

FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

LITTON INDUSTRIES, INC.

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

Docket 9123. Complaint, Jan. 31, 1979—Final Order, Jan. 5, 1981

This order requires, among other things, a Beverly Hills, Calif. firm, engaged in the manufacture, sale, distribution and advertising of various products, to cease making any unsubstantiated representations regarding the performance, characteristics, or benefit of any microwave oven; or its superiority over competing products. Further, the company must cease failing to maintain, for three years, accurate records of all materials, test reports, studies and surveys relating to any such representation. Additionally, the order prohibits the company from misrepresenting the purpose, content, reliability or conclusions of a test or survey; and advertising the results of any such survey, unless respondents in the survey are representative of the group referred to in the ads.

Appearances

For the Commission: *Robert L. Barton, Jr., Ronald E. Bogard, Carol Jennings and Julie K. Niemasik.*

For the respondent: *J. Wallace Adair, Howrey & Simon, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Litton Industries, Inc., a corporation (hereafter "Respondent" or "Litton"), 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. Litton Industries, Inc. is a corporation, organized, existing and doing business under and by virtue of the laws of the

State of Delaware, with its executive office and principal place of business located at 360 North Crescent Drive, Beverly Hills, California. Litton's Microwave Cooking Products Division is located at 1405 Xenium Lane North, Minneapolis, Minnesota.

PAR. 2. Litton is now, and for some time in the past has been, engaged in the manufacture, distribution, advertising, and sale of various products including microwave ovens.

PAR. 3. Respondent Litton causes the said products, when sold, to be transported from its place of business in various States of the United States to purchasers located in various other States of the United States and in the District of Columbia. Respondent Litton maintains, and at all times mentioned herein has maintained, a course of trade in said products in and affecting commerce. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of said business, Litton has disseminated and caused the dissemination of advertisements for microwave ovens manufactured by Litton, by various means in or affecting commerce, including magazines and [2]newspapers distributed by the mail and across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said microwave ovens.

PAR. 5. Typical and illustrative of the advertisements so disseminated or caused to be disseminated by Litton are the advertisements attached as Exhibits A, B, C and D, designated as the "initial consumer microwave independent technician survey advertisement," the "revised consumer microwave independent technician survey advertisement," the "initial commercial microwave independent technician survey advertisement," and the "revised commercial microwave independent technician survey advertisement," respectively.

PAR. 6. In Exhibit A, the "initial consumer microwave independent technician survey advertisement," printed in the *Wall Street Journal*, October 25 and December 13, 1976, and elsewhere, and in Exhibit B, the "revised consumer microwave independent technician survey advertisement," printed in *HFD Retailing Home Furnishings*, August 22, 1977, and in other advertisements substantially similar thereto, Litton has represented, directly or by implication, that:

1. The majority of independent microwave oven service technicians would recommend Litton to a friend.
2. The majority of independent microwave oven service technicians are of the opinion that Litton microwave ovens are the easiest to repair of all microwave oven brands.

3. The majority of independent microwave oven service technicians are of the opinion that Litton microwave ovens are superior in quality to all other microwave oven brands.

4. The majority of independent microwave oven service technicians are of the opinion that Litton microwave ovens require the fewest repairs of all microwave oven brands.

5. The majority of independent microwave oven service technicians have Litton microwave ovens in their homes.

6. Representations 1-5 were proved by a survey independently conducted by Custom Research Inc., in June 1976.

PAR. 7. In Exhibit C, the "initial commercial microwave independent technician survey advertisement," printed in *Hospitality (Restaurant)*, November 1976, and elsewhere, and in Exhibit D, the "revised commercial microwave independent technician survey advertisement," printed in *Restaurant Business*, September 1977, and elsewhere, and in other advertisements substantially similar thereto, Litton has represented, directly or by implication, that: [3]

1. The majority of independent microwave oven service technicians would recommend Litton to their customers.

2. The majority of independent microwave oven service technicians are of the opinion that Litton commercial microwave ovens are superior in quality to all other microwave oven brands.

3. The majority of independent microwave oven service technicians are of the opinion that Litton commercial microwave ovens are the easiest to repair on location of all microwave oven brands.

4. The majority of independent microwave oven service technicians are of the opinion that Litton commercial microwave ovens require the fewest repairs of all microwave oven brands.

5. The majority of independent microwave oven service technicians are of the opinion that Litton commercial microwave ovens are the least costly to maintain in operation over time of all microwave oven brands.

6. Representations 1-5 were proved by an April 1976 survey independently conducted by Custom Research, Inc.

In addition, in Exhibit C, Litton has represented, directly or by implication, that Litton is the best commercial microwave oven buy and that this representation was proved by the above-referenced survey.

PAR. 8. In Exhibits A and B, and in other advertisements substantially similar thereto, Litton has represented, directly or by implication, that:

1. Litton microwave ovens are superior in quality to all other microwave oven brands.
2. Litton microwave ovens are the easiest to repair of all microwave oven brands.
3. Litton microwave ovens require the fewest repairs of all microwave oven brands.

PAR. 9. In Exhibits C and D, and in other advertisements substantially similar thereto, Litton has represented, directly or by implication, that:

1. Litton commercial microwave ovens are superior in quality to all other microwave oven brands. [4]
2. Litton commercial microwave ovens are the easiest to repair on location of all microwave oven brands.
3. Litton commercial microwave ovens require the fewest repairs of all microwave oven brands.
4. Litton commercial microwave ovens are the least costly to maintain in operation over time of all microwave oven brands.

PAR. 10. In truth and in fact, the April and June 1976 technician surveys conducted for Litton by Custom Research, Inc., do not prove the representations listed in Paragraphs Six and Seven, for reasons including but not limited to the following:

(a) The survey respondents were drawn exclusively from the list of Litton authorized microwave oven service agents. As such the sample surveyed was not representative of the population of independent microwave oven service technicians and the surveys were biased.

(b) The surveys failed to establish that the survey respondents possessed sufficient expertise with either (1) microwave ovens or (2) competitive brands of microwave ovens to qualify as respondents for a microwave oven comparative brand survey.

(c) In some paired comparisons, the results lacked statistical significance because the base number was too small.

(d) The surveys conducted for Litton by Custom Research, Inc., were not in fact independent surveys. The surveys were designed and analyzed by Litton employees. The role of Custom Research was limited to placing the telephone calls, from a list of names supplied by Litton, and conducting the interviews, from a questionnaire supplied by Litton.

For the above reasons, representation 6 in Paragraphs Six and

Seven is false. Therefore, representation 6, contained in Exhibits A, B, C and D, was, and is, deceptive and unfair.

PAR. 11. In Exhibits A, B, C and D, and other advertisements substantially similar thereto, Litton has represented, directly or by implication, that it had a reasonable basis of support for the representations contained in those advertisements, at the time those representations were made. In truth and in fact, for the reasons enumerated in Paragraph Ten, Litton had no reasonable basis of support for the representations listed in Paragraphs Six, Seven, Eight and Nine, at the time those representations were made. Therefore, the representations listed in Paragraphs Six, Seven, Eight and Nine were, and are, deceptive and unfair. [5]

PAR. 12. In the course and conduct of the aforesaid business, and at all times mentioned herein, Litton has been and is now in substantial competition in commerce with corporations, firms, and individuals engaged in the sale and distribution of microwave ovens of the same general kind and nature as those sold by Litton.

