkes has issued no order of amendment.

The issue of conspiracy may not be considered to have been raised under the concept of conformance to the evidence (Section 3.15(a)(2)).

This, because the issue was not within the scope of the complaint, and the issue was not tried by express or implied consent of the parties, two requirements of Section 3.15(a)(2). To the contrary, complaint counsel's efforts to try the conspiracy issue have been contested by respondents every step of the way.

Notwithstanding my holdings with regard to conspiracy, in view of the fact that this case was allowed to be tried under a conspiracy theory and in light of the unusually long time it has taken to try this case and the voluminous record that has been compiled, I am going to make all findings called for by the evidence, including those relating to the issue of conspiracy.

The case was initially assigned to Administrative Law Judge Harry R. Hinkes for trial. Judge Hinkes was the ALJ during the [11] course of all of the pretrial, and he presided during the presentation of complaint counsel's entire case-in-chief. Both the pretrial and presentation of the case-in-chief were extensive. Prehearing conferences are reported at Tr. 1–2750. Formal hearings commenced on April 28, 1976, at Tr. 2753. Complaint counsel rested their case-in-chief on January 11, 1978, at Tr. 28,975.

At the close of complaint counsel's case-in-chief, all respondents filed motions to dismiss the complaint and to strike certain portions of the case-in-chief. Quaker's motion that the complaint be dismissed as to it was granted on February 24, 1978. Judge Hinkes deferred consideration of the other motions to dismiss until the conclusion of the entire case. By order of February 8, 1979, I denied requests of General Foods and General Mills for reconsideration of their motions to dismiss.

Judge Hinkes denied the motions to strike, by order of March 18, 1978, ruling that they amounted to, and should be considered together with, the motions to strike, thus effectively postponing the consideration of any such motions until the final arguments of the parties at the close of the record. By order of February 8, 1979, I denied General Foods' request for reconsideration of its motion to strike. Respondents, therefore, have been allowed to again raise at this time the motions to strike previously denied by Judge Hinkes.

After the consideration of various matters on the record (Tr. 28,976–29,228), respondents began their defense on April 25, 1978, at Tr. 29,229, with Judge Hinkes still presiding. On September 7, 1978, Judge Hinkes announced his impending retirement effective the end of that week and his intention to continue presiding in this matter under a special contract (Tr. 34,821–22). Hearings were continued on September 8, 1978 (Tr. 34,942–35,043), while Judge Hinkes was still an administrative law judge. Commencing September 12, 1978, and continuing through September 28, 1978 (Tr. 35,044–35,984), Judge Hinkes heard seven defense witnesses at a time he was no longer administrative law judge. On October 12, 1978, the next date scheduled for hearings, counsel for Kellogg, in light of the pendency of a motion to determine that Judge Hinkes was disqualified from presiding over the hearing, declined to produce Kellogg's next witness (Tr. 35,986–35,990).

On December 11, 1978, following the Commission's determination, on December 8, 1978, that Judge Hinkes became "unavailable" within the meaning of 5 U.S.C. 554(d) upon his retirement, I was appointed substitute administrative law judge to preside over further proceedings.

On August 9, 1979, complaint counsel and counsel for General Mills and General Foods stipulated that the seven witnesses who testified before Judge Hinkes during the period September 9, 1978, through September 28, 1978, (*i.e.,* after Judge Hinkes had retired) if recalled, would testify under oath identically as they [12]had already testified, and that their testimony already given be accepted as part of the record. Documents offered and received in evidence during the period in question were also stipulated as accepted as part of the record. Kellogg refused to become a party to the stipulation. Accordingly, on August 27, 1978, I ordered that the stipulation and the testimony and exhibits stipulated to be accepted as part of the record, "applicable, however, only among the stipulating parties."[4]
[13]

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[4] The testimony so stipulated into the record covers witnesses:
Richard B. Troxel (Tr. 35,044–35,273)
Rolf O. Berg (Tr. 35,274–35,352)
Arthur R. Schulze (Tr. 35,353–35,657)
Edward K. Bixby (Tr. 35,658–35,718)
Robert M. Cameron (Tr. 35,719–35,779)
Frank C. Blodgett (Tr. 35,780–35,874)
John L. Livingstone (Tr. 35,875–35,985)

The following exhibits were so stipulated into the record:
GMX 106 (CX–GM 173)
GMX 112 (CX–GM 2186)
GMX 116 (CX–GM 2190)
GMX 119 (CX–GM 2193)
GMX 124 (CX–GM 2474)
GMX 130 (CX–GM 561)
GMX 149 (CX–GM 129)
GMX 158
GMX 169
GMX 170
GMX 171
GMX 172
GMX 173
GMX 310–320
GMX 373
GMX 463
GMX 463A

(Continued)

When the Commission, on December 8, 1978, ruled that Judge Hinkes was unavailable and directed the appointment of a substitute ALJ, it also ordered the parties to file with the substitute ALJ briefs pertaining to the necessity and desirability of recalling and rehearing witnesses who had previously testified before Judge Hinkes. Respondents uniformly took the position that all witnesses should be reheard.

On February 21, 1979, complaint counsel filed a statement in support of their position that it was unnecessary to recall any witnesses. In that statement, complaint counsel "submit[ted] that there are no significant issues in this proceeding which turn crucially upon demeanor" (p. 2). It was stated that prior to Judge Hinkes' retirement on September 9, 1978, complaint counsel and respondents had presented 64 "fact witnesses" and that five more "fact witnesses" were presented by General Mills after Judge Hinkes' retirement (p. 9). With respect to these "fact witnesses," complaint counsel took the following position:

> Furthermore, thirty-six of complaint counsel's fifty-six fact witnesses were employees or former employees of respondents, as were the 13 fact witnesses called by respondents. If anyone is to suggest that the testimony of these fact witnesses should be taken at less than face value, it should be complaint counsel, toward whom most of these witnesses stood as agents of an adverse party. Nevertheless, complaint counsel are willing to rely upon the record evidence as a basis for any judgments of credibility that need to be made. If complaint counsel are willing to rely upon the record with respect to the credibility of these adverse witnesses, it is illogical for respondents, toward whom the witnesses were friendly, to insist they be recalled (pp. 10–11). **[14]**

On March 12, 1979, pursuant to my order of February 22, 1979, complaint counsel identified the "fact witnesses" referred to in their February 21, 1979 submittal and the pages of transcript covered by their testimony.[5] **[15]**

GMX 469
GMX 471
GMX 472
GMX 501
GMX 510–512
GMX 515–516
GMX 533
GMX 540
GMX 546–551
GMX 380 (CX–GM 2503A–Z23)
CX 2205
CX 2206
CX 2211

[5] The witnesses and pages of testimony so identified are as follows:

Witness	*Transcript Pages*
Dr. James R. Green	2889–3221
Eugene M. Schlenk	3222–3339
Dr. James R. Green	3340–3482

(Continued)

In my order of May 24, 1979, Denying [Respondents'] Motions For Hearing De Novo, I relied upon complaint counsel's concession and stated that "I shall accept the testimony of the [16]fact witnesses at

Jack W. Emry	3483–3622
Lawrence W. Corzine	3623–3770
Dr. James R. Green	3771–3835
Virginia Lee Laird	3836–3871
Betty Jean Dunham	3872–3894
Dr. Alan A. Fisher	3948–5824
Dr. James R. Green	5825–6430
Robert Calvin Bland	6462–7404
Joseph W. Pedersen	7405–7610
William E. Gentry	7611–8065
William H. Baumann	8066–8181
Biron A. Valier	8182–8296
Thomas N. Bezick	8297–8328
Henry T. Chandler	8329–8593
Ralph Boccella	8594–8654
Ben C. Irvin	8655–8791
Herman L. Stroup	8792–8871
Ralph Maron	8872–8930
Frank J. Kupka	8931–9071
Walter Steven Rubow	9072–9254
Richard F. Hurst	9255–9327
Richard W. Maurer	9328–9440
D.I. Ingraham	10682–10778
Jack W. Emry	10779–11056
Kenneth C. Englert	11219–11594
Jerry D. Wells	11595–11744
Howard M. List	11745–11919
Robert E. Hutson	11920–12122
Robert L. Nichols	12123–12743
Robert T. Bland	12744–12978
Charles A. Tornabene	12979–13238
Adolph S. Clausi	13393–13684
Wilfred H. Haughey	13685–13843
Eugene Raymond Mohlie	13844–14162
F. Kent Mitchel	14163–14334
Alvin Ossip	14335–14552
Larry D. Weiss	14553–14600
Max Randall Gould	14601–14884
Charles A. Hinman	14885–14938
John J. McBride	14939–15086
Kenneth Mason	15087–15248
James E. Legere	15249–15344
Robert A. Bowen	15345–15585
Harry E. Nickelson	15586–15651
Richard S. Sheehy	15652–15691
Vernon W. Cafarella	15692–16209
Joseph P. Manfrida	16210–16393
Vernon W. Cafarella	16394–16551
Robert F. Bodeau	16552–16836
Vernon W. Cafarella	16838–17145
Arthur R. Schulze	17146–17428
John Richard Schneider	17429–17495
Donald S. Schnitz	17496–17578
Arthur G. Yates	17579–17614
Arthur R. Schulze	17615–17842
Guy Lalone, Jr.	17843–17977
Preston Townley	17978–18038
Bernard J. Hogan	18039–18077
Alfred Boberg	18078–18125

(Continued)

face value and give it weight according to the overall testimony of the witnesses and the record as a whole" (p. 23). As for the expert witnesses who testified prior to my presiding, I have evaluated their testimony on the basis of the reasonableness and logic of their theories and economic conclusions, as I have done with respect to the experts who testified in my presence.

In so doing, I am in agreement with Kellogg's concluding witness, economic expert Dr. Robert Clower, who, when asked how the ALJ could decide which economic model or theory espoused in this case to accept, stated (at Tr. 40,175):

> I think this record contains an incredible amount of information for anyone who is seriously interested in comparing the kind of description of basic economic theory that is contained in the record at all levels, with the actual facts, and arriving, at least, at an informed judgment about which model makes the most sense.

In so appraising the expert evidence, I have found no need to evaluate the credibility of any expert witness who did not appear before me in the course of reaching the findings and conclusions that I make. Of course, to the extent any expert witnesses rely upon facts in reaching their conclusions or in giving opinions, which facts have not been established on the record, such conclusions or opinions are being afforded lesser or no weight.

This initial decision is based upon the entire record, including proposed findings of fact and conclusions of law and supporting memoranda filed by the parties as well as their answers, replies and

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Richard B. Troxel	18125–18421
Dianne B. Ellison	18422–18691
Owen B. Butler	25793–25887
Toby Ira Schreiber	25888–26070
Rudolf William Hirzel	29229–29537
Howard List	29537–29757
William E. LaMothe	29758–30132
Richard R. Walters	30133–30294
David E. Kinnisten	30295–30458
Howard L. Ross	32667–32779
William McKown	32780–33272
Richard B. Troxel	33368–33546
Todd S. Johnson	33547–33945
Richard B. Troxel	33946–34208
Michael J. Stevens	34209–34307
Boyd Sneddon	34308–34672
Rolf O. Berg	35274–35352
Arthur R. Schulze	35353–35657
Edward K. Bixby	35658–35718
Robert M. Cameron	35719–35779
Frank C. Blodgett	35780–35874

surreplies. The undersigned has also taken into account his observation of the witnesses who appeared before him[6] and their demeanor. [17]

Proposed findings not herein adopted, either in the form submitted or in substance, are rejected either as not supported by the evidence or as involving immaterial matters. In light of the 41,000 pages of transcript, 35 bound volumes of public exhibits, 16 binders of *in camera* exhibits and the extensive findings of fact, conclusions of law and supporting memoranda filed by the parties,[7] it is literally impossible to expressly and separately address each item of evidence and contention. Nevertheless, because of the salience and importance of this case, I am making factual findings in addition to those upon which I rely for disposition of the case so they may be available to a reviewing authority which may feel they are important in resolving any issues.[8]

ADMISSIBILITY OF DOCUMENTS PRODUCED FROM THE FILES OF RESPONDENTS

Before making any findings, it is necessary to consider respondents' uniform position that documents produced from the files of one respondent should be stricken as against all other respondents.

During the course of the trial, Judge Hinkes established the rule that documents produced from the files of any respondent, which were not forgeries, would be admitted into evidence conditionally against all respondents, subject to establishing a connection with those respondents other than the one from whose files the documents were produced. On February 22, 1978, following the close of complaint counsel's case-in-chief, each respondent moved to have stricken as to it all documents procured from the files of other respondents or from the files of any other entity.

General Foods identified over 2,000 documents (totalling some 10,000 pages) which it sought to have stricken. These documents came from the files of Kellogg, General Mills, Quaker, the Cereal Institute, Nabisco, the National Commission on Food Marketing, Ralston, A.C. Nielson Co., A&P and Procter and [18]Gamble. General Mills, without identifying specific documents, moved that all documents originating with the other respondents be stricken as to it. In light of General Mills' assertion that the vast majority of the

[6] I heard witnesses starting at Tr. 36,307.

[7] The following were filed: CP–769 pages; KP and KPL–971 pages; GMP–554 pages; GFP–698 pages; IP–43 pages; CR–576 pages; KS–330 pages; GMS–83 pages; GFS–698 pages; IS–30 pages—a total of 4,752 pages.

[8] Note, *e.g.*, my decision to make findings on the issue of conspiracy, notwithstanding my ruling that the complaint fails to charge conspiracy.

documentary evidence originated with respondents other than General Mills, it may be assumed that General Mills' motion to strike encompassed a larger number than the 2,000 documents covered by General Foods in its motion. The documents covered by Kellogg's motion to strike are listed on some 50 pages of its motion and include documents secured from General Mills, General Foods, Quaker and Ralston.

As related above, both Judge Hinkes and I refused to consider the motions to strike, ruling that such motions should await the final briefing. Respondents have now renewed their motions to strike.

Respondents' contentions underlying their motions to strike fall in two categories: (1) a lack of connection between the document and the moving respondents, and (2) the hearsay nature of the document, inasmuch as the author was not produced and so could not be cross-examined by the respondents.

1. *Connection between the documents and the moving respondents.*

The shared monopoly theory of this case is that, given the structure of the RTE cereal industry, the actions (or conduct) of each individual respondent, considered in conjunction with the actions of other respondents and others in the industry, have served to maintain a highly concentrated, noncompetitive market structure, to obtain, share and exercise monopoly power and monopolize, and to erect, maintain, and raise barriers to entry. The acts of each respondent which bear upon the allegations of the complaint, therefore, are relevant in appraising the acts and practices of the other respondents. Therefore, there is no substance to the general allegation that documents produced from the files of one respondent which describe the conduct of that respondent bear no relationship or connection to the other respondents.

For example, each respondent would have stricken as to it the price lists of the other respondents, for the reason that each company's price lists reflect only its own prices. While each price list shows only the pricing conduct of the issuing company, the price lists of all respondents show the aggregate pricing conduct of practically the entire industry. Under the complaint, which in large part relies upon economic theories flowing from the central theory of analyzing the structure, conduct and performance of an industry, each price list is relevant or connected to all respondents. While each respondent is to be tried on the basis of its own conduct, the theory of the case requires consideration of that conduct in the light of that of the other respondents. **[19]**

Respondents rely upon the principle applicable in conspiracy cases that there must be independent evidence of the existence of a conspiracy, and the participation of a party in the conspiracy, before declarations of an alleged co-conspirator in the course of executing or furthering the conspiracy may be admitted against another respondent. *See, e.g., United States* v. *Nixon,* 418 U.S. 683, 701 (1974); *United States* v. *Kessler,* 530 F.2d 1246, 1256–57 (5th Cir. 1976); *Flintkote Co.* v. *Lysfjord,* 246 F.2d 368, 378 (9th Cir.), *cert. denied,* 355 U.S. 835 (1957). The shared monopoly charge, however, is not a conspiracy matter as to which the above principle would apply.

Respondents assert that there is no legal basis for trying the charges of the complaint; that the documents secured from one respondent, therefore, are not relevant to the others under any recognizable theory of law. However, the only means by which to ascertain whether the acts and practices and methods of competition of the several respondents constitute unfair methods of competition within the meaning of Section 5 is to admit evidence of the acts and practices and methods of competition of the individual respondents and evaluate them in their aggregate.

Even though particular admissions or declarations against interest of one respondent may not be used directly against other respondents without being connected, they may be admissible against the party from whose files they were secured to show its individual activity or purport. This, in turn, could be considered in evaluating the environment within which the activities of all respondents are to be judged. Further, in addition to evaluating the overall situation of the industry, the acts of the individual respondents, quite apart from allegations of conspiracy or agreement, would be relevant under the theory that respondents have engaged in price leadership in lieu of overt agreement and have otherwise acted in concert or in similar fashion by reason of the their interdependent coordination induced by the structure of the RTE cereal industry.

As noted above, respondents contend that the shared monopoly aspect of this case fails as a matter of law. As I have also previously noted, I believed it inappropriate to consider motions to dismiss apart from a full consideration after completion of the entire case. Similarly, irrespective of my disposition of this matter, I believe it to be important not to strike evidence relevant to complaint counsel's theory of violation so that a reviewing authority may have a full record upon which to appraise that theory.

Returning to the conspiracy issue, I have already ruled that the complaint does not encompass the charge of conspiracy but that I shall, nevertheless, make findings on that issue. The cases relied upon by respondents, in asserting that documents taken from the files of one respondent are inadmissible against [20]the others, deal with the necessity of proving the existence of a conspiracy by independent evidence before declarations of a conspirator may be admitted against his co-conspirators. However, in a tacit conspiracy case, there is no evidence of express, verbal agreement. Conspiracy must be established through the conduct of the several alleged co-conspirators. *American Tobacco Co.* v. *United States,* 328 U.S. 781, 809–10 (1946); *United States* v. *Bausch & Lomb Optical Co.,* 321 U.S. 707, 723 (1944); *United States* v. *Consolidated Packaging Corp.,* 575 F.2d 117, 126–27 (7th Cir. 1978).

The cases cited above, and many others, reveal that there are many varying considerations to be taken into account in determining whether the business activities of individual respondents, as indicated by their own business documents, may be evidence of a tacit conspiracy. Consequently, a blanket ruling covering the thousands of documents objected to by respondents is not possible. It is necessary to evaluate each document in question, to the extent relevant to a particular issue, to ascertain, for example, whether it constitutes an act or recitation, and whether it constitutes an act or activity irreconcilable with independent business judgment of the particular respondent. To the extent such identical or closely related irreconcilable acts and practices are shown as to the several respondents, a conspiracy may be evidenced.

In my opinion, as explained below, complaint counsel have failed to establish that respondents conspired to monopolize or to maintain a monopoly. The relevant documents considered in reaching that conclusion are not being stricken.

2. *Hearsay Nature Of The Documents*

Each respondent moves to strike documents produced from the other respondents' files on the ground the documents are hearsay as to it and it has not had the opportunity to cross-examine the person who prepared the document.

Section 3.43(b) of the Commission's Rules of Practice provides for the admission of relevant, material and reliable evidence. It does not exclude hearsay evidence, and hearsay evidence may be received. *Philadelphia Carpet Co.,* 64 F.T.C. 762, 773 (1964); *Phelps Dodge Refining Co.* v. *FTC,* 139 F.2d 393, 397 (2nd Cir. 1943); *Hoover* v. *Beto,* 467 F.2d 516 (5th Cir.), *cert. denied,* 409 U.S. 1086 (1972). As stated in *Lenox, Inc.,* 73 F.T.C. 578, 604 (1968), "Clearly documents coming from a respondent's files can be regarded as reasonably reliable absent some countervailing evidence demonstrating their unreliability." In receiving the documents in question in evidence, the administrative law judge has already ruled upon their reliability, subject to the connection with other respondents for purposes of showing relevance and materiality, discussed above. **[21]**

This, of course, leaves the question of the weight to be given a particular document. In deciding that question, it is necessary to consider such matters as the circumstances surrounding the preparation of the document, its author, and the extent to which its contents are corroborated or are consistent with other evidence.

Accordingly, each respondent's blanket request that all of the thousands of documents produced from the files of the other respondents be stricken is being denied. Rather, each such document considered will be afforded the weight to which it is entitled in the course of making the particular findings that follow.[9]

COMPLAINT COUNSEL'S THEORY OF VIOLATION

Complaint counsel's theory of how respondents violated Section 5 of the Federal Trade Commission Act is summarized at CP 1–20 (CPF 1–50). The following recitation is derived from that summary.

Consumers are being overcharged for RTE cereals because they are being deprived of the benefits of competition. Kellogg, General Mills, and General Foods have maintained a pattern of conduct that has enabled them to charge supracompetitive prices and to reap monopoly level profits. The fact each respondent gains these enormous monopoly profits as a result of their conduct demonstrates that they are sharing monopoly power.

"In the most traditional antitrust sense, the three respondents have tacitly colluded and cooperated to maintain and exercise monopoly power—'power over price' and 'power to exclude' additional competitors." Respondents' conduct has regulated and suppressed competition in the RTE cereal market and has caused consumer prices to be substantially higher than if this were a more competitive market.

Respondents' monopoly power will continue to injure consumers unless greater competition is encouraged. This can be done by bringing additional competitors into the market. **[22]**

[9] Among such documents are many that simply aid in understanding the industry by providing industry description or background. They do not purport to constitute evidence of conspiracy or of interdependent behavior.

The Commission should dissipate respondents' monopoly power because respondents have eliminated competition among themselves and have raised barriers to entry. Therefore, the Commission should issue an order requiring respondents to create five strong new firms from their assets; and should encourage the entry of additional firms into the industry by requiring respondents to grant royalty-free licenses of brands they continue to own after the divestiture. This would encourage competition and prices would fall toward competitive levels.

The complaint charges that the three respondents and Quaker have collectively and individually engaged in acts and practices which maintained a non-competitive, monopolized market in the sale of RTE cereals. The main issues are consumer injury and the exercise of monopoly power by respondents.

RTE cereals constitute a large ready-to-eat product market with retail sales of over $740 million in 1970 and about double that in 1975.

Complaint counsel's proposed findings are organized according to a structure-conduct-performance framework of analysis. This describes a causal flow from an industry's structure to its behavior or conduct, and ultimately to its economic performance.

The RTE cereal industry is highly concentrated and is marked by high barriers to the entry of new firms. There are no barriers to entry unrelated to respondents' conduct. Respondents' conduct, therefore, explains the absence of entry by new firms which otherwise would pursue the extraordinary high profits in the market and seek a share of the rapid growth thereof.

The RTE cereal industry is highly concentrated at the six firm, four firm and three firm concentration levels. Since at least 1940, there have only been six significant producers of RTE cereals: Kellogg, General Mills, General Foods, Quaker, Nabisco and Ralston, of which respondents have always been the three largest.

New firms normally enter markets where profits are above the level that can be earned in alternative investments. Further, new entry is generally more attractive and easier in growing industries.

The RTE cereal industry is enormously profitable. This is shown by the accounting rates of return on capital employed by the industry as a whole, as well as the accounting rates of return for Kellogg, General Mills and General Foods individually, compared to the rate of return for the manufacturing sector of American industry. This conclusion is also true when alternative calculations are made which adjust for potential biases in the accounting rates of return. **[23]**

The RTE cereal industry has grown more rapidly than the United States economy as a whole. Despite the high profitability and rapid growth of the RTE cereal industry, no new firm had entered the industry from 1950 to 1972. The lack of entry into the apparently attractive RTE cereal industry must be caused by barriers to entry. Neither of the traditional nonconduct barriers to entry—economies of scale and the ownership of specialized resources such as patents—are present here. The only possible explanation for the lack of new entry lies in the respondents' conduct of introducing a large number of intensively advertised, trademarked RTE cereal brands which has had the effect of raising barriers to entry into the industry.

In highly concentrated industries, where only a few firms control most of the output, each firm may recognize that its competitive actions may have direct effects on the other large firms in the industry and may cause the others to respond in predictable ways. Recognizing their interdependence, each firm recognizes that it is in their collective best interest to avoid taking competitive actions which will result in the other firms reacting competitively. Therefore, if each firm manages to communicate or signal its decision to the others not to use certain competitive weapons and to follow the leadership of other firms, the small group of sellers may reach understandings with each other. The understandings can arise by reason of the firms' patterns of conduct without oral or written communication among them. These patterns of conduct can become long standing and become the rules of the game to which each firm will abide.

The respondents have adopted and adhered to certain rules of the game and, thereby, have suppressed the use of a wide variety of competitive weapons. Whereas the RTE cereal firms were highly price-competitive through the early 1950's, they reached an understanding with others to eliminate some of their more competitive price activities, as well as others, which could have reduced industry prices and profits. Having avoided such competitive action, the respondents channeled their competitive energies into brand proliferation. This raised barriers to the entry of new firms which otherwise would have entered. Thus, respondents have been able to earn monopoly profits for a substantial period of time.

Monopoly power is the power to hold prices above a competitive level of costs. Respondents exercised that monopoly power by coordinating their activities so as to suppress price and other forms of competition. They reached an understanding to minimize the use of trade deals, cents-off labels, and in-pack premiums. Kellogg and General Foods acquired two of the larger producers of private label

RTE cereal products; and, thereafter, respondents reached an understanding to terminate or [24]greatly reduce the sale of private label products. Respondents arranged through the A.C. Nielsen Company to exchange current detailed RTE cereal advertising information whereby they were able to coordinate a reduction in advertising expenditures when sales growth slowed in the late 1960's, and were able to avoid misunderstandings regarding each other's advertising strategies. In the late 1950's, each respondent adopted a shelf space plan based on common principles. The respondents avoided engaging in fortification competition prior to 1970, at which time they came to an understanding that they would fortify all of their RTE cereal products to comparable levels at about the same time.

The respondents avoided list price competition among themselves and tacitly colluded to increase prices by adopting a system of collusive price leadership in which Kellogg was usually the price leader, and General Mills and General Foods raised their price in consonance with Kellogg so as to maintain prices at the monopoly level.

The furnishing of private label products constitutes an important form of price competition. Respondents avoided this form of price competition by refusing to provide private label RTE cereals, despite respondents' available production capacity and a substantial demand by their customers for private label products.

The discontinuance of the powerful competitive tools of trade deals, in-pack premiums and cents-off labels could not have occurred without an understanding among respondents.

Retail shelf location is an important factor in the success or failure of an RTE cereal brand. By adopting virtually identical shelf-space plans and by reason of General Mills' and General Foods' tacit adoption of Kellogg's control of the retail shelves, so long as Kellogg allotted each of the other two respondents a fair share of the space, respondents suppressed competition among themselves and placed smaller firms and potential entrants in inferior and less desirable shelf locations.

Respondents refrained from fortifying most of their RTE cereal brands until they were spurred to do something by public criticism. Then, the respondents met at their industry association, The Cereal Institute, where they reached an understanding as to what each was going to do, *i.e.,* increase their fortification to comparable levels within a relatively short time.

Respondents suppressed competition among themselves by their exchange of current advertising data through the A.C. Nielsen

Company. Monthly or bi-monthly advertising data by brand and by advertising media were furnished to Nielsen which compiled the **[25]** data into a comprehensive industry report and distributed the information to each firm within two months of the actual expenditures. This allowed the respondents to coordinate their advertising efforts.

Normally, in view of respondents' monopoly profits and the industry's growth, new firms would have entered the market with competitive impact. However, there was no such entry because of respondents' conduct. By suppressing and avoiding the various forms of competition narrated above and in channeling substantially all of their efforts to increase sales into the introduction of a large number of intensively-advertised, trademarked RTE cereals ("brand proliferation"), respondents have persistently continued their monopoly profits while a new firm entering the industry would expect to operate at a loss. In this manner, respondents erected a barrier to entry.

Respondents' brand proliferation created a barrier to entry because RTE cereal brands are highly differentiated, with each brand having only a few directly competitive other brands. Thus, a price change of a particular RTE cereal brand will directly affect only a few, closely substitutable brands. This localized competition means that in order for a firm to introduce a new RTE cereal, the new brand must take a significant portion of its sales from the few brands with which it must compete most directly. In addition, a new RTE cereal brand must gain a minimum level of sales in order to be successful. This means that if there are a number of existing brands in the segment aimed at by the new product, there is not room for a new product to enter, although the existing brands can continue to make substantial profits. This situation exists in a number of the areas or segments of the RTE cereal market.

Existing firms are able to introduce new brands, while new companies cannot, because of certain advantages. One advantage is that an existing firm can preempt a profitable new product opportunity before a new entrant can act. One reason is that a manufacturer of RTE cereals must have from 3.5% to 5% of the market without being at a significant cost disadvanatage relative to other firms (firm economy of scale). Thus, one of the respondents, which already has much more than 3.5% of the market, can introduce an additional single brand while it is satisfying its firm economies of scale. An outsider would have to launch several brands at the anticipated level of 1% (brand economy of scale) before it could reach a firm efficiency scale approaching 3.5%.

Potential entrants can reasonably expect that their brand introductions would be subject to more vigorous competition from existing RTE cereal producers than would the brand introductions of respondents. A respondent could not react to a brand introduction of an existing competitor without breaking the rules of the game, and it could then expect a competitive [26]response throughout the cereal industry. On the other hand, a respondent could react to a single brand entry of a new company in the particular localized area where the new brand was competing while its other products would continue to reap monopoly profits.

Apart from preemption or retaliation, respondents' brand proliferation has made entry into the RTE cereal industry by outsiders less likely because it has significantly increased the costs which a new entrant would have to incur. This is because brand proliferation has decreased the size or share of market enjoyed by any individual brand and has increased the rate of failure of brand introductions. Thus, the outsider could not hope to introduce a single brand which would get enough return to make it worthwhile. It would be required to introduce multiple brands (some successful and some unsuccessful) with the increased costs of having to research and develop, advertise, and promote and market a number of products, each with its own costs. This increase in capital costs would eliminate potential smaller firms which could not raise the necessary capital and would even make the larger potential competitors more cautious before they might venture an entry into the RTE cereal market.

Economic performance of the RTE cereal industry is poor. One measure of the poor economic performance is respondents' high monopoly prices and profits. With prices so artificially inflated at monopoly levels, consumers purchase less than they would if prices were at lower competitive levels. Since less RTE cereal is produced, fewer resources are devoted to the manufacture and distribution of RTE cereals than would be employed in a competitive market.

Because of respondents' high profits, consumers have been inequitably overcharged. If prices were at lower, competitive levels, manufacturers would provide RTE cereals to the consumers at lower prices at which consumers would demand, and producers would supply, more RTE cereal. This would provide additional employment.

When firms reap monopoly profits, there is an incentive to increase costs, including advertising expenditures, above those which would prevail in a competitive market. This is because the profit to a firm for selling an additional unit of output is greater than if the prices were at a lower, competitive level. Firms charging higher prices, therefore, have an incentive to spend additional amounts on promotional activities in order to sell additional units of the commodities and gain higher returns. Therefore, monopolists are willing to incur higher costs than competitive firms would be willing to expend. Further, the channeling of rivalry into brand proliferation has required an increased amount of advertising and promotional expenditures as each new cereal is introduced. If additional price competition were restored to the industry and product [27]proliferation were decreased, advertising and other promotional expenditures would fall toward competitive levels, as would prices. The exorbitant advertising and promotional costs have been passed on to consumers in respondents' monopoly prices.

"Only substantial structural relief holds the prospect of significantly improving the performance of the industry." Complaint counsel's proposed order includes provisions requiring divestiture by spin-off, mandatory royalty-free trademark licensing, a ban on future acquisitions, and a ban on shelf space plans.

Kellogg would be required to divest itself by spin-off of three viable firms. General Mills and General Foods would each be required to divest itself by spin-off of one viable firm. Each divested firm would be capable of producing at least 5% of industry output and would be granted exclusive rights to manufacture and distribute trademarked cereal brands formerly owned by the parent firm. This divestiture requirement, by increasing the number of firms in the industry, would substantially lessen the possibility that the firms in the industry could tacitly collude to avoid competition.

The trademark licensing provision would require that respondents offer to license royalty-free for 20 years any RTE cereal brand remaining in their possession after the divestitures. Any new RTE cereal brand introduced by a respondent would become subject to the licensing requirement five years after it was introduced into national distribution.

The spin-off provision would have at least three important competitive effects. First, it would create the potential for direct competition between the remaining RTE cereal products of the respondents and the licensed versions of those brands. Second, it would lower barriers to entry for new firms, since a new firm by license could get a new product immediately. Third, the five divested firms could use this additional licensing provision to utilize the remaining portion of their productive capacities not utilized by the products exclusively licensed to them by the parent firms.

The proposed ban on acquisitions by the respondents for 20 years would inhibit the reconcentration of the industry following divestiture.

The ban on shelf space programs would prohibit respondents from making shelf space recommendations covering the entire RTE cereal section. Each firm could continue to make recommendations concerning the shelving of its own brands. This provision would restrain respondents from making it more difficult for new entrants and smaller producers to obtain better shelf space. **[28]**

Monopoly power is power over price and power to exclude competitors. The existence of such power finds support in the combined market shares of the respondents. "However, proof of monopoly power in this case rests primarily on the evidence that each of the respondents gained monopoly profits over a long period of time." Monopoly power is also demonstrated by the respondents' exercise of their power to exclude further competition by reason of their brand proliferation.

Respondents are said to have violated Section 5 of the Federal Trade Commission Act because their conduct violates the Sherman Act prohibitions against conspiracies to monopolize. This is evidenced by the overall understanding among respondents to abide by certain rules of the game whereby respondents suppressed and avoided various forms of competition and channeled their activities into brand proliferation which, in turn, led to the erection of barriers to entry.

Conduct may violate Section 5, whether or not it is held to have violated the Sherman Act. Respondents' cooperative conduct is said to violate the policies of the antitrust laws and is, therefore, an unfair method of competition. Respondents have been unfair to consumers in terms of the monopoly overcharges that have resulted from their conduct, and respondents have been unfair to competitors because they have barricaded the market against additional competitive entry.

Complaint counsel have further explained their theory of the case at CP 54–61 (CPF 6–1 through 6–19) from which the following additional recitation has been derived.

Complaint counsel rely for their evaluation of the RTE cereal industry and the behavior of the major RTE cereal producers in accordance with the structure-conduct-performance framework of economic analysis. This demonstrates that the highly concentrated structure of the RTE cereal industry enabled respondents tacitly to collude or cooperate to avoid a wide variety of competitive activities which would have eroded the monopoly profits they enjoyed. Instead, respondents introduced a large number of intensively advertised, trademarked RTE cereal brands, with the effect of creating a brand proliferation barrier to the entry of new firms. This allowed respondents to charge monopoly prices and earn monopoly profits which are the measure of poor economic performance. The structure-conduct-performance framework may also be used to evaluate complaint counsel's proposed remedy.

The basic principle underlying the structure-conduct-performance framework is that the structure of an industry may affect the behavior or conduct of its members which, in turn, **[29]**determines the quality of the industry's performance. There may also be feedback effects inasmuch as firm conduct may affect structure.

