

Complaint

IN THE MATTER OF

ITT CONTINENTAL BAKING COMPANY, INC., ET AL.

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

Dockets 8860. Complaint, August 24, 1971—Order & Opinion, Oct. 19, 1973.

Order requiring a Rye, New York, manufacturer, seller, and distributor of bakery products, "Wonder Bread" and "Hostess" snack cakes, and its advertising agency, among other things to cease misrepresenting the nutritional content, efficacy or functional value of its products.

Appearances

For the Commission: *Thomas J. Donegan, Lynne C. McCoy, William S. Busker and David O. Bickart.*

For the respondents: *Gordon A. Thomas and Alan C. Davis, Rye, N.Y. and Covington & Burling, Wash., D.C. for ITT Continental Baking Company, Inc.; Cahill, Gordon, Sonnett, Reindel & Ohl, Wash., D.C. and Elhanan C. Stone, New York, N.Y. for Ted Bates & 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 ITT Continental Baking Company, Inc., a corporation, and Ted Bates & Company, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent ITT Continental Baking Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Halstead Avenue, Rye, N.Y.

PAR. 2. Respondent Ted Bates & 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 principal office and place of business located at 666 Fifth Avenue, New York, N.Y.

PAR. 3. Respondent ITT Continental Baking Company, Inc., is now, and for some time last past has been, engaged in the manu-

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facture, sale and distribution of certain bakery products designated "Wonder Bread," and "Hostess" snack cakes which come within the classification of "food," as said term is defined in the Federal Trade Commission Act.

PAR. 4. Respondent Ted Bates & Company, Inc., is now, and for some time last past has been, an advertising agency of ITT Continental Baking Company, Inc., 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 bakery products of ITT Continental Baking Company, Inc., "Wonder Bread," and "Hostess" snack cakes, which come within the classification of "food," as said term is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of its aforesaid business respondent ITT Continental Baking Company, Inc., causes the said bakery products, when sold, to be transported from its places of business located in various States of the United States to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent ITT Continental Baking Company, Inc., maintains, and at all times mentioned herein has maintained, a substantial 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 ITT Continental Baking Company, Inc., and Ted Bates & Company, Inc., have disseminated, and caused the dissemination of, certain advertisements concerning the said bakery products 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 newspapers, and by means of television and radio broadcasts transmitted by television and radio 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 products, and have disseminated, and caused the dissemination of, advertisements concerning said bakery products 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 bakery products 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) Four television commercials ask children how big they want to be and then through time sequence photography depict a child dramatically growing taller and larger. These commercials open showing a young child with "HOW BIG DO YOU WANT TO BE?" overprinted. The announcer says "Wonder asks, how big do you want to be?" Various children answer as they are photographed, "Big enough so that the barber won't have to cut my hair in a baby's chair," "Big enough to be a cheerleader," "Big enough to sink a basket," "Big enough to touch the ceiling by myself," "Big enough to dance with my girlfriend," "Big enough to go surfing," "Big enough to wear my daddy's shoes," "Big enough to see the parade," "Big enough to ride a two-wheeler," "about ten times bigger than my sister," "Big enough to reach things without a chair," and "Bigger than George, he's my dog." After the children have told how big they want to be the announcer states, "He'll never need Wonder Bread more than right now, because the time to grow bigger and stronger is during the Wonder Years—ages one through twelve—the years when your child grows to ninety percent of his adult height." During this audio message the child is pictured growing rapidly, apparently from a very young child to a twelve year old in physical stature. Then the audio portion continues "How can you help? By serving nutritious Wonder Enriched Bread. Wonder helps build strong bodies twelve ways. Each delicious slice of Wonder Bread supplies protein for muscle, minerals for strong bones and teeth, carbohydrates for energy, vitamins for nerves. All vital elements for growing minds and bodies." During this message a second segment of the child's growth sequence is shown. The commercial ends with parents serving their child Wonder Bread and the audio stating "During the Wonder Years—the growth years—help your child grow bigger and stronger. Serve Wonder Bread. Wonder helps build strong bodies twelve ways."