PAR. 13. The use by Litton of the aforesaid unfair and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the consuming public into the purchase of substantial quantities of microwave ovens manufactured by Litton.

PAR. 14. The aforesaid acts and practices of Litton, 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 and deceptive acts or practices in or affecting commerce and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

cut in the circulation of the largest circulation traffic of the year, and other factors such as the truck, bus, and jeep were still profitable, but clearly AMC was in trouble again. "We have maintained excellent liquidity and been able to reduce fixed costs and have a lot of local expansion points," says a top American Motors executive, "but through a difficult period," and chairman Roy D. Chapman Jr. and president William V. French in a statement designed to reassure a worried public.

But the decline in small car sales does not fully explain the industry-wide lag. Some analysts and auto executives say the Ford price may have deterred buyers who were to be persuaded before deciding. "I believe the strong showing by cars and light pickup trucks may be leading to a recession and auto sales. The next six to eight hours of all 1977 model cars will be sold, with only 1500 cars remaining, with some quantity over the remaining, has put off many would-be buyers."

Whatever the reasons, some analysts are scaling back their estimates of sales for the current model year—in some cases from as much as 11.3 million vehicles to as low as 10.5 million. Such a decline would hardly be disastrous, but it would reduce one of the major props that has supported the recovery during the long post- and post-January Carter recessionary economy.

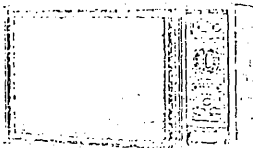
ISRAEL: The Economic Enemy

Israel is an relatively calm, and for the time being at least its military needs seem satisfied. But Israel has problems within its borders are facing a rampant economy and runaway inflation—and as far as they are facing. A fortnight ago, it announced a plan to close a wide range of banks, says Prime Minister Yitzhak Rabin. Labor ministers announced a 10 percent increase in the subsidy can they have seen for a year, some by 45 percent. The result by last week was the country's worst labor rebellion in years. Well over 70,000 Israeli had stopped working or threatened to strike in protest. And the government, which has been pushing an austerity program to slow Israel's 35 percent inflation rate and whittle a \$2 billion trade deficit, seemed unable to calm things down.

Israel's economic woes date to the 1973 Yom Kippur war and the Arab oil embargo and worldwide starvation that followed. Net oil exports \$2.6 billion a year, but inflation sent 1974 in imports of all kinds soaring from \$2.2 billion in 1973 to \$3.6 billion in each of the next two years. At the same time, the global slump dried up markets for Israel's traditional exports—mainly textiles, processed food and chemicals. Finally, the Israeli military had to make up for the losses it suffered during the Yom

Quality is No. 1 at Litton!

76% of the independent microwave oven service technicians surveyed recommend Litton.



Litton Model 412 microwave oven.

Litton leads all brands.

Brand To Brand	PREFERENCE FOR SPECIFIC BRANDS AMONG TECHNICIANS SERVICING THOSE BRANDS			AVERAGE PREFERENCE FOR LITTON VS. ALL COMBINATION OF OTHER BRANDS
	Litton vs. GE	Litton vs. Amana	Litton vs. Norge Chef	
Which Microwave Oven Brand would you recommend to a friend?	59% vs. 23%	66% vs. 18%	61% vs. 1%	76% vs. 8%
Which Microwave Oven Brand is easiest to repair?	65% vs. 5%	66% vs. 8%	71% vs. 0%	72% vs. 4%
Which Microwave Oven Brand is the best quality?	48% vs. 16%	50% vs. 26%	69% vs. 1%	63% vs. 9%
Which Microwave Oven Brand requires fewest repairs?	38% vs. 22%	42% vs. 24%	59% vs. 3%	53% vs. 12%
Which Microwave Oven Brand do you have in your home?	48% vs. 19%	59% vs. 18%	70% vs. 5%	67% vs. 10%

Among independent technicians servicing Litton and competitive microwave ovens, an average of 76% of those surveyed said they would recommend Litton to a friend. And an average of 63% identified Litton brand ovens as having the best quality.

You'll find it in our full line of advanced countertop microwave ovens, double oven and combination microwave ranges.

Litton Microwave Ovens are available in a variety of colors and finishes. Litton Microwave Ovens are available in a variety of colors and finishes. Litton Microwave Ovens are available in a variety of colors and finishes. Litton Microwave Ovens are available in a variety of colors and finishes.

And in such Litton features as Vari-Cook® oven control, Vari-Temp® automatic temperature control and new Memorymatic™ microwave program cooking. Innovative ways to microwave more foods better.

Need any more reasons to buy Litton? Ask your Litton dealer for a microwave cooking demonstration. For his name and number, call us right now, toll free 800-328-7777.



Litton... changing the way America Cooks.

EXHIBIT A

Litton is the best commercial microwave oven buy.

EXHIBIT C
Dec 15, 1976

80% of the independent microwave oven service technicians surveyed recommend Litton to their customers.

When technicians servicing Litton and competitive brands were asked in an independent survey* which microwave oven they'd recommend to prospective customers, 80% said "Litton." An overwhelming preference over major competitive brands like Amana and Sharp.

These experienced servicemen prefer Litton over other brands for many reasons.

That's what we've been saying all along.

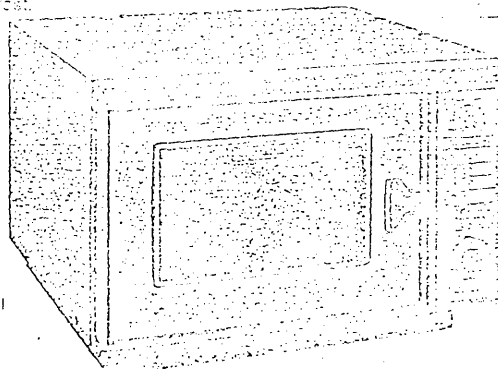
Litton offers a full line of the most advanced microwave oven systems. From 600 to 2000 watts. With such innovative features as new Vari-Power™ control, Push-button solid state timers, Automatic defrost, Intrusion-proof doors, Advanced checks and self diagnostic system, Durable and sturdy construction for added safety. And a standard Litton Advanced Power Supply system.

And each oven comes with the total support of the Litton Systems Masters: Engineers, Food Applications Chefs, Sales and Service representatives who can help increase profits and maximize efficiency.

Take the advice of your independent microwave technician. Litton is the best commercial microwave oven you can buy.