Structural characteristics of an industry include the number of sellers and their relative sizes, concentration, and the existence of barriers to the entry of new firms. Important conduct features of an industry include pricing practices and product policies, including the kinds and numbers of products to offer, and how products should be physically differentiated, as well as advertising and research and development policies, and innovation.

The economic performance of an industry falls into three broad categories: efficiency, equity, and progressiveness.

One. Efficiency. This includes a determination of whether an industry manufactures and distributes its products at the lowest possible cost and whether the optimal amount of society's resources are devoted to producing the industry's products. An example would be a monopolist which restricts output in order to raise prices and increase its profits. This would result in consumers purchasing less at monopoly prices than they would if there were lower, competitive prices. With less products being produced, the monopolist employs fewer resources than under a competitive environment. Enjoying inflated monopoly profits, the monopolist may not hold its costs at their lowest possible levels as it would attempt to do in a competitive market.

Two. Equity. This includes a determination of whether the prices consumers are paying are higher than necessary to attract capital investment into the industry. When this occurs, there is unnecessary and inequitable transfer of income from consumers to producers.

Three. Progressiveness. This concerns the extent to which suppliers have taken full advantage of scientific and technological opportunities to provide the best possible products made by the most efficient production processes available.

In a competitive market, *i.e.,* one where the structure of an industry is such that there are many sellers, prices and profits will tend to equal costs (costs being defined to include a normal profit). This is good economic performance. When there is a single monopolistic seller, there is a tendency for the seller to raise prices in excess of costs and so earn excess or monopoly profits. This indicates poor industry performance. Between the extremes of pure competition and monopoly, there may be oligopoly. In an oligopolistic industry, the prices may gravitate toward costs (the competitive result) or they may tend to be in excess of cost (the monopolist result). **[30]**

In an oligopoly, where you have few sellers each of considerable size, the sellers often recognize that each seller's actions may materially affect the fortunes of the others; that their fortunes and decisionmaking are interdependent. The oligopolists are likely to realize that, if they work together and coordinate their actions, they may achieve monopoly profits by sharing the monopoly power they possess as a group. If there is a barrier to the entry of new firms, they would be able to sustain monopolistic profit levels without the threat of new competition coming into the industry.

There is a great incentive for sellers in an oligopoly to coordinate their activities rather than to engage in aggressive competitive actions which may lead to retaliatory actions by their rivals. Thus, sellers in an oligopoly may achieve a monopoly result by tacitly colluding or by pursuing a cooperative policy. Even if they do this, if there is no substantial barrier to entry, new entrants would be attracted to the industry who would add additional competition. However, if there is a barrier to the entry of new firms, the oligopolists would be able to sustain their monopolistic profit levels without the threat of competition from the outside.

> In order to determine whether a market is operating in a competitive or a monopolistic manner, or close to one of those extremes, a careful analysis of the structure of the industry and of the conduct and performance of its sellers must be undertaken (CPF 6–16).

Having demonstrated that the RTE cereal market's highly concentrated structure contributes directly to respondents' conduct in tacitly colluding and cooperating to avoid competition and to raise prices to monopoly levels, *i.e.*, that the respondents' conduct and the ultimate poor performance of the RTE cereal industry flow from the industry's structure, it is clear that an effective remedy requires structural relief. "So long as the structure of the RTE cereal industry is unchanged, it is unlikely that an order directed solely to the firms' conduct will result in more vigorous competition and improved economic performance" (CPF 6–19).

From complaint counsel's own analysis of what they purport to show, it can be seen that they have assumed a formidable burden of proof. Having outlined the elements of complaint counsel's theories of violation, we can now turn to what the record actually shows. [31]

FINDINGS OF FACT[10] AND DISCUSSION

I. THE RESPONDENTS AND OTHER PRODUCERS OF RTE CEREAL

1. The relevant product market, as found in the next section, is the RTE cereal industry. The six major producers in the industry are the three respondents and Quaker, Nabisco and Ralston (CX 106A–G).

A. *Kellogg*

2. Kellogg, founded in 1906, is a Delaware corporation with its principal office and place of business located in Battle Creek, Michigan. Kellogg and its wholly-owned subsidiaries manufacture and sell, among other things, RTE cereal products (its principal business), tea, soup, gelatin, and puddings (Kellogg Answer, ¶ 3; Tr. 11,936–38, 12,173–74; CX–K 746G). In 1968, RTE cereals accounted for approximately 87% of Kellogg's net sales; in 1970, this figure was about 75% (CX–K 1090Q). Kellogg is the largest producer of RTE cereals. In 1950, Kellogg's share of the total RTE cereal market was [32]between 35% and 37%, on either a pound or dollar sales basis; in 1970, it had approximately 44% of the market, on either basis (CX 106A–G).

3. Kellogg has both domestic and foreign subsidiaries. The part of Kellogg that has responsibility for manufacturing RTE cereals in the United States is called Kellogg Company, U.S. The Kellogg Sales Company subsidiary encompasses the field selling force of Kellogg. Kellogg International has responsibility for the sales of Kellogg RTE cereals in countries other than the United States (Tr. 11,925–26, 11,930–31, 11,939).

[10] Findings of fact, for the most part, are made in numbered paragraphs. Discussions and applications of findings, as well as consideration of legal and other matters, appear where deemed appropriate. Some precede or follow particular findings which pertain thereto; others follow all of the numbered findings. Findings which appear in unnumbered paragraphs are, nevertheless, findings.

The record contains a considerable amount of economic testimony. When I cite the testimony of an economist under findings of fact, it may mean that I am accepting the economic principle, theory or conclusion testified to as a finding in this matter. And when I do so, that necessarily means that I have rejected other contrary or inconsistent economic positions. On the other hand, it may simply indicate that an economist has testified to or espoused a particular economic proposition without my necessarily accepting that economic proposition as a fact. The nature of my treatment of such economic evidence will be apparent from the finding.

Many of the conclusions reached by economic experts are based upon other evidence in the record. The weight to be given such economic conclusions, of course, depends upon, and varies with, the reliability of the evidence relied upon as well as the economic witnesses' accuracy in relating and interpreting the relied upon evidence.

4. Until 1939, Kellogg manufactured RTE cereal products only at Battle Creek, Michigan (CX–K 1097A). In 1943, it acquired the business and certain assets of the Miller Cereal Company in Omaha, Nebraska, and leased, with an option to purchase, the manufacturing facilities. In 1958, Kellogg purchased these facilities (Kellogg Answer, ¶ 11). From 1963 to 1970, Kellogg manufactured RTE cereal at four plants in the United States: Battle Creek, Michigan; Memphis, Tennessee; Omaha, Nebraska; and San Leandro, California (CX–K 1079A; Tr. 11,926). Today, Kellogg has another plant in Lancaster, Pennsylvania (Tr. 36,583–84). Kellogg also has RTE cereal manufacturing facilities in 17 foreign countries and sells its RTE cereal products in more than 130 countries (CX–K 1090R).

5. In 1970, Kellogg Company had RTE Cereal Operations assets of $179 million (CX 757B). In 1950 and 1970, Kellogg's RTE cereal sales were $64,922,000 and $308,944,000, respectively. Pound sales for 1950 and 1970 were 258,604,000 and 591,707,000, respectively (CX 430C - Tables, p. 11 "C–Kellogg," received into evidence as GFX 1319).

B. *General Mills*

6. General Mills is a Delaware corporation with its principal office and place of business located in Minneapolis, Minnesota. General Mills is a diversified company manufacturing and selling, among other things, RTE cereals, flour, toys, chemicals, clothes and jewelry (General Mills Answer, ¶ 2B).

7. Prior to 1969, General Mills' RTE cereal business was a part of its Grocery Products Division with several functional areas: a manufacturing division, a sales division, a marketing division, and a comptroller (Tr. 18,145). In 1969, General Mills reorganized its divisions which had responsibility for RTE cereals and created the following divisions within the general framework of its Consumer Foods Group: (1) the Big G Division, which is responsibile for all marketing of RTE cereals and associated products; (2) the Packaged Food Operating Division, which manufactures all products of the Consumer Food Group with the exception of family flours; (3) the Grocery Products Sales Division, which sells all products of the **[33]** Consumer Food Group with the exception of institutional products; and (4) the Sperry Division, which is responsible for institutional sales (Tr. 18,132–33, 18,135–36, 18,140–41; CX–GM 2041).

8. General Mills operates RTE cereal plants in Buffalo, New York; South Chicago and West Chicago, Illinois; Toledo, Ohio; and Lodi, California (CX–GM 2119; Tr. 18,133). RTE cereal represents

between 40% to 60% of production for each of these plants (Tr. 18,133–34; CX–GM 2119).

9. In 1970, General Mills had RTE cereal operations assets of $66.9 million (CX 754D). Its sales of RTE cereal for fiscal year ending May 1951 were $33,224,000 and 125,481,000 pounds; sales for fiscal year 1970 were $141,775,000 and 269,427,000 pounds (CX 430C - Tables, p. "C–GMI," received into evidence as GFX 1319). General Mills' share of the total RTE cereal market for both 1950 and 1970 was approximately 20% on either a pound or dollar basis (CX 106A–G).

C. *General Foods*

10. In 1895, Charles William Post began to produce Postum Cereal, a grain-based cereal beverage, as a coffee substitute. In 1896, he organized the Postum Cereal Company, Ltd. (a partnership association limited) in Battle Creek, Michigan to market this product. Mr. Post developed Grape Nuts cereal, and introduced it in 1898 (GFX 1234D, E, 1370A, B).

11. In 1899, Mr. Post founded the Battle Creek Paper Company Ltd. to provide cartons and containers for his products. This company evolved into the present Carton & Container Division of General Foods Corporation, which provides packaging for various General Foods products—including RTE cereals—as well as for some contract customers (GFX 1226F, 1370B).

12. In 1904, the Postum Cereal Company introduced a corn flake product named Elijah's Manna. In 1907, this product was renamed Post Toasties. In 1922, the Postum Cereal Company introduced its third RTE cereal—Post's 40% Bran Flakes—which, like the first two, remains in distribution today (GFX 1226F, 1234E, 1370B).

13. In the late 1920's, the company moved outside the cereal category and expanded its product line to include gelatin desserts, flours, puddings, chocolate, coconut, syrup, coffee, baking powder, fruit pectin and frozen foods. In recognition of this development of its lines of business, in 1929, the name of the Postum Cereal Company was changed to General Foods Corporation (GFX 1226D, 1370C).

14. In 1943, General Foods acquired the Jersey Cereal Company of Irwin, Pennsylvania, a manufacturer of private label and controlled brand RTE cereal, with plants in Irwin and St. Joseph, **[34]** Missouri (Tr. 12,143–44, 13,714). General Foods subsequently closed the Irwin and St. Joseph plants and moved their operations to Battle Creek (CX–GF 121G).

15. General Foods is a Delaware corporation with its principal

office and place of business located in White Plains, New York. General Foods produces and/or sells, among other things, RTE cereals, baking powder and ingredients, coffee, beverages, nuts, popcorn, frozen foods, syrups, pancake mixes, pet foods, and gelatin and other desserts (General Foods Answer ¶ 11(b); GFX 1242–79, 1370C). Since approximately 1965, General Foods has been the third largest producer of RTE cereals, which are sold under its "Post" label; before 1965, General Foods had been the second largest RTE cereal producer (CX 106A–G; GFX 1370J).

16. During the period of time covered by the complaint, all of General Foods' RTE cereals were manufactured in Battle Creek, Michigan (CX–GF 562). General Foods now has an additional RTE cereal manufacturing plant in Modesto, California (Tr. 36,658–59, 36,966).

17. After an internal reorganization in 1946, General Foods began to manufacture and market its RTE cereals in the United States through its Post Cereals Division. In the early 1970's, as a result of further organizational changes, a newly formed Beverage and Breakfast Division assumed responsibility for General Foods' RTE cereal business, and the Post Division was eliminated (Tr. 16,215–20; CX–GF 167).

18. In 1970, the RTE cereal operations assets of General Foods were over $44.9 million (CX 752B). General Foods' sales of RTE cereals for fiscal year 1950 were $25,785,000 and 126,000,000 pounds; in 1970, sales were $94,242,000 and 225,730,000 pounds (CX 430 C - Tables, p. "C–General Foods," received into evidence as GFX 1319). In 1950, General Foods' share of the total RTE cereal market was approximately 22% based on dollar and pound sales. By 1970, these market shares had declined to approximately 17.7% based on pound sales, and 14.8% based on dollar sales (CX 106A–G).

D. *Quaker*

19. The Quaker Oats Company is a New Jersey corporation with its principal office and place of business in Chicago, Illinois. It was incorporated in 1901. Quaker manufactures and sells, among other things, RTE cereals, to-be-cooked cereals, mixes, frozen foods, cookies, pet foods, and chemicals (Quaker Answer ¶ 2D; Tr. 15,389–90). As of 1970, Quaker produced RTE cereals in plants located in Cedar Rapids, Iowa; Depew, New York; Shiremanstown, Pennsylvania; and Danville, Illinois (Tr. 15,390; CX Q 576). Quaker has both domestic and foreign subsidiaries (Tr. 15,398–99).

20. Quaker's share of the RTE cereal market, based on pound

sales, was between 4.1% and 5.0% in 1950, dropped to approximately [35]2.4% in 1960, and rose to about 7.0% in 1970. Quaker's market share, on a dollar sales basis, went from 6.6% in 1950 to approximately 9.0% in 1970 (CX 106A–G).

E. *Nabisco*

21. Nabisco is headquartered in New Jersey (Tr. 3224). It is engaged principally in the manufacture, processing, and sale of food products in the United States and foreign countries. Its products include biscuits, cookies, crackers, hot cereals, RTE cereals and pet foods (CX–GF 3000Z–139). Nabisco's major RTE cereal products are Nabisco's Shredded Wheat and Spoon Size Shredded Wheat (CX 430 C - Tables, p. "C-Nabisco," received into evidence as GFX 1319).

22. Nabisco purchased Ranger Joe Cereal Company, which had been a regional producer of presweetened puffed wheat and rice, in the mid-1950's (Tr. 26,494–95; CX–GF 167Z–11).

23. Nabisco's share of the RTE cereal market, based on pound sales, was 9.3% in 1950 and approximately 4.8% in 1970; on a dollar sales basis, these market shares were 6.6% and 3.7%, respectively (CX 106A–G).

F. *Ralston*

24. Ralston was incorporated in Missouri in 1894 and is headquartered in St. Louis, Missouri. It manufactures and sells, among other things, RTE cereals, pet foods, tuna fish, and snack foods (Tr. 3739, 3839, 8190).

25. Ralston produces RTE cereals in Battle Creek, Michigan; Cincinnati, Ohio; and Lancaster, Ohio (Tr. 3531, 3572, 10,722). It sells under the Ralston name and under private label (Tr. 3839–40, 8213, 17,506–08). Ralston's share of the RTE cereal market, based on branded pound sales, grew from approximately 3.0% in 1950–1951 to approximately 5.0% in 1960. It declined to approximately 3.8% in 1970. If Ralston's private label sales were included, its market share would be somewhat greater (CX 106A–G).

G. *Other Companies*

26. Over the years, there have been a number of manufacturers of RTE cereals. It has been estimated that in 1911, there were over 100 brands of corn flakes being packed in the Battle Creek, Michigan area alone (GFX 1370G). **[36]**

27. In 1965, the National Commission on Food Marketing sur-

veyed 58 cereal producers in preparing its study of this category. Twenty-four of these producers had sales of $200,000 or more (GFX 1370G).

28. For example, Van Brode Milling Co. manufactured corn flakes and crisp rice and private label cereals dating back to the 1940's (Tr. 12,136, 13,717, 36,316). Jersey Cereal Company produced a number of RTE cereals, including corn flakes, wheat flakes, bran flakes, rice flakes, rice gems, wheat puffs, and rice puffs under its own name as well as private labels. Jersey's net sales were $2.7 million in 1942 (GFX 253F).

29. Colgate-Palmolive marketed Weetabix, a shredded wheat, and Alpen, a natural cereal (Tr. 12,573–75, 26,492). Carnation acquired the Albers Milling Company, an early manufacturer of corn flakes, and began to market the product as Carnation Corn Flakes. Carnation quit the business in 1963 (Tr. 11,752, 12,911, 26,334). Pillsbury was manufacturing a granola by 1972 (Tr. 12,914).

30. Specialty Brands, early in 1973, acquired the Vita Crunch Foods, Inc., which produced a granola-type cereal. By 1975, this company's sales amounted to about $5 million (Tr. 25,916–18).

31. Organic Milling Company entered the RTE cereal business in 1971 with a granola product and, by 1975, sales had reached $1 million. Organic Milling Company acquired the Vita Crunch label in 1975 and, in 1977, earned annual revenues in excess of $2 million (Tr. 37,295, 37,298).

32. The H.J. Heinz Company entered the RTE cereal business in the 1930's and produced a rice flakes product until some time prior to the late 1950's (Tr. 12,992, 26,334).

33. International Multifoods Corporation acquired the Kretchmer Wheat Germ Company and subsequently manufactured a natural cereal (Tr. 30,039). The company also manufactured a granola, Sun Country Granola (Tr. 26,487).

34. Pet, Inc., by 1972, had sold various types of granolas, including Heartland, and two presweetened cereals (Tr. 12,916, 12,998).

II. THE RELEVANT MARKET

A. *Relevant Product Market*

The standards set out in *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962) (a Section 7 Clayton Act case), by which relevant product markets and submarkets are determined are also applicable to a case involving charges of monopolization and restraint of trade. [37]

United States v. *Grinnell Corp.*, 384 U.S. 563, 573 (1966); *Borden, Inc.*, 92 F.T.C. 669, 782–84 (1978).[11] As stated in *Brown Shoe:*

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. *United States* v. *E.I. duPont de Nemours & Co.*, 353 U.S. 586, 593–595. The boundaries of such a submarket ..ay be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors (at 325, footnotes omitted).

1. *Recognition By The Major RTE Cereal Producers, Including Respondents, Of The RTE Cereal Market As A Distinct Product Market*

35. In a 1969 "[o]rientation presentation for people outside the Company telling about the Kellogg Company" (CX–K 746A), "The Ready-To-Eat Cereal Industry" comprises a separate section. Highlights in this section include "the growth in pound volume of this industry" and Kellogg's share of the RTE cereal "market" (CX–K 746G). Another Kellogg product, Pop Tarts, is discussed under a separate section entitled "Toaster Pastry Market" (CX–K 746H).

36. Speeches by Kellogg executives clearly reflect Kellogg's view that RTE cereals is a distinct product market (CX–K 549K, M, 559C), exclusive of products such as Pop Tarts and hot cereals (CX–K 549D, 559D). Kellogg's marketing plans for its RTE cereals [38]also contain numerous references to the "RTE cereal market" (CX–K 7176A, 7177A, 7178B, 7179A).

37. General Foods' marketing plans also consistently refer to "the RTE cereal market" in their analyses of particular RTE cereal brands and groups of brands (CX–GF 1300B, F, 1303A). Several General Foods marketing plans used the following formats which specifically outlined RTE cereal as the relevant market for analysis:

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[11] Respondents assert that the Commission's ruling in *Borden* is incorrect and reflects a misreading of *Grinnell.* The Commission's ruling is not a mere passing reference to language in *Grinnell,* but constitutes a studied consideration of the question. It, therefore, constitutes a controlling precedent covering my determination of relevant product market.

I. Total Industry

A. Total Market Trend
During Fiscal '67, the total RTE
pound cereal market . . .

(CX–GF 602Q);

I. Market Climate

A. Market Profile

1. *Volume.* Ready-to-eat cereal
market pound volume . . .

(CX–GF 1300B).

38. Similarly, General Mills' marketing plans contain references to the "RTE cereal market" (CX–GM 600A; GMX 106A). The marketing plan for the product Lucky Charms, for example, refers to the "Total RTE Market" when discussing "Cereal Market Trends" (CX–GM 2176B).

39. When Quaker purchased and used Nielsen data for sales forecasts for RTE cereals, the information was on the basis of the total market, the presweetened market and the nutritional market, and it looked essentially at those two segments within the total market. This is the format in which this Nielsen data was ordered by Quaker (Tr. 14,969–70). The respondents similarly purchased reports from Nielson and other survey service companies which included data on RTE cereal sales (See, *infra,* Findings 153, 154).

40. The marketing plans of the major producers of RTE cereals also divide the total RTE cereal market into sub-segments. Kellogg recognized "the presweetened segment of the R–T–E Cereal market" (CX–K 397A). A Kellogg marketing plan stated that its new presweetened RTE cereal product Kombos "will not only add to . . . [its] overall sales volume, but will, in addition, protect and increase . . . [its] dominance in an important segment of the RTE cereal business" (Tr. 11,689; CX–K 9031A). General Foods noted that "[t]he bran category (excluding raisin brans) continues to decline in importance to the total R–T–E market" (CX–GF 1302A). General Mills' analyses of "Cereal Market Trends" in its marketing plans include graphic presentations which show and plot "Total RTE Market" pound sales over **[39]**time, with a "Pre-Sweet Market" pound sales line juxtaposed on the same graph (CX–GM 2176B, 2178B, 2185B). A Quaker marketing plan states: "[T]his project [Quisp and Quake] is another major effort on the part of Quaker to establish its position in the pre-sweetened segment of the RTE market" (CX–Q 153B). Several Quaker marketing plans included the following format for market analyses:

I. Analysis

A. Market Trends

1. Total RTE pound sales . . .

2. Total RTE dollar sales . . .

(CX–Q 164B, 167C, 2496B, 2497B, 2630B).

41. Kellogg, General Foods, and Quaker projected and evaluated market shares for particular RTE cereal brands in relationship to the total RTE cereal market (Tr. 11,724, 12,133, 12,150, 13,054, 14,969, 36,397).

42. Both Kellogg and General Mills endeavored to secure shelf space for their RTE cereals at least equivalent to the share their sales bore to the total market sales of RTE cereals (Tr. 7103, 8022–23). Kellogg's magna board, which was used as part of its shelf space program, made no space accommodations for instant breakfast or toaster pastry products (Tr. 8965), and Kellogg's recommendations included the replacement of instant breakfast from the RTE cereal shelf section to the hot cereal section (Tr. 8915).

43. Major producers of RTE cereals viewed only other RTE cereal products and the firms producing those products as competitors in the RTE cereal industry. These producers examined other RTE cereal products to learn about the competitive environment of which their RTE cereals were a part. Industry witnesses testified that the companies with which they compete are other RTE cereal manufacturers (Tr. 7521, 11,374, 14,717, 17,173–77, 18,015; CX–K 549F, G, H).

44. Kellogg, the largest factor in the RTE cereal industry, did not consider other breakfast foods as being in the same market. Pop Tarts, generally known as toaster pastries, were viewed as constituting a separate market of convenience bakery products (CX–K 129, 260C, 549D, 740F, 746H). The advent of new products known as instant breakfast drinks did not cause Kellogg to make any changes in its advertising policies, promotional strategies, or pricing policies with respect to Kellogg's RTE cereal products. Neither did the introduction of toaster pastry products cause Kellogg to make any adjustments or changes in its promotional strategies or pricing decisions regarding RTE cereals (Tr. 11,558–60). **[40]**

45. Kellogg wants instant breakfast drinks to be placed in the milk fortifier section of supermarkets, along with such products as Nestles Quick, Ovaltine and Bosco (Tr. 12,702). Kellogg's position is that a separate market exists for instant breakfast drinks, apart from the cereal market:

Instant Breakfast drink is not a cereal! It is a milk fortifier, comparable to:

Ovaltine
Homo
Bosco
Hershey's Milk Amplifier
Nestles Quick
Ghiradelli's Flick (CX–K 7172B).

"Instant Breakfast" drink is not a cereal. It was reportedly designed to appeal to people who do not eat breakfast. (Cereal customers eat breakfast so it does not belong in that department.)
More than 78% of the population drink coffee. To reach breakfast skippers (especially the "coffee only" kind), place "instant breakfast" drinks in the "Coffee, Tea, and Cocoa" department (CX–K 7172D).

46. Ready-to-eat and hot cereals are two separate types or categories of cereals (Tr. 6558, 9095). This distinction was recognized by a Kellogg official in a marketing strategy address at a sales meeting in November 1960:

I think we can safely say that the ready-to-eat cereal industry has done a better selling job than the hot cereals (CX–K 559D).

And Kellogg separately disseminated market share data on cereals to be cooked (Tr. 12,133).

47. The Cereal Institute is a trade association, with membership limited to all producers of RTE and hot cereals (Tr. 11,866–67, 15,333). While producers of hot cereals were members, in part, for the purpose of funding research into the effects of eating cereals of any kind for breakfast (Tr. 15,333), hot cereals clearly do not belong in the RTE cereal industry. RTE cereals are a revolutionary departure from a cooked cereal (Tr. 29,585). Jewel Food Stores, for [41]example, treated hot cereals as a separate category from RTE cereals and shelved hot cereals after RTE cereals along with instant breakfast and toaster pastries (Tr. 9095). As developed throughout this section of the initial decision covering relevant product market, hot cereals are not a part of the recognized RTE cereal market. They have no impact on the pricing of RTE cereals, they do not qualify as the convenience food which characterizes RTE cereals, but require cooking or heating, and are not produced on RTE cereal type of equipment. Indeed, Kellogg, the largest producer of RTE cereals, has never produced a cooked cereal (Tr. 12,134). The following RTE cereal manufacturers are members of the Cereal Institute:

Kellogg Company
General Foods Corporation
General Mills, Inc.
The Quaker Oats Company

Ralston Purina Company
National Biscuit Company
Malt-O-Meal Company
Van Brode Milling Company, Inc.

(CX–CI 59A; Tr. 11,866–67)

2. *Distinct Prices Of RTE Cereal And Insensitivity To Prices Of Other Products*

48. When establishing prices for RTE cereal products, Kellogg considered the prices of competitive RTE cereal products (Tr. 11,564–65, 11,647, 11,736, 12,927–28). General Mills and General Foods also set their RTE cereal prices to be responsive to, or competitive with, those of their major RTE cereal competitors and their particular competitive brands (Tr. 14,208–09, 14,235, 36,403; CX–GM 110A; CX–GF 17L, 485Z–107, 601F, 1382U, 1410L). In pricing Wheaties, for example, General Mills considered primarily all-family cereals and, to a lesser extent, children or adult cereals (Tr. 35,527).

49. The introduction of instant breakfast drinks and toaster pastry products caused no changes in the pricing, promotion, or advertising of Kellogg's RTE cereals (Tr. 11,558–60, 12,497). Kellogg never instituted a trade deal on an RTE cereal product in response to a trade deal on toaster pastry products (Tr. 12,535). Representative chain store executives testified that, in pricing RTE cereals, retailers would not consider the prices of instant breakfast drinks, toaster pastry products, eggs, or any other products (Tr. 9003, 9132, 9347).

50. For the period 1960–1972, the actual cost per serving of an RTE cereal ranged from two cents to six cents, and an additional four **[42]**to five cents for milk (Tr. 17,682, 30,044–45). Carnation's Instant Breakfast cost substantially more—13 cents per serving for the product itself, and 25 cents additional for the milk that is required (Tr. 17,683, 30,044–45; CX–K 9B, 11A). A bacon and egg breakfast is materially higher in price than a bowl of cereal and milk to the extent of there being dollar differentials (Tr. 17,098–99, 17,682–83). Pop Tarts cost more than RTE cereals on a cost per serving basis (Tr. 12,213). RTE cereals are more convenient and less expensive, on a per serving basis, than toaster pastries, frozen waffles and frozen pancakes, and have an economic advantage over such products (Tr. 30,042). While hot cereals are sold at lower prices than RTE cereals, this has not resulted in an increased sale of hot cereals at the expense of RTE cereals (Tr. 30,051).

3. *RTE Cereals' Peculiar Characteristics And Uses*

51. RTE cereals have grain as a basic ingredient, and are ready to be consumed as purchased without further preparation (Tr. 12,142). They are processed from corn, wheat, oats, rice or bran, and combinations or blends thereof (CX–K 698; CX–GM 736), and are then either flaked, puffed, granulated, extruded, or shredded (Tr. 7524, 10,723, 13,405; CX–GM 736). RTE cereals contain sugar and vitamin additives and some are processed in a flavored syrup (Tr. 10,723–25, 11,482, 11,786, 11,806). These are a unique combination of characteristics.

52. Unlike many other breakfast products, RTE cereal products require little preparation prior to consumption. In fact, preparation requirements are so minimal that a child can easily prepare his or her own RTE cereal. The consumer adds only cold milk, and sugar if desired (Tr. 11,796–97, 11,858–60, 12,426, 12,996, 30,041–42). The consumer does not cook or heat the product, nor is boiled water or any other cooked substance added to an RTE cereal prior to its being consumed (Tr. 11,753). Such ease of preparation is a significant and distinguishing characteristic of RTE cereals, just as its name "ready-to-eat" describes (Tr. 12,923).

53. Most other foods consumed at breakfast require more than minimal preparation. Bacon and eggs must be cooked prior to being eaten. Hot cereals lack the convenience and ease of RTE cereal products, requiring cooking or the addition of boiling water prior to consumption (Tr. 13,220). Producers of toaster pastries and frozen breakfast products recommend that these products be toasted or warmed before being eaten (Tr. 30,043).

54. RTE cereal products are packaged for easy storage in moisture-resistant boxes or bags normally containing half a dozen or more servings, and they can be stored or shelved for relatively long periods of time, often for as long as nine to twelve months (Tr. 6664, 17,569). This is in contrast to many other breakfast **[43]**foods which must be kept refrigerated or frozen, and to some which may be stored only for short periods of time. Frozen pancakes, frozen waffles, and frozen french toast, as their names imply, must be frozen; bacon and eggs must be refrigerated. Perishable products, such as bacon and eggs, must be used within a short time.

55. RTE cereals are designed to be a nutritional breakfast which can be eaten from a bowl. Many cereal eaters prefer eating their breakfast instead of drinking it from a glass, as is done when consuming instant breakfast. Buc Wheats, for example, was introduced by General Mills to provide the nutrition of a bacon and egg

breakfast for the many consumers who wanted this nutrition in the convenient form of a cereal (Tr. 17,714–18, 30,041–42).

56. Unlike other food products, RTE cereals are consumed predominantly at breakfast (Tr. 12,142, 14,224–25). Instant breakfast drinks, on the other hand, are viewed by Kellogg as "quick energy snacks" which are consumed anytime throughout the day, particularly between meals, at lunch, and before bedtime. Furthermore, instant breakfast drinks were designed for breakfast "skippers" (CX–K 7172D).

4. *RTE Cereals' Unique Production Facilities*

57. RTE cereal products are manufactured by a number of basic high volume processes which are unlike those used for the production of other breakfast foods. The processing includes such steps as cooking, pelleting, drying, flaking, puffing, extruding, toasting, and coating. Bacon and eggs, for example, are not "produced" with manufacturing equipment. Cereal production equipment, on occasion, has been used to manufacture non-cereal products such as Whistles and Bugles, which are marketed by General Mills as snack foods (CX–GM 736, 2018A, 2019D, 2020D). It is significant that Kellogg, the largest producer of RTE cereals, has never produced a cooked cereal (Tr. 12,134).

58. It is clear, therefore, that the major RTE cereal producers recognize the RTE cereal industry as a distinct market, with certain submarkets, and plan, compete and conduct their RTE cereal business on that premise; that the prices of RTE cereals are distinct from those of other breakfast foods and are insensitive to the prices of such other products; that RTE cereals have peculiar characteristics and uses and are manufactured on unique production facilities. Under the criteria enunciated in *Brown Shoe* v. *United States,* 370 U.S. 294, 325 (1962), it must be concluded that RTE cereals constitute the relevant product market. **[44]**

B. *Segments Of The RTE Cereal Industry*

59. While RTE cereals constitute the relevant product market, all RTE cereals do not compete to an equal degree with each other. There are segments or categories of cereals which compete more strongly with each other because of their similar attributes. There are some cereals that are so similar that they compete with each other on a one to one basis. At the same time, some cereals may have a broader appeal than the particular segment or category they may

fall in so that they compete to varying degrees with cereals outside of their particular category.

60. The record does not permit an exact delineation of the segments and of the relative degree of competition within and among segments and individual cereals. It does, however, support the finding that there are such segments and such primary and varying degrees of competition.

61. General foods, for example, when looking for new product opportunities, recognized that competition among brands is, to a degree, segmented or localized (Tr. 14,192–93, 14,407–16, 14,497–500).

62. Some brands are more directly competitive with one another than with other cereals (Tr. 7563–71). New brands mostly affect the sales of other cereals in the same category or segment. For example, if a new cereal is "very close " to a General Foods brand in meeting some of the same consumer wants, some consumers of the General Foods brand would likely try the new brand (Tr. 14,088–89, 14,220–27). Sometimes there could be an alternative direct choice to a particular General Foods brand (Tr. 13,537–40). While the introduction of a new RTE cereal would have some effect on the sales of all other RTE cereals, it would have more effect on those products in the same segment, and the most effect on products with which the new product is most closely competitive (Tr. 15,222, 15,754–55).

63. The greater the difference between an existing brand and a new brand, the less the impact from the introduction of the new brand. For example, the introduction of a new chocolate flavored presweet would have greater impact on on existing chocolate flavored presweets than on fruit flavored presweets (Tr. 14,966).

64. Kellogg, when pricing its new RTE cereals, considered the pricing of brands with which its new brand would compete most directly. Kellogg planned to sell its new cereals at prices comparable to those charged for these most directly competing brands (Tr. 11,564–65, 13,200–01). Kellogg generally identified areas of opportunity for new brands by looking at the sales growth of particular brands in particular market areas (Tr. 12,832–33). It estimated sales for its new brands, in part, on the particular brands the new brand would have to compete with. Kellogg looked at the brands the new brand was tested against. The sales estimates assumed that the new brand would be priced "competitively" in relation to those brands it might compete most directly against (Tr. 12,876–79). **[45]**

65. In pricing each established brand, Kellogg gave special consideration to the prices of the brands that the Kellogg brand competed with most directly. Relatively few brands were considered

as the directly competitive brands for each Kellogg brand (Tr. 30,056–59; CX–K 130C–D).

66. A Kellogg marketing plan for seven Kellogg cereals indicates that certain new brands are "direct competition" for the Kellogg products, while other new brands are "indirect competition." The new directly competitive brands were deemed to have affected the sales of the Kellogg products (CX–K 397C).

67. In determing whether to use an in-pack premium with a particular brand, Kellogg considered what its competitors were doing on a comparable product (Tr. 12,321).

68. General Foods expected its new brand introductions to take some sales from directly competitive brands in the new brand's category, such as all-family, unsweetened or adult (Tr. 8824–25).

