

it hereby is, dismissed.

IN THE MATTER OF

COCA-COLA COMPANY, ET AL.

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

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

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

Appearances

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

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

COMPLAINT

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

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

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

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

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

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

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

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

Complaint

83 F.T.C.

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

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

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

b) One such television commercial pictures a father supervis-

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

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

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

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

Complaint

83 F.T.C.

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

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

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

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

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

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

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

k) The trademark "Hi-C."

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

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

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

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

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

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

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

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

PAR. 9. In truth and in fact:

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

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

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

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

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

Complaint

83 F.T.C.

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

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

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

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

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

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

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

INITIAL DECISION BY WILLIAM K. JACKSON,
ADMINISTRATIVE LAW JUDGE

SEPTEMBER 15, 1972

PRELIMINARY STATEMENT

This proceeding was commenced by the issuance of a complaint

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

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

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

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

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

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

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

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

Initial Decision

83 F.T.C.

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

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

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

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

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

CX—Commission's Exhibits

RX—Respondents' Exhibits

CPF—Complaint Counsel's Proposed Findings and Conclusions

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

RMPF—Respondent Marschalk's Proposed Findings and Conclusions

CRB—Complaint Counsel's Reply Brief

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

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

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

FINDINGS OF FACT

I. Identity of Respondents

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

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

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

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

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

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

Initial Decision

83 F.T.C.

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

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

II. The Challenged Commercials and Advertisements

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

A. Hi-C Television Commercials

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

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

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

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

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

Initial Decision

83 F.T.C.

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

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

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

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

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

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

B. Hi-C Magazine Advertisements

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

C. Hi-C Newspaper Advertisements

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

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

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

Initial Decision

83 F.T.C.

D. The Hi-C "Trademark"

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

E. Hi-C Point-of-Purchase Advertising

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CX 44O—a point of purchase advertisement bearing the phrase "Free Player Photo."

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

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

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

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

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

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

Initial Decision

83 F.T.C.

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

Title CX #/ Script RX#	Fruit Language and Depictions	Vitamin C Language	Other Representations
Kids (Hi-C version) CX 41I/RX 149R	Audio: "7 real fruit flavors." A portion of some oranges are shown for .3 of a second in a refrigerator. Grapes are shown on a Hi-C label.		craziest lunch a lot less crazy. That's why it's called 'the sensi- ble drink.'" Superimposed writing: "THE SENSIBLE DRINK."
Hiking (30-second ver- sion) CX 41L/ RX 149S	Audio: "Made from fresh fruit." Brief showing of 46-ounce cans of Hi-C Orange- Pineapple Drink, Apple Drink, Cherry Drink, etc. with depic- tion of said spe- cific fruit on label of can.		Audio: "* * * lunch. The kids packed it. Lunchtime! * * * Nothing but big cans of Hi-C and little ones? just pret- zels * * * Hi-C, the sensible drink." Super- imposed writing: "THE SENSI- BLE DRINK."
Hiking (60-second ver- sion) CX 41K/ RX 149T-U	Audio: "Made from fresh fruit." Brief showing of cans of Hi-C with same labels on cans as in 30- second version.	Audio: "lots of Vitamin C."	"Lunchtime * * * Nothing but big and little cans of Hi-C? Just pret- zels * * * Oh, well * * * It's good for you * * * Hi-C, the sensible drink." Super- imposed writing: "THE SENSI- BLE DRINK."
Clown (30-second ver- sion) CX 41N/ RX 149V	Audio: "Hi-C is made from fresh fruit."		Audio: "Hi-C, the sensible drink." Superimposed writing: "THE SENSIBLE DRINK."
Clown (60-second ver- sion) CX 41M/ RX 149W	Audio: "made from fresh fruit."		Audio: "The sensible drink. It's good for you. So you can pour all the fun you want to." Super-

Initial Decision

83 F.T.C.

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

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

Initial Decision

83 F.T.C.

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

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

- a) Hi-C's made from fresh fruit. Hi-C's made with real fruit.
- b) Hi-C's high (rich) in Vitamin "C." That's why they named it "Hi-C."
- c) Hi-C's good for you. That's why it's called "The Sensible Drink."