	Litton vs All** Brands Compared	Litton vs Amana	Litton vs Sharp
Best quality	75% vs 14%	75% vs 10%	80% vs 5%
Requires fewest repairs	75% vs 14%	70% vs 3%	70% vs 11%
Least costly to maintain in operation over time	69% vs 20%	65% vs 15%	60% vs 12%

*Survey conducted by Customer Research Inc. Complete results available on request.
**Based on 1975-1976 independent survey of 1000 technicians who recommended 41 brands of microwave ovens. Litton ranked first with 80% of the technicians recommending Litton over all other brands.



Litton...
changing the way
America Cooks.

EXHIBIT C

Call 800-375-7222 for more information. Litton is a registered trademark of Litton Microwave Corporation.

Please send me more information.

Name _____
Title _____
Firm _____
Business address _____
City _____ State _____
Telephone _____
Area code _____
E-mail address _____

LITTON

OCT 1977

79% of microwave service technicians surveyed say Litton is the best quality commercial microwave oven.

80% would recommend Litton to their customers.

Among technicians servicing Litton and other commercial microwave ovens, 79% of the respondents said they would recommend Litton to their customers. A study preference over other brands. A study of 211 technicians who service commercial microwave ovens, such as Amstar and Sharp. Survey respondents were 211 technicians who were authorized to service Litton commercial microwave ovens and who service at least one other brand.

These experienced technicians obviously prefer Litton over other brands for many reasons. And Litton quality is certainly one of them.

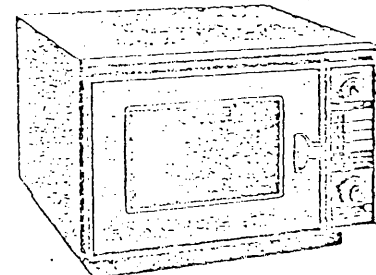
Litton offers a full line of the most advanced commercial microwave ovens. From 600 to 1000 watts. With touch controls. Or features as new VariPower™ control. Plus optional solid state timers. Automatic defrost. Inflation-proof doors. Advanced chokes and shield plate design. Dual door design for increased safety. And dependable Litton® Advance Power Supply System.

And each oven comes with the total support of the Litton System Masters: Engineers, Food Applications Chefs, Sales and service representatives who can help increase profits and maximize efficiency.

Follow the preference expressed by the microwave service technicians surveyed. 79% of whom said Litton is the best quality commercial microwave oven.

*Survey conducted by Litton Microwave Oven, Minneapolis, MN. And by 211 technicians servicing commercial microwave ovens.

Brand	Best Quality	Would Recommend
Litton	79%	80%
Amstar	10%	10%
Sharp	11%	10%



**Litton...
changing the way
America Cooks.**

Call 800-228-2777 toll free in Minnesota, call 612-633-7354.
 Write Litton Microwave Cooking Products,
 1921 Summit Central Drive, Minneapolis, MN 55440.
 Explain more about what makes Litton a better microwave.
 Home & Litton representative (CR) NR 107

Name _____
 Title _____
 Firm _____
 Business Address _____
 City _____ State _____ Zip _____
 Telephone _____
 Area Code _____

LITTON
 Microwave Cooking

©1977, Litton Systems, Inc.

31-11547 Printed in U.S.A.

EXHIBIT D

INITIAL DECISION BY JOHN J. MATHIAS,
ADMINISTRATIVE LAW JUDGE

JUNE 6, 1980

PRELIMINARY STATEMENT

The original Complaint in this matter was filed on February 1, 1979, and charged Litton Industries, Inc., a large conglomerate manufacturer and seller of various high technology products for industrial, commercial, and governmental use, with using "unfair and deceptive statements" (Complaint, Paragraph Thirteen) in advertisements for the sale of microwave ovens produced by its Litton Microwave Cooking Products ("LMCP") Division in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The Complaint was amended on April 16, 1979 to include as a respondent Litton Systems, Inc. (a wholly-owned subsidiary of Litton Industries, Inc.). Litton Microwave Cooking Products was, during the time covered by the [2]Complaint, a division of Litton Systems, Inc., rather than a direct division of Litton Industries, Inc.

The gravamen of the charges against respondents is that certain advertisements published by respondents and their dealers purported to show that independent microwave oven service technicians preferred Litton ovens in certain respects and that such preferences were revealed by surveys conducted of such independent technicians, whereas, in truth and in fact, the advertisements were "deceptive" because the underlying surveys did not provide a "reasonable basis" for the claims made.

In 1976, LMCP devised two surveys of microwave oven service agencies named on its own two lists of authorized service agencies—the commercial list of those authorized to service Litton's commercial ovens and the consumer list of those authorized to service its consumer ovens. The surveys were then conducted for it by an independent research organization. Originally, the surveys were intended for internal use only. Advertisements based thereon had not been planned. After having tabulated the results of the surveys for these internal purposes, executives of Litton decided to incorporate the results into advertising (Tr. 2023, 2035). The survey results were then published in two separate advertising campaigns, utilizing primarily newspapers, magazines and trade journals during 1976 and 1977. Appendices A, B, and D, are examples of advertisements Litton published in the first campaign.

Upon objections by Federal Trade Commission staff members to some of its claims, Litton revised the advertisements in 1977 to more

fully describe the nature of their survey (See Appendices C, and E), but subsequently discontinued the survey campaign upon further objections by staff members of the Federal Trade Commission.

In addition to advertising placed directly by Litton, retailers and distributors also engaged in newspaper radio advertising of the survey results. Some of this advertising was paid for, in whole or in part, by Litton (the "cooperative advertising program"). Appendices F through K are examples of advertisements placed by retailers and distributors. Appendices H through K were part of the cooperative program.

The principal issues presented for trial were:

(1) Did LMCP disseminate and cause to be disseminated challenged advertisements in commerce?

(2) What representations did LMCP in fact make?

(3) Did LMCP have a reasonable basis for making such claims? [3]

(4) Were the advertisements false and misleading in any respect?

(5) Should the parent corporation Litton Industries, Inc. be held responsible for the acts of the LMCP division of its subsidiary Litton Systems, Inc.?

(6) What is the proper scope of the order, if any, to be issued?

The hearing on the case-in-chief commenced on September 17, 1979 and was concluded on October 5. After additional discovery by complaint counsel, respondents' defense case was presented between November 5 and November 21, 1979. Rebuttal and surrebuttal hearings were held on January 21 and 22, 1980. The record was closed on March 7, 1980. In total, nine witnesses testified on behalf of complaint counsel and 258 Commission exhibits were introduced into evidence. An additional nine witnesses testified on behalf of the respondents and 37 respondent exhibits were introduced into evidence. The hearings consumed a total of 27 trial days and 4633 pages of transcript.

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 replies. I have also taken into account my observation of the witnesses who appeared before me and their demeanor. 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.

The findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony and exhibits supporting the findings of fact. They do

not necessarily represent complete summaries of the evidence supporting each finding. The following abbreviations have been used:

- Tr. - Transcript, preceded by the name of witness and followed by the page number.
- CX - Complaint Counsel's Exhibit, followed by its number and the referenced page(s).
- RX - Respondents' Exhibit followed by its number and the referenced page(s).
- CPF - Complaint Counsel's Proposed Findings. [4]
- CPFM - Memorandum in Support of Complaint Counsel's Proposed Findings.
- RPF - Respondents' Proposed Findings.
- CRB - Complaint Counsel's Reply Brief.
- RRB - Respondents' Reply Brief.
- LMCP - Litton Microwave Cooking Products, a division of Litton Systems, Inc.
- Litton - As used herein refers to LMCP.