69. General Foods believed that if it introduced brands similar to ones it already had on the market, they would take a fair share of sales from those similar brands; that if it introduced brands dissimilar to ones it already had on the market, they would take fewer sales from its own brands (Tr. 14,198–99).

70. General Mills sales personnel recognize that certain RTE cereal brands are more directly competitive with one another than with others (Tr. 7698–99, 7709–12).

71. While there is not complete agreement among respondents and other RTE cereal producers (or their representatives) as to the demarcation of the segments and as to which brands are in most direct competition, the following brand categories and individual brand competitors have been recognized by them to the extent indicated:

1. *Corn Flakes*

72. Kellogg sees its Kellogg's Corn Flakes as most closely competitive with other corn flakes, including Post Toasties, General Mills' Country Corn Flakes and private label corn flakes (Tr. 7565–66; CX–K 7181I). Kellogg compares the retail pricing of the corn flakes brands (CX–K 130C, 663).

73. In pricing, General Foods has regarded Post Toasties as directly competitive with Kellogg's Corn Flakes, and chose not to change Post Toasties' price in the absence of a price change by Kellogg (Tr. 13,983–84; CX–GF 418D, 485Z–107, 2024C). General Foods decided that its Post Toasties and Kellogg's Corn Flakes should sell [**46**]at identical prices for the same size packages (Tr. 14,235). General Mills recognized that consumers perceived its Country Corn Flakes as nothing more than another corn flake (Tr.

17,634, 17,750). Country Corn Flakes, Kellogg's Corn Flakes, and Post Toasties are direct alternative choices to the consumer (Tr. 13,538–40).

2. *Wheat Flakes*

74. The RTE cereal manufacturers have seen other wheat flakes as the most direct competitors to their own. Kellogg sees the direct competitors for its Pep as General Mills' Wheaties and Post's Grape Nuts Flakes (CX–K 684, 758C).

75. Mr. Schulze, a top marketing official of General Mills, felt that its Wheaties' primary competition was Kellogg's Corn Flakes, but that Wheaties' pricing was in parity with Kellogg's Pep and General Foods' Grape Nuts Flakes (CX–GM 280). He testified that Wheaties' most direct competitors were Kellogg's Corn Flakes, Pep, and Team Flakes (Tr. 17,188–89). A General Mills analysis of a proposed Wheaties price change compared its prices to those of its "major flake competitors," Post Toasties, Kellogg's Corn Flakes, Grape Nuts Flakes, and Cheerios (CX–GM 287B). A General Mills marketing plan listed General Mills' Cheerios and Kellogg's Corn Flakes, Rice Krispies and Special K as Wheaties' "4 Direct Competitors" (CX–GM 2181B).

76. General Mills conducted a "switching" analysis study on a test product called Frosted Wheaties that showed a high rate of switching between the test product and regular Wheaties. General Mills, therefore, decided not to market Frosted Wheaties (Tr. 15,830, 16,191–92).

77. General Foods' strategy was to maintain the same retail price on Grape Nuts Flakes that was charged on Wheaties (CX–GF 418D).

3. *Variety Packages*

78. Kellogg saw variety packages as direct competitors of each other. Kellogg compared the retail prices of its tray pack to those of Post and of Kellogg's Variety to Post's Tens (CX–K 118E, 130C). If Kellogg were introducing a new variety package, it would look at the price of the competing variety packages already on the market (Tr. 11,564). **[47]**

4. *Rice Krispies, OK's, Alpha-Bits And Cheerios*

79. At times, the RTE cereal producers have compared Kellogg's Rice Krispies, Kellogg's OK's, General Foods' Alpha-Bits, and General Mills' Cheerios as directly competing brands.

80. Kellogg believed that Rice Krispies competed more with Cheerios than with other cereals. Thus, in pricing Rice Krispies, Kellogg was "conscious of the price of Cheerios" (Tr. 30,114–15). Kellogg, in its marketing strategy for Rice Krispies, noted that its sales force had made an effort to bring Rice Krispies' retail pricing in line with Cheerios, and that this effort resulted in share and volume increases for Rice Krispies. Kellogg's marketing personnel frequently compared the retail price of Rice Krispies with that of Cheerios (CX–K 125B, 126B–C, 130C, 131A, 135B; 7179B). General Mills also compared these two brands. In pricing its Cheerios, General Mills originally concluded that Kellogg's Corn Flakes and Rice Krispies were Cheerios' only "major competitive products" (CX–GM 278A). Subsequently, General Mills added Kellogg's Sugar Frosted Flakes to Cheerios' "principal competition" (CX–GM 563Z–5, Z–22, 2167A).

81. Kellogg recognizes that its OK's competes in the same area of the market as Cheerios. It identified General Mills' Cheerios, an established oat cereal, as being in a growing area of the market, thus offering an opportunity for a new Kellogg brand. The sales success of Cheerios was the principal reason Kellogg developed OK's (Tr. 11,267–68, 12,832–33). Kellogg sees Cheerios as OK's biggest single oat competition (CX–K 563C–E).[12] Kellogg's objective for OK's was to establish it in the oat area of the market, occupied exclusively by Cheerios until Alpha-Bits and Life were introduced (CX–K 396A). Kellogg expected that the most important source of OK's sales would be Cheerios and Alpha-Bits consumers switching brands. The next most important source would be other kid oriented cereal consumers; then, consumers of all other cereals (CX–K 396A).

82. General Foods introduced Alpha-Bits in recognition of the opportunity to introduce a new brand in this shaped dough area of the market. Consumers had shown a liking for the expanded, dough-based Cheerios. General Foods determined that some variety in flavor, texture and form might support a new brand in this area. That was the genesis of Alpha-Bits, which included other letters of the alphabet in addition to the Cheerios' "O" (Tr. 13,413–18). **[48]**

5. *Nutritional Cereals*

83. Nutritional cereals compete more closely with each other than with other cereals. Even among the nutritional cereals, some cereals compete more directly than do others.

84. Kellogg's advertising agency considered Quaker's Life and

[12] Cheerios and OK's are primarily oats with some differences. Cheerios is entirely composed of O's; OK's had some O's and K's. Later, the K's were removed (Tr. 7560, 29,651).

General Mills' Total to be potent competition for Kellogg's Special K, with Total a roadblock to further Special K sales increases. It considered Special K and Total to be in a "head-on-battle," with Special K losing volume to Total (CX–K 7355A). In 1965, the agency reported to Kellogg that "products directly competitive in nutritional appeal to Special K are: Total, Life, Kellogg's Concentrate, General Foods' Grape Nuts and National Biscuit Company's Team;" and that Total was a threat to Special K (CX–K 7353F).

85. The agency reported to Kellogg a "need for a related product [to Special K], specifically the need for a strong Kellogg contender in the nutritional cereal market that can combat the nutritional claims of Total" (CX–K 7353H). The sales growth of Special K and Total in the nutritional segment led Kellogg to identify that segment as presenting an opportunity for profit from yet another brand. Kellogg, therefore, developed Product 19, a similar product (Tr. 12,396–98, 12,839–40).

86. Kellogg identified two important subsegments of the nutritional market segment—the protein segment, toward which Special K was aimed, and the vitamin segment, toward which Product 19 would be aimed. Other products in the protein segment were Life and Concentrate. The only other product in the vitamin segment before Product 19 was General Mills' Total. The most important requirement for Product 19 was to compete in the Total market (Tr. 13,006; CX–K 466).

87. Most new products are targeted at those people expected to be most interested in the product. Advertising is then developed to appeal to those people. Product 19's advertising was aimed at those 35 years of age and older. Kellogg directed its marketing plan toward the same audience as that served by General Mills' Total (Tr. 11,483, 12,398–403; CX–K 7176H).

88. There were six logical direct competitors of Product 19: Special K, Concentrate, Nabisco's Team Flakes, Total, Corn Total, Life—the nutritional cereals (Tr. 7563–64).

89. Kellogg's marketing plan for Special K compared the retail prices of the six other cereals in the "nutritional category" to that of Special K. Kellogg noted that the prices of Total and Product 19 "remain very competitive." In addition, the new presweetened cereals with vitamins, such as King Vitaman, "represent indirect . . . competition" (CX–K 7184K). Within the grouping of the seven **[49]**nutritional cereals, two were considered as most directly competitive: Total and Product 19 (Tr. 11,483, 12,398–403; CX–K 7176A–M).

90. Kellogg considered taking competitive moves with respect to its nutritional brands if Nabisco's Team Flakes continued to improve

its sales. It also noted that General Mills had responded to Product 19 by increasing Total's iron fortification level. General Mills' advertising campaign on Total included an assertion that it was a "calorie controlled breakfast," following Special K's primary claim for being a "calorie-controlled, complete breakfast" (CX–K 7180E).

91. "Since its introduction, the overall marketing strategy for Product 19 has been to place the brand in direct competition with General Mills' Total." Kellogg recognized that Product 19's most readily identifiable competition has come from within the nutritional category. The other cereals in that category are Total, Special K, Post Fortified Oat Flakes, Life, Grape Nuts, and Nabisco's Team Flakes. Total has traditionally been Product 19's primary competitor. Kellogg compared advertising and pricing among these seven cereals (CX–K 607, 674, 7176A, E, F, G).

92. Kellogg's product manager for Special K recommended a coupon on Special K to combat General Mills' use of a promotional insert with Total and Post's Grape Nuts' sales growth (CX–K 649). Kellogg compared the retail prices of Product 19 and Special K to Total to determine whether they maintained their proper relationships (CX–K 125B, 130C).

93. In analyzing the consumption of "health cereals," General Mills concluded that consumers were more likely to switch their purchases among Total, Special K, Product 19, and Fortified Oat Flakes (CX–GM 128C, 570B). The nutritional category, according to General Mills, included these cereals plus Life and Grape Nuts (Tr. 7699, 7710; CX–GM 597F, G). Among these cereals, the most nearly competitive were considered to be Total, Special K, and Product 19 (Tr. 15,746–47; CX–GM 174, 280). General Mills responded to the introduction of Total's "direct competitor," Product 19, by increasing the fortification of Total (CX–GM 567).

94. From 1966 to 1970, General Mills believed that Kellogg's Product 19 competed more directly with General Mills' Total than it did with other RTE cereals. Mr. Schulze of General Mills was concerned that the introduction of Product 19 would have an adverse effect on the sales of Total, which it did (Tr. 17,196–203). General Mills' product manager and assistant product managers for Total thought that the introduction of Product 19 adversely affected Total's rate of sales growth (Tr. 17,236).

95. General Mills thought Kellogg's Product 19 and Special K and Quaker's Life would likely have the greatest impact on the sales of its Total. General Mills considered Product 19 a "direct competitor" to Total. Special K was said to be "more directly competitive

with Total" after Kellogg increased the fortification level of Special K (CX–GM 564C). **[50]**

96. Product 19's introduction in Kellogg's Sperry Zone (Western United States) adversely affected Total's market share in that area (CX–GM 570J, L). General Mills undertook "defensive activity" to blunt the inroads of Product 19 on Total's sales (Tr. 17,231–37; CX–GM 570N).

97. While General Mills felt that Product 19 had taken sales from brands other than Total, its impact was felt in lost Total sales (CX–GM 69B, 567A, 570Z–13, 601G, I). General Mills expected increased pressure on Total's sales from other brands to be introduced in the health cereal category, which included Total, Product 19, Special K, Fortified Oat Flakes, and Life (CX–GM 69C, 570Z–13–14). General Mills' strategy for Total was to "stave off inroads made by Product 19" (CX–GM 570Z–15).

98. In determining its introductory price for Buc Wheats, General Mills considered the prices of Total, Product 19, and Special K. It wanted to make sure that Buc Wheats' pricing was reasonably competitive with those products (Tr. 17,297, 17,284; CX–GM 592Q, 593U, Z–16, 599S, V).

99. General Mills' marketing personnel concluded that bran and health categories differed. General Mills expected Vital 7, a fortified bran product, to compete in the health category, although it might compete with bran products as well. General Mills expected Vital 7 to compete with other 100% minimum daily vitamin requirement products such as Total and Product 19, but not necessarily with Special K, which was considered quite different (Tr. 17,261).

100. In January 1968, a General Foods consumer study concluded that "three brands form the basic nutrition[al] cereal category—Total, Life, [and] Special K—with other brands used substantially less frequently for [their more] specific nutritional attributes" (CX–GF 1348Z–204). A second consumer survey found that the nutritional cereal category included Special K, Total, Product 19, and Grape Nuts (CX–GF 1403O, Q). General Foods considered the prices of Special K, Total, and Life when it priced Grape Nuts (CX–GF 485Z–85).

101. General Foods' market research group explored how large an opportunity there was for a particular new brand by looking at the brand's characteristics, the strength of its consumer appeal, the size of the potential consumer group, the other brands that could satisfy those consumers in the same general market segment, and how those other brands were performing (Tr. 14,188–89).

102. When General Foods introduced Fortified Oat Flakes, it

concluded that its "direct competition" was Special K, Product 19, Total, and Life (CX–GF 1406G). In exploring how large the opportunity was for Post's Oat Flakes, General Foods looked at the market segment comprised of the cereals whose primary attribute was nutrition. Those cereals included Grape Nuts, Special K and the wheat based cereals (Tr. 14,188–89). Kellogg's introduction of Concentrate, marketed as a nutritional cereal, was closely watched by **[51]**General Foods because of the likely effect on its Oat Flakes (Tr. 14,220–27).

103. Quaker priced its Life cereal to maintain a "spread relationship" with "its principal competition—Special K and Total" (CX–Q 46E, H; 47E).

6. *Raisin Brans*

104. Raisin bran cereals constitute a recognized cluster of cereals that compete more closely with each other than with other brands (Tr. 7565). In marketing Kellogg's Raisin Bran, Kellogg gives special consideration to Post's Raisin Bran advertising (CX–K 7177A–B, D, H, I). Kellogg compares the retail prices of the Post and Kellogg raisin brans (CX–K 130C, 663). A Kellogg analysis of its Raisin Bran business considered only Post's Raisin Bran in addition to its own (CX–K 439).

105. In addition to comparing raisin brans, Kellogg also considered some less direct relationships between raisin brans and other cereals. For example, in preparing its marketing strategy for Kellogg's Raisin Bran, Kellogg also watched Post's Bran/Prune Flakes and Ralston's Bran Chex with Raisins. Kellogg also noted the demise of General Mills' Bran with Raisin Flavored Flakes (Tr. 7565; CX–K 7177A–B, D, H–I).

106. When General Foods priced its raisin bran, it compared only Kellogg's Raisin Bran prices (CX–GF 439C, 440J, 2000R). It viewed Kellogg's Raisin Bran as Post Raisin Bran's "major (and virtually only) competitor" (Tr. 13,537–40; CX–GF, 440F, 485Z–120). General Foods believed that the two raisin brans should sell at identical prices (Tr. 14,235).

107. General Mills, with its Wheaties Bran with Raisin Flakes, attempted to get some of the growing business that was being obtained by the competitive raisin bran products (Tr. 17,995).

7. *Whole Bran*

108. Kellogg developed Bran Buds in recognition of the opportunity for a new brand in the growing segment of whole bran products,

consisting of Kellogg's All Bran and Nabisco's 100% Bran (Tr. 12,844). Kellogg compared Bran Buds with Nabisco's 100% Bran in terms of consumer preferences. Bran Buds was designed to protect Kellogg's position in the whole bran category, while blocking the sales growth of Nabisco's 100% Bran. Kellogg introduced Bran Buds to work with All Bran to "bracket competition." Kellogg expected Kellogg's All Bran and Bran Buds and Nabisco's 100% Bran to be close competitors (CX–K 409B, 566, 605, 686). **[52]**

109. It is not likely that a bran product would compete with a presweet flavored product such as Apple Jacks. If there were any competition, it would be very small (Tr. 12,880).

8. *40% Brans*

110. The 40% bran cereals constitute a recognized cluster of brands that compete more closely with each other than with other brands. General Foods believed that its Post Bran Flakes "competes most directly with the Bran segment of the RTE cereal market . . . composed of Bran Flakes and Whole Bran products, excluding Raisin Bran" (CX–GF 1990C); that within that grouping, Post's Bran Flakes are "directly competitive" with Kellogg's 40% Bran Flakes (CX–GF 485Z–23). General Foods tried to price its Bran Flakes to match Kellogg's 40% Bran Flakes (Tr. 14,235; CX–GF 418D, 1989B, 1991H). Kellogg compares the retail prices of Post 40% Bran Flakes and Kellogg's 40% Bran Flakes (CX–K 87B, 122B, 127A).

111. General Mills' marketing people believed that the bran market might support another product. General Mills did a simulated sales test, mailing a package flat to a representative sample of bran consumers to determine if they were interested in buying General Mills' new product, Alive (Tr. 15,797–99).

9. *Shredded Wheat*

112. The shredded wheat segment includes cereals perceived by consumers as meeting similar desires of taste and texture—Quaker Muffets, Quaker Shredded Wheat, Nabisco Shredded Wheat and Sunshine Shredded Wheat (Tr. 15,289). Within the shredded wheat segment, brands were divided into whole biscuit and spoon-sized products (Tr. 15,289–92).

113. Quaker priced its Shredded Wheat relative to Nabisco's Shredded Wheat (Tr. 15,289–301).

114. Kellogg placed its Mini-Wheats in the "Shredded Wheat market" where it would appeal first to consumers of shredded wheat products. Other products deemed by it to be in this area of the

market were Nabisco's regular and spoon-sized shredded wheats, Ralston's Wheat Chex and General Mills' Wheat Stax. Mini-Wheats was expected to take sales away from other shredded wheat competitors (CX–K 573C–G, 679). Nabisco's Sweet Wheats was seen as a close competitor to Mini-Wheats. Kellogg reasoned that to cut into Nabisco's Shredded Wheat sales significantly will require a "more directly competitive product—an unsweetened" Mini-Wheats (CX–K 7201E). In determining the introductory advertising for its Mini-Wheats, Kellogg considered the introductory advertising [53] expenditures for the most recent brand introductions in the shredded wheat category (Tr. 13,096). However, Mini-Wheats was sufficiently differentiated from other shredded wheat products that consumers of Mini-Wheats, over 60% of whom came from purchasers of regular shredded wheats, did not make price comparisons with the regular shredded wheats (CX–K 529A).

115. Kellogg attributed declines in the sales of Kellogg and Nabisco shredded wheat to the success of Sunshine Shredded Wheat (CX–K 647).

116. Kellogg's Krumbles was considered by Kellogg to be a part of the Wheat Shreds market, consisting of six other shredded wheat brands. Krumbles was the only one not in biscuit shape (CX–K 680A, C).

10. *Presweets*

117. Kellogg regarded particular products as representing narrower areas or subsegments within the presweetened segment. It sought to develop products to compete more directly with particular presweet products, such as Cap'n Crunch and Trix. Sales growth for these products indicated that this was a narrower area of opportunity within the overall presweet area. Kellogg developed Froot Loops for the "fruit flavored presweet" area (Tr. 12,869–75; CX–K 526, 909).

118. Kellogg compared the retail prices of certain presweets: Kellogg's Sugar Pops and General Foods' Honeycombs; Kellogg's Sugar Smacks and General Foods' Sugar Crisp; Kellogg's Froot Loops and General Mills' Trix; Kellogg's Cocoa Krispies and General Mills' Cocoa Puffs; General Mills' Corn Bursts and Kellogg's Sugar Frosted Flakes (CX–K 33, 130D). These pricing comparisons indicate Kellogg's belief that the brands compared were more directly competitive with one another than with other brands.

119. General Foods considered introducing an unflavored Pebbles in addition to its two flavored Pebbles products (CX–GF 1372L). It did not do so, however, since it was a presweetened unflavored rice

product like its Sugar Sparkled Rice Krinkles, and might drive Krinkles out of the market. While there were differences, the products were too similar (Tr. 17,456–58).

120. When Kellogg introduced Apple Jacks, it packaged and priced that product competitively with General Mills' Wackies and Lucky Charms, Post's Honeycombs and certain other new items. Kellogg was concerned that Apple Jacks might take sales from its own existing presweets (CX–K 7342B). General Mills considered Apple Jacks to be one of five major competitors of Lucky Charms (CX–GM 604Z–11, 2176E; Tr. 2824–26). **[54]**

11. *Presweetened, Shaped Oat Cereals*

121. Within the overall presweetened segment, presweetened, shaped oat cereals compete more directly with each other than with other presweets. Kellogg tested its All Stars against General Mills' Frosty O's and General Foods' Alpha-Bits to judge consumers' preferences (CX–K 528). All three were presweetened, shaped oat cereals (CX–GM 2). All Stars' introduction was analyzed by Kellogg in terms of its effect on General Mills' Frosty O's and Twinkles (CX–K 604). General Mills thought that the introduction of Kellogg's All Stars adversely affected the sales of General Mills' Twinkles (Tr. 16,621; CX–GM 2). General Foods endeavored to minimize Crispy Critters' cannibalization of Alpha-Bits (Tr. 14,198–99). OK's and Stars "overlapped some," but were not considered by General Foods' Director of Corporate Marketing Services to be identical to General Foods' shaped cereals, such as Alpha-Bits (Tr. 14,220–27).

12. *Chocolate Flavored Cereals*

122. Within the overall presweet segment, the chocolate flavored cereals compete more directly with each other than with other presweets. While the flavored cereals, such as Froot Loops, Cocoa Puffs, Trix, Orange Sugar Crisp, Kream Krunch, Kombos and Krinkles, are the logical direct competitors to Kellogg's Cocoa Krispies, even among these flavored cereals, the chocolate or cocoa flavored cereals, such as Cocoa Puffs, are more direct competitors (Tr. 7563, 7567). Thus, Kellogg compared its Cocoa Krispies to other chocolate flavored cereals (Tr. 12,825). It compared the advertising of General Mills' Cocoa Puffs to that of Kellogg's Cocoa Krispies (CX–K 7175N) and the retail pricing of Cocoa Pebbles to that of its Cocoa Krispies (CX–K 574C). Cocoa Pebbles was a more direct competitor to Cocoa Krispies than were some other products (Tr. 12,296; CX–GF 2021D).

123. Kellogg expected to lose retail support for Cocoa Krispies when it introduced Cocoa Hoots. It noted a declining share trend for cocoa flavored cereals as a category. "It's possible that the market is over-saturated with cocoa-flavored products." Other cocoa flavored cereals were Cocoa Puffs, Count Chocula and Cocoa Pebbles (CX-K 7205D). Kellogg sought to acquire more of the chocolate flavored segment with Chocolate Kombos (CX-GM 2171B).

124. General Mills believed that Cocoa Krispies and Cocoa Puffs were more closely competitive with one another than with other cereals (Tr. 15,747; CX-GM 2171A). It concluded that its Cocoa Puffs should be "priced right with the Kellogg product," Cocoa Krispies (CX-GM 278A). **[55]**

13. *Fruit Flavored Cereals*

125. Within the overall presweet cereal segment, the fruit flavored cereals compete more directly with each other than with other presweets. Kellogg identified the fruit flavored presweets as an area that presented an opportunity for a new brand. This was indicated by the sales growth of General Mills' Trix in this subsegment. Kellogg, therefore, introduced Froot Loops (Tr. 12,875-76). Kellogg's Apple Jacks is a flavored cereal. Therefore, its logical competitors are other flavored cereals; then, to a lesser degree, other presweetened cereals (Tr. 7566).

126. Anticipating that General Mills' Lucky Charms would be a close competitor to Kellogg's Froot Loops, Kellogg's product manager recommended an increase in Froot Loops' advertising to "take the steam away" from the introductory advertising for Lucky Charms (CX-K 596).

127. The Director of Marketing for General Mills' cereals thought that there was a competitive set of fruit flavored cereals competing more directly with General Mills' Trix. Froot Loops was Trix's most directly competitive cereal (Tr. 16,599, 16,742; CX-GM 19B). The competitive environment for Trix was all children's cereals, but the product that was watched most closely by General Mills' marketing people was Froot Loops (Tr. 18,015).

128. General Mills did a market test to determine which of two flavor levels of its Trix was superior when tested in the context of a set of fruit flavored cereals. It tested only against Trix's key competitor, Froot Loops, "because there wasn't anything else really in that category that was a sufficient alternative for the consumers" (Tr. 15,814-15).

129. General Foods concluded that its Pebbles "is more likely to

attract users of Froot Loops than it is to attract users of other brands" (Tr. 14,461–62; CX–GF 2021D).

130. General Foods determined that, within the overall presweet market, fruit and cocoa flavored cereals were growing at a faster rate than unflavored cereals. General Foods, at the time, did not have any products in these two flavored presweet segments. Subsequently, Fruity Pebbles was tested against Froot Loops and Cocoa Pebbles was tested against Cocoa Krispies—"head-on-head" (Tr. 17,443–44).

14. *Rally and Life*

131. Kellogg expected its Rally to compete most directly with Quaker's Life. Kellogg's Rally was aimed at the market in which Life was the leading cereal. Kellogg's estimate of sales for Rally were based on the sales of Ralston's Chex-type products and on Life (CX–K 742A–B, 7235B, 7239). **[56]**

132. Mr. Wells, Kellogg's New Products Marketing Manager, testified that when he prepared a suggested retail price for Rally, the only directly competitive brand he could recall comparing was Quaker's Life (Tr. 11,735–40).

133. Kellogg recognized Life as Rally's closest, though not its only, competitor, and tested Rally for consumer preference against Life. Kellogg knew that, in competing with Life, it would need to match the marketing efforts, both advertising and promotion, of Life (Tr. 11,700; CX–K 530).

15. *Sugar Smacks and Sugar Crisp*

134. Kellogg's Sugar Smacks and General Foods' Sugar Crisp are more directly competitive with one another than they are with other cereals. Kellog believed Sugar Crisp to be Sugar Smacks' most direct competitor (Tr. 12,384; CX–K 7175N). When vitamin fortification of Sugar Crisp and inserts caused a softening of Sugar Smacks' sales, Kellogg responded by fortifying Sugar Smacks to the same level as Sugar Crisp (CX–K 595, 7175N, 7352B–C; Tr. 7559, 7603, 12,384, 13,130–33).

135. Sugar Crisp, termed by Kellogg the logical, direct competitor to its Sugar Smacks, was said to have gained sales from Sugar Smacks and Quaker's Cap'n Crunch, Quisp and Quake, as a direct result of the insert in the Sugar Crisp package. Kellogg's own insert in Sugar Smacks was expected to result in reducing Sugar Crisp's sales to "normal levels." Puffa Puffa Rice was also included in

Kellogg's analysis of "sweetened puffed products" (CX-K 650A-B; Tr. 7559).

136. General Foods priced Sugar Crisp in terms of the pricing on the "identical Kellogg brand," Sugar Smacks (CX-GF 418D, 1381S, 1410L).

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137. Kellogg had what may be termed a market or brand segmentation study prepared for it by its advertising agency, Leo Burnett (Tr. 12,892-99; CX-K 9012). That study, prepared sometime between 1951 and 1972, came up with six groups or segments as follows:

> Group I cereals are Kellogg's Corn Flakes, Rice Krispies, Post Toasties, Special K, Wheaties, and Cheerios. Because these cereals "are perceived as having similarities," they "are seen as somewhat interchangeable." Bringing these cereals together is their "plain" or "bland" taste. **[57]**
>
> They are also seen as the "old, established, traditional brands." The "plain" tasting cereals contrast with flavored cereals. They are good fruit carriers and sugar is added individually (CX-K 9012G-K).
>
> The Group II cereals are the "kid flavored cereals" including Pebbles, Quisp, Cap'n Crunch, Lucky Charms, Kaboom, King Vitaman, Froot Loops, Cocoa Puffs, Trix, and Apple Jacks. They are presweetened. They are not bland, but carry a "multitude of flavors." Pebbles, Froot Loops and Trix are seen by consumers in very similar ways. These cereals are defined in terms of their sweet, multi-fruit flavors by those who like them (CX-K 9012M-N).
>
> Group III are presweetened, but not flavored. They include Sugar Pops, Sugar Crisp, and Sugar Smacks. These cereals have rather definite grain tastes, not an added flavor. They are less bland than the Group I cereals. Another similarity is that they are puffed (CX-K 9012Q-R).
>
> Group IV are the shredded wheat cereals, spoon size and regular shredded wheat, Mini-Wheats, and Wheat Chex. This group is "clearly defined by the texture of its primary ingredient," wheat. There is a distinctive wheat taste, and they are not good fruit carriers (CX-K 9012T, V).
>
> Group V consists of the Kellogg and Post raisin brans alone, with "nothing else quite like them." "[R]aisins are the most salient feature of these cereals" (CX-K 9012V).
>
> Group VI are the adult nutritional cereals which include Total, the Post and Kellogg 40% bran flakes, Product 19, Fortified Oat Flakes, and to a lesser extent, Special K, Grape Nuts, and Wheaties. The first four are soggy and flaked and possess a strong taste. They are "good for you" (CX-K 9012W-X).[13] **[58]**

138. The situation just described is termed "localization" by

[13] This is a partial summary of the findings of the study. *See* CPF 9-94. Except for quoted words and phrases, this is not a verbatim reproduction of any part of the study.

complaint counsel and is central to their contention that respondents created a barrier to entering the RTE cereal industry by their proliferation of products. However, as indicated above, localization is a matter of degree and cereals do compete to varying extents with other than so-called directly competing products and products in their particular category or segment (Tr. 22,794).

139. This is true, to some extent, because individual cereal products possess a number of attributes and many other cereals also contain a number of these same attributes; and, there is a considerable overlapping of attributes even among cereals not deemed directly competitive.

140. Consumers aged 35 and older consume certain products ("adult products"), which are not eaten in any significant amounts by children 13 years old and younger. Adult products include Total, Special K, Product 19, All Bran, 100% Bran and 40% Bran Flakes. Children consume certain products ("child products") which are not eaten in significant amounts by adults. Child products are essentially the presweets. Certain products ("all-family products") are eaten in substantial amounts by consumers of all ages (Tr. 35,367–70). All-family products include Cheerios, Rice Krispies and Corn Flakes. Child and all-family products compete with each other (GMX 546A, 549A). Adult and all-family products compete with each other. (Tr. 8824–25, 35,367–68, 35,372–87; GMX 194, 195, 547A–B, 548A–B).

141. Although only 16.2% of Cheerios' volume is consumed by individuals 35 years of age and over (GMX 547A), this is a substantial figure. It is such a large volume that Cheerios cannot ignore that group of consumers and advertises and promotes to them (Tr. 35,378–79, 35,386–87).

142. Cheerios does not achieve its volume increases strictly at the expense of products such as Cap'n Crunch, Sugar Frosted Flakes or Rice Krispies. It very likely draws from many different consumers who eat many different products (Tr. 35,370–71).[14] For example, a brand switching analysis shows that of the two-member families who purchased Cheerios in 1969–70 each of 21 other brands accounted for over 1% of their consumption (GMX 518A). In 1975–76, for a similar sample of families, 25 other brands each represented more than 1% of their consumption (GMX 518B).

143. Lucky Charms, a child cereal, need not be concerned with adult cereals; but children who consume Lucky Charms also consume many other child products (GMX 546A, 549A). **[59]**

144. Total, an adult cereal, competes with many other adult and

[14] This is true of other all-family products (Tr. 12,791, 15,137, 17,392–95, 35,367, 35,384, 35,392).

all-family products, including Special K, Grape Nuts, Post 40% Bran Flakes and Product 19 (GMX 525A; Tr. 33,730–31, 33,743–44, 33,751, 33,753, 33,899–900, 35,397–400).

145. Kellogg's Corn Flakes appeals to all age groups and, in a sense, competes with every other cereal on the shelf (Tr. 7566). The brand switching analyses referred to above (Finding 142) show that two member families consuming Kellogg's Corn Flakes had more than 1% of their consumption accounted for by each of 20 other brands in 1969–1970 (GMX 520A), and by each of 23 other brands in 1975–1976 (GMX 520B).

146. Apple Jacks competes with all flavored cereals and most other presweetened products (Tr. 7566).

147. General Foods' market planners believed that all cereals were competitive with Sugar Crisp, although Sugar Crisp was primarily competitive with other presweetened cereals (CX–GF 4K, 1410A).

148. A General Foods market research review of Grape Nuts in 1956 stated: "Because of its distinct flavor, unique form and texture [Grape Nuts] does not fall into any specific category, and competes with all RTE cereals for its share" (CX–GF 40).

149. The 1963 Menu Census concludes that there "is a strong usage relationship between Post Raisin Bran and Post presweetened cereals" (GFX 1210Z–5).

150. A FY 70 review by General Foods' Marketing Division states that "Alpha Bits is the only letter-shaped cereal and is primarily competitive to colored, flavored and shaped presweetened brands" (CX–GF 1382). The FY 72 Management Summary for Crispy Critters describes that product as a "unique, fun to eat, animal shaped, presweetened cereal primarily competitive with other presweetened cereals that possess shapes, additives or flavors" (CX–GF 1417A). Pink Panther Flakes was considered to be in competition "to all children's presweetened cereals" (CX–GF 1439). Cocoa Pebbles "frequently interacted" with Cap'n Crunch and Frosted Rice, in addition to chocolate flavored cereals (GFX 1317).

C. *The Relevant Geographic Market—The United States As A Whole*

1. *Use by Major Producers of National Price Lists*

151. The price lists issued by the RTE cereal companies show uniform national prices for each brand. Kellogg lists a single price for each brand for all states within the United States, except for Hawaii (CX–K 828, 846, 856, 861, 866, 869). General Mills' and **[60]**

General Foods' RTE cereal list prices are each uniform for the entire United States, except for Alaska and Hawaii (CX–GM 440, 452, 469, 502; CX–GF 297, 311, 314). Quaker and Ralston each issue price lists which show a single price for each RTE cereal brand throughout the country (CX–Q 430, 432, 434, 436; CX–R 579, 580 thru 591).

152. Except when a product is being test marketed, the major RTE cereal companies generally sell their products nationally (CX–K 1067; CX–GM 2111, CX–GF 556; CX–Q 2983). During a test market, companies introduce the new product in selected regions and, if the product meets its expected sales volume, the sales regions are expanded in a planned sequence, often termed a "roll-out." When the roll-out has been completed, the product is distributed on a national level (Tr. 12,537–38, 16,009–11, 16,035–36, 29,773, 29,991).

2. *Purchase By Major Producers Of National Market Share Data*

153. Each respondent and Quaker subscribed to services provided by the A.C. Nielson Company (Tr. 7728–29, 7732, 8604–05, 11,550, 12,802, 14,349, 14,351, 15,594–96). A typical report purchased from Nielson by these companies contains, among other data, information on the total national sales of RTE cereals, average nationwide consumer prices for individual products, national market shares and advertising of individual brands, national distribution and out-of-stock conditions reflecting retailers' temporary product shortages, and estimates of national consumer sales on both a dollar and a pound basis (KX 14). Respondents used Nielson as a medium for exchange of national advertising expenditures on a total RTE cereal basis and on a brand-by-brand basis nationwide (Tr. 11,842–43, 14,233, 14,354, 14,356–58, 15,596–98, 15,600–01; CX–ACN 2; CX–GM 176).

