FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

TOMY CORPORATION

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

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

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

Appearances

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

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

COMPLAINT

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

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

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

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

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

PAR. 5. In the course and conduct of its said business, respondent has disseminated, and caused the dissemination of certain television advertisements concerning said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which were broadcast by television studios located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said products in or affecting commerce.

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

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

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

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

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

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

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

PAR. 9. In truth and in fact:

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

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

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

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

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

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

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

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

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

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

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

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

I.

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

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

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

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

II.

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

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

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

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

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

III.

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

IV.

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

V.

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

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

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

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

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

Appearances

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

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

COMPLAINT

The Federal Trade Commission has reason to believe that the party respondents named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act (Title 15, U.S.C. 45). Accordingly, the Commission

hereby issues this Complaint stating its charges with respect thereto as follows:

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

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

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

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

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

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

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

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

C. Respondent General Foods Corporation (General Foods) was incorporated in 1922. It is a corporation organized and doing business under the laws of the State of Delaware with its principal office and place of business located at 250 North St., White Plains,

New York. As the nation's largest food manufacturer, General Foods produces and sells, among other things, RTE cereals, coffee, beverages, frozen food, pet foods, and desserts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In truth and in fact:

Respondents' RTE cereals do not enable children to perform the physical activities represented or implied in their advertisements. A

child's ability to perform such physical activities depends on many other factors, including but not limited to general body build, exercise, rest, a balanced diet and age.

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

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

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

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

In truth and in fact:

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

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

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

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

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

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

In truth and in fact:

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

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

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

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

C. *Control of Shelf Space*

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

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

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

D. *Acquisition of Competitors*

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

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

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

In 1946, General Foods acquired the RTE manufacturing facilities of Campbell Cereal Company, Minneapolis, Minnesota, a substantial competitor in the sale of RTE cereal. Following this acquisition,

General Foods dismantled the RTE facilities of Campbell and shipped said facilities to South Africa.

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

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

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

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

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

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

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

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

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

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

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

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

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

9. Through the aforesaid acts and practices:

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

(b) Respondents, individually and collectively, have obtained,

shared and exercised, and now share and exercise, monopoly power in, and have monopolized, the production and sale of RTE cereal, in violation of Section 5 of the Federal Trade Commission Act.

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

Initial Decision by

Alvin L. Berman, Administrative Law Judge

September 1, 1981

Preliminary Statement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9. Through the aforesaid acts and practices:

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

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

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

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

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

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

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

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

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

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

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

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

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

complaint counsel were justifying the joinder of respondents in a case that did not charge conspiracy.[2]

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

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

MR. LIEDQUIST:

* * * * * * *

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

* * * * * * *

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

* * * * * * *

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

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

* * * * * * *

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

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

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

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

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

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

(Continued)

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

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

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

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

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

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

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

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

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

> Moreover, the complaint does allege that the respondents individually *and in combination* have maintained a noncompetitive market structure and that individually *and collectively* have obtained, shared and exercised monopoly power, although complaint counsel concede that their behavior is "not a conspiracy in the traditional sense."
>
> General Mills contends, however, that these allegations of the complaint amount to no more than conscious parallelism which, as noted earlier, is not recognized as within the meaning of the Sherman Act. General Mills does not address itself to whether or not conscious parallelism is within the meaning of Section 5 of the Federal Trade Commission Act, an Act which has been recognized as going beyond the narrow confines of the Sherman Act. Moreover, General Mills discounts the complaint's clarification expressed by complaint counsel. They explained that respondents engaged in "interdependent actions and decisions" which they defined as "ones taken with the knowledge that the action requires cooperation of each member of a group in

order to minimize competition among the group and maximize the joint profits of the group's members."

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

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

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

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

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

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

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

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

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

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

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

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

After the consideration of various matters on the record (Tr. 28,976–29,228), respondents began their defense on April 25, 1978, at Tr. 29,229, with Judge Hinkes still presiding. On September 7, 1978, Judge Hinkes announced his impending retirement effective the end of that week and his intention to continue presiding in this matter under a special contract (Tr. 34,821–22). Hearings were continued on September 8, 1978 (Tr. 34,942–35,043), while Judge Hinkes was still an administrative law judge. Commencing September 12, 1978, and

continuing through September 28, 1978 (Tr. 35,044–35,984), Judge Hinkes heard seven defense witnesses at a time he was no longer administrative law judge. On October 12, 1978, the next date scheduled for hearings, counsel for Kellogg, in light of the pendency of a motion to determine that Judge Hinkes was disqualified from presiding over the hearing, declined to produce Kellogg's next witness (Tr. 35,986–35,990).

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

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

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

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

(Continued)

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

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

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

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

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

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

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

(Continued)

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

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

(Continued)

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

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

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

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

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

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

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

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

ADMISSIBILITY OF DOCUMENTS PRODUCED FROM THE FILES OF RESPONDENTS

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

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

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

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

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

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

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

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

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

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

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

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

case requires consideration of that conduct in the light of that of the other respondents. **[19]**

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

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

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

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