FINDINGS OF FACT

I. THE RESPONDENTS

1. Litton Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive office and principal place of business located at 360 North Crescent Drive, Beverly Hills, California (Ans. Par. One). Litton Systems, Inc., is a wholly-owned subsidiary of Litton Industries. Its executive office and principal place of business is located at the same address as Litton Industries, Inc. (Ans. Par. One, Adm. 7/5/79, No. 328). Litton Microwave Cooking Products is a division of Litton Systems. (Respondent's Memorandum in Opposition to Complaint Counsel's Motion for Partial Summary Decision, April 6, 1979, pp. 4 and 8.)

2. Litton Industries, Inc., is a large, conglomerate corporation with numerous diversified products and a worldwide operation. (*Litton Industries, Inc.*, 85 F.T.C. 333, 337.) In 1969 it was ranked as the 39th largest industrial corporation in the United States, with nearly half of its growth attributable to over 100 acquisitions made since 1953, and had sales totalling \$1.9 billion (85 F.T.C. at 337-38, 378).

3. Respondent Litton Systems through its Litton Microwave Cooking Products Division is now, and for some time in the past has

been, engaged in the manufacture, distribution, advertising, and sale of various products including microwave ovens (Ans. Par. Two).

4. Respondent Litton Systems, through LMCP, causes the said products, when sold, to be transported from their place of business in various States of the United States to purchasers located in various other States of the United States and in the District of Columbia. Said respondent maintains, and at all [5]times mentioned herein has maintained, a course of trade in said products in and affecting commerce. The volume of business in such commerce has been and is substantial (Ans. Par. Three).

5. In the course and conduct of said business, Respondent Litton Systems, through LMCP, has disseminated and caused the dissemination of advertisements for microwave ovens manufactured by Litton, by various means in or affecting commerce, including magazines and newspapers distributed by the mail and across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said microwave ovens (Ans. Par. Four).

6. In the course and conduct of the aforesaid business, and at all times mentioned herein, respondent Litton Systems, through its Litton Microwave Cooking Products Division has been and is now in substantial competition in commerce with corporations, firms, and individuals engaged in the sale and distribution of microwave ovens of the same general kind and nature as those sold by Litton (Ans. Par. Twelve).

II. THE ADVERTISEMENTS AND THE REPRESENTATIONS

A. *The Advertisements Were Widely Disseminated.*

7. The complaint in the present case was issued by the Commission with regard to a series of advertisements for Litton microwave ovens, based upon the results of two surveys of the opinions of purportedly independent consumer and commercial microwave oven service technicians. The national advertisements based upon these surveys appear in the record as CX 1, 2, 3, 4 and 6. These ads were disseminated in two separate campaigns, one occurring from October 1976 through February 1977 and the second from August through October of 1977 (CX 8; Interr. No. 61).

8. During the first campaign, ads for consumer microwave ovens (CX 1 and 2) were disseminated in the *Wall Street Journal*, *Better Homes and Gardens*, *Newsweek*, *Sunset*, and *Time* magazine, as well as in 27 different newspapers in cities across the country, including Atlanta, Boston, Chicago, Cleveland, Dallas, Detroit, Ft. Worth,

Houston, Ft. Lauderdale, Jacksonville, Miami, Orlando, Los Angeles, Minneapolis, New York, Newark (New Jersey), San Francisco, San Jose, Santa Ana, St. Paul, St. Petersburg, and Tampa (CX 8 and 9; Interr. No. 61; Ans. Par. Six). The consumer ad also was disseminated in two consumer trade magazines (CX 8 and 9). Ads for commercial microwave ovens (CX 4) were disseminated in eight trade publications directed toward the restaurant business, fast food [6]outlets, and institutions such as hospitals (CX 8; CX 12; Interr. No. 61; Ans. Par. Seven).

9. During the second ad campaign, in 1977, an ad for consumer microwave ovens (CX 3) was disseminated in *HFD Retailing Home Furnishings* (CX 8; Ans. Par. Six). Ads for commercial microwave ovens (CX 6) were published in five trade magazines, primarily directed toward the restaurant business (CX 8; CX 13; Ans. Par. Seven).

10. In addition to the national advertisements based on the service technician surveys, there were at least 109 local advertisements (106 print and 3 radio), based on the Litton surveys and placed by Litton microwave oven dealers (CX 14-25, 27-51, 54-71, 73-80, 82-84, and 86-128; summarized in CX 132). The advertising copy (referred to by Litton as advertising "slicks") upon which these local ads were based was disseminated by LMCP to its dealers and distributors in 1976 and 1977, with the suggestion that the dealers insert their own names and place the ads in the local media (Adm. 9/13/79, Nos. 261 and 262; Interr. No. 52; CX 289). At least 41 of these local ads were paid for in part or in total by Litton under its cooperative advertising program (CX 132; CX 148 O-R). These local advertisements were run between September 1976 and February 1978 in newspapers and advertising circulars, as well as on some radio stations, in cities and communities in at least 26 states across the country (CX 132). Many of the local advertisements which were published in late 1977 were still based on the original Litton advertisement copy (CX 48, 59, 101-104, 108, 112, 113) and some of these were paid for, in part, by LMCP (CX 132).

11. CX 239D is a table entitled "Survey Among Independent Service Agents" indicating that the Litton survey of service agencies revealed a preference for Litton in certain respects over named competitive brands. This table was provided to district and regional managers and distributors¹ at an annual sales meeting in Lake Geneva at some time prior to August 2, 1976 (CX 239A). This table was reproduced exactly in a local advertisement published in the

¹ LMCP distributed its ovens throughout most of the United States through 54 independent distributors who sold, in turn, to the individual retailers within their areas (Houserman, Tr. 2769-71).

Williamsport Sun Gazette on September 21, 1976 (CX 128; Niemasik, Tr. 1035-44). This [7] reveals that the information distributed at the Lake Geneva meeting was passed on to retailers through the Litton sales network.

12. A nine-page report of the results of the commercial technician survey, entitled "A Study of the Attitudes of Independent Commercial Microwave Oven Service Technicians Toward Brands of Commercial Microwave Ovens" was distributed by Litton at the National Restaurant Association Show in 1976 (CX 270; Tr. 1079).

13. Through the means described in Findings 10 through 12, above; the dissemination of advertising "slicks" to dealers and distributors, information supplied to district and regional managers and distributors at the Lake Geneva meeting, the dissemination of the report of the commercial oven survey at the National Restaurant Association Show, and Litton's participation in the cooperative advertising program; Litton provided the instrumentality to its distributors and dealers to make the representations referred to below.