154. Similar nationwide information was purchased by respondents from Market Research Corporation of America (MRCA), Selling Area Marketing Information (SAMI), and National Purchase Diary (Tr. 7464, 11,764, 12,784, 14,365, 16,031, 16,062–66, 29,591, 34,349; CX–GF 1380; CX–K 560; CX–GM 604Z–5).

3. *Preparation By Respondents Of Nationwide Marketing Plans For Their RTE Cereals*

155. The internal marketing plans prepared by the RTE cereal companies discuss the total RTE cereal market on a national basis, the nationwide performance of various segments of the RTE cereal market, and also the nationwide performance of individual cereals

considered in the context of a national market (CX–K 7175 thru 7179; CX–GM 2170; CX–GF 1300; CX–Q 155). **[61]**

156. In 1965, Kellogg's marketing plan for its presweetened cereals considered the impact of a limited national roll-out of Cap'n Crunch and the national introduction of General Mills' Lucky Charms and Crispy Critters (CX–K 7357F). In planning media strategy for Count Chocula and Frankenberry, General Mills decided that "a combination of child network and spot television will be used [in 1972/73] support of in-pack premium promotions to achieve national reach and impact" (CX–GM 2198C–D). A marketing analysis of the raisin bran segment attributed the growth in that segment to a nationwide increase in the absolute number of households consuming raisin bran cereals and to a nationwide increase in the consumption of raisin bran cereals per household (CX–GF 2000D). According to Quaker's 1968–1969 marketing plan for Life, among the factors favorable to the growth of the nutritional segment was an increase in the nationwide percentage of better-educated people and wealthier families (CX–Q 155B).

4. *Use By Major Producers Of Nationwide Network TV And Other Media To Sell Their RTE Cereals*

157. Because of the national scope of the RTE cereal market, Kellogg uses network television to advertise its products. Network television provides nationwide television coverage for Kellogg's advertising efforts (Tr. 11,379–80). Part of Kellogg's 1970–1971 media strategy for Corn Flakes was to use "nighttime TV as the primary medium to provide continuing national support against the primary target audience of younger families with children as well as older adults" (CX–K 7181L). Similarly, television is the primary medium for Kellogg's Raisin Bran because of its national coverage (CX–K 7177G, 7184M, 7187Q).

158. General Foods planned to use "kid network" 30-second advertisements for Honeycomb in 1971 to take advantage of the medium's ability to generate efficient national reach of children under 12 years of age. Additionally, "kid network allows the brand to effectively tie-in with planned show-oriented promotions" (CX–GF 1383, 1374N). General Foods admitted making substantial expenditures for network television advertising for its RTE cereals (General Foods Admission of Fact 37).

159. In 1970–1971, General Mills planned to use night network television advertising for Wheaties "to provide a national base of continuity against the target family audience and deliver optimum

reach" (CX–GM 2172C; *and see,* CX–GM 2167, 2171). General Mills has admitted making substantial expenditures for network television advertising for its RTE cereals for the years 1965 through 1970 (General Mills Admissions of Fact 56, 58, 59, 60, 63, 64, 65, 68, 82, 83, 90). **[62]**

160. Quaker also used network television to advertise its RTE cereal products (Quaker Admission of Fact 108; CX–Q 151G, 153I, 154J).

161. The above findings compel the conclusion that the relevant geographic market is the United States as a whole.

III. STRUCTURE OF THE RTE CEREAL INDUSTRY

162. The RTE cereal market is large and has experienced rapid and substantial growth. Following are the dollar sales of RTE cereals through grocery stores for the years 1952 through 1971, as reported by Nielsen:

Year	Total Dollar Sales ($ millions)
1952	237
1953	254
1954	265
1955	280
1956	312
1957	336.4
1958	379.8
1959	401.1
1960	421.1
1961	449.5
1962	480.3
1963	527.8
1964	577.5
1965	624.6
1966	655.7
1967	656.0
1968	679.3
1969	710.0
1970	741.2
1971	782

(CX 101F).[15] **[63]**

[15] General Mills (GMPF 5–15 thru 18) challenges the reliability of CX 101 and 106 (market share data) asserting that Nielsen data, upon which they are based, are not accurate; that General Mills' Director of Consumer Research testified (Tr. 16,161–63) that Nielsen's figures for several products were not in accord with General Mills' own actual sales figures for those products.

However, all respondents subscribed to Nielsen services, including those that furnished sales data (Tr. 15,595), and all used and relied upon the sales data so furnished (Tr. 11,489–90, 12,782–83, 13,349–50, 15,725, 15,842, 16,063, 16,163). While General Mills' Director of Consumer Research testified to some differences, he explained that

(Continued)

163. Total industry sales showing growth in pounds for the period 1940–1975 at five year intervals is as follows:

INDEX OF GROWTH IN TOTAL RTE CEREAL INDUSTRY POUND SALES
1940 = 100

Year Ending 12/1	Sales MM lbs.	Total Index
1940	458	100.0
1945	594	129.7
1950	610	133.2
1955	783	171.0
1960	941	205.5
1965	1178	257.2
1970	1183	258.3
1975	1688	368.6

(CX 101E). **[64]**

164. The preceding tables show that, until the mid-1960s, there was rapid growth in pound sales of RTE cereals (*And see*, Tr. 26,157). From 1966 through 1970, there was almost no growth. The industry was relatively stable in terms of pounds and had a modest growth in terms of dollars. Rapid growth resumed after 1970. Between 1970–1971 and 1975–1976, the total RTE cereal market grew 55%. There was very rapid growth, particularly in 1973 and 1974 when the market was growing at an annual rate of 10% or 11% (Tr. 14,021, 17,684–85, 26,158).

165. RTE cereal pound sales grew considerably faster than other sectors of the economy. For the period 1952 through 1966, RTE cereal pound sales grew by 72.8%. Using the Economic Report of the President, which uses constant dollar GNP, the "all goods and services" group grew by 63.9% in real terms over the same period. A comparison of these differences shows that growth of output was considerably faster for RTE cereal than it was for the economy as a whole. For the same period, growth in RTE cereal dollar sales was 176.8%. GNP data from the President's Economic Report, which is based on current dollars unadjusted for inflation, show that the growth for "all goods and services" was 116.9%. RTE cereal dollar sales grew at an average of about 8.7% a year for the period 1955 to 1959, while the "food and kindred products" growth rate was 3.74%,

General Mills' figures covered point of sales from General Mills whereas Nielsen's figures reflected sales at the store level, so that pipeline delays accounted for some of the differences (Tr. 16,167). Further, he was not prepared to testify to the accuracy of Nielsen's overall figures (Tr. 16,163); and General Mills failed to introduce its own sales figures which were available to it.

Kellogg's Marketing Director testified (Tr. 12,795) that, in his opinion, Nielsen's sales figures were generally accurate and that they were relied on by Kellogg. Under all these circumstances, the Nielsen sales data are deemed reliable. *See Borden, Inc.*, 92 F.T.C. 669, 805 n. 40 (1979); and *General Foods Corp.*, 69 F.T.C. 380, 446–47 (1966), for precedents where the Commission has relied upon Nielsen data.

the "nondurables" growth rate was 5.48% and the "all-manufacturing" growth rate was 6.52%.

166. The RTE cereal industry, therefore, has been experiencing rapid growth. Its growth has been substantially faster than the growth in the value of "all goods and services" and substantially faster than the growth in real output of the economy as a whole. (Tr. 21,834, 25,158–59; CX 101E, F).[16]

167. For each year since at least 1940, there have been only six manufacturers of RTE cereal that produced in substantial quantity. The three largest have been Kellogg, General Mills and General Foods, followed by Quaker, Nabisco and Ralston, although not always in that order. From 1943 to 1970, these six firms accounted for at least 89% of industry sales, either on a pound or dollar basis. That 89% figure was in 1943. In 1970, these firms enjoyed over 97% of the market (CX 106A–G).[17] The following chart shows four-firm concentration ratios for the industry from 1962 through 1970: **[65]**

[16] General Mills, for example, favorably compared an RTE cereal annual growth of 7% with the 4% growth of the canned soup industry. The latter was considered by it to be a strong annual growth (CX–GM 111A). General Mills deemed the long-term growth of cereal sales to be phenomenal (CX–GM 262A). And Kellogg regarded cereals to be "one of the few rapidly expanding industries" (CX–K 552B).

[17] There has been no new major entry to challenge the positions of these six companies (Tr. 7435–36, 11,749, 12,911–12, 12,995).

RTE CEREAL INDUSTRY FOUR-FIRM CONCENTRATION RATIOS

	POUND BASIS				DOLLAR BASIS	
Year	Nielsen Data from General Foods and Kellogg[1]	Nielsen Data[2]	Adjusted Co. Submitted Data[3]	Adjusted Co. Submitted Data, Brand Products Only[4]	Adjusted Co. Submitted Data[5]	Adjusted Co. Submitted Data, Branded Prod's Only[6]
1962	89	–	90	90	90	90
1963	90	–	–	–	–	–
1964	90	–	–	–	–	–
1965	89	88	–	–	–	–
1966	88	88	89	89	90	90
1967	88	88	89	89	91	90
1968	88	–	90	89	91	91
1969	90	–	90	90	91	91
1970	89	–	90	90	92	91

[1] Source: CX 106A.
[2] Source: CX 106B.
[3] Source: CX 106F.
[4] Source: CX 106G.
[5] Source: CX 106D.
[6] Source: CX 106E.

[66]168. Since at least 1937, the four-firm concentration ratio based on pound sales has never been below 81%. And Kellogg, General Mills and General Foods together have accounted for over 80% of the pound sales from 1951 through 1971 (CX 106A, B, F, G). In 1950, Kellogg's share of the market was between 35% and 37%, on either a pound or dollar sales basis; in 1970, it's share approximated 44%. General Mills' share of the total RTE cereal market for both 1950 and 1970 was approximately 20%, on either a pound or dollar sales basis. In 1950, General Foods' share of the total RTE cereal market was approximately 22% based on dollar and pound sales. By 1970, its market share had declined to approximately 17.7% based on pound sales, and 14.8% based on dollar sales (CX 106A–G).

169. Quaker's share of the RTE cereal market, based on pound sales, was between 4.1% and 5.0% in 1950, dropped to approximately 2.4% in 1960, and rose to about 7.0% in 1970. Quaker's market share, on a dollar sales basis, went from 6.6% in 1950 to approximately 9.0% in 1970. Nabisco's share of the market, based on pound sales, was 9.3% in 1950 and approximately 4.8% in 1970; on a dollar basis its market shares were 6.6% and 3.7%, respectively. Ralston's share of the RTE cereal market, based on branded pound sales, grew from approximately 3.0% in 1950–1951 to approximately 5.0% in 1960. It declined to approximately 3.8% in 1970. If Ralston's private label sales were included, its market share would be somewhat greater (CX 106A–G).

170. Another measure of industry concentration, the Herfindahl Index, is calculated by summing the squares of each firm's market share. The Herfindahl Index differs from the more commonly used concentration ratio in that it shows a higher figure for industries where individual firm market shares are disproportionately high. For example, an industry in which the four largest firms had 50%, 10%, 10%, and 10% of the market, respectively, would have a higher Herfindahl figure than an industry where the four largest firms each had 20% of the market. Despite this difference in result, there is a correlation between four-firm concentration ratios and the Herfindahl Index. Highly concentrated industries have high Herfindahls. Industries that are not highly concentrated have low Herfindahls (Tr. 21,709–11, 26,215–21).

171. The Herfindahl Index for the RTE cereal industry has increased from .223 in 1945 to .276 in 1970 (CX 106A–G).[18] The following chart shows the Herfindahl Indices for the RTE cereal industry using several available alternate sources: **[67]**

RTE CEREAL INDUSTRY HERFINDAHL INDICES

	POUND BASIS				DOLLAR BASIS	
Year	Nielsen Data from General Foods and Kellogg[1]	Nielsen Data[2]	Adjusted Co. Submitted Data[3]	Adjusted Co. Submitted Data, Brand Products Only[4]	Adjusted Co. Submitted Data[5]	Adjusted Co. Submitted Data, Branded Prod's Only[6]
1962	0.270	–	0.286	0.284	0.305	0.304
1963	0.276	–	–	–	–	–
1964	0.278	–	–	–	–	–
1965	0.273	0.262	–	–	–	–
1966	0.262	0.266	0.281	0.280	0.292	0.291
1967	0.269	0.268	0.277	0.275	0.286	0.285
1968	0.268	–	0.283	0.282	0.294	0.294
1969	0.274	–	0.287	0.286	0.293	0.292
1970	80.276	–	0.289	0.288	0.294	0.293

[1] Source: CX 106A.
[2] Source: CX 106B.
[3] Source: CX 106F.
[4] Source: CX 106G.
[5] Source: CX 106D.
[6] Source: CX 106E.

[68]172. By various alternative methods of comparison, including rankings of industries by concentration ratios, averages of concentration ratios, and averages of Herfindahl Indices, the RTE cereal

[18] The Herfindahl Indices for the RTE cereal industry are somewhat understated inasmuch as they were calculated using market shares of only the six largest producers, where data were available. Inclusion of the squares of the market shares of the smaller firms would have raised the industry indices.

industry has been one of the most highly concentrated industries in the United States (Tr. 26,166–67).

173. Census Bureau classification Standard Industrial Code 2043, entitled Cereal Breakfast Foods (SIC 2043), includes RTE cereals, hot cereals and baby cereals. As hot cereals and baby cereals comprise a relatively small fraction of the classification, SIC 2043 is a good approximation of the RTE cereal market (Tr. 26,194–99, 26,207, 27,672–73).[19]

174. In 1958, SIC 2043 had a four-firm concentration ratio of 83%. Only 29 of the 443 industries engaged in manufacturing (the All Manufacturing Group) that year had concentration ratios greater than 80%. Two-thirds of the industries in this group had concentration ratios of less than 50%. Only three of the 42 industries engaged in the manufacture of food and kindred products (the Food Group) had concentration ratios greater than 80%, while two-thirds of those industries had concentration ratios of less than 50% (Tr. 26,181–82; CX 108D).

175. In 1963, SIC 2043 had a four-firm concentration ratio of 86%, ranking it among the 27 industries in the All Manufacturing Group with concentration ratios above 80%. More than two-thirds of the 417 industries in this group had concentration ratios of less than 50%. Only one industry in the Food Group, in addition to cereals, had a concentration ratio greater than 80%. Two-thirds of the 44 industries in the Food Group had concentration ratios of less than 50% (Tr. 26,179–80; CX 108C).

176. In 1967, only 22 of the 354 industries in the All Manufacturing Group had four-firm concentration ratios higher than 80%, one of which was SIC 2043 with a concentration ratio of 88%. It was one of only two industries in the Food Group with four-firm concentration ratios over 80%. Two-thirds of the industries in the All Manufacturing and Food Groups had concentration ratios less than 50% (Tr. 26,178; CX 108B).

177. The four-firm concentration ratio for SIC 2043 in 1972 was 90%. SIC 2043 was one of the 11 most concentrated in the All Manufacturing Group, comprised of 381 industries, and it was the most concentrated of the 43 industries in the Food Group in 1972. Again, two-thirds of the industries in the All Manufacturing and Food Groups had concentration ratios of less than 50% (Tr. 26,167–72; CX 108A). **[69]**

178. The simple arithmetic average of four-firm concentration ratios for 1972 was 39% for the All Manufacturing Group and 44%

[19] Actually, the inclusion of hot cereals and baby cereals would tend to understate the concentration of the RTE cereal industry.

for the Food Group. The four-firm concentration ratio for SIC 2043 in 1972 was more than twice those averages, 90%. In that same year, the eight-firm simple arithmetic concentration average was 52% for the All Manufacturing Group and 58% for the Food Group. The eight-firm figure for SIC 2043 in that year was 98% (Tr. 26,185–86).

179. CX 108J is a set of tables prepared by the Bureau of the Census which shows average concentration ratios, weighted by industry employment, for the All Manufacturing Group and for the Food Group. The weighted average four-firm concentration ratio for the All Manufacturing Group in the years 1947, 1954, and 1958 ranged from 33.2% to 34.9%, depending on the base year used to determine the employment weights. The weighted average four-firm concentration ratio for the Food Group for the same years ranged from 30.9% to 33.2%, again depending upon the base year used in determining the weights. The four-firm concentration ratio for the cereal industry (SIC 2043) was 79% in 1947, 88% in 1954 and 83% in 1958 (Tr. 26,186–90; CX 108J).

180. The average concentration ratio, weighted by product value for 184 manufacturing industries which appeared in all four of the Census years 1947, 1954, 1958, and 1963, ranged from 35.3% in 1947 to 38.9% in 1963. The ratios for SIC 2043 again are significantly higher than the averages, ranging from 79% in 1947 to 86% in 1963 (Tr. 26,190–92).

181. The RTE cereal industry is highly concentrated in relation to other industries when comparing Herfindahl Indices of concentration. For 108 four-digit industries in 1947, the average four-firm Herfindahl Index was .0968.[20] During that same year, the four-firm Herfindahl Index for SIC 2043 was .1609. Of the 108 industries which made up the average Herfindahl Index, only 18 industries had higher Herfindahls than did SIC 2043. In 1954, the average Herfindahl Index for the 93 industries covered was .0921, while the Herfindahl for SIC 2043 was .4026. Of the 93 industries which made up the average Herfindahl Index for 1954, only four had higher Herfindahls than did SIC 2043 (Tr. 21,821–24, 26,218–22; CX 106A–G, 108S, T). **[70]**

182. In addition to concentration being consistently high for many years in the RTE cereal industry, the positions and market shares of the leading firms have remained relatively stable (CX 106A–G; Tr. 26,230–31, 26,498–504). Until about 1966 or 1967, the four largest producers in the industry were the three respondents

[20] The average Herfindahl Index was calculated from industry Herfindahls compiled by Ralph L. Nelson using Bureau of the Census data (Nelson, *Concentration in the Manufacturing Industries of the United States* 1963). Nelson's book contains Herfindahl Indices for a number of large industries for the years 1947 and 1954 (Tr. 26,218–19).

and Nabisco, at which point in time Quaker replaced Nabisco as the fourth largest (CX 101A–D, 106A–G). Of 44 five-digit product classifications for which necessary information was available covering the years 1954, 1958, 1963, 1967, and 1972, the RTE cereal industry had the third lowest fluctuation in four-firm levels of concentration. Of 47 such product classifications for which the necessary information was available, the RTE cereal industry had the sixth lowest fluctuation in eight-firm concentration levels (CX 108L; Tr. 26,231–33).

183. Various renowned economists have specified certain industry concentration levels as "critical" in the sense that, at or above such levels, sellers become conscious of their interdependence, *i.e.,* that the action of each seller affects all of the others; and that this recognition of interdependence may lead to a pattern of conduct that causes monopoly power to be exercised. Bain, Meehan, Duchesneau and others have estimated that the critical level is reached when an industry has an eight-firm concentration ratio of 70%. Most studies of economists who espouse the "critical level" theory estimate the four-firm critical level of concentration to be between 50% and 60%, although Stigler found that a 70% four-firm concentration was required to be critical (Tr. 21,711–16). The concentration levels of the RTE cereal industry, as found above, far exceed all of the various estimated critical levels.

The above finding should not be construed as one to the effect that respondents are conscious of their interdependence with the result that they have or are exercising monopoly power by means of tacit collusion or otherwise. It is merely a finding as to the existence of the economic theory of critical levels, and that concentration in the RTE cereal industry exceeds the critical levels that have been estimated. Not all economists agree with the critical level concept (Tr. 21,713). **[71]**

IV. COMPETITION

A. *Industry Characteristics*

Complaint counsel assert (CP 136) that respondents exercised monopoly power by avoiding price and nonprice competition on RTE cereal products. Complaint counsel theorize that in a tightly knit oligopoly, such as the RTE cereal industry, each firm recognizes that its actions and the actions of each of its competitors will have an impact upon the other competitors. It takes into account the other firms' anticipated reactions in every potential competitive decision that it makes. Such firms, in economic parlance, are termed "interdependent". In such a situation, the firms recognize that it is to their mutual advantage to avoid competitive activities which will only bring about responsive competitive activities by their large competitors. The firms, therefore, avoid such competitive acts in accordance with understood "rules of the game." In order to so successfully avoid competition, all major firms must participate.

These interdependent firms consider unrestrained competition in any dimension to be undesirable because competition of any type would have the potential of breaking down the tacit agreement to limit competition and maximize group profits. Not only must the firms trust each other, but they must all understand the rules of the game so that no action of any of the participants may be misinterpreted to be other than complying with the rules of the game.

184. In support of their structural approach, complaint counsel rely (CPF 8–74) upon an economic theory set forth by Dr. Jesse W. Markham in The American Economic Review, Vol. XLI (1951), pp. 891–905, in an article entitled "The Nature and Significance of Price Leadership." A reprint of that article was received in evidence as KX 104. KX 104 is paginated 176–189. Dr. Markham is a professor in the Graduate School of Business Administration at Harvard and was Director of the Bureau of Economics of the Federal Trade Commission from 1953 until the end of 1955. Complaint counsel have stipulated to Dr. Markham's credentials as a recognized expert in the field of industrial organization economics (Tr. 38,253–55).

185. In his article, Dr. Markham advanced the proposition that "in industries which possess certain specific features, . . . one would expect, *a priori,* a type of price leadership . . . inimical to the public interest." He termed this Price Leadership In Lieu Of An Overt Agreement and reasoned that such price leadership could achieve the same parallel action among sellers as if there had been overt collusion to that end (KX 104 at 185–86). Dr. Frederick Scherer, the economist introduced by complaint counsel who sought to apply Dr. Markham's model to the RTE cereal industry, testified that the Markham article "is widely regarded by economists as the leading article on the subject of price leadership in industry. It has been extensively reprinted" (Tr. 27,801). **[72]**

186. Dr. Markham listed five specific conditions prerequisite to application of his Price Leadership In Lieu Of An Overt Agreement thesis. The first condition is:

> Firms must be few in number and each firm must be sufficiently large to be compelled to reckon with the indirect as well as the direct effects of its own price policy (KX 104 at 186).

187. As further elucidated by Dr. Markham, when this condition is met, industry members would be cognizant of the fact that there is a common course of action that would benefit all of them (Tr. 38,426). The high concentration ratios for the relatively few leading firms in the industry, headed by Kellogg with some 40% of the market, satisfy this condition.

188. The second condition:

> Entry to the industry must be severely restricted if the price set by the price leader is to remain close to a rationalized oligopolistic price for any significant length of time. If the long-run cost curve for the new entrant is substantially the same as those which confront entrenched firms, price rationalization can be only temporary since the rationalized price will attract new entrants which, in turn, will bid the price down. If, however, the time lag between investment decisions and actual investment in the industry is significant, price rationalization for the duration of the lag may suggest itself as a profitable possibility (KX 104 at 186).

189. In discussing restriction of entry, we are not limited to "barriers to entry" as that phrase is used by economists. In this industry, we have had no entry except with respect to granola or natural RTE cereals, which is an exceptional situation (*infra*, Findings 661, 662). This in itself reflects severe restriction to entry. The extent to which this may be attributable to high costs of entry by an outsider, including costly and time consuming or even unsolvable problems in developing an acceptable competitive product **[73]**(situations not deemed by some economists to constitute barriers to entry), is immaterial.[21]

190. Expansion through the introduction of new products by existing firms would not be considered as entry here since the expansion would be by firms theoretically engaged in price coordination through price leadership. This disposes of respondents' argument that Quaker's expansion, as well as the introduction of new products by the several respondents, constituted entry.

191. It is concluded, therefore, that the second condition of Dr. Markham's economic theory is satisfied.

192. The third condition:

> The "commodity" produced by the several firms need not be perfectly homogeneous but each producer must view the output of all other firms as extremely close substitutes for his own. If this condition is not fulfilled, each producer is likely to view

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[21] In the face of long and costly efforts to effect entry, together with the very real possibility that the new product may not be accepted by consumers, a potential entrant may decide against entry. Even though it is not deterred by a "barrier to entry," the deterrence, nevertheless, is real.

Further, in the face of such high costs, long delays and problematical success, a potential entrant might well decide against entry since it would realize that once it effected substantial entry, it could not count on a continuation by existing firms of prices that afforded supracompetitive profits. An oligopolistic price, therefore, will not automatically draw new entry since this may well not be the price at which the new entrant will anticipate competing.

his product as distinctive in character and the "market" will not be characterized by a single price policy but by several. Examples of such individual pricing policies may be found in the automobile and brand-name men's clothing markets. Where the output of each firm is differentiated to the extent that it is only a moderately good substitute for the output of other firms, price leadership, of course, is meaningless (KX 104 at 186).

193. This condition is not present in the RTE cereal industry. To the contrary, as I have already found (Findings 59–150), the RTE [74] cereal market is segmented into numerous subcategories, with cereals competing primarily against other cereals in their own categories. And, in many instances, two or three cereals within a segment compete primarily with each other. Indeed, this segmentation or localization of cereals is an essential element of complaint counsel's contention that respondents have created a barrier to entry of new competition into the industry by reason of their proliferation of brands.

194. Some of the segments and competing cereals previously identified are: corn flakes; wheat flakes; variety packages; Rice Krispies, OK's, Alphabets and Cheerios; nutritional cereals; raisin brans; whole bran; 40% brans; shredded wheat; presweets; presweetened shaped oat cereals; chocolate flavored cereals; fruit flavored cereals; Rally and Life; and Sugar Smacks and Sugar Crisp.

195. Among the various RTE cereals distributed by the respondents and Quaker during the period 1950–1972 are the following:

Kellogg: Apple Jacks, Bran Buds, Chocolate Kombos, Cinnamon Frosted Mini-Wheats, Cocoa Krispies, Concentrate, Corn Flakes with Bananas, Froot Loops, Kellogg's All-Bran, Kellogg's 40% Bran Flakes, Kellogg's Corn Flakes, Kellogg's Jumbo Assortment, Kellogg's Raisin Bran, Kellogg's Request Pack, Kellogg's Snack-Pack, Kellogg's Variety, Krumbles, OK's, Orange Cream Krunch, Orange Kombos, Pep, Product 19, Puffa Puffa Rice, Rally, Rice Krispies, Special K, Stars, Strawberry Cream Krunch, Strawberry Kombos, Sugar Frosted Flakes, Sugar Frosted Mini-Wheats, Sugar Pops, Sugar Smacks, Triple Snack and Vanilla Cream Krunch (Request For Admissions of Fact #10–34—Kellogg Company, dated December 4, 1972; Kellogg's Admissions of Fact #10–34, dated February 16, 1973).

General Mills: Alive, Big G Goodness Pack, Bran Wisps, Breakfast Squares, Buc Wheats, Buttercups, Carmel Puffs, Cheerios, Clackers, Cocoa Puffs, Cornados, Corn Bursts, Corn Total, Country Corn Flakes, Frosty O's, Fun Pack, Hi-Pro, Hot Toasted 40% Bran, Jets, Kaboom, Kix, Lucky Charms, Pick-A-Pack, Protein Plus, Smiles, Sugar Cones, Sugar Jets, Sugaroos, Total, Trix, Twinkles, Unsweetened Lucky Charms, Vital 7, Wackies, Wheat Hearts, Wheaties,

Wheaties Bran with Raisin Flavor Flakes and Wheat Stax (Request For Admissions of Fact #9–53—General Mills, Inc., dated December 4, 1972; General Mills' Admissions of Fact #9–53, filed February 20, 1973).

General Foods: Alpha-Bits, Bran Flakes, Bran & Prune Flakes, Cinnamon Raisin Bran, Corn Crackos, Corn Fetti, Corn Flakes & Blueberries, Corn Flakes & Peaches, Corn Flakes & Strawberries, Count Off, Crispy Critters, Fortified Oat Flakes, Frosted Rice Krinkles, Grape Nuts, Grape Nuts Flakes, Heart of Oats, Honeycomb, Oat Flakes, Pebbles, Pink Panther Flakes, Post Tens, Post Toasties, Puff Corn Flakes, Raisin Bran, Rice Krinkles, Sugar Coated Corn Flakes, Sugar Crisp, Super Orange Crisp, Top 3 and Treat-Pak (Request For Admissions of Fact #7–34—General Foods Corporation, dated December 4, 1972; General Foods' Admissions of Fact #7–34, filed March 6, 1973). **[75]**

Quaker: Cap'n Crunch, Cap'n Crunch's Crunch Berries, Cap'n Crunch's Peanut Butter Cereal, Diet Frosted Puffed Rice, Diet Frosted Puffed Wheat, King Vitaman, Life, Oat Flakes, Quake, Quaker Puffed Rice, Quaker Puffed Wheat, Quaker Shredded Wheat and Quisp (Request For Admissions of Fact #12–20—The Quaker Oats Company, dated December 4, 1972; Quaker's Admissions of Fact #12–20, dated March 14, 1973).

196. The failure to establish condition three is apparent from the very existence of these many different brands of cereals, each extensively advertised to extol their differences to the consuming public. And Dr. Markham testified that the degree of differentiation among RTE cereal products was such that his condition three has not been met (Tr. 38,433).

197. As Dr. Markham has testified, his model cannot be used to anticipate price leadership in differentiated product industries. "[H]eterogenous products imply a certain heterogeneity in prices; and that in and of itself vastly complicates any process of having—arriving at price patterns so parallel that they would be those one might expect in lieu of an overt agreement." In an industry where products are close substitutes, products will be purchased purely on the basis of price, and competitors are in a position to follow price leaders. In an industry with differentiated products, it is no longer clear what there is to be coordinated. Price can no longer be identified and isolated for particular products as something the sellers can focus on for purposes of coordination (Tr. 38,430–31).

198. The fourth condition:

The elasticity of the market demand schedule for the output of the industry . . .

must not greatly exceed unity. If demand for the output of the industry is elastic because the oligopoly is only a segment of a larger monopolistically competitive market, the prices of closely competing products severely limit or possibly even eliminate the gains to be derived from adopting a price leader. Moreover, if demand for the output of the oligopoly is highly elastic, firms are not likely to adhere to the price leader's price if to do so would result in substantially less than capacity operations, since each firm could still stimulate its own sales considerably by lowering its price, even though all other firms met the new price (KX 104 at 186–87). **[76]**

199. An inelastic demand means that a price change will not significantly affect the quantity purchased (Tr. 27,809–10, 38,435–37). An industry at unity would be one, for example, where a 5% change in price would affect purchases by about 5% (Tr. 27,809–10).

200. While a coefficient of price elasticity of demand for the industry has not been developed on this record, it would appear that the demand for RTE cereal products is relatively price inelastic (Tr. 27,814, 28,000–01, 28,238). The uniqueness and price insensitivity of RTE cereals in relationship to other products has been described above (Findings 48–56). General Foods decisionmakers believed that consumer demand for RTE cereals is relatively price-inelastic (GFPF 7–509).

201. Respondents' contention (KPF 3–69; GMPF 2–44 thru 2–49; GFPF 7–628 thru 7–630) that RTE cereals are price elastic in relationship to all other breakfast foods is not supported in the record. To the contrary, the record establishes that the fourth condition is met.

202. The fifth condition:

Individual-firm cost curves must be sufficiently similar so that some particular price allows all firms to operate at a satisfactory rate of output. If, for example, the industry is composed of several high-cost low-capacity firms and several low-cost high-capacity firms, the resulting conflict in price and output policies cannot be resolved by adopting a price leader so long as all firms remain in the industry. Low-cost firms will not accept the price leadership of high-cost firms since there is a better option in the form of a lower price and a higher rate of output open to them (KX 104 at 187).

203. The record contains no cost studies. Complaint counsel (CPF 8–73) rely upon the testimony of Dr. Scherer to the effect that product technology and equipment were equally available to each respondent, raw materials (corn, oats, etc.) were purchased by each on the commodities market at the same quoted prices and each could utilize advertising agencies and procure advertising space and time on substantially equivalent terms (Tr. 27,814–16). Also, when estimating the costs of other producers, respondents assumed that the costs were equal to their own (CX–GM 171A; CX–GF 4039Z–91; CX–K 443A). This inference could be made, however, only when respondents were manufacturing similar products (Scherer 28,633).

204. In light of the large number of different products using different basic ingredients, different manufacturing processes and [77]different production lines, there is no basis for complaint counsel's assumption that condition five has been met. Complaint counsel themselves, in the course of meeting respondents' contentions as to Nabisco's profitability, assert (CRPF 11–62) that there is no basis for assuming Nabisco had the same capital-to-sales ratio as its competitors; that Nabisco could have different technology and older assets with resultant different capital intensities. And complaint counsel argue (CRPF 11–246) from the possibility that General Foods' cost per pound in relation to its competitors may be low.

205. Kellogg (KPF 3–71, 3–72) relies upon cost/sales figures derived from KX 97 which would show that General Foods was the high cost producer[22] followed by Kellogg and General Mills in that order.[23] General Mills (GMPF 2–52, 2–153) and General Foods (GFPF 7–632) rely on GMX 553 which shows that Kellogg was the high cost producer, followed by General Mills with unit costs as much as 25% lower than Kellogg's, and then General Foods with costs 33% lower than Kellogg's and 8% lower than General Mills'.

206. Complaint counsel (CRPF 114) would discount these exhibits because of their inconsistent results. The burden of proof as to costs, however, rests with complaint counsel and, while inconsistent, the only cost analyses in the record show that respondents' costs differed.

207. Complaint counsel (CRPF 8–115 thru 8–117) would also fault KX 97 and GMX 553, because costs as a percentage of sales shown by these exhibits could be accounted for by respondents having different selling prices. They would also fault GMX 553 because the firms differ in their relative order on costs depending upon whether the ratio used is cost/dollar sales or cost/pound sales. These objections, however, merely confirm the fact that respondents are selling different products, having different weights, at different prices; and that complaint counsel's inability to demonstrate that Dr. Markham's condition five has been met is a corollary of the fact that condition three has not been met.

208. Dr. Markham's widely regarded model of price leadership in lieu of overt agreement requires that all five stated conditions be met. The record clearly establishes that condition three (that each producer must view the output of all other firms as extremely close substitutes for its own) is not present and that complaint counsel **[78]**

[22] The President of General Foods Testified that General Foods was a high cost producer (Tr. 36,369), as did its Breakfast Foods Manager (Tr. 13,984).

[23] It cost General Mills more to produce Country Corn Flakes than it cost Kellogg to produce Kellogg's Corn Flakes (Tr. 17,748–49).

have failed to demonstrate the meeting of condition five (the similarity of the firm's cost curves). The RTE cereal industry, therefore, has not been shown to be one where price leadership in lieu of overt agreement is to be anticipated.