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

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

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

III. The Product

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

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

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

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

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

Initial Decision

83 F.T.C.

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

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

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

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

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

The Allegations

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

Respondents have represented * * * that: * * *

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

Paragraph Nine: In truth and in fact * * *

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

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

The Actual Representations Made

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

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

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

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

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

Initial Decision

83 F.T.C.

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

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

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

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

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

(4) The Drossler survey indicates that consumers are well

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

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

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

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

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

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

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

Initial Decision

83 F.T.C.

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

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

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

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

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

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

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

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

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

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

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

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

Initial Decision

83 F.T.C.

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

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

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

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

The Ocean Spray Case

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

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

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

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

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

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

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

The Validity of the Claim as Made

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

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

Initial Decision

83 F.T.C.

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

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

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

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

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

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

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

HEARING EXAMINER JACKSON: * * * there is on the record now as I have stated and summarized it, evidence through you.

I will repeat it again, first that a food that contains 90 calories is marginally significant to the overall caloric intake. Secondly, you have developed the same item contained more than 100 percent of the daily requirements of vitamin C.

Thirdly, you have stated that it contained vitamin A, it contains potassium, it contains folic acid. Now, evaluate it in terms of those?

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

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

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

Initial Decision

83 F.T.C.

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

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

Allegations

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

Paragraph Eight * * *.

Respondents have represented that: * * *

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

Paragraph Nine: In truth and in fact * * *

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

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

Actual Representations Made

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

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

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

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

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

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

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

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

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

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

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

* * * * *

Hi-C tastes good, and it's good for you. That's why it's called * * * The Sensible Drink. (RX 149N)

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

Initial Decision

83 F.T.C.

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

Hi-C as a “Sensible” Source
Nutritionally of Vitamin C

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

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

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

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

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

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

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

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

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

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

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

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

Initial Decision

83 F.T.C.

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

The Ocean Spray Case

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

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

If you've wondered what some of our earlier advertising meant when we said Ocean Spray Cranberry Juice Cocktail has more food energy than orange juice or tomato juice, let us make it clear: we didn't mean vitamins and minerals. Food energy means calories. Nothing more.

Food energy is important at breakfast since many of us may not get enough calories, or food energy, to get off to a good start. Ocean Spray Cranberry Juice Cocktail helps because it contains more food energy than most other breakfast drinks.

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

Folic Acid in Orange Juice

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

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

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

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

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

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

Initial Decision

83 F.T.C.

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

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

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

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

The Ocean Spray Case

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

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

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

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

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

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

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

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

Evidence Concerning the Vitamin A Content of Orange Juice

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

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

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

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

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

Initial Decision

83 F.T.C.

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

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

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

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

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

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

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

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

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

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

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

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

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

Respondents have represented that: * * *

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

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

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

The Actual Representations Made

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

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

Initial Decision	83 F.T.C.
Commercial	Depiction
CX 41C "Flying Kites" (60-second version)	A bowl of oranges, apples and grapes is shown during a picnic for 1.7 seconds.
CX 41E "Zoo" (60-second version)	A bowl of grapes, bananas, apples and oranges is shown during a picnic for 2 seconds.
CX 41G, 41H "Mother's Day Out" (60- and 30-second versions)	A bowl of oranges and grapes is shown inside a refrigerator when it is opened for 1.8 seconds in the 60-second version and 1.2 seconds in the 30-second version.
CX 41Q, 41R "Apple" (60- and 30-second versions)	A bowl of apples and oranges is shown on a table for 21 seconds in the 60-second version and 6 seconds in the 30-second version, and an apple is involved in the story line of the commercial.
CX 41I "Kids"	A fractional part of what appears to be oranges stored in the refrigerator door is shown for .3 of a second.