14. CX 152, a four-page report of the consumer technician survey results, entitled "Consumer Service Agency Survey," is one version of a document intended to be used as a mailing piece to be sent to those persons requesting "complete survey results" as invited in the consumer survey advertisements (CX 308K-L; CX 1, 2 and 3). CX 178, a four-page report of the results of the commercial technician survey, entitled "Commercial Service Agency Survey," also was prepared as a mailing piece to be sent to persons requesting "complete results," as invited in the commercial survey advertisements (Adm. 7/5/79, No. 137; CX 308R; CX 4 and 6).

B. The Consumer Oven Advertisements

15. In CX 1 (Appendix A), the headline reads: "Quality is No. 1 at Litton!" The sub-head of this ad states: "76% of the independent microwave oven service technicians surveyed* recommend Litton." In the body of the ad, under a caption asserting that "Litton leads all brands," there is a chart containing percentage preference figures obtained from the survey of technicians servicing consumer microwave ovens. Litton is favored over all other brands on every point of comparison, and in most of the 20 comparisons the preference figure for Litton is greater than 50%. In the final column, showing the average preference for Litton over all competitors, the preference figure for Litton exceeds 50% in all categories. In the text of the ad, Litton highlights two of the statistics from the chart: "Among

FEDERAL TRADE COMMISSION DECISIONS

Initial Decision

97 F.T.C.

independent technicians servicing Litton and competitive microwave ovens, an average of 76% of those [8]surveyed said they would recommend Litton to a friend. And an average of 63% identified Litton brand ovens as having the best quality."

16. CX 2 (Appendix B), an ad which contains a picture of Dan R. Cavalier, President of the Marketing and Sales Division of LMCP, is substantially the same as CX 1. CX 3 is a revised version of CX 1 and 2 which adds the following clarification of the survey to the text of the ad: "Survey respondents were 234 technicians who work for independent service agencies authorized to service Litton microwave ovens, and who serviced at least one other microwave brand." But otherwise CX 3 (Appendix C) makes the same general representations as CX 1 and 2. The statistics in the last column of the chart in CX 3 (indicating the preference for Litton over all other brands) differ slightly from those in CX 1 and 2. However, the preference shown for Litton is still greater than 50% in each category of comparison.

17. CX 1, and 2 represent that the results of the survey are projectable to the population of independent microwave oven service technicians who service Litton and competitive brands of microwave ovens. Through the use of the term "surveyed" the ads represent that the opinions of technicians surveyed are representative of those of the general population of independent microwave oven service technicians who service Litton and competitive brands. Thus, representations 1-5, as alleged in Paragraph Six of the complaint, are plain from the face of CX 1 and 2. The ads convey that the majority of such independent microwave oven service technicians would recommend Litton, have Litton ovens in their homes, and are of the opinion that Litton ovens are superior in quality, easiest to repair, and have the fewest repairs when compared with other brands.

18. The claim that the survey results are projectable to a greater population of independent service technicians also is apparent in the numerous local advertisements based on the Litton surveys and placed by Litton microwave oven dealers (CX 14-25, 27-51, 54-71, 73-80, 82-84, and 86-128). In some cases, the representation of projectability is even more blatant in the local than in the national ads. For example, in CX 54 and 126, radio spot advertisements, paid or in part by Litton (CX 132), the copy reads: "73 percent of the technicians who service microwave ovens recommend Litton ovens over all other microwave ovens" (Emphasis added). Litton, in each of these two instances, paid a major portion of the cost of these promotions (CX 132B and D; Appendices J and K).

19. In many of the local advertisements derived from the Litton surveys, the term "independent microwave oven service technicians" is used without definition or explanation. Some [9]local ads merely used the headline, "76% of the independent microwave oven service technicians surveyed* recommend Litton," without any accompanying textual material or disclosure that only technicians who serviced Litton and one other brand were eligible respondents (CX 39, 41, 57). Some ads merely incorporated the chart showing the preference figures for Litton over other brands, with no accompanying explanation (CX 97 and 115). CX 40 shows the headline and the chart, but has no textual material. One series of local ads claims the following:

A survey of 235 independent service agents has just been completed. The findings picked LITTON for best quality, fewer repairs, easiest to repair, lower cost for servicing. All this adds up to the best microwave on the market today (CX 67, 69, 76, 78, 88, 90, 95, and 96).

Litton participated in the cost for two of such advertisements, CX 95 and 96 (CX 132C). The copy for two radio advertisements simply refers to "technicians who service microwave ovens":

Are you still skeptical about buying a microwave oven? Or maybe you're just unconvinced about which brand to buy? Well, when it comes to microwave ovens, one name is leading all the rest. That's right! It's Litton! 73 percent of the technicians who service microwave ovens recommend Litton ovens over all other microwave ovens (CX 54 and 126).

And another radio ad talks about "a recent survey of independent microwave service technicians," with no explanation or definition of terms (CX 127). These local advertisements represent that all independent service technicians were surveyed, not merely those technicians working for agencies which service Litton and at least one other competing brand.

20. The final representation alleged in Paragraph Six of the complaint is that such representations of preferences by independent microwave service technicians were proved by a survey conducted by Custom Research, Inc. Again the advertisements speak for themselves. CX 1, 2 and 3 rely upon the Litton survey of consumer microwave service agencies to support the claim that certain percentages of service technicians prefer Litton ovens in the stated respects. Thus, Litton uses the survey as proof of such claims. [10]

21. Therefore, in CX 1 (Appendix A), the initial consumer microwave independent technician survey advertisement, printed in the *Wall Street Journal*, October 25 and December 13, 1976, and elsewhere, and in other advertisements substantially similar thereto

(Ans. Par. Six) Litton has represented, directly or by implication, that:

1. The majority of independent microwave oven service technicians servicing Litton and competitive microwave ovens would recommend Litton to a friend.

2. The majority of such independent microwave oven service technicians are of the opinion that Litton microwave ovens are the easiest to repair of all microwave oven brands.

3. The majority of such independent microwave oven service technicians are of the opinion that Litton microwave ovens are superior in quality to all other microwave oven brands.

4. The majority of such independent microwave oven service technicians are of the opinion that Litton microwave ovens require the fewest repairs of all microwave oven brands.

5. The majority of such independent microwave oven service technicians have Litton microwave ovens in their homes.

6. Representations 1-5 were proved by a survey conducted by Custom Research, Inc., in June 1976.

22. The revised consumer microwave independent technician survey advertisement (CX 3—Appendix C) printed in *HFD Retailing Home Furnishings*, August 22, 1979, and elsewhere (Ans. Par. Six), made the same representations, except the universe of technicians to which such preference claims were applied was more limited. The revised ad included only service technicians who worked for independent service agencies authorized to service Litton microwave ovens, and who serviced at least one other microwave oven brand. The revised advertisement still referred to a survey, however, so it represented that the 234 technicians "surveyed" were representative of a broader group of technicians who fit this definition—technicians working for Litton authorized independent agencies who serviced at least one other brand.