(b) Four thirty second versions of the television commercials described in subparagraph (a) above show only one growth sequence. Two of these commercials have the following audio:

Wonder asks how big do you want to be? Big enough to sink a basket. Bigger than George. He's my dog. And the time to grow bigger and stronger is during the Wonder Years—ages one through twelve—when your child grows to ninety percent of his adult height. How can you help? By serving nutritious Wonder Bread. Each delicious slice supplies protein, minerals carbohydrates and vitamins, so during the Wonder Years help your child grow bigger and stronger serve Wonder Bread. Wonder helps build strong bodies twelve ways."

The audio portion of the other two of these commercials is:

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Wonder asks how big do you want to be? Big enough to see the parade. Big enough to ride a two-wheeler. Big enough to dance with my girlfriend. Big enough to go surfing. And you can help them grow bigger and stronger with Wonder Enriched Bread. Wonder supplies needed vitamins and minerals to help your child get bigger and stronger. During the years one through twelve when he grows to ninety percent of his adult height. Delicious Wonder Bread. Wonder helps build strong bodies twelve ways.

(c) Three thirty second television commercials open with scenes of children playing as the announcer states, "these are the Wonder Years—ages one through twelve—when your child actually grows to ninety percent of his adult height." As the announcer explains that "each slice of Wonder Bread supplies protein for muscle, minerals for strong bones and teeth, carbohydrates for energy, vitamins for nerves, all vital elements for growing minds and bodies," a child is shown eating Wonder Bread with an insert overprinted showing a child in four different stages of growth underneath the printed words "protein," "minerals," "carbohydrates," and "vitamins," respectively. The commercials end with the announcer imploring "To help make the most of these Wonder Years, serve Wonder Bread. Wonder helps build strong bodies twelve ways."

(d) A number of television commercials broadcast on the program "Bozo Circus" on Channel 9 in Chicago, Ill., representative of which is the following audio portion of one of these commercials:

UNCLE NED: Say, how many of you would like to grow up to be as big as an elephant? That's pretty big, isn't it? And, of course, no one *really* wants to be quite that big. But you are going to do a lot of growing in the next few years, and it is fun thinking about how big you'll be. You know, one thing that's so important to your growing is the kind of food you eat. You need to eat the right kinds of food. Yes * * * foods that are good for you, like Wonder Enriched Bread. Because Wonder is baked with vitamins and other good things that help you grow up big and strong and have energy for worktime and playtime fun. And you know what fun Wonder is to eat. Yes, just look at this delicious Wonder Bread sandwich * * * so tender and light, just the way you like it. You can enjoy Wonder so many times during the day: for your sandwiches at lunch, after-school snacks * * * perhaps with your evening meal, too. So Mom, when your kids tell you how big they want to be—remember, they'll never need Wonder more than right now. Wonder helps build strong bodies 12 ways!

(e) Numerous television commercials broadcast on the network television program "Captain Kangaroo," representative of which is the following audio portion of one of them:

Captain Kangaroo: Mr. Moose, I have an interesting question for you. If you could be as big as you wanted to be * * * how big would you want to be?

Mr. Moose: Gee * * * as big * * * as big as big * * * I know! As big as a tree! Than I could see *everything* around me for miles and miles.

Captain Kangaroo: Wouldn't that be fun, Mr. Moose!

Mr. Moose: Yes! Do you think eating Wonder Bread would get me that big?

Captain Kangaroo: Well * * * not *quite* as big as a tree * * * but Wonder *does* help boys and girls grow up big and strong, and give them energy for work and play. Each slice of Wonder is baked with vitamins and other good things that help you grow.

Mr. Moose: And Wonder tastes so good, too.

Captain Kangaroo: It does indeed—it's so light and tender and white, baked soft just the way you like it best. Great for lunchtime sandwiches * * * and anytime snacks. You'll want to enjoy Wonder Enriched Bread soon. Mother, please look for the red, yellow, and blue balloons printed on every wrapper. Remember, Wonder helps build strong trees—uh, bodies! 12 ways!