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

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

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

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

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

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

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

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

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

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

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

Initial Decision

83 F.T.C.

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

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

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

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

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

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

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

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

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

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

Hi-C fruit drinks are good enough to eat.

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

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

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

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

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

Initial Decision

83 F.T.C.

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

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

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

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

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

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

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

Respondents have represented that: * * *

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

Paragraph Nine: In truth and in fact * * *

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

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

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

The Actual Representations Made

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

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

Initial Decision

83 F.T.C.

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

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

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

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

The Allegation

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

Respondents have represented that: * * *

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

Paragraph Nine: In truth and in fact * * *

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

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

The Representations

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

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

Initial Decision

83 F.T.C.

The Meaning of the Newspaper Advertisements

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

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

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

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

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

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

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

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

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

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

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

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

The "Clown" Commercial

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

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

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

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

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

Respondents have represented that: * * *

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

Initial Decision

83 F.T.C.

Paragraph Nine: In truth and in fact * * *

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

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

The Actual Representations in the "Kids" Commercial

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

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

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

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

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

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

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

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

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

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

The Actual Representations in “Mother’s Day Out” and “Hiking”

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

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

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

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

Initial Decision

83 F.T.C.

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS

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

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

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

ORDER

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

Dissenting Statement

83 F.T.C.

DISSENTING STATEMENT OF COMMISSIONER JONES

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

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

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

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

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

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

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

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

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

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

Dissenting Statement

83 F.T.C.

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

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

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

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

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

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

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

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

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

⁵ See CX 42C which asks:

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

The advertisement then states:

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

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

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

Opinion

83 F.T.C.

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

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

OPINION OF THE COMMISSION

BY DENNISON, *Commissioner*:

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

I.

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

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

¹ 15 U.S.C. §§ 45, 52.

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

³ Finding 25; transcript, p. 1159.

⁴ Transcript, pp. 846-847, CX 39A.

⁵ Finding 25; transcript, pp. 1160-61; RX 1Y-1Z-8.

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

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

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

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

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

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

⁷ Finding 62; CX 4C.

⁸ RX 1N; transcript, pp. 1499-1500.

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

¹⁰ Finding 19.

¹¹ Complaint, Para. 7k.

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

¹³ Findings 22, 26; RX 1Q-1R; transcript, pp. 1158, 1161.

Opinion

83 F.T.C.

II.

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

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

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

III.

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

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

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

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

¹⁷ Appeal brief, pp. 11-13, 13-15, and 15-16, respectively.

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

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

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

¹⁸ See, e.g., Findings 31-35, 90, 120, 126-131, 141.

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

²⁰ Appeal brief, p. 16.

²¹ Dr. Joseph Smith, whose testimony appears at pp. 1349-1411 of transcript. In many respects, Dr. Smith's testimony confirms the Commission's own interpretation of meanings reasonably likely to be attributed to Hi-C advertising.

²² Appeal brief, pp. 16-17.

²³ See thorough review and summary of explicit representations made in Hi-C's advertising, appearing in Findings 20, 21. See also Findings cited in footnote 18, *supra*, relating to im-

Opinion

83 F.T.C.

We have reviewed the nature and extent of the administrative law judge's analysis of the advertising challenged in this case, as well as his consideration of relevant testimony and survey data. We test the initial decision's findings by their relevance and adequacy, not by a tally of the number derived from the proposed findings of either party to this litigation, and we find them to be helpful to the Commission in reaching its decision in this case.²⁴

IV.

The ultimate questions before the Commission on this appeal are factual ones, involving the determination, first, of whether or not certain representations were made in the advertising of Hi-C, and, second, whether any representations found to have been made had the tendency or capacity to deceive.

In examining these issues, the administrative law judge considered each of the six separate allegations of misrepresentation appearing in the complaint, sought to determine the actual representations reasonably likely to have been communicated to consumers, and then addressed the validity of those claims.