Dr. Markham's model, well-reasoned as it may be, is, of course, merely an economic theory as to what may be expected. Even if all conditions of the model had been met, it would not substantiate a finding that the respondents in fact coordinated prices by reason of price leadership and price followership. Complaint counsel would still be required to prove that situation by the acts and practices of the individual respondents. And they are not precluded from that attempt because the industry does not fit the model. Nevertheless, respondents' acts and practices, as evidenced, must be evaluated in light of the characteristics of the industry and the inconsistencies of those characteristics with the conditions of Dr. Markham's model.

It is alleged that respondents, under the principles described above, tacitly colluded or arranged to avoid a wide range of competitive activities that would threaten to reduce prices and the resultant monopoly profits which respondents allegedly achieved. We shall now consider the various competitive activities alleged by complaint counsel to have been subverted by respondents to following "the rules of the game" (CP 136–38).

B. *Monitoring of Competitors' Activities*

209. Each respondent closely monitored the activities, including pricing actions, of all other RTE cereal producers. Each respondent published and delivered list prices for its RTE cereal products to customers in advance of the actual price increase dates (Tr. 7522, 7841–42, 13,221, 13,705; *See* CX–K 766 thru 869; CX–GM 361 thru 504; CX–GF 214 thru 320). Through its monitoring efforts, each respondent knew, usually in advance of the effective date of the price increase, when, and the extent to which, another respondent was changing prices (Tr. 7521, 7887, 14,250).

210. Respondents used several methods for monitoring purposes, including their own personnel and market reporting services such as A.C. Nielsen and Selling Area Marketing, Inc. (SAMI) (Tr. 7472–81, 8075–76; CX–K 7B, 11C, 13A, 15A, 16, 20B, 24B, 25B, 26B, 27B, 37B, 38A, 48B, 76, 88C, 916A; KX 14; CX–GM 93, 281; CX–GF 1593). Such monitoring allowed each firm quickly and accurately to obtain detailed information about the actions of the others in such areas as pricing, new product introductions, product changes, advertising, promotional programs and shelf space activities. This information,

along with other considerations, was used by each respondent in planning its future conduct with respect to the development, marketing, sales and pricing of RTE cereals (Tr. 7523, 7525–27, 11,841–43, 12,319, 12,321, 12,730–31, 12,737, 12,927–28, 13,017–19, 13,045, 13,200, 14,172, 14,231–35, 14,270, 14,282, 14,346, 14,364, 17,336–38, 18,010; CX-K 944C; CX-GM 81). **[79]**

211. Such monitoring of competitors' activities is consistent with alleged efforts to coordinate competitive practices, including pricing. It is also consistent with an effort to react in a competitive fashion to the competitive activities and strategies of others in the industry (Tr. 38,433–35, 38,606).

212. For example, General Foods' technical research department monitored competitors' new and established product activities in order to remain aware of technical advances (Tr. 13,641–42).

213. In order to continually assess the competitive environment, General Foods purchased information on other companies' activities and on consumer preferences from A.C. Nielsen, SAMI, Market Research Company of America (MRCA), and the National Purchase Diary (Tr. 14,349).

214. Data received by General Foods from MRCA and National Purchase Diary gave profiles of just what categories of persons purchased particular products. This allowed researchers to determine the number of families purchasing a product, the number and frequency of purchases, the demography of buyers and an analysis of purchasing patterns over time (Tr. 14,364–65).

215. General Foods carefully monitored and tried to assess the impact of all competitive products on its line of RTE cereals. The introduction of a new product by one of its competitors would inaugurate an in-depth analysis of that product. The technical department would undertake to analyze the cereal as to its ingredients and its claims, and then perhaps run a consumer test. The new product's price was considered to have a potential impact on the market and was, therefore, compared to established products' prices. General Foods' researchers would ask Nielsen to track distribution of the product in the United States, as well as its sales and pricing trends (Tr. 14,219–21).

C. *Price Competition*

Complaint counsel assert that elimination of price competition in the industry is shown by the industry's high rate of return and price/cost margins, both of which were substantially higher than those of most other manufacturing industries; and by an analysis of price trends showing that the prices for RTE cereals rose faster than those for other food products and that price decreases for RTE cereals were practically non-existent (CPF 8–9). First, however, we turn to the more direct evidence bearing on respondents' pricing activities.

216. We first consider the methods whereby the respondents set their prices. Top executives of all respondents have denied the [80] existence of any agreement among the respondents concerning price (Tr. 29,918, 35,462, 35,815, 36,552). Such testimony of Kellogg and General Mills officials falls within that which I am bound to accept at face value (*see, supra,* pp. 13–16). And, of course, if Kellogg and General Mills had no such agreements with General Foods, General Foods had no such agreements with Kellogg or General Mills. Unless overcome by more persuasive evidence, I am required to accept such testimony as accurately describing the situation.

1. *Pricing Policies*

(a) Kellogg

Since Kellogg is the alleged price leader, we shall first consider its method of pricing.

217. Kellogg has not set prices in order to maintain a profitable price structure for its RTE cereal competitors (Tr. 29,928).

218. Among the most important factors considered in Kellogg pricing decisions were production costs. During the period covered by the complaint, Kellogg conducted pricing meetings attended by senior executives at which it considered the basic problem of what to do about increasing costs, including raw materials, packaging, labor and overhead (Tr. 29,913–14, 29,993, 30,102, 30,115). The same considerations entered into Kellogg's determinations of the appropriate prices for new products it was introducing (Tr. 13,200–01).

219. Kellogg had a guideline for gross margins on RTE cereals, as well as a target net profit figure (Tr. 30,060, 30,063). Through experience, Kellogg had learned that maintenance of its gross margin guidelines for individual brands would generate sufficient revenues to cover costs and still meet its net profit guideline for each brand (Tr. 30,006). In these pricing meetings, therefore, it was understood that price increases should maintain profit margins on the products (Tr. 30,073–74).

220. Decisions to increase price generally covered a group of cereals and did not always include those cereals which were experiencing the largest cost increases. The final decision to increase prices was based primarily on the "total amount of revenue" that

would be generated if the increases were taken. At the same time, an analysis was made on a product-by-product basis (Tr. 30,103–04). The Kellogg executives considered the impact that the changes in input costs would have on the gross margins for particular brands (Tr. 29,914). Some brands fell short of margin guidelines and others exceeded them (Tr. 30,013–14). Products chosen for the largest price increases were those that were expected to maintain their sales pattern despite increased prices (Tr. 30,063–69). [81]

221. Both Kellogg's market research department and its comptroller's office prepared memoranda for use at the pricing discussions. The comptroller's memoranda detailed, on a product-by-product basis, the present and proposed Kellogg selling prices, the present and proposed retail selling prices, the date of the last price increase, the package size, the proposed price increase per dozen, the calculated percentage increase, and the selling prices of other producers' brands; also, the amount of additional revenue that would be generated if the particular price increases were made (Tr. 12,936, 30,070–74, 30,103–04).

222. When cost increases were incurred, Kellogg could either maintain its price on a particular brand and accept a reduced margin of profit or raise the price of the brand.[24] If Kellogg felt that a prospective price increase would have a sufficiently adverse impact on sales, it would not increase price, but would accept a lower margin. On the other hand, if Kellogg felt that a price could be increased without a significantly adverse effect on sales, the price of the brand in question would be raised (Tr. 29,914, 29,917, 30,068).

223. To estimate the potential effect of a price increase on the sales of a particular brand, Kellogg examined the prices of products which competed with that brand. Kellogg recognized that pricing a brand above competition could adversely affect sales (Tr. 29,919). For brands with direct competitors, Kellogg had to exercise care in raising prices. For brands with no direct competitors, Kellogg had greater pricing flexibility (Tr. 30,059).

224. When attempting to estimate the impact of a price increase on sales, Kellogg considered the recent sales trend of the brand in question, sales trends of competitive brands and the recent pricing activity of competitive brands (Tr. 12,933–34, 12,941, 30,102). It also considered what competitors might do if Kellogg changed its prices (Tr. 30,056).

225. Kellogg considered the effect that changes in the wholesale prices of its cereals might have on retail prices. Kellogg was

[24] At times, Kellogg was able to preserve the margin of a particular brand in the face of rising costs by substituting acceptable less costly inputs (Tr. 29,915).

concerned particularly about establishing wholesale prices that would lead to retail prices that would surpass "psychological barriers" (such as fifty cents per box, or one dollar per box), which might present a significant deterrent to sales (Tr. 12,939, 29,917). **[82]**

226. When sales of a particular brand had fallen or had not grown as expected, Kellogg might consider a price reduction. The deciding factor was whether the price reduction would increase sales volume sufficiently to offset the resultant lower per unit margin. The purpose of any price reduction, like any price increase, was to increase profits (Tr. 29,920).

227. List price decreases, however, were seldom used. Coupons were the most frequently used means by which Kellogg effected short-run price savings on selected RTE cereals (Tr. 13,041). Unlike trade deals, which are short-term price reductions to grocers, Kellogg felt assured that coupon price reductions would reach the consumer (Tr. 12,545). Kellogg believed that price reductions did not stimulate sales among regular heavy users of a particular brand, whereas couponing effectively granted price reductions to the marginal consumer who might not otherwise purchase the couponed brand (Tr. 12,289, 12,545, 29,926–27).

228. If competitors did not follow a Kellogg price advance and the resultant price differential adversely affected Kellogg's sales, consideration would be given to taking appropriate action (Tr. 30,106–07).

229. In 1966, Mr. Charles Tornabene, then Kellogg's Vice President and Domestic Sales Manager, made a speech at an annual regional meeting of Kellogg officials. In it, he described Kellogg as the leader in the industry (CX–K 549L) and stated:

> A leader should do all in its power to build and expand its industry sales and avoid any steps which will drag the industry down. A leader must maintain a profitable price structure within the industry—both for its members and its distributors.
>
> * * * * * * *
>
> Only a strong company can afford to exercise restraint when it is needed to keep an irritable condition from deteriorating into a war that no one wins. Only a strong company can set the pace that provides a favorable climate for a strong and growing industry. Only by disciplining ourselves can we set the example for a disciplined industry (CX–K 540M, Q).

He also quoted with approval the comment of one whom he identified as a well-qualified observer: **[83]**

> [T]here is no area in the food business today in which the true qualities of industry leadership are more aptly displayed than in the cereal industry where Kellogg provides strong and consistent leadership in building and expanding the profitable

climate of true growth, virtually free from destructive pricing and promotional practices (CX–K 549P).

230. In addition, Mr. Tornabene stated that "Kellogg has a long history of consistently resisting price cutting and gimmicks and withstanding competitive pressure in these areas;" and that "where it was necessary to participate—overwhelmingly—in order to put an end to destructive practices," Kellogg has done so and would continue to do so (CX–K 549M).

231. This speech reflects Mr. Tornabene's and Kellogg's belief that, as the industry's leading competitor, it would not serve Kellogg's interest to engage in destructive pricing and promotional wars. It does not indicate the existence of an agreement between Kellogg and its competitors; and even if it did, Mr. Tornabene's statement could not be used against the other respondents as evidence of a conspiracy since that statement was not made in furtherance of a conspiracy, and the existence of a conspiracy has not otherwise been established (see, *supra,* p. 19).

232. In the face of Kellogg's President's sworn testimony that Kellogg has not set prices in order to maintain a profitable price structure for its RTE cereal competitors (Tr. 29,928), and in the absence of any other evidence that would tend to show that Kellogg acted to help its competitors realize profits, Mr. Tornabene's generalization in this area is entitled to little weight. Contrary to the factual conclusion complaint counsel would draw from Mr. Tornabene's statement, both General Mills and General Foods were constrained by Kellogg prices from raising prices on their own products.

(b) General Mills

233. As with Kellogg, a primary determinant of price, both for new and established General Mills products, was input costs (Tr. 16,604, 16,609, 35,524).

234. General Mills also considered the prices of competitive products in reaching pricing decisions. This was to avoid pricing its products out of line with competition, which might result in deterring sales (Tr. 16,604–10, 35,653–54). [84]

235. General Mills considered the past pricing activities of General Foods and Kellogg. Pricing data considered included pricing histories, analyses of price changes by all three respondents, including price change effective dates, brands affected and the amount of revenue generated by increases (Tr. 17,331–34; CX–GM 27, 168, 2007B, 2012A).

236. General Mills had its field personnel promptly report competitive price change information (CX–GM 186, 194, 281, 283). Price changes were often reported by telegram (CX–GM 199, 201, 205, 249, 250–51).

237. By 1967, General Mills' average price per pound had risen by $.095 over 1962, the highest absolute increase of the six largest RTE cereal companies. By 1970, General Mills' average price per pound had increased by $.19, or 52.1%, a much larger increase than that of any other major RTE cereal manufacturer. From 1968 on, General Mills' average price per pound was higher than that of any of its competitors except for Quaker (GMX 560A; GFX 1151, 1152).

238. Because it saw itself in a premium priced position, General Mills was reluctant to initiate desired price increases for fear of substantial sales losses. Reporting to the head of General Mills' cereal department in March 1967, Mr. Schulze (then in charge of Adult Cereal Marketing) concluded that General Mills was "not in a position to advance prices" on its adult cereals because of three factors: (1) recent price increases on these cereals; (2) current prices on these cereals were equal to or above their "direct competition"; and (3) "Kellogg is still the clear leader in the cereal industry, and with our current premium-priced position, we do not feel that we could lead a price advance" (CX–GM 280A).

239. The competitive constraints brought to bear by General Mills' perceived position as a premium priced manufacturer are exemplified in pricing decisions involving Trix and Lucky Charms. These brands were recognized as "premium priced products." In March 1967, Mr. Bodeau, a General Mills official, recommended against a price increase on these brands because they were already priced higher than most presweets. "We believe increasing our premium difference would be unwise and result in volume losses on these products" (CX–GM 278B).

240. The prices of Trix and Lucky Charms were not increased at that time. The price of Trix was not increased until November 1967 (CX–GM 477); and Lucky Charms' price was not raised until January 1969 (CX–GM 487). In the interim, General Foods had increased the prices of Honeycombs and Super Sugar Crisp in June 1967 (CX–GF 304), Kellogg had increased the price of Sugar Smacks and Sugar Pops in August 1967 (CX–K 858), and General Foods had again increased the price of Super Sugar Crisp, along with Alpha-Bits, in September 1967 (CX–GF 305).

241. In analyzing the possibility of raising prices for its "child cereals" in mid-1967, General Mills compared its prices with **[85]** those of its competitors and evaluated the "price changing history."

It concluded that, because it expected to lose too much volume if it raised prices, while its major competitors did not, there was "no price advance possibility unless our major competitors initiate a change" (CX–GM 278A, C–D).

242. It is concluded that the record reflects genuine independent business reasons why General Mills did not originate price changes to a greater degree than it did and followed price increases of its competitors.

(c) General Foods

243. Pricing questions arose at General Foods as a part of the annual budgeting and marketing planning process. Costs and market conditions were evaluated and pricing assumptions were factored into annual product plans. In addition, decisions were often made during the year, as necessary (Tr. 13,984, 36,396, 36,400–01).

244. General Foods, as did Kellogg and General Mills, viewed input costs as a prime determinant in its pricing decisions (Tr. 13,984, 36,400–01; CX–GF 4039Z–23). As a much smaller producer than Kellogg and General Mills, General Foods believed that it had smaller profit margins and that it was under greater cost pressures and urgencies to increase prices in response to cost increases (Tr. 13,984). General Foods, therefore, sought opportunities to increase prices (Tr. 36,369, 36,574–76, 36,400–01).

245. Nevertheless, General Foods could not unilaterally raise its prices on brands which faced direct competition. It believed, for example, that initiating price advances on Post Toasties or Post Raisin Bran which put those products at a price disadvantage vis-a-vis their direct competitors (Kellogg's Corn Flakes and Kellogg's Raisin Bran, respectively) would result in significant share swings away from the Post brands (CX–GF 2022E, 3000Z–23c, 4039Z–79). Despite increasing costs, General Foods had to wait for larger companies to move before it could act to meet its own profit margin goals (Tr. 13,984). Accordingly, a 1967 General Foods Task Force recommended that General Foods "[a]ssume the position of a follower in pricing action that occurs in the industry recognizing that *price increases will not be followed automatically unless such action is justified by cost*" (emphasis supplied) (CX–GF 4039P).

246. General Foods' overall policy was to "Price directly competitive generic brands, *i.e.*, Corn Flakes, Bran Flakes equal to prime competition on a price per ounce basis" (CX–GF 4039P). Further, its intent was to price such cereals as high as possible within the constraints imposed by its competitors. It became a follower rather

than a leader (CX–GF 17L, 418A, 1408E, 2033J, 3000Z–193, Z–216, 4033H). **[86]**

247. The record is replete with instances where General Foods' policy to follow rather than initiate pricing action was implemented with respect to particular brands, *e.g.,* General Foods' Raisin Bran's relationship with Kellogg's Raisin Bran (CX–GF 345E, 440J, 1996C); General Foods' Alpha-Bits' relationship with Kellogg's Froot Loops and General Mills' Trix and Lucky Charms (CX–GF 1382U); General Foods' Pebbles' relationship with leading flavored brands (CX–GF 1420C, 2021H); General Foods' Bran Flakes' relationship with Kellogg's Bran Flakes (CX–GF 1989B); General Foods' Sugar Crisp's relationship with Kellogg's Sugar Smacks (CX–GF 1410L). General Foods' Post Toasties' relationship with Kellogg's Corn Flakes (CX–GF 2022E, 2024C); General Foods' Pink Panther Flakes' relationship with "other kid presweet brands" (CX–GF 1435Z–38); General Foods' cereal assortments' relationship with Kellogg's cereal assortments (CX–GF 2008B, 2009C).

248. General Foods' policy was to "[r]ecognize through pricing any unique attribute or quality which a Post product offers the consumer, *i.e.,* higher than average prices will be charged for products which are unique in convenience or benefit" (CX–GF 1300M). However, even these relatively exclusive brands had to be priced "within a generalized area of reason relative to other cereals" (Tr. 36,403). As stated in its 1967 Task Force report, General Foods sought to "[p]rice brands having no direct competitor to maximize gross margins after recognizing the retail price range for brands within the same category" (CX–GF 4039Q).

249. General Foods' 1967 Task Force sought to raise the profit margin of brands such as Post Toasties, Bran Flakes, Raisin Bran and Grape Nuts Flakes, which were subject to direct competition (CX–GF 4039Z–104). However, it was unsuccessful in this effort (CX–GF 3000Z–23c). General Foods, despite its desire to avoid initiating price increases, was forced to initiate a price increase on Raisin Bran in June 1969. Kellogg did not increase the price of its Raisin Bran until December of that year (CX–GF 3000Z–23c). The consequent price disadvantage resulted in a substantial sales swing to Kellogg (CX–GF 3000Z–23d). This experience was cited by the 1971 Task Force as evidence "that brands with direct competitors . . . witness volume swings with price differentials. . . ." Consequently, the Task Force recommended that, on such products, General Foods should "follow the market leaders or direct competitor whenever possible" (CX–GF 3000Z–193).

250. General Foods has evaluated the possibility of lowering

prices—the issue being whether price reductions would generate sufficient additional sales to offset the lower margin General Foods would receive on each sale (CX–GF 571K, S, Z–1, Z–6, Z–15 thru Z–17, 4039Z–106, Z–109). A 1970 report was particularly interested in, and analyzed, the pricing alternatives (upward and downward) for Post Toasties (CX–GF 2022E).

251. After an internal assessment, a member of the 1971 Task Force rejected the idea of an across-the-board price reduction, **[87]** because it would require an unrealisitc increase in sales volume to offset the decreased margins resulting from the price reduction.

Given our current margin situation a reduction in price (as a marketing strategy) does not appear to be a realistic opportunity for Post (CX–GF 3000Z–193).

Two price increases on Post Grape Nuts, in June 1969 and in November 1970, caused substantial share losses (CX–GF 3000Z–23c, Z–180).

252. Categories in which General Foods faced direct competitive pressure produced substantially lower variable gross profit rates than categories in which competition was less direct. A low variable gross profit rate in the corn flakes category was attributed to "the reluctance of Kellogg's and Post to make major pricing moves" (CX–GF 3000Z–68). General Foods lowered its price on Post Toasties to meet a Kellogg price decrease on Corn Flakes in July 1971 (CX–GF 3000Z–121, Z–177).

253. General Foods' overall margins were lower in FY 1973 than in FY 1969 (CX–GF 3000Z–261). This situation was attributed to three factors, the first two of which were:

[Post Toasties] price decline.

Inability to take planned pricing action (CX–GF 3000Z–179).

These factors reflect competitive constraints that affected General Foods' pricing decisions (CX–GF 3000Z–261).

254. General Foods' price per pound was less than that of the other respondents (CX 106D, F; GFX 1151–52).

255. It is concluded that the record reflects genuine, independent business reasons why General Foods did not originate price changes to a greater degree than it did and followed price increases of its competitors.

2. *Coordination of Prices*

(a) Brand Price Coordination

Dr. James Green, formerly an economist with the Commission, was presented by complaint counsel to testify with respect to price [88]coordination of particular competitive products. He testified to this end for seven days (Tr. 9687–10,501). His direct examination extended for five days (Tr. 9687–10,227).

256. Dr. Green, on the basis of his own examination of documents in the possession of complaint counsel, selected products for comparison that he thought were highly substitutable (Tr. 9837, 9897, 10,470). While Dr. Green purported to find pricing coordination among a number of products, a study of his analyses reveals that a pattern consistent with coordination was established only with respect to three sets of products—Kellogg's Corn Flakes and General Foods' Post Toasties; Kellogg's and General Foods' Raisin Brans; Kellogg's Sugar Frosted Flakes and General Foods' Sugar Coated Corn Flakes (Tr. 9,833, 10,130–42, 10,170–83; CX 341; *see, supra,* Finding 106).[25]

257. Dr. Green's failure to present evidence for additional sets of products, consistent with coordination, pricing agreement or price leadership and followership, is reflected by a number of factors.

258. Dr. Green loosely defined "coordination" in terms of price levels and the amount of price change, and the time lags between price moves of the pairs of products being studied (Tr. 9,833–42). In evaluating price changes, however, he disregarded package size changes of products being compared which effectuated changes in cost per ounce of those products (Tr. 9789, 10,232–33, 10,259–60). Also, because of package size changes, the witness abandoned efforts to compare price levels and relied upon the length of time lags (Tr. 10,082, 10,085, 10,088). The witness at times relied on timing of price changes, irrespective of price levels (Tr. 10,291–92). Dr. Green finally conceded (Tr. 10,343) that his conclusions and testimony as to coordination had to do with the timing of price changes, not with price levels. **[89]**

259. However, time lags varied greatly in length, from relatively short periods to periods as long as four to six months and even eight to nine months and, in some instances, there would be no response at all (Tr. 9941, 9964, 9990, 10,061, 10,064, 10,081, 10,087, 10,142, 10,154). Price changes varied so in timing that Dr. Green could not

[25] Other products compared by Dr. Green, but where pricing coordination was not established, include General Foods' Grape Nuts and Quaker's Life (Tr. 9893–9947); General Mills' Cocoa Puffs and Kellogg's Cocoa Krispies (Tr. 9949–9967, 10,377–96); Kellogg's Product 19 and Special K and General Mills' Total (Tr. 9967–9990, 10,355–76, 10,418–21); General Mills' Frosty O's and General Foods' Alpha-Bits (Tr. 9992–10,000, 10,422–31); Kellogg's All Stars and General Foods' Alpha-Bits (Tr. 10,003–09); General Mills' Wheaties and General Foods' Grape Nuts (Tr. 10,016–64, 10,396–410); General Foods' 40% Bran Flakes and Kellogg's 40% Bran Flakes (Tr. 10,065–88); Kellogg's All Bran and Nabisco's 100% Bran (Tr. 10,092–122); General Mills' Trix and Kellogg's Froot Loops (Tr. 10,143–47, 10,432–44); Kellogg's Rice Krispies and General Mills' Cheerios (Tr. 10,149–55, 10,276–343).

tell whether a price change on a product was in response to a prior one on a different product, or was the beginning of a new price round (Tr. 9941–45). Dr. Green disregarded situations where an increase in price was accompanied by an increase in the size of the box, as he felt unable to make a judgment in such a situation (Tr. 10,384, 10,395). Neither did he take into account situations where a price change in one product was preceded or followed by a box size change in another, or a size change in one product was not responded to by a competitive product (Tr. 10,426–30).

260. Apart from the above recitation of some of the defects in the witness' analyses, I have carefully studied Dr. Green's presentation on the issue of brand price coordination. Except for Kellogg's Corn Flakes and General Foods' Post Toasties, Kellogg's and General Foods' Raisin Brans, and Kellogg's Sugar Frosted Flakes and General Foods' Sugar Coated Corn Flakes, there is no evidence of price uniformity, maintenance of pricing levels, or pricing responses consistent with a pricing agreement or arrangement among respondents or with price leadership and followership.

261. In addition to what he presented at the hearings, Dr. Green had prepared comparisons of other sets of products which he thought were comparable. These comparisons were not presented at the hearings because, in Dr. Green's opinion, they did not reveal any apparent pricing coordination (Tr. 10,249).

262. The record, therefore, lacks probative evidence of price coordination between particular brands other than the three sets of products identified above. To the contrary, the record tends to evidence a lack of such brand price coordination or parallel pricing movement.

263. The extent to which the record shows price similarity between the two brands of corn flakes, the two brands of raisin bran and the two brands of sugar frosted or sugar coated corn flakes does not establish any coordination in avoiding price competition. Price similarity, even identity, is to be expected for very similar products even under competitive conditions (Tr. 10,462, 27,813, 28,517, 28,642, 38,371–73, 38,579).

(b) Pricing Rounds Coordination

Complaint counsel contend that "respondents under Kellogg's leadership, coordinated their pricing behavior by engaging in a **[90]** pattern of price leadership in lieu of overt collusion" (CPF 8–10). Starting with Dr. Markham's model which sets forth the conditions under which such a situation may be anticipated (CPF 8–61 thru 8–74, 8–82; CRPF 8–87 thru 8–122), which I have already found does not fit here (*supra,* Findings 186–208), complaint counsel rely primarily on an analysis of pricing rounds in the industry covering 1965 through 1970, prepared and testified to by Dr. Scherer (CPF 8–83 thru 8–84). As described by complaint counsel, "A price round is a series [or group] of list price changes that occur when a firm changes the price of two or more regular size branded products" (CPF 8–83).

Before examining in detail the 16 price rounds in question, it is appropriate to compare some of the basic concepts involved in price leadership with what Dr. Scherer's price rounds profess to show.

264. We start with condition three of Dr. Markham's analysis—the requirement that the products of the respective firms be viewed "as extremely close substitutes." This requirement is obvious since we are dealing with *price* leadership and it is necessary to have products sufficiently similar so that *price* is a primary element and can be coordinated by leadership and followership. As already found, except for three sets of products, Kellogg's Corn Flakes and General Food's Post Toasties, Kellogg's and General Foods' Raisin Brans, Kellogg's Frosted Flakes and General Foods' Sugar Coated Corn Flakes, there is no evidence of price uniformity, maintenance of pricing levels or pricing responses at a product level consistent with price leadership and followership.[26]

265. The 16 price rounds, as presented by Dr. Scherer and relied upon by complaint counsel, do not take prices into account other than for the fact that price changes were made. Levels and magnitudes of price changes are ignored. Indeed, the price round presentation does not even demonstrate that "lead" price changes on particular products were followed by price changes on what may be termed directly competing products. To the contrary, the amount of price change varied by product, and the types of cereals involved in one company's price change varied from those in the subsequent price change of other companies. In short, there is no correlation of individual products or individual product prices in Dr. Scherer's price rounds. Indeed, individual products and prices are not even evaluated. There is, therefore, no showing of correlation of any brand prices or price differentials as to particular brands. **[91]**

266. General Mills' overall prices in relationship to pounds of RTE cereals sold increased far more rapidly than those of the five other largest factors in the industry:

[26] Dr. Scherer conceded that, for most products, "there seems to be very little pattern in the relationships between changes in the price of one product relative to changes in the price of another" (Tr. 27,922).

AVERAGE PRICE PER POUND SOLD[27]
($)

Year	Kellogg	General Mills	General Foods	Quaker	Ralston	Nabisco
1962	.392	.365	.321	.485	.288	.324
1966	.445	.440	.398	.524	.355	.355
1967	.463	.460	.401	.551	.366	.370
1968	.474	.482	.392	.581	.355	.378
1969	.496	.513	.414	.604	.382	.398
1970	.522	.555	.426	.633	.388	.408
Increase 1962–70	.130	.190	.105	.148	.100	.084
% Increase	33.4	52.1	32.8	30.4	34.7	25.9

Neither Kellogg nor General Foods matched General Mills' overall price increases.

267. This disparity in relative price increases for General Mills vis-a-vis, Kellogg and General Foods cannot be wholly attributed to the possibility that, during the period in question, General Mills may have introduced new, more expensive brands and discontinued older, less expensive brands. A comparison of pricing levels limited to brands that were in existence in 1961 shows that General Mills increased these prices overall more rapidly than did its competitors (Tr. 31,702; KX 102).

268. None of the 16 "rounds" of price changes involved list price changes of all of any company's brands (Tr. 27,915; CX 1004). Dr. Scherer originally explained the import of his price round presentation as follows (Tr. 27,828–29):

> Now, it is my inference, I don't find exact documentary support for this inference, but it is my inference that what is going on is a kind of averaging process. That is to say, one goes into a price round with the expectation of raising a certain amount of [92]additional revenue through the price increase. And one chooses, therefore, a group of products that through which by raising the price, one can, if all goes well, raise that additional amount of revenue.
>
> Now, if one is alone in this price increase, then the products who prices have been increased are liable to suffer some erosion of market volume. But, if everybody goes up on a package of products, if everybody takes part in the round and increases prices on a group of products, then the following will happen:
>
> After the round some products prices will not have been increased. Some products prices will have been increased. There will be some tendency for the demand to flow towards the products whose prices have not been increased. But if everyone goes up by more or less the same percentage of his total volume, the gainers will more or less on average be offset by the losers. That is to say, the products whose prices have been

[27] Derived from GMX 560A.

raised will now be relatively high priced relative to the products whose prices have not been raised.

Each firm will have products whose prices have been raised. Each firm will have products whose prices have not been raised, and on the average, the gains and losses of patronage in this type of group price increase approach will average out if, in fact, the companies tend to move on about the same fraction of their product line. Over the average.

269. Dr. Scherer's approach, therefore, was not to confirm or establish a situation of price leadership where price was an essential element of product competition, but rather to attempt to explain why it was not necessary for the parties to engage in such a practice.

270. Except for a period when General Foods was competing on the basis of the overall General Foods name, all respondents have competed on an individual brand basis, particularly against the competing brands in the pertinent segment or, on an even narrower basis, against individual directly competing brands. I cannot accept, in the absence of direct proof, Dr. Scherer's inference that respondents, pursuant to agreement or price leadership and followership, are willing to suffer an erosion of sales on particular [93]brands by raising their prices in the absence of price increases of their direct competitors, in anticipation of securing greater sales on brands whose prices are not increased.

271. Brand competition is much too intense and complicated to assume that, by averaging out the price increase to constitute an equal percentage of total volume, competitive price differentials will not affect different products differently. Therefore, I reject Dr. Scherer's unsupported inference as to the nature of the price leadership and followership existent among respondents. In any event, an analysis of the price rounds demonstrates that they are inconsistent with any such percentage agreement or coordination.[28]

272. In order to have price leadership, the parties must understand the purport of each other's actions. As Dr. Scherer has written:

Leadership is a means of communicating, and the process may break down if some messages go unheeded, so that one never knows what the reaction to a new price announcement will be (F. Scherer, *Industrial Market Structure and Economic Performance* 168 (1st ed. 1970)).

273. Keeping this principle in mind, it is noted that Dr. Scherer included in his analysis only "price advances on more than one product unaccompanied by package changes" (Tr. 27,903). According-

[28] Even if percentage of the line change coordination had been established, this would have been insufficient proof of price coordination in the absence of a showing of the levels of price change.

ly, he excluded all list price changes by any respondent that applied to only one brand (Tr. 27,827),[29] as well as price moves that were accompanied by package size changes (Tr. 27,903). Dr. Scherer explained his reasons for such exclusions:

I infer from what I have seen of the processing technology that it is a little **[94]**bit difficult mechanically to change a package size. So not uncommonly only one product's package size is changed at a moment in time and then there may be a price increase accompanying it. And by and large I found that in the company monitoring documents not much attention was paid to those single package size changes accompanied by a price change.

I also observed that by and large not much attention was paid to single price changes, single product price changes even without a package size change, so I came to the conclusion that occasional single product price changes were really not a part of the standard price leadership-followership pattern. And so I have, for the most part, excluded single product moves from my analysis (Tr. 27,826–27).

* * * * * * *

I excluded price moves that were solely accompanied by package changes. That is to say, if there were no changes of packages, package sizes, in the price change, then I excluded that as a round,. . .

The reason I did that is this: That very frequently one finds on package changes that it is ambiguous whether a price change has been effected or not. A package change will take place, a price change may take place simultaneously on the price of the package. And it is a little bit ambiguous because it depends upon the relationship of the package increase or decrease relative to the price increase—the case price increase or decrease, whether the effective price has been raised or lowered.

And so I found in company documents that the companies had a little bit of trouble analyzing just what was going on and how to interpret these package changes, and so I excluded them (emphasis supplied) (Tr. 27,830–31).

* * * * * * *

Q. And are you saying that because a competitor may have difficulty understanding the market implications of a price move of a **[95]**competitor, that is justification for excluding the price move as a round?

* * * * * * *

THE WITNESS: The word I have trouble with is justification. In that question. That implies some universal set of criteria that aren't defined.

It was my best professional judgment that, indeed, those kinds of situations provided much more ambiguous signals than other kinds of situations, and so therefore I did so exclude them.

* * * * * * *

Q. When you say "ambiguous signals," you mean between and among competitors?

---

[29] An analysis that covered such price changes would have been instructive since it might reflect the competitive situation on a one-to-one basis of directly competitive products. Of course, Dr. Green had already failed to show a correlation in individual brand pricing (*supra*, Findings 255–61).

A. Price leadership is a method of signalling, and presumably you are signalling between and among competitors, yes.

274. Thus, rather than attempting to account for or reconcile pricing actions which appeared inconsistent with the communication process requisite for price leadership and followership among respondents, Dr. Scherer chose to ignore them.

275. Still another requisite for price leadership in lieu of overt collusion, to be kept in mind when analyzing the price rounds, is that all respondents must cooperate (CPF 8–7).