(f) Numerous radio commercials. Representative of the copy of these commercials is the following transcript of one of them:

It's here! The nation's most famous bread is now on the shelves of your grocery store. Wonder Bread has been a household favorite in thousands of homes all over the country. Now you can discover for yourself why so many people have preferred Wonder Enriched Bread for so long. Famous for its flavor. Wonder is also famous for helping build strong bodies 12 ways. Wonder's great 12-way nutrition helps make the most of your child's "Wonder Years." These are the growth years * * * the formative years from one through twelve when children actually grow to 90% of their adult height. To help make the most of these "Wonder Years" serve Wonder Enriched Bread. Each slice of Wonder Bread supplies vital growth elements * * * protein, minerals, carbohydrates and vitamins. Children just love Wonder's soft, light texture—so delicious for sandwiches, so perfect for toast. So make the most of your Children's "Wonder Years"; serve Wonder Enriched Bread. It's the bread famous for helping build strong bodies 12 ways.

(g) Advertisements appearing in national magazines picture children at play with the following copy overprinted:

Make the most of their "Wonder Years." You can do the most for your children's growth during their "Wonder Years"—ages one through twelve. These are the years when your children actually grow to 90% of their adult height. Each slice of Wonder Bread during the "Wonder Years" give children protein for muscle, minerals for strong bones, carbohydrates for energy, vitamins for nerves * * * all vital elements for growing minds and bodies. Helps build strong bodies 12 ways!

(h) Advertisements appearing in newspapers and national magazines picture children and use the following copy:

"Big enough to make the team. That's how big I want to be." He'll never

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need Wonder Bread more than right now. The time to grow bigger and stronger is during the "Wonder Years"—ages one through twelve—when a child reaches 90% of his adult height. So help your child by serving Wonder Enriched Bread. Each slice supplies vitamins, minerals, carbohydrates and protein. Delicious Wonder Bread! Helps build strong bodies twelve ways!

(i) Advertisements appearing in newspapers picture children at play and use the following copy:

Make the most of their "Wonder Years." The "Wonder Years," one through twelve, are the formative years when you can do the most for your child's growth. During these years your children develop in many ways—actually grow 90% of their adult height. Every delicious slice of Wonder Bread is carefully enriched with foods for growing bodies and minds. The "Wonder Years" come only once. Make the most of them. Serve your children nutritious Wonder Bread. Helps build strong bodies 12 ways!

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

a) Said Wonder Bread is an outstanding source of nutrients, distinct from other enriched breads.

b) Consuming said Wonder Bread in the customary manner that bread is used in the diet will provide a child age one to twelve with all the nutrients, in recommended quantities, that are essential to healthy growth and development.

c) Parents can rely on Wonder Bread to provide their children with all nutrients that are essential to healthy growth and development.

d) The optimum contribution a parent can make to his child's nutrition during the formative years of growth is to assure that the child consumes Wonder Bread regularly.

e) The protein supplied by said Wonder Bread is complete protein of high nutritional quality necessary to assure maximum growth and development.

PAR. 9. In truth and in fact:

a) Said Wonder Bread is not an outstanding source of nutrients, distinct from other enriched breads. Said Wonder Bread is a standardized enriched bread. All enriched breads are required by law to contain minimum levels of certain nutrients. The amount and kind of nutrients contained in said Wonder Bread is the same as that contained in most other enriched breads. Said Wonder Bread does not contain the maximum amounts of nutrients permitted by law, as promulgated in Standards of Food

Identity of the Food and Drug Administration. Said Wonder Bread contains only 38 percent of the maximum calcium permitted, 57 percent of the maximum riboflavin permitted, 72 percent of the maximum niacin permitted, 76 percent of the maximum iron permitted and 83 percent of the maximum thiamine permitted.