Appeal from the dismissal of the complaint has been taken with respect to four of the six allegations of false and misleading advertising.²⁵ These appear in Paragraphs 8c-8f, respectively, of the complaint and allege that Hi-C advertisements represent that:

- c. Said drink is the beverage that is "The Sensible Drink," nutritionally and economically, as a source of vitamin C.
- d. Said drink is made with fresh fruit and has a high fruit content comparable to fresh fruits and fruit juices.
- e. Said drink is unqualifiedly good for children and children can drink as much of it as they like without adverse health or nutritional implications.

plied claims. Throughout the hearings, the administrative law judge recognized frequently his responsibility, and that of the Commission, to determine the meanings conveyed by the challenged advertisements (see, e.g., transcript, pp. 478, 663, 707-708, 726, 737, 900, 1034-1035, 1179, 1181, 1277-1278).

²⁴ The *Grand Caillou* opinion, relied upon by complaint counsel, does not question the propriety of using proposed findings submitted by one party; it questions rather the use of such proposed findings to the exclusion of independent reasoning, at the expense of providing findings relevant to the issues and helpful to the Commission. *In the matter of Grand Caillou*, 65 F.T.C. 799, 806-07, 814-15 (1965).

²⁵ Appeal brief, pp. 2-3. No appeal is taken from the administrative law judge's findings concerning Paragraphs 8a and 8b of the complaint, which alleged that Hi-C advertisements represent that:

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

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

Nor is appeal taken from the administrative law judge's failure to order the corrective advertising relief originally requested in the complaint.

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

The initial decision has provided us with useful details and summaries of the express representations contained in the individual Hi-C advertisements and in the advertising campaign(s) seen as a whole.²⁶ Four such express, literal, claims appear in the phrasing of the complaint's allegations as well as in certain of the advertisements: "the sensible drink," "made with fresh fruit,"²⁷ children "can drink as much* * *as they like," and "high in Vitamin C."

Much of the testimony given by some twenty witnesses appearing in these hearings focused on the meanings and validity that could be assigned to these phrases, seen alone and in conjunction with companion elements found in the advertisements. Of that testimony, some of the most significant dealt with the meanings attributable to the presence of the declarative adjectives "high" and "sensible" appearing in these express claims. It was here that the search for an implied comparison to citrus juices, specifically orange juice, was concentrated.

A. The Express Representations

Reviewing first the four express representations, we find that the administrative law judge's rulings as to their validity were amply supported in the record.

Thus, for example, in relation to the claim that Hi-C is "the sensible drink" as a source of vitamin C, the testimony of five nutritionists supports the conclusion that Hi-C is "an excellent source" of vitamin C, judged in terms of its nutritional, and minimal caloric, content.²⁸ A six ounce serving of Hi-C would provide 110 percent of the Recommended Dietary Allowance for vitamin C for children,²⁹ while making only a "marginally significant" contribution to the Recommended Dietary Allowance for

²⁶ Findings 20, 21. We refer to campaign(s) in recognition of the fact that more than one advertising campaign may be involved in the challenged advertisements, as indicated, *e.g.*, by the newspaper advertisements prepared in the fall of 1969 after the announcement of a ban on the sale of products containing cyclamates (see footnote 12, *supra* [p. 807 herein]).

²⁷ The wording "made with fresh fruit" appears in the complaint only. The following phrasing is found in Hi-C advertisements: "made from fresh fruit" and "made with real fruit." See Findings 21, 98.

²⁸ Findings 46-50, 58-69; transcript, pp. 1027-1028, 1445, 1449-1450, 1476, 1524-1527; RX 1Z17-18.

²⁹ Finding 46; CX 7D.