23. In CX 1, 2 and 3, and in other advertisements substantially similar thereto, Litton has represented, directly or by implication, that: [11]

1. Litton microwave ovens are superior in quality to all other microwave oven brands.

2. Litton microwave ovens are the easiest to repair of all microwave oven brands.

3. Litton microwave ovens require the fewest repairs of all microwave oven brands.

24. The explicit representations of CX 1 (Exhibit A of the complaint), CX 2 and CX 3 (Exhibit B of the complaint) are that independent microwave oven service technicians believe these three assertions to be true. The person reading the ad receives the impression that because service technicians prefer Litton ovens, in the manner indicated, Litton ovens must in fact be superior to other brands. The superior quality, ease of repair, and infrequency of repair of Litton microwave ovens are the implicit representations of these ads (CX 1, 2 and 3).

25. In one of the local radio advertisements based upon the Litton service technician survey (but for which there is no record evidence that Litton contributed to its cost, CX 132D), the implicit claims of CX 1, 2 and 3 were made explicit, with the direct assertion that the technician is an expert who knows much more about microwave ovens than the consumer and whose advice therefore should be heeded:

If you're shopping for a microwave oven, you're going to be asking a lot of questions. Because there are a lot of different brands and features to consider. To help you make your decision wisely, here are some *facts* to consider. In a recent survey of independent microwave service technicians, 76 per cent said *Litton* would be *the* microwave brand they'd recommend to a friend. That's 3 out of 4 who'd recommend *Litton*. And when asked which microwave oven requires the *fewest* repairs—and is *easiest* to repair, the great majority said *Litton*. And quality? Again most technicians said *Litton*. And naturally, far more technicians said that *Litton* was the brand that they had in their own homes. Chances are, you don't know as much about microwave ovens as a service technician. He's an expert, and therefore his opinion and recommendations are worth listening to. And 3 out of 4 recommend *Litton!* (CX 127). [12]

This advertisement simply states the message which Litton intended the reader to glean from CX 1, 2 and 3—independent service technicians know best, and they prefer Litton.

C. The Commercial Oven Advertisements

26. In CX 4 (Appendix D—Exhibit C attached to the complaint), the headline reads: "Litton is the best commercial microwave oven buy." The sub-head reads: "80% of the independent microwave oven service technicians surveyed recommend Litton to their customers." The textual material below the sub-head relates:

When technicians servicing Litton and competitive brands were asked in an independent survey which microwave oven they'd recommend to prospective customers, 80% said 'Litton'. An overwhelming preference over major competitive brands like Amana and Sharp.

These experienced servicemen prefer Litton over other brands for many reasons.

To the right of the text is a chart containing the percentage figures derived from the commercial technician survey. In all cases the preference for Litton exceeds 50%. The concluding paragraph of the text states: "Take the advice of your independent microwave serviceman, Litton is the best commercial microwave oven you can buy."

27. As with CX 1, 2 and 3, the representations alleged in the complaint are clear from the face of CX 4: that the majority of certain independent microwave oven service technicians would recommend Litton ovens and hold the opinion that Litton commercial microwave ovens are superior in quality, easiest to repair on location, require the fewest repairs, and are the least costly to maintain in operation over time when compared with other commercial microwave brands. Litton represents that the Custom Research commercial technician survey is evidence of the technicians' preference. Through use of the term "surveyed" the ad represents that the technicians surveyed are representative of the population of independent commercial microwave oven service technicians who service Litton and competitive brands (CX 4).

28. CX 6 (Appendix E—Exhibit D of the complaint) is a slightly altered version of CX 4. Its headline states: "79% of [13]microwave service technicians surveyed say Litton is the best quality commercial microwave oven." And the sub-head reads: "80% would recommend Litton to their customers." In the text of CX 6, it is disclosed that the "[s]urvey respondents were 211 technicians who work for independent service agencies authorized to service Litton commercial microwave ovens, and who service at least one other brand." But otherwise, CX 6 makes the same general representations as CX 4.

29. Therefore, in CX 4, the initial commercial microwave independent technician survey advertisement, printed in *Hospitality (Restaurant)*, November 1976, and elsewhere, and in other advertisements substantially similar thereto, Litton has represented, directly or by implication, that:

1. The majority of independent microwave oven service technicians servicing Litton and competitive microwave ovens would recommend Litton to their customers.

2. The majority of such independent microwave oven service technicians are of the opinion that Litton commercial microwave ovens are superior in quality to all other microwave oven brands.

3. The majority of such independent microwave oven service technicians are of the opinion that Litton commercial microwave

ovens are the easiest to repair on location of all microwave oven brands.

4. The majority of such independent microwave oven service technicians are of the opinion that Litton commercial microwave ovens require the fewest repairs of all microwave oven brands.

5. The majority of such independent microwave oven service technicians are of the opinion that Litton commercial microwave ovens are the least costly to maintain in operation over time of all microwave oven brands.

In addition, in CX 4, Litton has represented, directly or by implication, that Litton is the best commercial microwave oven buy and that this representation was proved by the above-referenced survey.

30. The revised commercial microwave independent technician survey advertisement (CX 6) printed in *Restaurant Business*, September 1977, and elsewhere (Ans. Para. Seven) made the same representations, except the universe of technicians to whom such [14]preference claims were applied was more limited. It included only service technicians who worked for independent service agencies authorized to service Litton and who serviced at least one other brand. Since the advertisement still referred to a survey, it represented that the 211 technicians surveyed were representative of a broader group of technicians who fit this description—technicians working for Litton authorized agencies who serviced at least one other brand.²

31. In CX 4 and CX 6, and in other advertisements substantially similar thereto, Litton has represented, directly or by implication, that:

1. Litton commercial microwave ovens are superior in quality to all other microwave oven brands.

2. Litton commercial microwave ovens are the easiest to repair on location of all microwave oven brands.

3. Litton commercial microwave ovens require the fewest repairs of all microwave oven brands.

4. Litton commercial microwave ovens are the least costly to maintain in operation over time of all microwave oven brands.

32. The explicit representations, that independent microwave service technicians believe these propositions to be true, are also

² The revised commercial ad differed in at least one other respect from CX 4 in that it eliminated the explicit statement that "Litton is the best commercial microwave oven buy." This is, of course, still the general message conveyed by the language of this advertisement (CX 6).

implicit representations that the assertions are in fact true. Consumers of commercial microwave ovens will derive from the ads an overall impression of superiority of the Litton brand (CX 4 and 6).

D. The Local Advertisements

33. All or some of the claims alleged in Paragraphs Six and Eight of the complaint are contained in each of the local advertisements based on the Litton surveys (CX 14-25, 27-51, 54-71, 73-80, 82-84, and 86-128). Some local ads incorporated [15]the representations of the national ads in their entirety (e.g., CX 14). Others incorporated only selected claims (e.g., CX 39 and 67). Litton paid all or a portion of the cost for a number of the latter ads, even though they did not contain the full text of its national advertisements (e.g., CX 39, 54, 60-66, 95-96, 106, 115, 120-122, and 126).