276. As part of its price leadership theory, complaint counsel assert that Kellogg is the price leader and that a typical price round begins with Kellogg's announcement that it plans to increase prices on a certain group of products on a particular date (CPF 8–10, 8–85). These Kellogg price increases, according to complaint counsel, were expected to be, and in fact were, matched by the other respondents so that approximately the same pricing relationship existed between the firms after the increase as had existed before the increase (CPF 8–21, 8–85). As previously noted, Dr. Scherer's price rounds analysis does not attempt to demonstrate a brand price relationship. But in our evaluation of the rounds, we must keep in mind the assertion that Kellogg is the price round leader and that the other respondents are the followers. The requirement that the followers follow has been expressed by Dr. Scherer:

Whatever the reasons for a firm's acceptance as price leader, its leadership must be **[96]**followed consistently and with near unanimity if the industry is to make the most of its market opportunities. Leadership is a means of communicating, and the process may break down if some messages go unheeded, so that one never knows what the reaction to a new price announcement will be (F. Scherer, *Industrial Market Structure and Economic Performance* 168 (1st ed. 1970)).

277. Still another requisite of complaint counsel's price leadership-price followership theory is that the price followers "change their prices in consonance with those of the leader" and "thereby reduce . . . the duration of any significant price differentials" (CPF 8–11). This condition is obvious because, to the extent there are prolonged delays in reacting to the price leader, there is an absolute failure of price coordination. Also, from the point of view of the leader, the longer the delay, the less assurance it has that the other firms will follow and this can cause a breakdown of the system. Further, from an evidentiary point of view, the longer the delay by the follower in making its price change, the less clear it is that its price change is in response to that of the leader rather than in response to other competitive conditions (Tr. 32,499). Time delays in

following price changes by the leader, therefore, are important considerations in evaluating Dr. Scherer's price rounds.

Analysis of Pricing Rounds

278. Prior to Dr. Scherer's Round 1, Kellogg, on January 1, 1965, changed prices on 23% of its line (CX–GM 168).[30] The price increase was accompanied by a package size change and so was one of those excluded by Dr. Scherer as "ambiguous" (Tr. 27,830, 28,470). Neither General Mills nor General Foods took any action in response to Kellogg's January 1, 1965, price change (Tr. 28,470).

Round 1

279. Prior to April 8, 1965, Kellogg announced price increases effective April 24, 1965, on cereals representing 24% of its RTE cereal sales volume (CX–K 852; CX–GM 168). On April 8, 1965, General [97]Mills issued a price list with increases effective that date on 58% of its line, but allowed customers to purchase at old prices until May 7 (CX–GM 168, 464). General Foods then advanced 28% of its product line, effective May 14 or May 17, 1965 (CX–GF 295; CX–GM 168)[31] Dr. Scherer's analysis for 1965 shows that the "comparable dollars generated" by General Mills' pricing actions were over 120% higher than Kellogg's and 43% higher than General Foods' (GMX 105).

280. Thus, there is no coordination as to share of line moved or comparable dollars generated in Round 1.

281. Between Rounds 1 and 2, Kellogg increased its price on a single product, Froot Loops (CX–GM 168) and General Mills, on June 7, 1965, increased its prices on 50% of its line, but also made a package size change. In accordance with his guidelines, these price changes were ignored by Dr. Scherer (Tr. 38,466–67).

Round 2

282. Kellogg, on December 9, 1965, announced that prices on 34% of its product line would increase effective January 22, 1966 (CX–K 766, 853; CX–GM 168). On January 10, 1966, General Foods announced advances on 12% of its line to be effective February 14, 1966 (CX–GF 298, 571Z–21). By December 13, 1965, four days after Kellogg's announcement, General Mills analyzed the additional

[30] The volume percentages used throughout this price round analysis refer to dollar sales volume (Tr. 27,861).

[31] It is assumed in all instances that each respondent, through its monitoring activities, was aware of each price change in the industry soon after its announcement. Evidence relating to particular instances of acquiring price change information, therefore, is not being referenced.

revenues to be generated by Kellogg's move (CX–GM 26). General Mills, on January 28, 1966, increased prices on 22% of its line effective that date, but with price protection available until February 22 (CX–GM 168, 468, 2487).

283. It is noted, however, that Dr. Scherer did not take into account two price changes by Quaker, in November and December 1965, both before Kellogg's announcement of its price increase (CX 1005). Again, the shares of respondents' product lines covered by the price changes varied considerably.

284. Dr. Scherer ignored a Quaker price move between Rounds 2 and 3—a price increase announced February 21, 1966, effective March 14, 1966 (CX 1004). **[98]**

Round 3

285. Kellogg, on March 4, 1966, announced that price increases affecting 48% of its line would be effective March 26 (CX–K 768; CX–GM 92, 173). Two and one-half months later, on May 17, 1966, General Foods announced increases on 36% of its line to be effective June 20, 1966 (CX–GF 300, 571Z–13; CX–GM 168). General Mills did not act until June 30, when it announced price hikes on 37% of its dollar sales volume, with price protection available until July 23 (CX–GM 168, 470, 2488).

286. Kellogg's move in Round 3 was closer in time (six weeks) to General Mills' move in Round 2 than it was to either General Foods' or General Mills' moves in Round 3 (two and one-half and four and one-half months, respectively). General Mills' move is actually closer to Kellogg's move in Round 4. Therefore, it is not clear where the round lines should be drawn and who is the leader and who is the follower. Again, General Mills' and General Foods' percentage of line covered differed from that of Kellogg.

Round 4

287. On September 2, 1966, Kellogg announced advances effective October 1, 1966, on 61% of its product line (CX–K 773, 856; CX–GM 168). General Foods announced, on September 28, 1966, that increases on 59% of its line would be effective October 24 (CX–GF 571Z–8, Z–9; CX–GM 168, 473). On October 24 or November 7, General Mills advanced 53% of its line effective that date, but allowed customers to buy at the old price until November 14 (CX–GM 168, 473). General Mills had previously analyzed Kellogg's increases and estimated that they would provide Kellogg with $5.6 million in additional annual revenues (CX–GM 175).

Round 5

288. General Foods advanced prices on 9% of its product line effective June 26, 1967 (CX-GF 304). This action was not followed by any of the other producers. Nevertheless, Dr. Scherer included it because it satisfied his basic criteria for classifying a price move as a round, *i.e.*, a price advance on more than one product at the same time (Tr. 27,825, 27,830-34). Dr. Scherer, however, ignored a price increase by General Foods on June 1, 1967, on 8% of its product line because it only involved one product (Tr. 38,467).[32] **[99]**

289. This solitary move by General Foods is totally inconsistent with a Kellogg price leadership premise.

Round 6

290. Kellogg announced on August 4, 1967, that price increases on 20% of its sales volume would be effective on August 26 (CX-K 777, 858; CX-GM 168). On August 29, General Foods announced price hikes on 20% of its volume to be effective September 25 (CX-GF 305, 353K, 571Z-2; CX-GM 168). General Mills made no price move (CX 1005).

291. Thus, we have General Mills making no price changes in two consecutive rounds.

Round 7

292. Kellogg, on October 27, 1967, announced that increases on 41% of its line would be effective on November 25 (CX-K 779, 859; CX-GM 168). General Foods acted first after Kellogg's increase by announcing on November 17 that price advances on 53% of its line would go into effect on December 18 (CX-GF 307, 571Y; CX-GM 168). General Mills announced on November 20 that increases on 67% of its line would be effective immediately, but customers could buy at the old price until December 9, 1967 (CX-GM 168, 477, 2491). General Mills had previously analyzed Kellogg's advances and calculated that this increase would provide Kellogg with an additional $3.7 million in annual revenues (CX-GM 180).

293. Here, we have General Mills making its first price move in over a year after having failed to participate in price Rounds 5 and 6.

[32] Dr. Scherer also ignored single product price moves by Kellogg, General Foods, Quaker and Nabisco (Tr. 38,467).

Round 8

294. Kellogg on December 8, 1967, announced price advances on 32% of its product line effective January 6, 1968 (CX–K 780, 860; CX–GM 168). General Mills, on January 8, 1968, announced price increases on products constituting 24% of its product line, effective immediately, but with price protection offered until January 27 (CX–GM 168, 478, 479, 2492). General Mills had previously analyzed this increase and predicted it would provide $3.5 million in additional annual revenues to Kellogg (CX–GM 181). General Foods did not participate in this price round. **[100]**

295. Kellogg's December 8, 1967, "lead" announcement was shortly after General Mills' and General Foods' price announcements in Round 7 and close to the effective dates of those price changes. Therefore, calling Kellogg's December 8, 1967, announcement a price lead is somewhat arbitrary.

Round 9

296. On April 25 and May 15, 1968, General Foods announced price increases effective, respectively, on May 13 and June 3, 1968. The May 13 increase alone covered products totalling 17% of its line (CX–GF 309, 310, 571U; CX–GM 168). Neither General Mills nor Kellogg participated in this so-called round.

297. Since General Foods' second price announcement followed the effective date of its first, this really constitutes two price leads by General Foods, neither of which was reacted to by General Mills or Kellogg.

Round 10

298. On August 2, 1968, Kellogg announced increases on 45% of its product line effective on August 3, but with price protection to its customers at the old price until August 31 (CX–K 782, 861; GX–GM 168). General Mills analyzed these price moves and calculated that they would provide Kellogg with an annual increase in margins of about $5.3 million (CX–GM 186, 252, 253). General Mills believed that the important aspects to the advance were: (1) the total dollars generated, (2) the percentage of Kellogg's line that was affected, and (3) the time intervals between price changes (CX–GM 194, 252). However, General Mills did not participate in this round. Neither did General Foods.

299. This gives us two consecutive "rounds", months apart, each consisting of a price increase by a different respondent, but where

that respondent acted alone. Round 10 is particularly significant, since it consists of Kellogg raising prices on 45% of its product line with neither General Foods nor General Mills reacting.

Round 11

300. General Foods announced on November 27, 1968, that it was initiating increases on 57% of its line effective December 30 **[101]** (CX-GF 313, 571O-P; CX-GM 168).[33] Kellogg, on December 30, 1968, announced advances on 57% of its line to be effective on February 1, 1969 (CX-K 786, 863; CX-GM 168).

301. On January 10, 1969, General Mills announced advances on products accounting for 74% of its line, with price protection offered until February 1 (CX-GM 108, 2493, 2494). General Mills' action followed an analysis of the additional revenues Kellogg and General Foods would generate by their price increases, and General Mills personnel noted that its pricing action followed Kellogg price advances in August 1968 and January 1968 and a price advance by General Foods in December 1968 (CX-GM 31, 35, 110A, 168, 187, 566I).

Round 12

302. Kellogg, on May 9, 1969, announced that prices on brands representing approximately 25% of its line would be increased effective June 14 (CX-K 787, 865). On May 29, General Mills advanced prices on a number of its own brands effective June 2, but with price protection offered until June 21 (CX-GM 490, 2495). General Mills had previously analyzed Kellogg's move and estimated what it would yield in additional margins (CX-GM 168, 188, 258). General Foods, on June 13, announced increases on 50% of its line effective June 30 (CX-GF 317, 571G, 1508; CX-GM 168).

Round 13

303. On November 11, 1969, Kellogg announced price increases effective December 13 on products constituting 60% of its product line (CX-K 789, 866; CX-GM 168). On November 17, General Mills announced increases on 77% of its product line, effective that day, but with price protection offered until December 6 (CX-GM 168, 288, 289, 496, 497, 2498). On November 12, General Mills had analyzed the increase and determined that it would generate $7.8 million in

[33] Actually, Quaker had previously announced price increases on November 18, 1968 (Tr. 38,468).

additional annual revenues for Kellogg (CX–GM 191, 355). By November 18, General Foods had also analyzed Kellogg's advance, stated its belief that "parity pricing" could best be established "by quickly matching Kellogg's advance," and on November 20 announced increases covering 44% of its line, effective December 15 (CX–GF 317, 320, 355, 418, 571E). **[102]**

304. This round is described by Dr. Scherer as the one "in which perhaps the most typical pattern existed" (Tr. 27,861). Kellogg led off. General Mills followed within six days and General Foods followed just three days later. While the pattern of respondents' action in this particular round may be the most consistent with price leadership, the round is atypical when compared with the 15 other rounds that are relied upon by complaint counsel, where we find that Kellogg is not the price leader, or there are long delays in price followership and even instances of non-participation by one or more of the respondents. Even in Round 13, we find a wide variance among respondents with respect to the percentage of their respective lines covered by the price increases—Kellogg, 60%; General Mills, 77%; and General Foods, 44%.

Round 14

305. On February 12, 1970, Kellogg announced that, effective March 21, it was increasing prices on products constituting 24% of its dollar volume (CX–K 791, 867; CX–GM 168). General Foods, on April 2, 1970, announced increases covering 20% of its line with an effective date of April 6, but with price protection offered until April 18 (CX–GF 315, 571C). While General Mills analyzed Kellogg's price increase, including additional revenues that would be generated, it took no pricing action (CX–GM 207, 287).

306. If Round 13 was considered by Dr. Scherer as perhaps the most typical instance of price leadership (Scherer, Tr. 27,861; CPF 8–101), this very next round fails to qualify by a large margin. Kellogg's price increase stood alone for about a month and one-half before General Foods acted. And General Mills, while it evaluated Kellogg's price increases, and ostensibly was also aware of General Mills' response, took no action.

Rounds 15 & 15A

307. General Mills announced an increase in price on RTE cereals representing 72% of its dollar volume, effective June 1, 1970 (CX–GM 502). On June 25, Kellogg announced increases on 67% of its line, effective July 25 (CX–K 793, 868). General Foods did not

participate in what complaint counsel term the first part of Round 15.

308. At the outset of what complaint counsel term the second part of Round 15 (CPF 8–105), General Mills initiated additional increases on several cereals effective September 28 and November 16, 1970 (CX–GM 2018). General Foods announced, on November 20, 1970, that it was increasing several of its own brands effective November 23, but with price protection offered until December 19 (CX–GF 319, 571A). An internal General Foods memorandum dated November 18, 1970, [**103**]comments, "The recommended increases will re-establish profit margins that have decreased versus the previous four year average and to meet recent competitive price changes. Competitive price increases have recently been taken by Kellogg—7/70 and General Mills—6/70" (CX–GF 434). Kellogg did not participate in the second part of Round 15.

309. General Foods' November 20, 1970, price increase announcement was effective December 19, 1970, over six and one-half months after the June 1 effective date of General Mills' price increase and almost five months after the effective date of Kellogg's last prior price increase. This falls far short of meeting the expectation of timely responses to a price leadership situation.

Round 16

310. Kellogg, on or before January 18, 1971, announced that it intended to raise prices effective February 6 on a number of products (CX–K 7073; CX–GF 449; CX–GM 205). General Mills and General Foods both announced price increases on January 29, effective February 1, with price protection offered until February 20 (CX–GF 1525, 1699; CX–GM 449, 2018, 2019). Complaint counsel have offered no evidence as to percent of line covered or dollars generated by the price moves in this round. Dr. Scherer's theory that respondents coordinated price increases by covering equal percentages of products cannot be tested.

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311. In addition to the failure of complaint counsel's price rounds presentation to contain the necessary product and pricing information upon which to evaluate an alleged price leadership-price followership situation, the rounds, to the extent they do furnish information, are inconsistent with price leadership-price followership.

312. Kellogg is alleged to be the price leader. Yet, it was first in

only 12 of the 16 price rounds (12 of 17 if Round 15 is considered as two separate rounds, as well it may be). Of the 12 rounds in which Kellogg was first, General Mills followed in only nine instances, and General Foods in only 10 instances. General Mills and General Foods together followed in only eight of the 12 rounds in which Kellogg changed its prices first. General Foods led three times, and on two of those occasions neither Kellogg nor General Mills followed. General Mills led once (twice if Round 15 is considered to be two rounds). Kellogg alone followed in Round 15. General Foods alone followed in Round 15A.

313. Without repeating the details listed in the round by round analysis made above, it is clear that the long delays in price **[104]** followership and the instances where price changes were not followed at all render complaint counsel's price round presentation inconsistent with a price leadership-price followership premise. It is also clear that the wide variations in dollar share of line affected by the separate price changes of the individual respondents is inconsistent with Dr. Scherer's theory that overall price uniformity was achieved by coordinating dollar share of line covered by price changes.[34]

314. On December 20, 1977, following four days of direct examination, Dr. Scherer on cross-examination, for the first time, presented a new explanation of how respondents were coordinating prices (a theory of comparable dollars generated per share of the market) (Tr. 28,519). This new theory was one which had occurred to Dr Scherer just several days before (Tr. 28,576, 28,619, 28,620). What Dr. Scherer did was to divide the additional dollars generated by each firm's price increase by that firm's market share (Tr. 28,620).

315. As one basis for his theory, and in order to ascertain dollars generated, Dr. Scherer relied upon CX-GM 168. CX-GM 168, though found in the files of General Mills, was prepared by an unidentified employee of General Mills and there is no indication of the purpose for which it was used by that company. The accuracy of the data contained in CX-GM 168 is suspect, subject to verification by corroborating evidence (to which complaint counsel have not called my attention), and the document is binding on General Foods and Kellogg only to the extent of evidencing that such a document was prepared at General Mills (*See* Tr. 10,614–16).

316. In preparing a comparison of dollars generated by price moves, Dr. Scherer did so on an annual basis for the years 1963–1968

[34] General Mills' practice of estimating additional profits to be generated by Kellogg's price changes is not inconsistent with a general business interest in evaluating activities of competitors. It does not prove Dr. Scherer's theory, particularly in light of respondents' disparate actions. Further, there is no evidence of such analyses being made by the other respondents.

and reflected the results of all price moves, including those excluded in the preparation of his price round analysis (Tr. 28,519–21, 28,581–82). Dr. Scherer conceded that if he had attempted such a correlation on the basis of his price rounds, his coefficients of correlation would have been much less (Tr. 28,591). For the 1963–1968 period considered by Dr. Scherer, General Mills increased its prices at a rate 30% higher than Kellogg; and in every year other than 1963 and 1966, General Mills' price increases generated at least 30% more dollars than did Kellog's price increases (Tr. 28,595–608). **[105]**

317. Dr. Scherer's theory of comparable dollars generated, therefore, bears no relationship to price leadership in lieu of overt collusion. It takes no account of prices on particular brands, although it is clear that competition is on a brand basis. It totally ignores the price rounds, which serve no purpose under this theory. His theory abandons parallelism by price move. Dr. Scherer has simply advanced the assertion that, over the years, prices for the several respondents have increased in a similar fashion (although, in fact, General Mills' price have increased at a 30% greater rate).

Price leadership in lieu of overt collusion contemplates a simple action and reaction. It would cover a situation where A would raise its price on a particular item by 5¢ and B would follow and raise its price by about the same amount. The theory, however, would not apply to the complicated situation envisioned by Dr. Scherer where each respondent would calculate the added revenues that would result from price raises on a number of products by another respondent and then, selecting its own and frequently different type products, work out price increases that would accomplish a similar overall profit increase for it—all in relationship to share of market entitlements. This simply is not contemplated by the economic theories advanced by complaint counsel. It is difficult to comprehend how such a complex arrangement could be reached short of working out an express agreement.

318. As Dr. Telser testified, the figures relied upon by Dr. Scherer merely reflect a crude form of RTE cereal price index (Tr. 31,670–71). One would expect a degree of correlation over time for products that are closely related in terms of condition of supply and demand such as RTE cereals (Tr. 31,674). Dr. Scherer's supposition that this was the result of collusion or price leadership in lieu of overt collusion remains a supposition. It is not established by the record in this case.

319. It is concluded, therefore, that complaint counsel have failed to prove a conspiracy on the part of respondents relative to the establishment, maintenance or change of prices for RTE cereals.

Neither have they proved that respondents engaged in price leadership-price followership in lieu of overt collusion.

3. *Other Forms of Price Competition*

Complaint counsel assert (CPF 8–111):

> In addition to avoiding direct competition on the list prices of RTE cereals, respondents also avoided virtually all other forms of price competition that might have destabilized the market by spiraling into unrestrained competition. Respondents refrained from offering trade deals **[106]**(discounts) to customers, from producing private label cereals, and from using "cents-off" labels that would provide consumers with the benefits of at least some price competition. Respondents' avoidance of each of these forms of competitive behavior demonstrates their success at restraining all significant forms of competitive rivalry and maintaining high prices and monopoly level profits.

However, as I have already found, complaint counsel have failed to establish that respondents, either by agreement or by means of a price leadership-price followership regimen, fixed or controlled list prices. Any evidence tending to show parallel action with respect to indirect pricing activities such as trade deals, lower priced private label cereals and cents-off labels, therefore, is of no consequence in establishing the existence of support mechanisms to a price fixing situation.

(a) Competition Through Price Promotions

(i) Trade Deals

320. Trade deals are payments by manufacturers to retailers, usually in the form of discounts off the wholesale case price of the manufacturers' products (Tr. 9267, 27,956, 33405–06; CX–GM 16A). Trade deals are offered to retailers either in exchange for some performance promoting the manufacturer's products or they may have no performance requirement. The promotional services required of retailers may include setting up special display shelves, featuring a cereal brand at a reduced price, placing coupons redeemable at the retailer's store in the retailer's weekly advertisements, or stocking a new product or package size (Tr. 33,405–06).

321. Both before and immediately following World War II, trade deals were prevalent throughout the RTE cereal industry (CX–GF 18 O, 4039Z–108). During the mid to late 1950's, the use of trade deals declined considerably (CX–NCFM 500 at 162; CX–GF 507I). Thereafter, for some ten years, the trade deals used by the RTE cereal producers were primarily introductory allowances. Such allowances

are used when new products are introduced to compensate retailers for additional expenses incurred in adding the new products to the retailers' shelves for warehousing and adding to accounting and computer systems (Tr. 7990, 11,341, 17,306–07, 27,957–58).

322. General Mills felt that trade deal activation by any of the major producers would lead to retaliatory trade deals or some other price reaction by the others (CX–GM 16, 17, 135B, C, 140, 142A). It **[107]**believed that if trade deals were activated, "major competitors would retaliate immediately to protect their present share of [the] market" (CX–GM 135B, C). It also believed that neither Kellogg nor General Foods was "anxious to try an activation [trade deal] war" (CX–GM 17D). It reasoned that, in order to pay for a trade deal program, Kellogg and General Foods would have to "(a) cut advertising, (b) cut profit, [or] (c) raise prices." General Mills could not "see either competitor deciding to cut profits." If Kellogg and General Foods "were to increase their prices—to lay out additional trade money—we, in turn, following competition, could do the same and retain, if not improve, our profit margins" (CX–GM 17D).

323. General Mills' advertising agency, which had been closely associated with it for years (CX 443), stated that the cereal industry "has resisted pressures to enter into the allowance [trade deal] battles which most other package goods categories wage continuously. The reason has been that once this type of activation is made to work to one company's overall advantage, . . . competition must retaliate and it soon becomes more of a defensive than offensive marketing device" (CX–GM 16B).

324. General Foods also was aware that any initial sales benefit that it could gain from the use of trade deals might be wiped out by responsive actions by others (CX–GF 76C). It believed that "The highly price competitive nature of the cereal market in the early 1950's (price off, trade deals, pack-ins) . . . suggests that price maneuvers may be at most a short term advantage" (CX–GF 76C, 4039Z–108). Thus, we find that "As a general rule, Post cereals . . . [would] not utilize trade deals" except on new products or new sizes or major product changes (CX–GF 601K).

325. When asked by a grocery store chain about straight case allowances vis-a-vis allowances with performance requirements, Kellogg's General Sales Manager told the chain that Kellogg did not want to get store premium types of trade deals started again; that it did "not want to give case allowances just to establish everyday low prices" (CX–K 7144A).

326. The foregoing recitation of evidence relied upon by complaint counsel reflects an awareness by each individual respondent

of what competitive practices, including trade deals, are taking place in the industry. It additionally evidences each respondent's individual desire not to precipitate a price war by giving trade allowances other than those offered in connection with the introduction of new products. List prices having been arrived at after considering costs, competitive factors and profit objectives, it is reasonable that respondents would not want to sell at lower prices by reason of trade deals which could establish a permanent discount at which retailers could stock up on all their needs. It is to be anticipated, therefore, that respondents would be selective in offering trade deals. **[108]**

327. Respondents evaluated each other's potential to resume large scale trade deal activities and, while they did not anticipate such a resumption, they each stood ready to respond by competing in like fashion should another start.

328. The foregoing does not reflect an agreement with respect to competition by offering trade allowances. No respondent was waiting for a signal from any other respondent to resume large scale trade allowance activities, nor is there any evidence that an agreement or action by a leader precipitated the decline of trade deals in the 1950's.

329. While the record shows an evolvement over time from heavy use of trade allowances prior to the middle or late 1950's to relatively little use until the end of the 1960's, when the practice was resumed, there is no evidence of an abrupt shift or of other timing consistent with agreement of leadership.

330. Kellogg has employed trade deals on some of its most popular established brands since 1966. Kellogg employed trade deals with Product 19 each year from 1966 to 1970. It gave trade allowances on both Corn Flakes and Shredded Wheat in 1968 and 1969, on Special K in 1969 and on Raisin Bran in 1970 (CX–K 1072).

331. General Mills employed trade deals with most of its established cereal brands in 1969 and 1970 (KX 203C).

332. By 1971, each respondent offered trade deals on the majority of its brands. General Mills enlarged its trade deal activity in 1969 to carry trade deals on 11 of its 15 brands (CX 409C), stepped up its trade deal activity in 1970, and then reached an even higher level in 1971. Kellogg waited until 1971, at which time it extended its trade deal usage to 18 brands of its 20 brand product line (CX 409B). General Foods also waited until 1971 to act. During that year, it used trade deals with nine of its 14 brands.

TRADE DEAL USE, 1966–1971

	Kellogg		General Mills		General Foods	
	No. of Deals	No. of Brands Affected	No. of Deals	No. of Brands Affected	No. of Deals	No. of Brands Affected
1966	3	2	(not available)		9	2
1967	6	2	3	3	10	2
1968	5	3	5	4	1	1
1969	5	4	15	11	3	3
1970	4	3	29	10	3	3
1971	58	18	38	14	16	9

(KX 201–04) **[109]**

333. Thus we see that in 1969, General Mills (not Kellogg, the alleged price leader) was the first to reinstitute the wide use of trade deals, and that Kellogg and General Foods waited until 1971 before they engaged in trade deals as a general practice. The sequence and timing of respondents' resumption of trade deals negates complaint counsel's contention that respondents coordinated their utilization of trade deals so as not to upset the equilibrium of their alleged list price arrangements; and there is no evidence demonstrating the sequence or timing of respondents' earlier abandonment of trade deals sometime in the 1950's.

334. Complaint counsel rely upon the fact that, unlike the situation for RTE cereals, trade deals were used frequently to promote other grocery products from 1960 through 1972 (Tr. 8556, 8903, 9267–69, 18,001–02; CX–GM 16B, 142A). RTE cereal sales, however, are not as responsive as other food products to promotional stimuli such as trade deals. Since consumer RTE cereral purchases do not change much seasonally, unlike products such as Kool-Aid, there is less need to use trade deals to provide rapid inventory build-up to cover surges in consumer demand (Tr. 36,848). In General Mills' opinion, the additional volume of RTE cereals moving to retailers under trade deals caused shelf space and inventory problems for retailers, inasmuch as RTE cereals were considered "[t]oo bulky for display purposes," and inventory overflow caused "floor and back room space problems" (CX–GM 140B).

335. General Foods has established that its utilization of trade deals over the years was responsive to, and consistent with, marketing and business factors and problems which it had to face.

336. Trade deals on RTE cereals were perceived by General Foods as effective primarily in prompting grocers to promote particular products, but not in securing retail price decreases (Tr. 36,847–49). Advertising has been perceived by General Foods as the

most effective and efficient marketing tool for making consumers aware, and inducing their trial, of General Foods cereal products (CX–GF 3000Z–76–77).

337. General Foods' fluctuating use of trade deals must be viewed against the background of: (a) the dramatic growth of television in the middle 1950's just as its cereals were losing market share, and General Foods' shift of marketing emphasis from promoting individual cereals to advertising its full line of products, (b) General Foods' efforts to introduce new products in the early 1960's, which directed marketing resources away from existing products and led to a deemphasis of the line approach, and (c) the sudden leveling off of RTE cereal sales in the late 1960's, which led General Foods to increase its use of promotions. **[110]**

338. Prior to FY 1958, which began in April 1957, the Post Division engaged in "individual brand promotion where each Post product was sold on its own merits in competition with both other Post brands and other company brands" (CX–GF 16A). However, the share of total RTE cereal sales represented by Post cereals declined from over 27% in early 1952 to less than 23% in late 1956 (GFX 203B).

339. The management consulting firm of McKinsey and Company ("McKinsey") was retained to study the problems of the Post Cereals Division and to recommed a remedial program. In its July 1956 report to General Foods, McKinsey recommended that "the Division should . . . emphasize the promotion of the Post 'line'" (GFX 1235Z–4).

340. Shortly thereafter, in September 1956, a new "Marketing Philosophy" (GFX 1288) was adopted by the Division calling for "advertising and selling a *line* of cereals as opposed to individual brand marketing" (emphasis in original) (CX–GF 16A).

341. As part of this change, the Division's management decided to increase consumer-directed advertising. To implement this, the Division greatly increased its use of what was then a new marketing tool—television (Tr. 36,355–61).

342. During FYs 1952–1955 (April 1951–March 1955), television advertising accounted for approximately 25% of General Foods' cererals' consumer-directed marketing expense (GFX 203J). This grew to nearly 50% in FY 1956, over 60% in FYs 1957–1959 and over 80% in FY 1960 (GFX 203J; *see also,* CX–GF 4T–U).

343. Thus, after the FY 1956 introduction of the line approach, the emphasis was shifted away from those marketing tactics that are most effective with respect to individual products—*e.g.,* trade-directed activities—into line-oriented advertising, especially television.

344. By 1960, there was significant improvement in consumer perception of General Foods' cereals (CX–GF 1300G). Therefore, in planning for FY 1961, the Post Division's management decided that "[a]fter three years of intensive line promotion," it was time to "capitalize fully on the high consumer awareness of the Post line theme" by developing "more individual brand sell in [RTE cereal] product advertising" (CX–GF 324K).

345. In FY 1962, the return to individual product promotion accelerated, but with advertising continuing to play a more important role than it had in the early 1950's:

> [W]e plan to continue the strong individualistic approach in each of our product commercials. This approach identifies the product as one of the [111]family of Post Cereals but proceeds to sell the product on its own individual merits (CX–GF 6B).

346. In February 1965, General Foods was of the opinion that money was better spent on consumer advertising than on trade deals:

> Post believes that consumer advertising is a more effective and efficient *long term* benefit to cereal success—so trade deals will not be employed. The only exception is the introduction of a new product (and in some instances, a new *size*) where a trade deal may be employed as an aid in establishing broad-scale distribution (emphasis in original) (CX–GF 485Z–7).

347. The advertising emphasis on individual products continued through FY 1966 (CX–GF 485L, 1300E–G).

348. In FY 1962, the managers of the Post Division had decided to undertake "a substantial new product program" based upon "a number of innovative products and concepts on hand" (CX–GF 4039Z–17). This program was undertaken (GFX 1370H–I).

349. The Division's marketing managers believed "that during periods of new product introduction, advertising and promotional support for established brands could be reduced without impairing the vitality of their franchises" (CX–GF 4039Z–18); "that the halo effect of the new product would compensate for the lack of [advertising and promotion] support on the established brands" (CX–GF 4039Z–19). Accordingly, from FY 1962 through FY 1966, the Division's managers followed a marketing strategy of "holding volume on established brands by according them the minimal advertising and promotional support consistent with that objective" (CX–GF 4039Z–17).

350. From 1950 through 1965, there had been continuous and substantial growth in sales of RTE cereals. Then, pound sales of RTE cereals grew by only .4% in 1966 and declined by 2.1% in 1967 (CX 101E).

351. By late 1966, both established Post cereals and new products were considerably below their planned volume and profit goals (CX–GF 4039B). In November 1966, a special Post Cereal Task Force was organized "to complete an in-depth examination of all areas appropriate to the cereal business and recommend a three year operating strategy for the cereal business" (CX–GF 4039B).

352. In its 1967 report (CX–GF 4039), the task force recommended that "each advertising message [be devoted] exclusively [112]to the individual brand rather than to line sale" (CX–GF 4039P). It recognized that consumer promotion was "an effective means of generating short-term incremental sales in the cereal business" (CX–GF 4039Z–111). It, therefore, recommended that promotional expenditures be raised "above the levels of recent years" (CX–GF 4039Z–114).

353. By the following year, the Division was fully committed to using promotions to "[s]ecure short-term volume increases" (CX–GF 602G), and in the reallocation of marketing resources from advertising into promotions (CX–GF 3000Z–23i).

354. Trade deals have consistently played a relatively small role in the marketing of General Foods' cereals:

TRADE DEALS ON GENERAL FOODS' CEREALS FY 1952–1961
(in thousands of dollars)

Fiscal Year	Total Marketing Expense	Trade Deals	Trade Deals as a Percentage of Total Marketing Expense
1952	14,385	277	1.92%
1953	16,431	200	1.21%
1954	15,958	310	1.94%
1955	15,706	526	3.34%
1956	16,626	490	2.94%
1957	16,562	332	2.00%
1958	16,850	59	0.35%
1959	21,630	221	1.02%
1960	17,776	223	1.25%
1961	16,977	50	0.29%

355. While there was a clear decline in General Foods' use of trade deals beginning in FY 1958 from 2% to .35%, this is explained by the change in the Post Division's marketing strategy from an emphasis on individual products to an overall line approach, the belief that promotional efforts on new products would have a halo effect on established products, and the switch to television as a preferred method of promotion. The subsequent switch back to trade

deals reflects the poor performance of both new and established General Foods products and the decision that it was necessary to use promotions, such as trade deals, to secure short-term increases in sales volume.

356. Complaint counsel do not contend that, when utilized, respondents did not attempt to gain competitive advantages by their [113]trade deals. Thus, CX-GM 17, a December 1970 General Mills memorandum, recommended a "Plan B" trade deal, providing for extra retailer displays, features and price reductions on Wheaties, because it was felt that General Mills' sales force could "better handle activation than theirs [Kellogg's and General Foods']" (CX-GM 17E), and that General Mills could profitably gain consumer sales by using the trade deal (CX-GM 17).

357. Respondents made extensive use of trade deals throughout the complaint period in connection with the introduction of new products (Tr. 7990-91, 11,341-42, 12,306, 13,094, 17,306-07, 27,956-58, 36,934). Introductory trade deals were considered by respondents to be particularly useful to secure retailer acceptance of new products and thus "as an aid in establishing broadscale distribution" for new products (CX-GF 485Z-7). It is immaterial whether an introductory trade discount on a new product is considered to constitute a lowering of price from an established list price or as establishing an initial price below list. In either event, the product is being offered at a relatively low competitive price; and that is price competition between the new product and products already on the market.

(ii) Cents-Off Deals

358. Complaint counsel (CPF 8-111, 8-164) assert that respondents avoided the use of cents-off labels as part of their avoidance of all forms of price competition practices that might disrupt their established pricing structure.