Opinion

83 F.T.C.

calories for a six year old child.³⁰ Within these nutritional parameters, this record fails to support an allegation that Hi-C is not a nutritionally sensible source of vitamin C. Nor do we find convincing evidence in the record to support the allegation that Hi-C was not an economically sensible source of vitamin C, relative to other brands of fruit drinks as well as to citrus juices.³¹

The express claims "made from fresh fruit" and "made with real fruit" appear in several of the Hi-C advertisements. They are challenged by complaint counsel as communicating the misrepresentation that Hi-C is made with fresh fruit, in the specific sense that unprocessed fruit was used in the manufacturing process.³² We endorse the initial decision's findings that consumers would not be reasonably likely to take this meaning from these words. The claims are true in the sense that the fruit components of the product are made from fresh fruit rather than from artificial or synthetic ingredients,³³ and consumers are likely to so interpret the representation, based upon their understanding of canned, unrefrigerated fruit drinks.³⁴

Similarly, we find no merit in the allegations concerning the explicit claim that children "can drink as much as they like," appearing in two newspaper advertisements and, in a different phrasing, in the 60 second version of one television commercial.³⁵ These words have been challenged throughout this proceeding as contributing to a misrepresentation that Hi-C can be consumed by children in unlimited quantities, to the exclusion of other foods, without adverse health or nutritional implications.³⁶ We do not see that meaning as reasonably to be derived from these advertisements.

We turn now to the fourth express claim found in the advertisements and specifically challenged in the complaint: that Hi-C is "high in Vitamin C." Much of the testimony of the nutritionist

³⁰ Findings 64, 65; transcript, pp. 1007-1012, 1025.

³¹ Findings 91-95. One form of orange juice, frozen concentrated, was found to provide the Recommended Dietary Allowance for vitamin C at less cost than Hi-C. See p. 14, *infra* [p. 813 herein], for discussion of complaint counsel's reliance on this single comparison.

³² Appeal brief, pp. 29-30.

³³ Finding 106; CX 4B; transcript, p. 1158.

³⁴ See Finding 103.

³⁵ Finding 125 describes the representations made in these advertisements. Headline elements of the newspaper advertisements include the phrases "Now it makes more sense than ever" and "Today it makes the most sense." The television commercial, featuring a clown, uses the phrase "* * * you can pour all the fun you want to." (CX 43A, CX 43B, CX 41M, RX 149W).

³⁶ Complaint, Para. 8e; Finding 124; appeal brief, p. 47. See Joint Prehearing Statement of June 14, 1971, p. 37, for agreement of the parties that the representation concerning "consumption to the exclusion of other foods" was at issue.

witnesses supporting the claim that Hi-C is a sensible source of vitamin C serves also as evidence for the validity of the claim that the product is "high" in vitamin C.³⁷ Using the Recommended Dietary Allowance for vitamin C as a frame of reference, these witnesses established Hi-C as "high" in vitamin C in relation to human nutritional needs. Their judgment was based upon the fact that a single six ounce serving of Hi-C contains 44 milligrams of vitamin C, compared to the Recommended Dietary Allowance of 40 milligrams for the primary consumers of the product, children between the ages of two and twelve.³⁸

The initial decision determined the validity of the "high in Vitamin C" claim "in relation to human nutritional needs."³⁹ The Commission agrees with the reasonableness of this criterion, but notes with interest the fact that the administrative law judge had to evaluate the claim in relation to a standard. The same is true of consumers viewing these advertisements, and it is true despite the absence of express comparisons to any standards.

B. The Issue of Implied Comparisons

Having determined that no misrepresentations were contained in the challenged express claims made in Hi-C's advertising, the Commission recognizes the far more vital task now before it: an analysis of the representations that reasonably may have been implied or suggested by these advertisements.

A common and critical thread running throughout the allegations of the complaint and the conduct of the hearings centered on the contention that these advertisements in some way compared Hi-C to citrus juices in general, and to orange juice in particular.

In the complaint itself, for example, the advertising is charged specifically with having represented that Hi-C is "particularly high in vitamin C content even as compared to * * * citrus juices," and that Hi-C "has a high fruit content comparable to fresh fruits and fruit juices;" similarly, the complaint alleges that Hi-C cannot "accurately be termed The Sensible Drink" because "Orange is more sensible * * *."⁴⁰

³⁷ See footnote 28, *supra* [p. 811 herein].