E. Representation of Reasonable Basis

34. In each of the advertisements discussed above LMCP made the representation, directly or by implication, that it had a reasonable basis of support for the claims made in those advertisements, as of the time those representations were made. The over-all tenor of each of these advertisements is that the Litton surveys provided a reasonable basis for such claims (e.g., CX 1-4, and 6).

F. Representation That Surveys Were Independently Conducted

35. The complaint charges and complaint counsel urge that respondents have also represented in the above mentioned advertisements that the survey which supported their preference claims were "independently" conducted by Custom Research, Inc. (Complaint, Pars. Six and Seven). Complaint counsel argue that since LMCP's marketing staff was largely responsible for the planning and design of the surveys (Finding 41, below), that such a representation is false.

36. In one of its advertisements, CX 4—the original commercial ad, Litton claimed that the statistics stated therein were based on an "Independent survey by Custom Research, Inc." In all other ads it was simply noted that the survey was conducted for Litton by Custom Research, Inc. In either case I find that the reader was not likely to believe that the Litton surveys were totally independent. It is difficult to perceive how any reader of the advertisements in question could possibly believe that the surveys were conceived, designed and conducted without any input by Litton, in view of their narrow focus. Further, the contact part of the surveys—which might

be thought of as the "conduct" of the surveys—was, in fact, conducted independently by Custom Research, Inc. (CX 145B, 248A-B).

37. Complaint counsel's own experts cast some doubt upon their position. In defining an "independent" survey they were not able to pin it down to a single definition, but [16]instead, referred to a continuum from totally independent to totally dependent. While their testimony would place the Litton surveys at the lower end of this continuum, they would concede some degree of independence was present in the Litton surveys (Miller, Tr. 586-90; Sudman, Tr. 1717-20).

III. LACK OF REASONABLE BASIS

A. *The Litton Surveys*

38. The advertisements in question were based on two surveys conducted in 1976 for LMCP by Custom Research, Inc. (CRI), a market research firm located in Minneapolis, Minnesota. The latter firm screened the survey respondents and conducted the telephone interviews (CX 145B). The data from the surveys was keypunched, verified and tabulated by another company, Maple Plain Company, Maple Plain, Minnesota (CX 145B).

39. The first of these surveys was taken of commercial microwave service agencies.³ It was conducted in two parts, with the first and basic portion of the survey being taken during the period April 28, 1976 to May 4, 1976. A follow-up survey was then made of these same commercial service agencies during the period September 1, 1976 to September 8, 1976, at which time the agencies were asked which brands of microwave ovens they serviced (CX 179B, 308-O-P). The latter information was required because during the interim period LMCP had decided to advertise the results of the survey (George, Tr. 2023; Houserman, Tr. 2786, 3401-02; CX 308A, O-P).

40. The second survey was taken of consumer microwave oven service agencies.⁴ It was conducted during the period June 22, 1976 to June 25, 1976. It was modeled after the commercial survey, with the exception that it included questions designed to elicit the identity of brands serviced along with the preferential questions asked in the commercial survey (CX 150, 184, 308A and J, 145B, 152A and 305B).

41. The survey questionnaires were, in each case, primarily the work-product of LMCP's marketing staff (CX 145B, 248, 305A, [17]

³ Commercial microwave ovens are those used commercially by such enterprises as vending machine companies and restaurants.

⁴ Consumer microwave ovens are those primarily sold for use in the home.

and 308E-J). Such surveys were not conducted with advertising in mind. At their inception they were devised for internal use only. After seeing the results, LMCP's marketing personnel decided to use them in advertisements (George, Tr. 2025-26, 2032-33, 2034-35; Houserman, Tr. 2784-85; CX 177).

42. Such surveys were designed to elicit opinions as to certain quality preferences from independent microwave oven service agencies (CX 152, 177, 178, 162 and 163). Respondent's definition of an "independent microwave oven service agency," as used in the surveys, is one which services one or more brands of microwave ovens and other appliances, but does not sell microwave ovens or other appliances, and is not owned or controlled by a manufacturer (Houserman, Tr. 2787, 2790-91, 2930-34; CX 1-4, 6). This definition is in accord with the industry definition of the term (Jadwin, Tr. 885-94; Seitz, Tr. 2335-37; Omstead, 2519-20; Winters, Tr. 2660). It is also a logical one. The service technicians who testified in this proceeding indicated uniformly that they depended primarily on referrals from retailers for their business and that they would be unable to get such referrals if they were competing with those retailers for sales (Seitz, Tr. 2337; Omstead, Tr. 2520; Winters, Tr. 2686, 2660, 2748).

43. LMCP's marketing staff, in preparation for the surveys, obtained copies of the Litton authorized service agency lists (for both commercial and consumer ovens) from Mr. Houserman, the company's national field service manager (Houserman, Tr. 2785; CX 162 and 163). In addition, LMCP had in its possession the service agency lists of two of their competitors, Sharp and Magic Chef. Such lists were placed inside ovens sold by those manufacturers and had been obtained by LMCP prior to the conduct of the surveys (CX 175, 176; RRB, p. 110). The Sharp list (CX 175) was originally prepared in 1975 and was still being packed in Sharp ovens in 1976 (Jadwin, Tr. 885-87, 888-94). The Magic Chef list (CX 176) was published in approximately August of 1973 and had been superseded by other lists prior to 1976 (Wooden, Tr. 998-1000, 1003-07).

44. LMCP was aware that its own service agency lists (CX 162 and 163) did not contain the names of all agencies which serviced its microwave ovens. Such lists only contained the names of agencies which were authorized to do in-warranty work on Litton ovens. Due to the essential similarity of microwave ovens, agencies which serviced other brands of ovens could and would be repairing Litton ovens as well (Seitz, Tr. 2347-55). The LMCP marketing staff thus turned again to Mr. Houserman for an estimate of the number of such service agencies that might exist. Mr. Houserman estimated that there would be approximately 100 of such agencies (Houserman,

Tr. 2790, 3028; [18]Response of 7/5/79 to Requests for Admissions, p. 22, Admission No. 25; RRB, pp. 12 and 64). To be on the safe side the marketing staff considered that there might be as many as 200 (CX 177; CX 152A and 178A).

45. The Litton surveys were designed and conducted as a census of the agencies on the two Litton lists, *i.e.*, the commercial and consumer lists.⁵ An attempt was made to contact each and every one of those agencies (CX 209; Zeisel, Tr. 4148-49). No attempt was made to contact any of the additional 100 agencies that were estimated to be then servicing Litton ovens but who were not on the lists of authorized agencies (CX 148B-C).

46. In the conduct of this "census" it was decided to weigh only the opinions of personnel at agencies which serviced two or more brands of microwave ovens, with one of those brands being Litton (CX 148B). It was also decided that the interviewer must speak to a qualified technician at each agency. To be qualified the technician must have serviced Litton and one or more other brands of microwave ovens and have been engaged in such business for at least one year at the time of the survey (CX 150, 184, and 185).