b) Consuming said Wonder Bread in the customary manner that bread is used in the diet will not provide a child age one to twelve with all the nutrients, in recommended quantities, that are essential to healthy growth and development. Said Wonder Bread provides only eight of the seventeen nutrients recognized as essential for which Recommended Dietary Allowances, designed for the maintenance of good nutrition, have been established for children and adults. One slice of Wonder Bread does not contain significant amounts of vitamin A, vitamin D, vitamin C, folacin, vitamin E, vitamin B₆, vitamin B₁₂, iodine, and magnesium, all of which are nutrients recognized as essential for which Recommended Dietary Allowances, designed for the maintenance of good nutrition, have been established for children and adults. The following amounts of Wonder Bread depending upon age and sex must be consumed daily by children, age one to twelve, in order to obtain the Recommended Dietary Allowance of the nutrients which Wonder Bread does provide: calcium, 40 to 68 slices; phosphorous, 24 to 40 slices; iron, 18 to 33 slices; niacin, 13 to 27 slices; protein, 12 to 23 slices (if the protein can be completely assimilated); riboflavin, 12 to 25 slices; thiamine, 7 to 15 slices; and calories, 16 to 36 slices.

c) Parents cannot rely on Wonder Bread to provide their children with all nutrients that are essential to healthy growth and development.

d) Assuring that the child consumes Wonder Bread regularly is not the optimum contribution that a parent can make to his child's nutrition during the formative years of growth.

e) The protein supplied by said Wonder Bread is not complete protein of high nutritional quality necessary to assure maximum growth and development.

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.

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PAR. 10. Certain of the aforesaid advertisements are addressed primarily to children or to general audiences which include substantial numbers of children, which advertisements tend to exploit the aspirations of children for rapid and healthy growth and development by falsely portraying, directly and by implication, said Wonder Bread as an extraordinary food for producing dramatic growth in children.

Therefore, the aforesaid acts and practices of respondents were and are false, misleading, deceptive and unfair.

PAR. 11. Certain of the aforesaid advertisements are addressed primarily to parents of children or are addressed to general audiences which include substantial numbers of parents of children, which advertisements tend to exploit the emotional concern of such parents for the healthy physical and mental growth and development of their children by falsely portraying, directly and by implication, Wonder Bread as a necessary food for their children to grow and develop to the fullest extent during the preadolescent years.

Therefore, the aforesaid acts and practices were and are false, misleading, deceptive and unfair.

PAR. 12. Typical of the statements and representations regarding said Hostess snack cakes in said advertisements, disseminated as aforesaid, but not all inclusive thereof, are the following:

a) An advertisement appearing in national magazines pictures a child eating a Hostess snack cake and uses the following copy:

A major nutritional advance from Hostess. Snack Cakes with body-building vitamins and iron. Look for the big "V" on every new package of Hostess Cup Cakes, Twinkies and Fruit Pies! It's the nutritional advance that takes the guesswork out of which snack cakes to buy! These famous Hostess Snack Cakes now give your children more than good taste * * * they give them important nutrition, too. So why settle for just cake—give them Hostess Snack Cakes fortified with body building vitamins and iron to grow on. Thank Hostess * * * for the good taste kids love and good nutrition they need.

b) A television commercial depicts a mother in a grocery store looking at different snacks. The audio portion states, "Snacks, snacks, everywhere snacks. Welcome to the snack cake jungle. Every where you look, snack cakes for the kids." The mother asks "Are there any that have more than good taste?" As the visual portion depicts a Hostess display the audio portion continues "Yes! Hostess announces Snack Cakes now fortified with vitamin and iron. You can thank Hostess bakers for new vitamin fortified snack cakes with the good taste kids love and good nutrition they

need." The mother carries away an armload of Hostess snack cakes and the visual portion switches to children eating the cakes. The audio continues "Like new Hostess Cup Cakes! That chocolaty devil's food cake with creamy filling and fudgy icing now gives your children more than good taste. It gives them important nutrition, too. Because now Hostess Cup Cakes are fortified with body building vitamins and iron to grow on. Yes there are snack cakes with more than good taste. New vitamin-fortified Hostess Snack Cakes. Look for the 'V' on packages of Hostess Cup Cakes. Thank Hostess for the good taste kids love, and the good nutrition they need." Other television commercials use the same copy except for substituting the products Hostess Twinkies or Hostess Fruit Pies instead of Hostess Cup Cakes and except for certain deletions producing shorter commercials.