³⁸ See Findings 46, 49, 50; Transcript references in footnote 28, *supra*. In addition to supplying 110 percent of the Recommended Dietary Allowance (RDA) for vitamin C for children, a six ounce serving of Hi-C would provide 80 and 75 percent of the RDA for vitamin C for adult women and men, respectively. The weight of the expert testimony established that a food providing approximately 50 percent of the RDA in a single serving would be considered an "excellent" or "high" source of vitamin C (see Finding 48).

³⁹ Finding 42.

⁴⁰ Complaint, Para 8f, 8d, 9c, respectively.

Opinion

83 F.T.C.

The progress of the hearings served to focus this central issue even more specifically on the content and nutritional value of Hi-C *vis-a-vis* orange juice. Thus, for example, even though Hi-C was shown to be more economical as a source of Vitamin C than other brands of fruit drinks, other citrus juices, and other forms of orange juice, complaint counsel have urged that Hi-C is not "the sensible drink" as a source of vitamin C because frozen concentrated orange juice, accounting for some 69 percent of orange juice consumption, provides the Recommended Dietary Allowance for vitamin C at slightly less cost than does Hi-C.⁴¹ This is but one example of the many contentions advanced in this case whose persuasiveness depends ultimately upon a finding that Hi-C advertising would have conveyed a comparison to orange juice.⁴²

A central element in the search for such a suggested comparison is to be found in the interpretation to be given to the adjectives "high" and "sensible" as used in claims for Hi-C. We look to them now, not as parts of explicit phrases and of isolated express claims, but rather as possible elements contributing to the potential communication of a comparison to orange juice within the context of a Hi-C advertisement viewed in its entirety.

The alleged deception envisioned in the claim that Hi-C is "high" in vitamin C is premised directly upon the communication of a comparison of the product's vitamin C content to a selected standard: orange juice. In an attempt to establish that consumers necessarily would refer to orange juice as the frame of reference against which to interpret a "high in Vitamin C" claim, complaint counsel introduced into evidence portions of the results of a survey conducted by the Drossler Research Corporation for the Department of Citrus of the State of Florida.⁴³ Primary reliance is placed by complaint counsel upon the indication in this survey of consumer attitudes that some 85 percent of consumers canvassed by telephone in June of 1971 named orange juice when asked to identify the one beverage which they believed best fit the phrase "highest in Vitamin C."⁴⁴

Further portions of the same survey, introduced by respondents, indicate that only 1.8 percent of these same consumers named fruit drinks as "highest in Vitamin C."⁴⁵ Equally dra-

⁴¹ Findings 94, 95; appeal brief, p. 44; RX 1Z9.

⁴² See footnote 16, *supra* [p. 808 herein].

⁴³ "National Consumer Survey," June 1971. CX 3A-C; Finding 34B.

⁴⁴ CX 3B.

⁴⁵ RX 45A.

matic differences in consumer attitudes toward orange juice and fruit drinks are reflected in responses concerning the beverage seen to be "best for breakfast" and the "most natural drink."⁴⁶ We agree that the consumer attitudes reflected in this survey provide further indication that consumers are aware of differences between orange juice and fruit drinks, particularly as related to vitamin C content.⁴⁷

The initial decision takes note of the substantial difference in meaning between the superlative degree "highest" used in the Drossler Research Corporation's survey, and the positive degree "high" appearing in Hi-C advertising.⁴⁸ On appeal, complaint counsel contend that stricken testimony of Mr. Drossler would have established that a majority of the people surveyed would have named orange juice had the question been rephrased less selectively to ask that they identify those beverages that fit the phrase "high in Vitamin C."⁴⁹ We find that even if this testimony had been admitted, it would not have provided reason to infer that Hi-C's representation of high vitamin C content would convey to consumers a claim of comparability or equivalence to orange juice. There is nothing in the record to persuade us that several products with differing vitamin C content could not quite properly be identified as "high" in that nutrient; orange juice has not preempted the right to make a representation of high vitamin C content.