359. A "cents-off label" is an announcement printed on a package indicating that the product contained in that package will be sold for a specified amount less than the listed retail price (Tr. 17,246).

360. Respondents used "cents-off" deals in the early 1950's, but not thereafter (Tr. 17,246, 30,111-12; CX-K 1073C, 7144; CX-GF 485Z-6, 4039Z-108). The record, however, does not indicate the extent to which this type of promotion had been engaged in, nor is there any evidence showing the sequence or timing of the cessation of this practice by respondents. As with the case of trade deals, there

is no evidence of an agreement among respondents not to engage in this practice.

361. Kellogg believed that if "one company starts it [cents-off deals], the others follow suit" (CX–K 139C). Although General Mills believed that "cents-off" promotions were powerful enough to "get immediate positive results" if used by competitors, it did not use such methods (CX–GM 135B, C; Tr. 17,246). General Foods believed that "price maneuvers" such as cents-off labels "may be at most a short term advantage" (CX–GF 4039Z–108); that respondents had avoided this type of rivalry because of the "bitter taste" of previous **[114]**competition and the danger that such actions would result in a "dilution of impact/inefficient investment of marketing funds" (CX–GF 76C). It stated that it would, "not utilize off-label packs unless competitive activity forces the issue" (CX–GF 601L). A General Foods' marketing plan summarizes its attitude toward cents-off labels:

> The nature of the Cereal business (in terms of multiplicity of brands and categories with little, if any, brand loyalty) is such that judgment indicates it would be an ineffective and inefficient expenditure of a brand's "lean" marketing funds to engage in a price-cutting battle via cents-off consumer promotion. Money so employed would be a risky drain on funds available to advertise brands' basic consumer benefits—which Post believes is the key to long-term cereal business success. Cents-off promotions will never be used (CX–GF 485Z–6).

362. The facts developed with respect to cents-off deals reflect a situation similar to that involving trade deals—an awareness by respondents of competitive practices and reasons why this practice has not been utilized by the individual respondents, apart from an agreement or an attempt to fix prices by price leadership. More particularly, with respect to General Foods, they reflect an implementation of its line marketing strategy at a time its products were not being promoted on an individual basis.

(iii) In-Pack Premiums[35]

363. In-pack premiums are small items, such as toys or games, that may be placed in boxes of RTE cereals to promote sales to consumers (CX–K 1073E; CX–GM 2115). Complaint counsel charge (CPF 8–171, 8–175) that respondents reached an express agreement to limit the use of in-pack premiums.

364. There is no direct evidence of such an agreement. As was the situation with respect to price fixing, top executives of each **[115]**

[35] This means of competition is being considered as a type of price promotion, since the offering of a premium along with the cereal at no additional cost acts as a price reduction to the extent of the value of the premium.

respondent have testified to the effect that decisions regarding in-pack premiums were made independently; that there was no express or tacit agreement among respondents regarding their use (Tr. 29,726, 29,944, 32,768, 35,462, 35,815, 36,361–62). Again, the testimony of Kellogg and General Mills officials falls within that which I am required to accept at face value. And if Kellogg and General Mills had no such agreements with General Foods, it follows that General Foods had no such agreements with Kellogg or General Mills. Unless overcome by more persuasive evidence, I am required to accept such testimony as accurately describing the situation.

Complaint counsel assert (CPR 8–175) that the alleged explicit agreement is demonstrated by (1) the importance respondents placed on the marketing effectiveness of in-packs; (2) the chronology of respondents' decisions to decrease their usage of in-packs; and (3) the expressed and implied recognition by respondents with respect to an understanding among themselves to limit in-packs.

365. Before 1957, respondents inserted in-pack premiums in many of their brands at the same time (Tr. 11,228, 13,023, 13,025; CX 1006; CX–GF 371). In 1956, Kellogg carried 36 in-packs in nine brands representing a range of approximately 12% to 23% of Kellogg pound volume over the year. General Mills carried 11 in-packs in five brands for a 6% to 12% volume share, and General Foods used in-packs in 13% to 23% of its pound volume. From April 1955[36] until January 1957, Kellogg used in-packs in cereals that accounted for 9.5% to 19.4% of its pound sales volume; General Foods used them in 9.5% to 22.4% of its sales volume; and General Mills used them in 6.2% to 15.1% of its sales volume (CX 1006; CX–GM 2115; CX–GF 371, 372).

366. Ralston, not one of the respondents, was the first major firm to discontinue putting premiums in packages. It did so by February 1956 (Tr. 28,753–55; CX–NCFM 500, at p. 177). General Mills started to decrease its use of in-pack premiums in October/November of 1956. This was some eight months later. Neither Kellogg nor General Foods decreased its use of in-pack premiums at that time. On the contrary, Kellogg increased its use of in-packs during February/March and April/May of 1957; and General Foods continued to increase its use of in-packs from February/March until June/July 1957. Just after reaching their peak of in-packs usage, Kellogg and General Mills began a precipitous decline in mid-1957. By August 1957 (General Mills), February 1958 (Kellogg) and March

[36] The record does not reflect detailed data on the use of in-packs prior to 1955.

1958 (General Foods), respondents were inserting in-packs in less than one half of one percent of their product volume (CX 1006). **[116]**

367. Thus, the chronology of respondent's change in their usage of in-packs does not support complaint counsel's assertions as to agreement. With regard to the importance respondents placed on the marketing effectiveness of in-packs, complaint counsel have failed to demonstrate that respondents acted against their best individual interests when they curtailed this promotional device.[37] To the contrary, the record tends to demonstrate significant business and marketing circumstances to which respondent's actions were reasonable individual responses.

368. In-pack premiums are used in the RTE cereal industry to provide short-term sales increases for the specific brands so promoted. In-packs, generally, are not credited with beneficial sales results extending beyond their term of use or beyond the particular brand with which the premium is employed (Tr. 12,435–36, 36,351–52; CX–GF 4, 485Z–4; CX–K 487, 546K, 650A). Television advertising, on the other hand, is regarded as uniquely effective in the RTE cereal industry in establishing long-term sales expansion (Tr. 29,930, 36,352, 36,361; CX–GF 485Z–7).

369. Television advertising appeared as a significant factor in the growing RTE cereal market in the early 1950's, and its employment rapidly expanded immediately prior to the decline of in-packs. Kellogg spent $706,000 in 1950 on television advertising, representing 8.3% of Kellogg's advertising budget. By 1957, Kellogg's television advertising had expanded to $13,537,000, which was 78.3% of total advertising expenditures. For the same period, General Mills' television advertising increased from $548,000 to $6,533,000. This was an increase from 10% to 83% of General Mills' total advertising expenditures. General Foods' television advertising jumped in similar fashion from $773,000 (12% of its total advertising expenditures) in 1951 to $5,863,000 (85.4% of total advertising expenditures) in 1957. RTE cereal television advertising by respondents continued to expand through the 1950's and early 1960's (GFX 1319).

370. Thus, it is reasonable to believe that each respondent independently reacted to the advent of television as an effective **[117]**advertising medium by shifting from promotional expenditures

[37] Complaint counsel would support their assertion that respondents placed great importance on the marketing effectiveness of in-packs by a number of respondent documents extolling the benefits of in-packs (*see, e.g.*, CX–K 37A, 47D, 650A, 651; CX–GM 38A; CX–GF 76B). These documents, however, were prepared in the last half of 1960 and in early 1970, when market conditions had changed and respondents were about to use, or were using, in-pack premiums. They do not indicate that respondents curtailed their use of in-pack premiums in the face of competitive reason why they should have been continued.

such as in-pack premiums to television advertising. Kellogg decided to make the shift (Tr. 11,235–36). So did General Foods (Tr. 14,181).

371. General Foods decided to replace in-pack promotions with television advertising as part of its strategy, initiated in 1957, to market Post cereals collectively as one line of cereals rather than as individual brands (Tr. 36,352, 36,356–62; CX–GF 5A, 18T; GFX 406A). The new line strategy emphasized television advertising as a means of increasing sales of the Post line of ready-to-eat cereals and relegated consumer promotions to a supplemental role (CX–GF 5B). Post sought to replace the prior marketing approach, which emphasized individual brand promotions such as in-packs, with heavy investment in advertising in order to create long-term expansion of Post line sales (Tr. 36,351–52, 36,360–61). The change in marketing philosophy resulted in a shift of marketing funds from premium promotions to advertising (CX–GF 16A, 406B). In 1952, General Foods' television spending on RTE cereals amounted to 30% of total marketing expenditures. In 1957, it had risen to over 60% (CX–GF 507I).

372. General Foods, in August 1967, referred to the previous in-pack rivalry as "fierce and unprofitable competition" (CX–GF 76A) and stated:

> We do not believe that any manufacturer will benefit—on a long term basis—by reverting to the premium wars of the 1950's (CX–GF 75).

General Foods ". . . recognized . . . that too intensive utilization[of in-packs] is certain to bring strong competitive retaliation. This would not serve the best long-term interests of Post, and could even be deleterious in the short-term" (CX–GF 4039Z–114). General Foods believed that the respondents avoided this method of competition because of the "bitter taste" of previous competition in this area. However, it was prepared to reinstitute the use of in-packs if Kellogg or General Mills started first (CX–GF 76A, C).

373. Kellogg had an "arsenal of package inserts ready to go" if another respondent resumed the practice (CX–K 546K). General Mills believed that if Kellogg got "the in-pack fever," General Mills would "probably have to follow" (CX–GM 38A).

374. The common evaluation by the several respondents as to the undesirability of resuming extended in-pack competition, and their stated readiness to respond if another competitor reinstituted the practice, does not evidence the existence of a conspiracy some ten years before, or a continuation thereof.

375. This brings us finally to several documents produced from the files of General Foods which refer to an industry guideline or

[118]rule. The first is a memorandum dated August 3, 1967, from a Mr. R. S. Braddock to a Mr. R. P. Brubaker (CX–GF 76). Mr. Braddock was an assistant or associate product manager under Mr. Brubaker, who was a product manager for a number of items. Mr. Brubaker was subordinate to Mr. Cobb, who was in charge of marketing (Tr. 14,593–94). In that memorandum of Mr. Braddock, we find the following:

Subject *Defensive Premium Plan*

This memo will

. . . analyze the likeihood of competition breaking the pack-in premium guideline;

* * * * * * *

Summary

If competition packs premiums in several presweet brands (thus breaking the industry "guideline") and we take no action until they arrive at retail, we risk loss of at least $1,100M in PBT.

* * * * * * *

Discussion - Rationale for Plan

To date, the three major manufacturers in the cereal business have been respecting an "unwritten rule," stemming from fierce and unprofitable competition in the early and middle '50s, that they have retail exposure with only one pack-in premium in one brand at a given time . . . (CX–GF 76A).

* * * * * * *

In summary, it is likely that Kellogg and General Mills *will* read the favorable Alpha-Bits experience and *will* react by putting greater emphasis in pack-ins but that they will do so within the existing guidelines—one premium in one **[119]**brand at a time (emphasis in original) (CX–GF 76C).

376. On August 11, 1967, Mr. Brubaker apparently forwarded Mr. Braddock's Defensive Premium Plan to Mr. Cobb. In Mr. Brubaker's forwarding memorandum to Mr. Cobb (CX–GF 75), he stated:

Subject *Defensive In-Pack Premium Plan*

In view of the persistent rumors that Kellogg is planning to pack premiums in several cereals, it is advisable for us to have a defensive plan prepared. Such a recommended plan is attached (emphasis supplied).

This recommended plan would enable us to strike back with four brands at retail containing premiums in a reasonably short period of time—for the modest investment of $10,000.

We recommend this investment in order to be prepared to launch such a program; however, we feel very strongly that if we learn that another manufacturer is packing premiums in multiple brands, our *first step* should be to do everything possible to ascertain the long term intent of the manufacturer in this area . . . (emphasis in original).

377. Thus, we find Mr. Brubaker not only forwarding Mr. Braddock's plan, but personally expressing concern if another manufacturer (possibly Kellogg) should pack premiums "in multiple brands." On the other hand, the reference to "rumors that Kellogg is planning to pack premiums in several cereals" indicates that the parties were not operating under explicit agreements, as complaint counsel contend.

378. In a May 1968, memorandum to Mr. Cobb from a Mr. P. A. Schweitzer, another assistant or associate product manager (Tr. 14,594–95), Mr. Schweitzer analyzed possible competitive reaction to a planned in-pack in Alpha-Bits. In that memorandum, we find: **[120]**

Being rational they will realize that if we were seriously going to pursue the multiple in-pack premium route, we would use a much stronger premium and it would be supported much more heavily.

In view of the above points, breaking a "magic guideline" with this paper pack-in will not force competition into reacting (CX–GF 26B).

So again, we find comment concerning a guideline which refers to the multiple use of in-packs.

379. If, in fact, there was a conspiracy to limit in-packs to one product at a time, the statements of Messrs. Brubaker, Braddock, and Schweitzer would have been made during the course of and in furtherance of that conspiracy. Without these memoranda, however, there is no *prima facie* evidence establishing such a conspiracy. The documents, therefore, may not be considered against General Mills or Kellogg for purposes of establishing a conspiracy or agreement as to in-packs (*supra,* p. 19).

380. Even if the documents could be used against all parties, standing alone it is unclear just what they would evidence. The reference to a gentlemen's agreement or guideline, coupled with the specific limitation of only one in-pack promotion at a time, does indicate the existence of an actual agreement. However, the period of time encompassed by that agreement would remain unsettled. The documents prepared in August 1967 and May 1968 purport to recite the situation then existing. They would not establish that the parties mutually abandoned the use of in-packs some ten years earlier, as complaint counsel contend. The evidence showing independence of action at that prior time (*supra,* Findings 365–67) is much too strong

to be overcome by these documents. The documents, therefore, at most are consistent with a later understanding, around 1967 and 1968, not to resume in-packs on a multiple scale. And the reference to rumors concerning Kellogg's intention to utilize multiple in-packs reflects General Foods' belief that Kellogg did not consider itself bound by any such understanding.

381. General Mills' analysis, in December 1967, was that the use of in-packs would favor Kellogg's medium sized brands; that without in-packs, General Mills' established brands had outperformed those of other companies, "even during the year in which Post went back to using them on several brands." The memorandum concluded, "Let's hope Kellogg does not get the in-pack fever because if they do, we'll probably have to follow and suffer" (CX–GM 38). This indicates that General Mills, in December 1967, was not using in-packs because of its own business judgment. It also evidences that General Foods, during one unidentified year, had in-packs on several brands. This would be inconsistent with an alleged agreement not to have multiple in-packs. **[121]**

382. Going one step further and assuming, *arguendo,* that the parties had a gentlemen's agreement in 1967 and 1968 not to use multiple in-packs, this would constitute the only promotional arrangement shown to exist among respondents. In-packs are a relatively expensive promotional device (Tr. 11,232; CX–GM 233; CX–GF 4013S; CX–K 546K) and are unique in that they put respondents "into the toy and gimmick business rather than the cereal business" (GFX 406A). A gentlemen's agreement limited to curtail this practice would be insufficient to establish an overall agreement not to compete pricewise or in any other fashion.

383. In any event, respondents resumed more extensive use of in-packs beginning in 1968, and increased utilization through 1972 (Tr. 21,906, 21,937; GMX 531; CX–GM 2115; CX–K 1073). This was in response to the lull in overall market growth and the respondents' ostensibly independent decisions to promote individual brands by short-term means such as in-packs (CX 101E, CX–GF 3000I, X, Z–100; GMX 241, 531A–F, 552A, 555A, 556A; GFX 1319). General Foods' resumption of in-packs was part of the abandonment of its full line advertising policy in favor of a brand promotional strategy (CX–GF 3000Z–11, Z–12, Z–20; 4039 O, Z–114, Z–115).

(iv) Coupons

384. Respondents' couponing activities negate complaint counsel's contentions that respondents avoided price related promotions.

Dr. Scherer, one of complaint counsel's economic experts, testified that respondents' couponing "remained at a fairly significant level during the 1960s" and was "widespread" (Tr. 27,967–68). Since 1965, when data on coupons for all respondents is available, each respondent used coupons on both established and new products (GMX 475–96; KX 78, 201C thru 204C; GFX 1336–44).

385. Kellogg distributes coupons inside cereal packages, in newspapers or through the mail, offering discounts worth usually five to 15 cents redeemable at retail stores. Retailers are reimbursed by Kellogg for the face value of the coupon, plus handling costs of two cents per coupon (Tr. 29,924–25).

386. From 1966 to 1972, Kellogg used coupons on products representing 75 to 80% of its line (KX 79A–H, 80; GFX 1319). Kellogg's yearly marketing plans show its strong reliance on coupons for promoting sales (*e.g.,* CX–K 7178K, 7179G, 7180H, 7193J, 7194M, 7195M, 7196K, 7198F, G, 7201G, I, 7207H, M).

387. General Mills used two types of coupons to promote its products. "Manufacturer coupons" are coupons which General Mills distributes to the consumer by direct mail, by distribution at shopping areas, through magazines and newspaper advertisements, or by [122]packing them in boxes of cereals or other General Mills products. The consumer redeems these coupons at the store when purchasing cereal. "Retailer coupons", denominated Plan F and Plan G, are coupons which General Mills induces a retailer to place in its own food advertisement. The consumer also redeems these at the store when purchasing cereals. General Mills reimburses the retailer for the cost of the coupon and gives it an additional allowance (Tr. 33,405, 33,425). Every General Mills product in national distribution since June 1968 has been promoted by either "retailer" or "manufacturer" coupons or a combination of both. From 1965 to 1968, when data for "manufacturer" coupons only is available, General Mills used coupons on products representing over 80% of its pound volume in every year but one (GMX 211, 225, 271, 564E–I).

388. General Foods similarly used coupons with the majority of its brands every year from 1965 to 1972. In 1965, all General Foods established cereals carried coupons except Sugar Crisp, Bran Flakes, Rice Krinkles and Raisin Bran. In 1966, coupons for Raisin Bran and Bran Flakes were added and, in 1967, coupons were distributed for Sugar Crisp and Rice Krinkles. From 1968 to 1970, General Foods used coupons with all of its cereal brands other than Crispy Critters and, in 1971, with all products except Crispy Critters and Honeycombs (GFX 1337 thru 1344).

389. Complaint counsel assert (CPF 8–165 thru 8–169) that

coupons were an ineffective means of promoting RTE cereal sales. However, the price incentive afforded by cents-off coupons amplified Kellogg's sales volume by inducing trial of cereal brands by non-users and by stimulating additional purchase by current buyers (Tr. 29,926–27).

390. Further, Kellogg emphasized their use in the early 1970's, at a time when other methods of promotion such as in-pack premiums and trade deals (conceded by complaint counsel to be very effective competitive devices (CPF 8–176 thru 8–179, 8–112 thru 8–115)) were available and widely used by Kellogg and the other respondents. For example, Kellogg's 1972–1973 Special K promotional strategy featured coupon promotion because of its effectiveness in promoting RTE cereal sales:

> Continue the pattern of in-pack couponing. This couponing can encourage increased consumption among current buyers and increase trial and re-trial (CX–K 7194M).

Kellogg's Mini-Wheats 1972–1973 "Promotion Strategy" likewise featured coupons:

> Stimulate trial and repeat purchase through the use of Mini-Wheats' in-pack coupons (CX–K 7201G). **[123]**

391. Consumers used over . . . of all Kellogg coupons distributed over the 1970–1972 period (derived from KX 80D, F *in camera*). This is a very high figure when it is realized that newspaper and mail offerings reach many people who are not potential customers of the cereal covered by particular coupons.

The pay back to consumers and cost to Kellogg from Kellogg's coupon promotions was substantial each year from 1966 to 1972.*

392. General Foods' 1967 Cereal Task Force recognized that couponing was "known effective:"

> (a) To generate trial among non or infrequent users.
> (b) To provide an incentive for current users to immediately repurchase or to purchase in extra quantity (loading).
> (c) To provide the Sales Force with an effective vehicle to sell against (CX–GF 4039Z–116).

The task force credited Post's 1967 national coupon campaign with generating substantial gains in market share for General Foods (CX–GF 4039Z–112). **[124]**

393. A consumer survey conducted for General Foods' Post Division in 1964 revealed that:

* Chart titled "KELLOGG COUPONS AND CASH REFUND REDEMPTIONS 1966–1972" not reproduced herein, because data is *in camera*. (KX 80A, B *in camera*)

Among a number of different types of premiums listed, housewives overwhelmingly selected as the one which would be most likely to cause them to buy a cereal: "A coupon allowing you to make your next purchase more cheaply" (GFX 569E).

394. Not only was the use of couponing by respondents substantial, but it appears, as indicated by the following chart,** not to have been coordinated.

As shown above, there is no continuity of pattern for any individual respondent or correlation among respondents on coupon and cash refund redemptions from any one year to the next. [125]

395. Complaint counsel (CPF 8–167, 8–168) would downplay the importance of coupons. They assert that the redemption of 2.6% of Kellogg coupons distributed in newspapers, 3% of those distributed in magazines, 8% of those distributed by direct mail and 6% distributed inside cereal packages, and the 5% and 6% redemption rate anticipated by General Mills of a coupon being distributed through newspapers (CX–K 576B–E; KX 78; CX–K 5A; CX–GM 14C) is insignificant. I cannot agree. The respondents have apparently engaged in mass distribution of coupons and not all coupons are noticed. Further, not every recipient wants RTE cereals or the particular cereal involved. And many recipients will receive duplicated coupons through different media.

396. In assessing the amount of price reduction involved, complaint counsel would divide overall sales by the value of the coupons redeemed. Respondents, on the other hand, would divide the price of a particular cereal (say $.50) by the value of the particular coupon (say $.07) and reach a 14% price reduction. In Finding 394 above, I have presented the price reduction resulting from coupons in the manner advocated by complaint counsel. However, to the person who redeems a $.07 coupon on a $.50 item, the price reduction is 14%. And respondents have made this type of price reduction readily available.

(b) Private Label RTE Cereals

Complaint counsel allege (CPF 8–124, 8–137) that respondents tacitly agreed to avoid private label business; and that, as a result, they reduced private label product production and so limited their pricing discretion and removed a threat to the stability of their agreement to avoid price competition.

397. The term "private label RTE cereal," in its strictest sense, refers to RTE cereal sold under a retailer or wholesaler label (*e.g.*, Safeway Corn Flakes), in contrast with cereal sold under the

** Chart titled "COUPON AND CASH REFUND REDEMPTIONS AS A PERCENTAGE OF DOLLAR SALES 1965–1972" not reproduced herein, because data is *in camera*. (GMX 561A, *in camera*) manufacturer's label (*e.g.*, Kellogg's Corn Flakes) (Tr. 11,549, 14,896). Private label RTE cereal generally is not advertised by the manufacturer and is sold to wholesalers and retailers at much lower prices than branded cereal sold under a manufacturer's label (Tr. 17,508–11).

398. "Controlled brand" RTE cereals are cereals sold under a manufacturer's label with no advertising support from the manufacturer (Tr. 13,697–98, 17,511). Controlled label cereals are distributed on a limited basis, generally to retailers too small to carry their own private label, and are priced at levels similar to private label (Tr. 13,700, 13,722–23; CX–GF 124A). As used here, the term "private label" encompasses private label and controlled brand RTE cereals.

399. The lack of advertising of private label RTE cereals enables manufacturers to price them lower than their branded counterparts. These lower prices are passed on by retailers in substantial measure to the consumer (Tr. 9001–02, 9338–39, 13,724, **[126]**17,505–26). Thus, private label products compete pricewise with branded products.

400. Ralston generally priced its private label products to give the consumer about a 10% saving over branded products. Retailers normally paid less than the price paid for the comparable branded product. Thus, retailers enjoyed about a 6% higher gross margin than on branded products (Tr. 17,509–11). General Foods priced its private label cereals by deducting the advertising and direct selling expenses of the comparable advertised brand. It then added the selling and brokerage expenses (CX–GF 121I–J).

401. Retailers attempt to capitalize on the price competition offered by private label RTE cereals by placing them close to their branded counterparts, so that their customers may choose the private label products on the basis of their lower prices (Tr. 9001–02, 9127–28, 9338).

402. Private labeling in the RTE cereal industry is much less extensive than in many other food product categories (Tr. 21,873–74; CX–CI 103). RTE cereal producers frequently use the "All Other" category reported by A.C. Nielsen as a basis for estimating the sales and market share of private label RTE cereals (Tr. 7414, 11,550–51; 12,947; CX–GF 121M). In 1943, the "All Other" category was 10.8% of total pound sales (CX 106A). This category declined to as low as 1.5% in 1967–1968 and never exceeded 3% after 1956 (CX 106).

403. Kellogg has never sold a private label RTE cereal product (Tr. 11,549, 12,655–69, 13,153–54, 27,927).[38]

404. In August 1943, Kellogg leased the facilities of Miller Cereal

[38] Consistent with this policy, Kellogg rejected requests from retailers during the period covered by the complaint (1950–1972) for private label RTE cereal products (Tr. 9016–19, 12,660–68, 13,153–54; CX–K 7054, 7148).

Company, which was primarily in the business of manufacturing and selling private label RTE cereal products. Miller produced several types of RTE cereals, including corn flakes, wheat flakes, 40% bran flakes and puffed wheat (CX–K 619). Kellogg discontinued Miller's private labels and began packing Kellogg brand cereals in the Miller facilities. The lease agreement contained an option to buy within 15 years, which Kellogg exercised in 1958. As a result, Miller was eliminated as an independent producer of RTE cereal products (Tr. 21,873; CX–K 444B, 619).[39]

405. Respondents, including Kellogg, are alleged to have engaged heavily in price competition prior to 1950. Kellogg's consistent **[127]** avoidance of private labels dating back over 40 years prior to 1950, including its discontinuance of private labels in the Miller facility in 1943, does not become suspect as a step in carrying out an alleged tacit agreement around 1950 not to engage in private label competition.

406. Like Kellogg, General Mills has never produced private label cereals (Tr. 15,933). Therefore, this practice, which long predated 1950, does not fit a time pattern from which it can be argued that there was tacit agreement not to engage in private label competition.

407. Both Kellogg and General Mills have maintained operations at a high level of capacity (Tr. 26,364, 27,155, 27,443, 28,236; CX 203). To the extent that excess capacity occurred, each company, as a matter of business policy, elected to utilize that capacity with newly developed branded products (Tr. 17,357, 17,866–67, 29,973, 33,134). Complaint counsel have failed to show that either Kellogg or General Mills had that degree of excess capacity over an extended period of time that would be necessary to enter into long-term commitments to provide private label products (*See* Tr. 13,787, 23,550–51; CX–GF 159B).

408. General Foods has produced private label RTE cereal products since at least 1937, when it sold about 100,000 pounds ($10,000) of private label RTE cereal (GFX 1370K).

409. In 1943, General Foods acquired the Jersey Cereal Company, with manufacturing plants in Irwin, Pennsylvania and St. Joseph, Missouri. Jersey produced a number of RTE cereals—including corn flakes, wheat flakes, bran flakes, rice flakes, rice gems, wheat puffs and rice puffs—some under its own name, but primarily under private labels (GFX 253F, 1370K).

410. General Foods purchased Jersey in order to acquire certain

[39] There is no evidence, or contention, that Kellogg acquired Miller with the intent of destroying private label competition.

patent rights, equipment and manufacturing knowledge, and to expand its private label business (Tr. 13,715–16; CX–GF 167Z–10, Z–11).

411. In 1947, after encountering problems in production, marketing and distribution, the private label business of General Foods showed an operating loss of $141,000 (CX–GF 121H).

412. In order to eliminate duplicative expenses and quality control problems, the plants at Irwin and St. Joseph were closed and their operations were transferred to Battle Creek (CX–GF 121G).

413. General Foods' private label business suffered further losses (CX–GF 121L). By 1953, General Foods had lost over $2 million (without full allocation of overhead costs) on its private label business since acquiring Jersey (GFX 1370L).

414. In order to save money in the marketing of its private label cereals, General Foods moved the responsibility for private [128] label sales from brokers to the General Foods sales division. Since this additional responsibility interfered with the sales force's marketing of General Foods' trademarked brands, responsibility for selling private label was shifted back to brokers (CX–GF 121F).

415. Around 1956, General Foods discontinued its business with what it considered "borderline private label cereal customers" whose volume did not justify the expense involved in supplying them (Tr. 13,729). This cut-back improved General Foods' profit situation on its private label products (CX–GF 121P).

416. General Foods continued to supply private label cereals to three principal customers—A&P, Kroger and American Stores. The Jersey control brand name was dropped in favor of private label sales (Tr. 13,730).

417. General Foods subsequently decided to discontinue its private label cereal operations as it was not considered to be a profitable business (Tr. 36,590). General Foods' 1967 Task Force had recommended discontinuance of private label operations, anticipating that the future demand for branded products would require the time, space, machinery and efforts then being devoted to private label (CX–GF 120B, 133A).

418. General Foods utilized its excess capacity in the production of new products (Tr. 13,656, 14,119, 36,591–93).

419. General Foods' private label cereal sales declined from a high of about 7 million pounds in 1955 to under 5 million pounds in 1960 and under 2 million pounds in 1970 (GFX 1370L). In 1966, General Foods' private label business was less than one-half of its 1949 level (CX–GF 121H–J, 152B). Its 1965 level was approximately

the same as its 1944 level of private label production (including Jersey) (CX–GF 121M).

420. Thus, General Foods, unlike Kellogg and General Mills, did make an effort to compete by offering private label products. For a time, it increased its private label production beyond the point previously reached by the company it had acquired, in part, for the purpose of producing private label. There is no evidence, or contention, that the acquisition was made to remove private label competition.

421. Relying upon a number of requests by retailers for private label products (CPF 8–154), Jersey's profitability in 1943, General Foods' profitability in the mid 1950's and Ralston's profitability on private label business (Tr. 17,501–10, 17,515–26), complaint counsel assert (CPF 8–156) that "respondents' excess capacity on production systems, the significant retailer demand for private label, and the profitability of producing private label, are factors that should have encouraged respondents to engage in private labeling activity. The absence of private labeling activity in the face of these incentives strongly indicates that respondents tacitly agreed to avoid competition by restricting output of private label products." **[129]**

422. As found above, however, neither Kellogg nor General Mills have been shown to have had sufficient excess productive capacity to engage in private label competition; and General Foods tried, but was unable to generate the returns deemed appropriate.

423. Complaint counsel's effort to second-guess the business judgment of respondents is made despite a failure to show that the sales and profit potential for private label products is greater than for branded products. It also flies in the face of an obvious disinclination of any company to private label its own products and so create competition for its own brands (Tr. 26,684, 28,365), as well as the difficulties in simulating the branded products of others (Tr. 9173, 17,556, 22,987–89, 25,857).

424. It is concluded, therefore, that complaint counsel have failed to establish that respondents' activities with respect to private label RTE cereals were in accordance with any agreement, tacit or otherwise; that respondents' activities reflected anything other than independent business decisions made in an effort to further legitimate business interests.

D. *Nonprice Competition*

Complaint counsel assert (CPF 8–170) that "[r]espondents did not limit their tacit agreement to avoid competition to pricing and related areas. Rather, respondents also avoided other actions in the form of nonprice competition that might have led to price competition or that potentially might have threatened their goals of maintaining marketplace stability and maximizing profits at the expense of customers." Here, complaint counsel include in-pack premium competition, competition for shelf space allocation at the retail level, competitive advantages by fortifying products and the exchange of data covering current advertising expenditures, as means of reducing marketplace uncertainties which otherwise might result in more active competition.

Respondents' activities with regard to in-pack premiums have been considered above as a price-related activity (Findings 363–83). We shall now consider the exchange of advertising expenditure data, shelf space competition and product fortification. The additional, but related, subject of competition in the introduction of new products will also be considered.

1. *Advertising*

425. Since before 1950, all three respondents and Quaker, Ralston, and Nabisco each submitted to A.C. Nielsen Co., usually through their advertising agencies, their brand-by-brand advertising expenditures for network and spot television, network radio, [130] newspaper, and magazine advertising for the two months prior to submission (Tr. 11,842–43, 15,596–97, 15,600–01, 15,641; CX–ACN 2; KX 14). Using this data, Nielsen prepared a bi-monthly report which detailed total advertising expenditures broken down by media for each brand of each company and, within seven weeks of the end of the bi-monthly period covered by the report, supplied it to the respondents and the other participating RTE cereal producers (Tr. 14,232–33, 14,354, 14,356–58, 14,953–54, 15,597–99; CX–GF 4010Z–35, Z–36; CX–GM 176).[40]

426. Complaint counsel assert (CPF 8–238) that this exchange of advertising information has served to allow respondents to prevent "an expensive advertising war."[41] However, there is no evidence that the respondents utilized the information to curtail or otherwise coordinate their advertising efforts. To the contrary, the record shows that industry members competed very strongly against each other in their advertising endeavors.

[40] General Mills did not participate in 1950 and for some six years thereafter (Tr. 15,615–16).

[41] This assertion is inconsistent with the further assertion (CPF 11–183, 11–205) that respondents have engaged in excessive and wasteful advertising.

427. Total advertising expenditures for the five largest producers increased from $23 million in 1950 to $84 million in 1971.[42] In addition to this absolutely large amount, advertising also has been substantial in comparison to sales. The advertising to sales ratio in the RTE cereal industry exceeded 10%, sometimes by a substantial amount (Tr. 21,905, 27,676; CX 513). This is substantially higher than for most other industries. Of more than 320 manufacturing industries, the advertising-to-sales ratio in the RTE cereal industry was among the two highest (Tr. 21,904, 27,678).

428. Total advertising for the three respondents went from $19.5 million in 1950 to over $86 million in 1967. During that [131]period, Kellogg's yearly advertising expenditures grew from $8.5 million to more than $40 million. General Mills' went from $5.4 million to $25.7 million. General Foods' went from $5.6 million to $19.5 million (GFX 1319; CX–GF 324J).

429. Advertising expenditures of those firms which furnished advertising data to Nielsen have varied widely (GMX 555). During the period 1958–1972, General Mills' advertising expenditures as a percentage of dollar sales were over 30% higher than Kellogg's in 10 of the 15 years, and were over 20% higher in four of the remaining five years. On the other hand, General Foods' advertising expenditures varied from being 33% less than General Mills' in 1961 to 23% higher than General Mills' in 1970. Quaker's advertising expenditures were twice as high as Kellogg's in 1971 and were never lower than Kellogg's; Ralston's advertising expenditures were never lower than 28% above Kellogg's; and Nabisco's varied from 57% higher to 14% lower.[43] None of the firms followed Kellogg, the alleged industry leader. The following table, derived from GMX 555, depicts advertising expenditures as a percentage of dollar sales, using Kellogg's expenditures as the benchmark (at 100%).