PAR. 13. Through the use of said advertisements and other similar thereto not specifically set out herein, disseminated as aforesaid, respondents have represented and are now representing, directly and by implication that:

a) The fortification of said Hostess Snack Cakes with vitamins and iron constitutes a major nutritional advance that has just been developed for providing children with good nutrition.

b) The fortification of said Hostess Snack Cakes with vitamins and iron constitutes a major nutritional advance that is unavailable in other baked goods used for snacks by children.

c) Said Hostess Snack Cakes provide all the vitamins recognized as essential to the healthy growth and development of children.

d) Said Hostess Snack Cakes provide children with good nutrition.

PAR. 14. In truth and in fact:

a) The fortification of said Hostess Snack Cakes with vitamins and iron does not constitute a major nutritional advance that has just been developed for providing children with good nutrition. The fortification of said snack cakes is the nutritional equivalent of using enriched flour to make the cakes, a process which adds certain amounts of vitamins B₁, B₂, niacin and iron. Such enrichment of baked goods has been developed and used for more than thirty years.

b) The fortification of said Hostess Snack Cakes with vitamins and iron does not constitute a major nutritional advance that is unavailable in other baked goods used for snacks by children. Any

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baked goods made with enriched flour provide the same nutrients in similar amounts.

c) Said Hostess Snack Cakes do not provide in significant quantities all the vitamins recognized as essential to the healthy growth and development of children. Said Hostess Snack Cakes provide in significant quantities only three of the ten vitamins that have been recognized as essential by the Food and Nutrition Board of the National Academy of Sciences—National Research Council and for which Recommended Dietary Allowances have been established for children and adults.

d) The aforesaid representation that said Hostess Snack Cakes provide children with good nutrition fails to disclose the material fact that the cakes are composed primarily of sugar.

Therefore, the advertisements referred to in Paragraph Twelve 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 Twelve and Thirteen were, and are, false, misleading and deceptive.

PAR. 15. Certain of the aforesaid advertisements are addressed primarily to mothers of children or to audiences which include substantial numbers of mothers of children, which advertisements tend to exploit the guilt feelings regarding the nutritional effect of snack cakes on children's diets of those mothers of children who have in the past been infrequent users or purchasers of snack cakes by making, directly or by implication, falsely unqualified claims that children need said Hostess snack cakes in order to have good nutrition.

Therefore, the aforesaid acts and practices of respondents were and are false, misleading, deceptive and unfair.

PAR. 16. In the course and conduct of its aforesaid business respondent ITT Continental Baking Company, Inc., had certain surveys of consumer attitudes conducted on its behalf. Typical and illustrative of the findings from these consumer surveys reported to respondent ITT Continental Baking Company, Inc., but not all inclusive thereof, are the following:

a) That for certain consumers who have guilt feelings about using or purchasing snack cakes for their children a nutrition claim might be an effective method of changing their attitudes and one of the aforesaid television commercials for said Hostess snack cakes was effective in utilizing a nutrition/vitamin claim to change the attitudes of consumers who had been reluctant to use

or buy snack cakes because of guilt feelings regarding the possible nutritional effect of such snack cakes on children's diets.

b) That certain of the aforesaid television advertisements for said Wonder Bread generated a significant increase in the number of consumers who rated said Wonder Bread excellent or very good as compared to other breads in terms of the quality of nutrition and the value of the bread for use by children.

Therefore, respondent ITT Continental Baking Company, Inc., on the basis of these survey findings, and other facts and survey findings not specifically set out herein, knew or had reason to know or should have known that certain of the aforesaid advertisements constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act. The continued dissemination of certain of the aforesaid advertisements which respondent ITT Continental Baking Company, Inc., knew or had reason to know or should have known were false advertisements constituted and now constitutes "unfair or deceptive acts or practices."

PAR. 17. The use by respondents of the aforesaid false, misleading and deceptive and unfair statements, representations, acts 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 said bakery products of respondent ITT Continental Baking Company, Inc., by reason of said erroneous and mistaken belief.

PAR. 18. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent ITT Continental Baking Company, Inc., 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 respondent.

PAR. 19. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Ted Bates and Company, Inc., has been, and now is, in substantial competition, in commerce, with other advertising agencies.