47. The technicians interviewed at the agencies to be covered in the "census" were intended to be representative of all independent microwave service technicians in the United States who serviced two or more brands of microwave ovens (one of which was Litton) (CX 152A, 178A, 1-4, 6, 308Z006-Z007).

48. CRI attempted to contact each agency on each list, in the two surveys. In connection with the commercial survey, 211 interviews were completed; that is, a qualified technician was contacted who answered the questions presented by the interviewer. In addition, 6% of the agencies on the list were no longer servicing commercial ovens, were no longer in business, or the number was disconnected, 19% did not qualify [19](serviced only one brand), and 5% would qualify but would not participate. At 38% of the agencies a qualified technician could not be reached after repeated calls (CX 178A).⁶ In the consumer survey, 234 interviews were completed (a qualified technician was reached who would answer the questions). In this case, 16% of the agencies on the list did not qualify for interviewing

⁵ A census is a survey in which an attempt is made to contact all members of a universe and measure them concerning the required characteristics or opinions (Miller, Tr. 487-88; Roshwalb, Tr. 3187-89; Zeisel, Tr. 4148-49). A universe (or population) is a collection of all units that are to be eligible for inclusion in a survey and to which the results of the study are intended to be generalized (Sudman, Tr. 1663; Miller, Tr. 474-75; Roshwalb, Tr. 3630-31).

⁶ Complaint counsel attempted to prove that there were an insufficient number of call-backs (repeat calls) to agencies which could not be reached, or at which a qualified technician could not be reached. Their arguments were primarily based on CX 153. However, complaint counsel were unable to show that this document was probative on this point (Tr. 3592, 4381 and 4383). Thus, the only evidence of record indicates that "repeated calls" and "up to six calls" were made to such agencies (CX 152A, 178A and 308B).

(serviced only one brand, had less than one year's experience, or only serviced commercial ovens), and 3% qualified but would not participate. At 34% of the agencies a qualified technician could not be reached after repeated calls (CX 152A).

49. The data was then keypunched, verified and tabulated by Maple Plain Company (CX 145B) to obtain the statistics later cited in respondents' advertisements.

50. In addition to its knowledge that each of these surveys omitted approximately 100 service agencies which serviced Litton ovens and at least one other brand, Litton knew or should have known that the lists of service agencies utilized included a number of servicing-dealers. Mr. Houserman, who supplied the lists to the LMCP marketing department, was well aware that at least two exceptions were made to the rule that the said lists of authorized service agencies (CX 162 and 163) listed service-only agencies. The exceptions were: that servicing-dealers were sometimes listed in "boondock" areas where an independent servicer could not be found to service Litton ovens; and secondly, some servicing-dealers insisted on being included on the list as a pre-condition of their purchase of Litton ovens for resale (Houserman, Tr. 2863-64, 2872-73, 3103, 3125-26). Moreover, Litton was placed on further notice of this fact by "verbatim" comments which were placed on a number of the completed questionnaires, indicating that the agencies in such instances also sold microwave ovens at retail (For example, see CX 150-Z016-Z019, 150-Z136-Z139, 150-Z553, 150-Z572-Z575, 150-Z688-Z691, and 185-Z003-Z005). [20]

51. Litton was also aware that the questionnaire used in the survey was designed only to obtain the opinions of a qualified technician at each agency. No attempt was made to randomize the selection of such technicians, or to determine whether the opinion of the contacted technician was representative of all the technicians employed by his or her agency (CX 150, 184 and 185; Zeisel, Tr. 4145).

B. Substantial Defects In The Litton Surveys

52. Contrary to the definition of the universe in the Litton surveys, the Litton lists used for such surveys included servicing-dealers as well as independent service agencies (Finding 50, *supra*). The number of servicing-dealers included in those lists may well have been substantial. As previously noted there were two major exceptions to the exclusivity of CX 162 and 163 (the Litton lists): (1) Servicing-dealers are put on the list in "boondock" areas where no one else can be found to service Litton ovens; and (2) Servicing-

dealers who insist on being placed on the lists as a pre-condition to purchasing Litton ovens for resale were sometimes included (Houserman, Tr. 2863-64, 2872-73, 3103, 3125-26). Complaint counsel subpoenaed LMCP's records to determine if there were any direct sales by Litton to agencies on CX 162 and 163 during fiscal year 1976. Those records revealed such sales to 20 agencies on the consumer list (CX 162) and 15 on the commercial list (CX 163; Tr. 3069-74). Moreover, on cross-examination Mr. Houserman admitted that four other agencies on the two lists were known to have purchased ovens from Litton for resale (Tr. 3104-07, 3127). This raised the number of admitted servicing-dealers to 24 on the consumer list and 19 on the commercial list. Further, respondents' earlier answers to interrogatories had established that four more agencies on the consumer list and five more on the commercial list were servicing-dealers in 1976; thus raising the totals to 28 and 24, respectively.⁷ [21]

53. The testimony of Mr. Houserman, however, indicates that these numbers may be only the tip of an iceberg. He admitted that Litton's records would only cover sales to agencies in markets where Litton sold directly to the retailer (Tr. 3111-12). Thus, in the greater part of the country, where LMCP sells through distributors, only the distributors records would show whether agencies on the lists for those markets purchased ovens for resale in 1976.⁸ Mr. Houserman also generally exhibited a lack of knowledge as to the scope of the business activities of agencies on the lists who were not in direct buying market areas (Tr. 3043-44, 3045-50). Nor did he check to determine the number of servicing-dealers on the lists prior to their use as a basis for the market surveys in question (Tr. 3067).

54. The only logical inference that can be drawn from these facts is that Mr. Houserman's two exclusions to the general rule (Finding 50 and 52, *supra*) applied to the 54 distributor markets as well as the direct selling markets. In fact, some of the answers to the survey questionnaires themselves indicate that this is so. Although the survey questionnaires did not elicit such information, some of the

⁷ Complaint counsel also introduced evidence showing sales of Magic Chef appliances to certain of the agencies on Litton's lists (Wooden, Tr. 4552-82). Although portions of this evidence are of doubtful substantiality, showing few if any sales of appliances, some of the sales revealed therein indicate the agencies making such purchases must have been dealers (Wooden, Tr. 4552-53, 4574, 4575, 4576, 4577, 4578, 4579, 4580, 4581) and the overall impact of such evidence reinforces other evidence of record indicating that many of the listed agencies were, in fact, servicing-dealers.

⁸ Litton's distribution system for consumer ovens consisted of three categories in 1976. Throughout most of the nation it sold through 54 product distributors, who dealt with the individual retailers and also set up the service network in such areas. It also had certain direct market areas where it acted as the distributor itself and sold directly to the dealer organizations. These were several large metropolitan areas (New York City, Detroit, Cleveland, Chicago, Dallas/Fort Worth, San Francisco Bay area and Los Angeles), the State of Florida and the State of Minnesota. Additionally, it also made direct sales to a category of purchasers called National Accounts. The latter consisted of direct sales to premium houses, such as, American Express credit card distribution, Gulf Oil credit card department, etc. (Houserman, Tr. 2769-71).