Primarily as a means of supporting the remedy of corrective advertising originally sought in this proceeding, complaint counsel introduced portions of periodic consumer research surveys conducted by Audits and Surveys, Inc., for the Coca-Cola Company during the period of time in which the challenged advertisements were run.⁵⁰ After issuance of the complaint in this case, Audits and Surveys, at the instance of respondents, re-examined all of the questionnaires received in an effort to determine the

⁴⁶ RX 41A, RX 45A.

⁴⁷ Finding 34B(4); RX 45A.

⁴⁸ Finding 34B (1-3).

⁴⁹ Appeal brief, p. 21. See transcript, pp. 416-422, for discussion of reasons for use of the superlative "highest" rather than the positive degree "high" in phrasing of questions in the survey.

⁵⁰ "The Continuing Foods Study," conducted from January 1, 1969 through March 1971. CX 39A-Z39; Finding 34G. During oral argument (see pp. 58-59), complaint counsel stated that these survey data had been introduced solely for the purpose of supporting the complaint's request for corrective advertising, no longer urged in this appeal. Complaint counsel asked, therefore, that the surveys now be given no weight in determining consumer impressions of Hi-C advertising.

Opinion

83 F.T.C.

extent to which consumers might have indicated recalling a comparison of any kind having been made by Hi-C advertising. Out of over 13,000 questionnaires completed from January 1, 1969, through March 30, 1971, including responses from 6,386 fruit drink users and 1,469 recallers of Hi-C advertising, only one individual stated that he got the impression of a comparison to orange juice from Hi-C advertisements.⁵¹ We note also that a total of only 31 individuals were recorded as having recalled a comparison to any beverage suggested in Hi-C advertising; of these, 18 saw the implied comparison as involving soft drinks.⁵² These results lend support to the contention that Hi-C advertising did not suggest comparisons to any beverages, let alone to orange juice.

The closely related misrepresentation alleged to be conveyed by the claim that Hi-C is "the sensible drink" is similarly grounded in the underlying theory that Hi-C advertising contains a comparison to orange juice.

Complaint counsel's focus on this specific comparison is well evidenced by the attempts to establish throughout this case that Hi-C is not as nutritious as orange juice, not only in terms of vitamin C content, but with respect to other nutrients as well.⁵³ Thus, for example, it has been argued that Hi-C contains less folic acid than orange juice, that it provides less vitamin A than orange juice, and that, as a result of containing fewer essential nutrients, Hi-C is therefore a less "sensible" drink than orange juice.⁵⁴ Complaint counsel rely heavily on testimony seeking to evaluate Hi-C, and the truth of its claims, on the basis of its total nutritional composition.⁵⁵ They urge on this appeal that stricken testimony of Dr. Van Itallie would have helped establish that Hi-C is not a "satisfactory food," in view of its relative lack of more than one nutrient.⁵⁶ We find that even if this testimony had been received, it would not have related clearly to Hi-C, since the testimony referred to foods that provide "a great many calories and only one nutrient;" Dr. Van Itallie's own testimony already

⁵¹ Finding 34G; RX 23B; transcript, pp. 1225-1227.

⁵² RX 23B.

⁵³ See discussion at p. 14, *supra* [p. 814 herein], of the companion contention that Hi-C is not as economical as one form of orange juice in providing the Recommended Dietary Allowance for vitamin C.

⁵⁴ See complaint, Para 9c; Findings 72-80, 85-89; appeal brief, pp. 39-40.

⁵⁵ See, e.g., reply brief, pp. 17-18.

⁵⁶ Appeal brief, pp. 40-42. Dr. Van Itallie stated: "* * * if a food provides a great many calories and only one nutrient, then that does not make a satisfactory food." (transcript, p. 1025).

had established that Hi-C provided at most a marginally significant contribution to the Recommended Dietary Allowance for calories.⁵⁷ More important, however, we are persuaded that all such testimony concerning the relative nutritional composition of Hi-C and orange juice is relevant to this case only insofar as we are able to find a comparison to orange juice, a claim of nutritional equivalence, in the advertising.

