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

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:

[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