[42] These expenditures, in millions of dollars, are as follows (CX 506B):

	1950	1971
Kellogg	8.5	32.9
General Mills	5.5	24.0
General Foods	6.4	16.1
Quaker	1.8	8.2
Nabisco	1.2	3.0
Total	23.4	84.2

[43] These figures are all advertising expenditures as a percentage of dollar sales.

INDEX OF ADVERTISING EXPENDITURES AS A PERCENTAGE OF DOLLAR SALES 1958–1972

Year	Kellogg	General Mills	General Foods	Quaker	Ralston	Nabisco
1958	100.0	126.8	110.4	149.8	144.5	157.1
1959	100.0	130.9	92.4	113.8	139.4	100.5
1960	100.0	107.2	91.1	127.6	182.2	86.1
1961	100.0	131.6	88.1	182.2	191.9	99.2
1962	100.0	121.2	96.7	168.0	189.3	104.7
1963	100.0	135.3	100.7	140.7	170.0	126.7
1964	100.0	132.6	111.6	132.4	152.3	135.3
1965	100.0	134.7	112.1	131.3	127.4	131.3
1966	100.0	126.0	133.5	128.2	138.9	140.9
1967	100.0	133.0	142.0	129.1	141.7	112.1
1968	100.0	142.8	152.6	174.0	134.4	122.2
1969	100.0	132.8	127.3	133.6	145.7	86.7
1970	100.0	124.8	154.2	155.0	174.4	88.4
1971	100.0	130.6	150.6	200.6	NA	115.5
1972	100.0	157.2	146.8	139.7	NA	138.4

NA - Data not available **[132]**

430. The following table shows advertising expenditures as a percentage of dollar sales for the three respondents:

ADVERTISING EXPENDITURES AS A PERCENTAGE OF DOLLAR SALES 1958–1972

Year	Kellogg	General Mills	General Foods
1958	14.57	18.47	16.09
1959	17.23	22.56	15.92
1960	16.26	17.43	14.81
1961	15.42	20.15	13.49
1962	15.21	18.43	14.71
1963	15.19	20.57	15.30
1964	15.23	20.19	16.99
1965	16.61	22.38	18.62
1966	15.72	19.81	20.98
1967	15.56	20.69	22.09
1968	12.08	17.25	18.43
1969	12.09	16.05	15.39
1970	10.60	13.23	16.34
1971	9.74	12.72	14.67
1972	9.39	14.76	13.78

(GMX 555A)

431. As the above tables demonstrate, Kellogg's, General Mills' and General Foods' expenditures on advertising followed markedly different and varying patterns during the period 1958–1972. **[133]**

432. Advertising expenditures on individual products have also

varied greatly. An examination of pairs of brands that Dr. Green studied in looking for brand pricing coordination fails to show parallel or coordinated advertising spending by respondents (*See* GMX 242–49). This is demonstrated by the following examples:

ADVERTISING TO SALES RATIOS FOR SELECTED PRODUCT PAIRS

A/S Ratio		A/S Ratio		A/S Ratio		A/S Ratio	
General Mills' Total	Kellogg's Product 19	General Mills' Cocoa Puffs	Kellogg's Cocoa Krispies	General Mills' Cheerios	Kellogg's Rice Krispies	General Mills' Trix	Kellogg's Froot Loops
–	–	.281	1.181	.132	.137	.188	–
–	–	.278	0.353	.147	.139	.141	–
–	–	.144	0.316	.159	.142	.170	–
–	–	.160	0.185	.161	.151	.147	–
.426	–	.102	0.130	.148	.148	.140	–
.196	–	.145	0.136	.160	.138	.157	–
.224	–	.124	0.159	.147	.134	.170	.211
.224	–	.145	0.155	.152	.132	.158	.157
.182	.627	.162	.106	.152	.115	.168	.094
.189	.336	.143	.087	.148	.126	.142	.060
.169	.308	.102	.113	.123	.125	.091	.097
.156	.176	.104	.073	.119	.094	.112	.062
.182	.200	.109	.051	.099	.095	.096	.045

(GMX 244, 245, 247, 248) **[134]**

433. Complaint counsel, purporting to rely on Mr. Glassman and Dr. Schmalensee (Tr. 22,469–71, 27,131–33) contend (CRPF 8–283) that such comparisons are not persuasive; that advertising-to-sales ratios would have to be adjusted for the introduction rate of new products before comparisons would be meaningful. Such an adjustment might well affect the comparison of overall advertising-to-sales ratios. However, it is compliant counsel's speculation that advertising expenditures may have been coordinated. And so it is complaint counsel's burden of proof that has not been met. In any event, complaint counsel's objection is inapplicable to the comparisons of advertising for the individual pairs of products selected for comparison by complaint counsel's own witness, Mr. Glassman.

434. Those economic experts who addressed themselves to an evaluation of advertising expenditures (both those introduced by complaint counsel and those introduced by respondents) agreed that there was no evidence of parallel or coordinated advertising endeavors by respondents (Tr. 22,467–68, 27,129–32, 38,565–66, 38,570, 38,622).

435. Complaint counsel assert (CPF 8–237) that "the mutual exchange of detailed advertising data permitted the respondents to make . . . [reductions in advertising expenditures in the late 1960's]

without fear of losing market share because each was able to coordinate its reduction with the others;" and that (CRPF 8–276) "without such an exchange, respondents may not have been successful in sharply reducing advertising expenditures in the late 1960's." This, however, is pure conjecture.

436. Respondents' executivies testified that no such arrangement was made (Tr. 29,725, 29,727, 32,768, 35,462–63, 35,815). And there is no evidence tending to establish the existence of any such agreement. The tables indicating lack of coordinated action and the evaluative testimony of expert witnesses to the effect there was no such coordination, referred to above, covered the late 1960's period in question. Further, there is no basis for complaint counsel's conjecture with regard to an exchange of advertising information instituted some 20 years before the downturn in advertising.

437. While total advertising expenditures in the RTE cereal industry declined in the late 1960's, this was largely in response to the slowing of RTE cereal market growth. RTE cereal sales reached 1.177 billion pounds in 1965, but then leveled off, reaching only 1.190 billion pounds by 1971 (CX 101E).

438. In 1968, General Foods reversed its long-term trend of advertising expansion and sharply reduced its advertising spending by more than $3 million (GMX 241). This was after the 1967 General Foods Task Force had recognized the decline in market growth and anticipated the continuing absence of RTE cereal market growth in planning its late 1960's marketing strategy (CX–GF 4039V). Further, General Foods was shifting its marketing emphasis away from advertising to individual product promotions as part of its **[135]** withdrawal from a full line advertising strategy to that of pushing individual brands (Tr. 27,369, 36,405–06; CX–GF 4039Z–114, Z–115). Overall advertising and promotional expenditures of General Foods for 1966 through 1970 showed no decline (GFX 24).

439. Advertising is expected to decline in a competitive industry as sales growth stops (Tr. 27,368–69, 38,566–67). There is nothing suspect, therefore, in the fact that Kellogg's and General Mills' advertising had begun to decline by 1968, and that advertising of Quaker, Ralston, and Nabisco also declined between 1967 and 1969 (GMX 241; GFX 1319).[44] Apart from a uniformity in decreasing the percentage of advertising expenditures in 1968, the following table, taken from GMX 241, shows a disparity of action on the part of respondents both before and after that year:

[44] As previously found (Findings 330–33, 349, 352, 353, 383) respondents' use of various product promotions increased as their advertising decreased.

ANNUAL ADVERTISING EXPENDITURES BY COMPANY, AND PERCENTAGE CHANGE FROM PREVIOUS YEAR
1964–1972

	Kellogg		General Mills		General Foods	
	($000)	% Change	($000)	% Change	($000)	% Change
1964	35,363		19,751		14,886	
1965	39,071	+ 10.5	25,017	+ 26.7	16,115	+ 8.5
1966	40,212	+ 2.9	22,404	- 10.4	19,419	+ 20.5
1967	40,877	+ 1.7	25,619	+ 14.4	19,486	+ .4
1968	33,847	- 17.2	21,029	- 17.9	16,463	- 15.5
1969	36,190	+ 6.9	21,085	+ .3	14,100	- 14.4
1970	32,740	- 9.5	18,750	- 11.1	15,399	+ 9.2
1971	32,853	+ .4	18,130	- 3.3	16,098	+ 4.5
1972	32,988	+ .4	24,018	+ 32.5	16,076	- .1

440. General Mills examined the marketing expenditures on a competitive product and its sales volume in order to evaluate what might be working or not working for a competitor in comparing the sales results of General Mills' own advertising efforts. There was no attempt to match spending levels (Tr. 15,945–49, 17,651–52, 17,656). Advertising spending levels for individual products were based on the recent and projected sales performance of the product, its recent advertising levels, its responsiveness to advertising and its existing or targeted consumption profile (Tr. 17,651, 17,303, 17,391). **[136]**

441. Kellogg, General Foods, and Quaker also used such advertising information to correlate advertising efforts with sales results, and so evaluate advertising efficiencies. Quaker and General Mills used sales and advertising data to project their own sales volumes (Tr. 12,804–05, 14,233, 14,953, 14,976, 15,771).

442. While competitors' levels of advertising expenditure were considered by respondents in setting advertising budgets for their cereal brands, they were not a controlling factor (Tr. 12,367, 15,243–44, 17,174, 17,651–53, 17,656, 29,712).

The complaint charges respondents with having maintained and utilized monopoly power. The exchange of advertising data has not been alleged as a violation of law. Therefore, the failure to show that such an exchange was utilized for monopolistic purposes constitutes a failure or proof under the instant complaint.

443. It is concluded that respondents engaged in very heavy advertising as a means of competing in the sale of RTE cereals. It is concluded further that, while respondents exchanged advertising data, such data was employed for legitimate business purposes, and that there is a lack of evidence to support complaint counsel's

speculation that the data exchanged was used to parallel or coordinate advertising endeavors.

2. *Competition For Retail Shelf Space*

444. Complaint counsel assert (CPF 8–170, 8–189, 8–204) that respondents had a tacit agreement to avoid competition for shelf space in retail stores; that this was accomplished by Kellogg formulating and implementing a shelf space allocation plan and General Mills and General Foods acquiescing in that plan. General Mills and General Foods executives have denied the existence of any such agreement or conspiracy (Tr. 32,712–13, 35,462, 35,815, 36,527). The record furnishes no basis for not accepting this testimony.

445. Normally, the RTE cereal section in a store comprises most, if not all, of one side of an aisle (CX–K 553J; Tr. 6523, 6560–61, 7291, 7607–09, 8308–11, 8818–22, 9062–65, 9070–71). As of November 1961, there were over 100 brands and sizes of RTE cereal products from which the retailer selected about 75 to 90 to be displayed (CX–K 553J; KX 3). In shelving these products, decisions must be made on where to locate each RTE cereal and how many "facings" (*i.e.*, the space needed to place one RTE cereal package broadside on the shelf with the front panel of the package displayed) each is to be given. Additional packages are placed in a row behind each front facing (Tr. 8090–92, 8346–47).

446. Apart from preventing out-of-stocks, there is a degree of relationship between sales volume and the amount of space an RTE **[137]**cereal product receives on the shelf (Tr. 8817). The location of the RTE cereal product on the retail shelf is also a factor in promoting sales (CX–GF 4039Z–12; *see also* CX–K 95A, 135C, 547H–J; CX–GM 148, 704; CX–GF 324C, 0, S, 325P, 0, L, 560–560A; QX 21 aka CX–K 108; GMX 7B, C aka CX–GM 152B, C). Traffic patterns are considered in selecting preferred locations (Tr. 9048–56; CX–K 556D, E). Either end of the aisle (Particularly the end reached last) is considered less desirable, and respondents usually preferred the center of the gondola where visbility to a consumer is normally the best. Also, a center location permits an expansion of space in either direction (Tr. 6520–23, 7210–11, 7283, 7291–93, 7695–96, 8233–35, 8313–15, 8750, 8820, 8949–50; CX–GM 148C).

447. Preferred locations would frequently vary from store to store, depending upon traffic patterns (Tr. 7684–86, 8121–24). General Foods tried to have its products shelved next to Kellogg's with its Post Toasties next to Kellogg's Corn Flakes (Tr. 8820).

448. Many of respondents' officials believed that grouping a

company's products together increases the manufacturer's opportunity to capture the customer's attention and, therefore, his impulse purchase (Tr. 6503, 6521–23, 6558, 7646–48, 8100, 8113–15, 8819).

449. There is a conflict in the evidence with respect to the importance of impulse purchases. General Mills executives testified that most RTE cereal purchases are planned and that the space allocated for a cereal may affect the time spent by the consumer searching for it, but will not have an impact on the product's sales (Tr. 7829–34, 8022, 8097, 8176–77). On the other hand, General Foods' 1961 marketing plan contains a reference to recent studies showing that 71.8% of all cereal purchases at the store level are made on impulse (CX–GF 324S). Since the studies are not identified and respondents in 1976 (when the exhibit was received) had no opportunity to cross-examine any witness with respect to the unidentified pre-1961 studies, the 71.8% estimate cannot be accepted as an accurate figure. Further, if RTE cereals were primarily impulse purchase items, respondents would not be making the immense advertising and promotional expenditures that they are to presell their products (*see, supra,* Findings 427, 428, 430, 439); and Dr. Scherer (and other economic experts) would not have felt required to make adjustments for advertising persistence rates when converting accounting rates of return to economic rates of return (*see, infra,* Findings 682, 685–87, 700, 768–91).

450. Before Kellogg developed its shelf space plan in the 1950's retail grocers varied in their methods of shelving RTE cereal products. Some would group cereals by grain, *i.e.,* corn-based products together, wheat-based products together, oat-based products together, rice-based products together, etc. Some retailers would group cereals by types, *i.e.,* presweetened cereals together, unsweetened cereals together, etc. Other retailers used other methods of shelving, including grouping by manufacturers (Tr. 6504–05, 6514–15, 8018, 8084, 8113, 32,675, 32,722). Also, most RTE cereal brands were accepted by most large retail outlets and few RTE **[138]**cereal products were allocated more than a minimum number of facings on the shelf (CX–K 553I, J, K). This meant that Kellogg, whose products were the largest sellers, was not getting its proportionate share of shelf space and that there were out-of-stocks of Kellogg products.

451. As grocery stores were changing from over-the-counter to self-service, Kellogg salesmen in particular, as representatives of by far the largest cereal producer, were called upon by retailers to offer shelf placement recommendations (Tr. 36,818). In 1956, Kellogg developed a standard Kellogg approach to shelf placement recom-

mendations. Space according to sales and company grouping were the two key elements of the Kellogg program (Tr. 6474, 6501).

452. Starting in 1956, and thereafter, Kellogg made recommendations to retailers about how to organize their cereal shelves using these two principles. The recommendations covered the products of all major manufacturers because retailers needed to see how the whole section would look (Tr. 6474, 6501, 6503–04, 6514). The same two general principles governed Kellogg's use of its "Magnaboard" (a mock-up of a cereal shelf with movable parts representing individual cereal brands) introduced in the early 1960's (Tr. 6542–43).

453. Sometime in the late 1960's, Kellogg computerized its shelf space plan. Where the plan was accepted, the retailer supplied Kellogg with its own sales data for each product (Tr. 6657). The computerized Kellogg shelf space plan, called Computerized Space Allocation ("CSA"), consisted of two phases. In Phase I, Kellogg recommended a change in the case size ordered for each cereal. The recommendation was usually to lower the case size pack of competitive products, which resulted in a reduction in facings for such products (Tr. 6943, 7114; CX–K 1063).

454. As part of Phase I, Kellogg recommended which items should be discontinued. It generally recommended that a product be discontinued when its share was less than .5% of all RTE cereal sales, or when the product was selling only four to five packages per week. However, the particular cut-off for discontinuance of a product, or of a size of a product, varied by account in accordance with what would minimize Kellogg's losses and maximize competitive losses. In all cases, an attempt was made to maintain distribution of Kellogg products. Discontinuance of a Kellogg product would be recommended only if it could take a number of competitive products with it (Tr. 6807–08, 7124–25). Phase II of the Kellogg program allocated the shelf space among the remaining cereals by volume (CX–K 1065).

455. Kellogg's shelf space efforts and strategies were designed to create more sales for Kellogg at the expense of its rivals (CPF 8–187, 8–191, 8–196, 8–204; Tr. 6501–03). The primary purpose underlying Kellogg's shelf space program was to reduce Kellogg out-of-stocks and get more retail shelf space for its RTE cereal products. Kellogg's share of shelf space and inventory historically **[139]**had been less than its share of sales. Thus, the principle of sales according to shelf space enhanced the placement of Kellogg's products at the expense of those produced by its competitors (Tr. 7095, 7103–06, 7285, 8758, 8769–70).

456. Kellogg recommended that retailers shelve RTE cereal

products in company groupings so that Kellogg's lower volume products would be next to its high volume products and gain increased sales as as result of impulse purchases (Tr. 6501–04, 6521–23, 7662–68, 7744, 7821–24, 8090–92).

457. Kellogg, therefore, unilaterally instituted a shelf space program which was designed to afford it a competitive advantage over other RTE cereal manufacturers, including the other respondents. There is no reason to believe that General Mills or General Foods was party to the institution or implementation of Kellogg's plan.

458. Kellogg's shelf space program was one of making recommendations to the retailers. The retailers made their own decisions on how to shelve RTE cereals (Tr. 6527, 6762, 7121, 7146, 7149–50, 7208, 7210, 7669, 7687, 8266–67, 8274, 8494, 8840–41, 8893–94, 8910–11, 8917–18, 9039, 9092–96, 9112, 9115, 9364–69, 29,960–61, 29,964, 36,342–43). To the extent retailers adopted Kellogg's recommendations, they did so because such recommendations served their own profitability and efficiency interests (Tr. 8904–07, 9032–33, 9136, 9377–78).

459. Kellogg's shelf space allocation principles were followed in a majority of retail outlets (CX–K 553Q, 556C–G), although utilization of Kellogg's CSA computerization service was not as universal (KX 1–2). The principles appear to have been adopted because they were consistent with, and in the best interests of, the retailers.

460. The principle of space according to sales ensured that the retailers would avoid out-of-stocks and over-stocks, increase their efficiency and profitability and reduce labor costs (Tr. 6540–42, 6694, 6722–23, 7151, 7206–07, 8904–07, 8906–07, 9032–33, 9136, 9377–78, 32,746, 36,813). Consequently, the retailer would achieve a better utilization of its capital and a better return on its investment (Tr. 7109, 7606–07, 32,700–01).

461. Kellogg did not invent the principle of allocating shelf space by sales volume (Tr. 7213). Sales volume is, and has been, the basic method of space allocation throughout grocery stores. A retailer's profitability is directly related to sales turnover. The allocation of shelf space according to sales volume reduces the likelihood that a product will be out of stock, maximizes turnover and return on investment and minimizes lost sales and lost profit both to the retailer and the manufacturer (Tr. 6540–41, 7085–86, 8010–11, 8021–22, 8091, 8838–39, 8904–05, 9032–33, 9135–37, 9195–97, 9377–78, 32,745–46; CX–NCFM 500 at 222).

462. As Kellogg's Director of Marketing Research testified (Tr. 7085): **[140]**

[P]rofitability in the operation of the cereal department revolves around turnover, the amount of stock that has to be carried, labor costs in placing the items on the shelf and, to be more specific, profitability, if you will take, for example, the item turnover, by allocating space according to sales, what that tends to do is to reduce the day's supply on the slower selling items and increase it on the faster selling items, and consequently increases the sales on those faster selling items because it decreases the out-of-stocks.

So what you have got is a better return on investment because your merchandise is turning over faster in total. In the backroom stock, I noted earlier that backroom stocks have diminished over the years. In fact, today, the backrooms don't anywhere near resemble what they used to be in the 1950's. Very little backroom stock is given for any product on the shelf and especially cereals.

By reducing the backroom stock the retailer has tended to reduce his investment. Therefore he is selling more goods today than he ever did before with less stock and therefore he is making more money.

463. Shelf placement by manufacturer was commonly used by retailers for a wide variety of goods other than RTE cereals (Tr. 8762–67, 8847–55, 9036–39, 9098, 32,727–29). Retailers believed that grouping products by manufacturer served both the consumer's best interests as well as their own. It was the most efficient arrangement from the standpoint of the consumer's ability to locate quickly the RTE cereals he or she was looking for (Tr. 8,113, 8888, 9032–33, 9035–36, 9039, 9136, 9377–78, 32,727). This system facilitated inventorying and ordering because the stores' order guides were arranged by manufacturer (Tr. 32,726).

464. To the extent that other arrangements, such as stocking by grain type, have been tried, they were unsuccessful (Tr. 9039, 9139–40). Each RTE cereal has many characteristics important to the consumer and no single one can be effectively used as a basis for grouping. Grain, for example, is not a workable basis for grouping because there are many multigrain cereals and because grain is not always the most important feature to the consumer (Tr. 12,684–87, 12,694, 12,717, 32,727). **[141]**

465. Faced with Kellogg's shelving program which advocated space according to sales and grouping by manufacturers, which principles were logical and advantageous to retailers, as well as ones to which retailers were accustomed, it is not surprising that General Mills and General Foods advocated the same guidelines as they competed for shelf space (Tr. 7765–67, 7781, 7789–91, 8020–31; *See* CX–GM 148; GMX 7, CX–GF 560, 4039Z–86).

466. While all three respondents generally advocated shelving by manufacturer and allocation of space according to volume, they each still competed for all the space it could get. This included efforts to get more than a "fair share" of shelf space if its credibility would not be impaired by doing so. And each recommended the discontinuance

of slow moving products of its competitors (Tr. 6548, 6565, 6808, 7126, 7279, 7644, 7653–54, 7660–61, 7669–72, 7721–22, 7745, 7659–60, 7670, 8003–05, 8038–39, 8132–33, 8376–77, 8619–20, 8841–42, 8623–24, 9145–46, 9171–72, 32,699–701, 32,707–11, 32,713–15, 32,720, 32,736–37, 36,526–27, 36,820–21, 36,892–94).

467. General Mills recommended space allocation by sales volume only where this would lead to an increase in shelf space for General Mills at the expense of its competitors (Tr. 8004–06, 32,698–99). Generally, it tried to take the additional facings needed from Kellogg and General Foods, because products of those companies presented the heaviest competition to General Mills (Tr. 32,699–702).

468. In retail accounts where General Mills had a share of total RTE shelf space which was greater than or equal to its share of sales in the region, it recommended space allocation according to sales volume only for those products and sizes which had a share of shelf less than share of sales (Tr. 8005, 8054–56, 32,705–06).

469. Recommendations to increase facings beyond share of sales could not be justified as being in the economic self-interest of the retailer, and would not sit well with him. Such recommendations would have an adverse impact on the salesman's credibility (Tr. 8918, 9081, 9179–80). Thus, a respondent's failure to recommend space beyond that indicated by volume is not an avoidance of competition, but is totally consistent with competition and the respondent's economic self-interest.

470. For its items which already had shelf space equal to or greater than sales, General Mills aggressively used other strategies, such as promotions and displays, or attempts to get the retailer to accept a second size of the product (Tr. 8005, 32,704–05). If successful, such efforts would increase sales. Once sales increased to the point where share of market was greater than share of shelf space, General Mills would recommend an increase in facings based upon the principle of space allocation according to sales volume (Tr. 8005, 32,704–05).

471. General Foods' salesmen sought to have its cereals shelved where they would get the most exposure, preferably some distance down [142]the aisle in order to afford customers easier access (Tr. 8814, 36,797). At the same time, however, a salesman could not make ludicrous proposals that would destroy rapport with the grocer and his credibility as an advisor, *e.g.,* that Kellogg's cereals should not be shelved at all, or should be shelved at an inconvenient location, despite their relatively greater consumer popularity (Tr. 8918, 9179–80, 36,791–92).

472. In 1968, General Mills developed a more formalized shelf

space program (CX–GM 148). It was entitled Cereals Organized for Profit ("COP"). General Mills' COP kit was developed as a partial response to the Kellogg computerized shelf space program, which Kellogg came out with in the late 1960's (Tr. 32,717–18). The main selling point for COP was that it used regional market share figures to allocate facings on the cereal shelf as opposed to share data based solely on sales by the particular account, as the Kellogg plan did. For example, if Cheerios enjoyed a 5% share in a region, but only a 4% share in a particular grocery chain, General Mills would urge the retailer to increase Cheerios' facings to its regional share level of 5% (Tr. 32,718–19).

473. The COP kit was a sales aid which allowed salesmen to simulate an RTE cereal aisle. The kit, as distinguished from the use of sales and shelf facings data, was generally used only when a complete reset of the cereal section was contemplated. This was usually only once a year, because it required a lot of preparation time on the part of the General Mills salesmen. The kit was abandoned as a clumsy sales aid, but General Mills continued to vie for shelf space (Tr. 32,719, 32,717–22).

474. From 1955 to 1965, Nielsen market share data was utilized by General Foods to recommend space allocation to retailers. Toward the end of that period, warehouse withdrawal figures were used in place of Nielsen data when requested by retailers (CX–GF 560). Thus, the General Foods plan, unlike Kellogg's program, recommended that a manufacturer's products be placed on the shelves in proportion to that manufacturer's market share rather than its share of sales in the particular store.

475. In 1955, all General Foods cereal packages were redesigned to achieve a "family resemblance," and line packaging was emphasized (GFX 1255 O, 1256W, 1288F). Accordingly, General Foods salesmen were advised to try to get all General Foods cereals shelved together to create a "billboard effect" and to stress the line of products (Tr. 36,346, 36,809).

476. By 1956, the Post Planned Shelving Program had taken shape. It advocated: (a) space according to sales as measured by A.C. Nielsen; (b) shelving by company; and (c) General Foods cereals **[143]** in the middle of the cereal section with Post Toasties next to Kellogg's Corn Flakes (CX–GF 4039Z–86).[45]

479. While the Planned Shelving Program continued to provide the basic framework for General Foods' shelf activities, in April 1964, General Foods introduced "Compact Packages" (GFX 1304A).

[45] At one point in the 1960's, General Foods experimented with recommending grouping RTE cereals by grain. However, the plan was a failure (Tr. 8630, 8814, 9140).

Compact Packages were resized versions of existing cereal packages, designed to hold equivalent quantities of cereal in smaller boxes (Tr. 36,841).

480. These new packages were intended to appeal both to consumers and to the grocery trade (Tr. 36,386–87). The anticipated consumer benefits were: (a) a better fit on home cupboard shelves; (b) greater stability; and (c) easier handling. The anticipated trade benefits were: (a) better space utilization, *i.e.,* more cereal in the same amount of shelf space; (b) greater package stability; and (c) better pallet patterns (GFX 1304B, C).

481. General Foods anticipated increased sales and profits arising from (a) consumer preference for, and therefore purchase of, the new packages relative to the other manufacturers' old-style packages, and (b) increased distribution of General Foods cereal brands by placing additional items in the section of cereal shelves where its cereals were placed (Tr. 36,391–92, 36,837). General Foods also anticipated a benefit from being perceived by the trade as a leader in innovative cereal shelving, and thereby being able to secure greater acceptance for its shelving recommendations (Tr. 36,841).

482. After an advertising campaign and promotional efforts (Tr. 36,391, 36,393, 36,839–40), General Foods' compact packages made an initial favorable impact, and it gained some additional facings. Over time, however, the program was a failure, and General Foods ended up losing shelf space (Tr. 36,392–93, 36,841–42; GFX 1301).[46]

483. In 1965, General Foods terminated the Compact Packages program and returned to larger packages (Tr. 36,831; GFX 1310, 1324).

484. In 1971, General Foods developed and introduced C.O.M.P.A.S.S. (Customer Oriented Method of Profitability and Sales Service), a computerized system for making shelf space allocation recommendations on the basis of product profitability (GFX 1371). [144]

485. This effort was undertaken because some of the Post Division's most popular products (*e.g.,* Post Grape Nuts, Tang breakfast drink, Gaines dog food) were packaged in relatively smaller containers when compared with competing products in the same category. Therefore, they were assigned relatively few linear feet of shelf space by retailers, although their profitability per linear foot was relatively high (GFX 1371B).

486. Preliminary presentations of the C.O.M.P.A.S.S. system

[46] Grocers, instead of stacking additional General Foods cereals in the newly available space, continued to allocate facings according to sales and so placed other manufacturers' products in some of the space where General Foods cereals had been (Tr. 36,842).

were made to a few selected major accounts (GFX 1371C). The accounts' reactions to the presentations varied (GFX 1371D).

487. The Post Division staff concluded that the trade's reaction to C.O.M.P.A.S.S. justified further development. During the summer of 1971, the program was further developed and a C.O.M.P.A.S.S. Manual was distributed to Post Division salesmen (GFX, 1236, 1372D).

488. Efforts with C.O.M.P.A.S.S. continued throughout 1971 and 1972 (GFX 1371E). However, attempts to use the C.O.M.P.A.S.S. program as a sales tool to gain additional RTE cereal shelf space for General Foods products were largely unsuccessful, as few retail accounts were willing to provide the data necessary to permit a C.O.M.P.A.S.S. analysis of their RTE cereal sections. It was the consensus among the Post Division sales personnel directly involved in the development of C.O.M.P.A.S.S. that three principal factors explained the low level of interest among retailers in using it for their RTE cereal sections: (a) grocery retailers were generally satisfied with the results of their allocating cereal shelf space on the basis of movement, (b) some retailers had their own internal information systems which provided the same information as C.O.M.P.A.S.S., and (c) many retailers were not sophisticated enough to understand the concept underlying, or the potential benefits of using, C.O.M.P.A.S.S. (GFX 1371E).

489. Respondents' shelf space programs do not preclude new products from being allotted space. Procter and Gamble was not concerned over its ability to secure shelf space for an RTE cereal product it might introduce (Tr. 25,836–37, 25,864–65). When natural cereals became popular, adequate space was available for these products (Tr. 25,922–25, 37,324–25, 37,312–15). Kellogg's program provided for two facings for a new product (Tr. 7158–59). Slower moving products often were allotted a larger share of shelf space than their share of the market called for (Tr. 8017–20, 9057–58, 9177–79, 9379, 32,737–38). There is no evidence that position on the shelf is of such importance that it would stop a new entrant. While some positions are better than others, there is not a truly bad spot in the total RTE cereal aisle (Tr. 9175–76).

490. It is concluded, therefore, that the record does not support complaint counsel's assertion that respondents had a tacit agreement to avoid competition for shelf space in retail stores. Kellogg independently formulated a shelf space allocation plan that incorporated principles which were in accord with retailers' preferred methods of doing business. The other respondents, faced [145]with the same requirements of retailers, responded with plans that

incorporated the same basic principles. While each respondent competed for the most favorable shelf location and the most space it could get, it was constrained not to push for more than a reasonable share in order to maintain rapport and credibility with retailers. Nevertheless, both General Mills and General Foods did present shelving alternatives and variations in an effort to gain competitive advantages.

3. *Fortification of Cereals*

491. Complaint counsel assert (CPF 8–170): "Widespread product fortification was avoided until outside pressure forced the respondents to fortify their cereals. Even then, fortification occurred only as a result of coordinated activity, thereby ensuring that no one of the respondents would gain a competitive advantage by introducing fortified products before others were prepared to fortify their cereals." And (CRPF 8–264): "[R]espondents agreed upon fortifying their RTE cereal lines in concert." The record does not support complaint counsel's assertions of agreement and coordination.

492. The addition of vitamins, minerals or other nutrients to cereal products is described as "fortification" or "restoration." Restoration is the replenishment to whole-grain levels of naturally-occurring nutrients lost during processing. "Fortification" is the addition of nutrients in amounts greater than those occurring in the whole grain, or of nutrients not naturally found in the grain (Tr. 29,714, 35,807).

493. The Council of Foods and Nutrition of the American Medical Association issued standards on the addition of nutrients to foods as early as 1939. These standards were to the effect that there were both nutritional and economic problems associated with the supplementation of food with specific nutrients, since supplementation might be wasteful and might have deleterious effects. This position was reaffirmed in 1946, 1953, and 1961. The last two times the position was announced in conjunction with the Food and Nutrition Board of the National Research Council. In May 1961, the two groups issued a joint policy statement which recommended that nutrients be added to foods only to the extent of restoring those which were contained naturally in the food item, but which had been lost by cooking during part of the manufacturing process. It was specifically recommended that the addition of nutrients to RTE cereals be limited to the "restoration" of the naturally occurring nutrients (GMX 540).

494. Consistent with these standards, Kellogg has added thi-

amine, niacin, riboflavin and iron to restore its cereals to whole-grain levels ever since 1941 (Tr. 11,806–07, 29,714, 29,948). Similarly, General Foods restored most of its RTE cereals to so-called whole-grain levels with essential B vitamins and iron in the middle 1940's (Tr. 14,115, 37,051; GFX 1370J). **[146]**

495. By 1941, Kellogg had fortified its Corn Flakes with vitamin D, and its Pep brand with vitamin D and vitamin B-1 (Tr. 29,715–17). Later in the 1940's, its Raisin Bran was fortified with iron and its Corn Soya had extra protein (Tr. 29,716).

496. Kellogg introduced Special K in 1956, fortified with seven vitamins and enriched with 20% protein (Tr. 29,716, 29,948; CX–GM 564C) and, in 1959, it introduced Concentrate, also vitamin fortified and containing 40% protein (Tr. 29,716). Vitamin D fortification in Kellogg's Corn Flakes was increased to 100% MDR[47] in 1956 (CX–K 457).

497. Product 19, fortified with 100% MDR of eight vitamins and iron, was introduced in 1967. (Tr. 29,663), and Frosted Mini-Wheats was introduced into test-market with fortification to the one-third MDR level in 1969 (Tr. 11,786–87; CX–K 573F). Kellogg fortified its Sugar Smacks with 33% MDR of six vitamins about 1968 (CX–K 7175S, 7352C). Kellogg's 40% Bran Flakes received 100% iron fortification in 1966 (CX–K 487), as did its Raisin Bran by 1969 (CX–K 415, 7177F).

498. When General Foods developed Oat Flakes in 1962, the product consisted of oats, soy, and wheat, and initially rice. However, since the product was called an oat flake, it was fortified to the point of having the protein quality and quantity, the nutritional micronutrients, the vitamins and the minerals of whole oats (Tr. 37,051–52). In 1966, one-quarter of the daily requirement of a series of vitamins and minerals was added to the product and the name was changed to Fortified Oat Flakes (Tr. 13,616–17).

499. After fortifying Oat Flakes, General Foods considered fortifying its entire cereal line (Tr. 37,059). In 1967, Sugar Crisp was fortified to one-third MDR and reintroduced as Super Sugar Crisp (Tr. 37,052).

500. According to complaint counsel, respondents avoided widespread fortification prior to 1971, at which time, pursuant to agreement, they fortified their RTE cereal lines in concert. However, the following fortified RTE cereal products were in the market by 1970:

[47] "MDR" refers to the minimum daily requirements for certain vitamins and minerals as set by the United States government.