In interpreting suggested meanings that might be conveyed by Hi-C advertisements, we cannot ignore the fact that the challenged express claims recurring in the advertising are phrased invariably in the positive degree, *i.e.*, "high" and "sensible," rather than in the comparative or superlative degree. Notwithstanding this fact, complaint counsel, in addition to having urged the presence of comparisons in these advertisements throughout the hearings, now raise on appeal the contention that Hi-C advertising contains a superlative claim of uniqueness as well. Specifically, we are asked to find that the representation of Hi-C as "the sensible drink" implies that Hi-C is a unique product in the sense of being superior to all other sources of vitamin C.⁵⁸

The Commission is willing to recognize that even express claims phrased merely in the positive degree such as "high" and "sensible" can convey comparative, and even superlative, meanings. They can do so, for example, if the advertisement's net impression serves to support such a comparison, or if the consumers viewing the advertisements bring to them the requisite expectations and frame of reference. In finding implied comparisons and claims of uniqueness in such situations, the Commission recognizes also that care must be taken not to prevent advertisers from making truthful and informative declarative statements.

With these thoughts in mind, the Commission has reviewed carefully the Hi-C advertisements involved in this litigation. To interpret fully the possible implied or suggested meanings conveyed, we have considered each Hi-C advertisement in its entirety.⁵⁹

In reviewing Hi-C's advertising, we have looked at the nutritionally oriented claims singly and in the context of the prominent representations, as well as overall mood and ambience, con-

⁵⁷ See footnote 30, *supra* [p. 812 herein].

⁵⁸ Appeal brief, pp. 45-46.

⁵⁹ As urged by complaint counsel (see appeal brief, p. 32), citing *F.T.C. v. Sterling Drug Inc.*, 317 F.2d 669, 674 (2d Cir. 1963), it is normally necessary "to consider the advertisement in its entirety and not to engage in disputatious dissection."

Opinion

83 F.T.C.

veying messages of appealing taste, enjoyment, fun, refreshment, convenience, and variety of flavors. Thus, for example, in light of the comparisons alleged to have been made to orange juice, we note the absence in Hi-C advertising of breakfast scenes so generally associated with the consumption of orange juice.⁶⁰

Having completed a review of the advertisements challenged in this case, the Commission finds that the advertising representations made in behalf of Hi-C are not reasonably likely to have communicated the comparisons and claims of equivalence to citrus juices, and to orange juice, so critical to the allegations advanced by complaint counsel.

V.

Aware of the importance of nutrition and of the relative inability of consumers to test for themselves the validity of nutritional claims made in advertising, the Commission has reviewed fully the advertisements and the record in this case.

We find that the false and misleading representations alleged to have been made in Hi-C's advertising are not reasonably likely to have been conveyed to consumers. Neither the advertisements themselves, nor the evidence produced in the hearings, serve to sustain the challenges to respondents' advertising advanced in this proceeding. This finding was made after considering each advertisement in its entirety, including its overall mood and ambience. The Commission carefully avoided confining its inquiry to the literal meaning of the advertisement, and we have not attributed to the consumer a heightened level of sophistication or knowledge. Thus, our finding simply reflects a deficiency in the evidence in the record.

The decision of the administrative law judge is therefore affirmed, and the complaint dismissed.

FINAL ORDER

This matter is before the Commission on the appeal of complaint counsel from the initial decision of the administrative law judge issued on September 15, 1972, dismissing the complaint. Upon examination of the record, the initial decision, and the briefs and oral argument in support of this appeal and in opposition thereto, the Commission has concluded, for the reasons set forth in the accompanying opinion, that the initial decision of the

⁶⁰ See Findings 34D, E.

746

Final Order

administrative law judge should be adopted and issued as the decision of the Commission. Accordingly,

It is ordered, That complaint counsel's appeal from the initial decision of the administrative law judge be, and it hereby is, denied.

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

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

Commissioner Jones dissenting.

IN THE MATTER OF

WARNER LAMBERT COMPANY