PAR. 20. 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

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methods of competition in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

INITIAL DECISION BY RAYMOND J. LYNCH,
ADMINISTRATIVE LAW JUDGE
DECEMBER 18, 1972

PRELIMINARY STATEMENT

This proceeding was commenced by the issuance of a complaint on August 24, 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 false, misleading and deceptive claims with respect to the nutritive value of ITT Continental products Wonder Bread and Hostess cakes and assorted snack products. 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 Wonder Bread is an outstanding source of nutrients, distinct from other enriched breads.

b) Consuming said Wonder Bread in the customary manner that bread is used in the diet will provide a child age one to twelve with all the nutrients, in recommended quantities, that are essential to healthy growth and development.

c) Parents can rely on Wonder Bread to provide their children with all nutrients that are essential to healthy growth and development.

d) The optimum contribution a parent can make to his child's nutrition during the formative years of growth is to assure that the child consumes Wonder Bread regularly.

e) The protein supplied by said Wonder Bread is complete protein of high nutritional quality necessary to assure maximum growth and development.

After being served with the complaint, respondents appeared by counsel and filed on October 1, 1971, their respective answers admitting some of the allegations of the complaint, but denying that any of their actions constituted a violation of law. Thereafter, prehearing conferences were held on October 22, 1971, February 29, 1972, March 10, 1972, April 13, 1972, May 1, 1972, and June 6, 1972. Witness lists were exchanged as well as documents. Counsel for the parties submitted pretrial briefs.

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Hearings commenced on June 12, 1972. Complaint counsel concluded their case-in-chief on July 12, 1972, and respondents commenced their case on July 12, 1972. Complaint counsel presented rebuttal testimony on September 18, 1972, and the record was closed on September 18, 1972.

Proposed findings of fact and briefs were filed by the parties on November 6, 1972.

Any motions not heretofore or herein specifically ruled upon, either directly or by the 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

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 ITT Continental Baking Company, Inc. (hereinafter referred to as ITT Continental), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Halstead Avenue, Rye, N.Y.

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2. Respondent Ted Bates & Company, Inc. (hereinafter referred to as Bates), is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 666 Fifth Avenue, New York, N.Y.

3. Respondent ITT Continental is now, and for some time last past has been, engaged in the manufacture, sale and distribution of certain bakery products designated "Wonder Bread," and "Hostess" snack cakes which come within the classification of "food," as said term is defined in the Federal Trade Commission Act.

4. Respondent Bates is now, and for some time last past has been, an advertising agency of ITT Continental, 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 bakery products of ITT Continental, "Wonder Bread" and "Hostess" snack cakes, which come within the classification of "food," as said term is defined in the Federal Trade Commission Act.

5. In the course and conduct of its aforesaid business respondent ITT Continental causes the said bakery products, when sold, to be transported from its places of business located in various States of the United States to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent ITT Continental maintains, and at all times mentioned herein has maintained, a substantial 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.

II. Wonder Bread

The Product

6. Wonder Bread is an enriched white bread that conforms to relevant standards of the Federal Food and Drug Administration (CX 172, Par. 10).

7. The enrichment of white bread in the United States was undertaken during World War II to combat serious deficiency diseases prevalent in this country at that time (Sebrell 2639). These diseases were iron deficiency anemia, beri beri, caused by thiamine deficiency, riboflavinosis, caused by riboflavin deficiency, and pellagra, caused by niacin deficiency (Sebrell 2640).

8. The bread enrichment program called for fortifying bread with iron and three B vitamins, thiamine, niacin, and riboflavin (Sebrell 2644). It was an important public health measure, which has contributed substantially to either the disappearance of, or the decrease in the incidence of, these diseases in the United States (Sebrell 2639-41, 2667; Briggs 875, 903-04).

9. In the opinion of an expert nutritionist who testified for the Commission, advertising promoting the nutritional attributes of enriched bread would be "very useful and commendable." (Briggs 907-08).

10. It is stipulated that Wonder Bread was largely advertised on the basis of nutrition between 1950 and 1964 (CX 172, Par. 5).

11. In the spring of 1964, at a time when advertising for Wonder Bread generally was under review by the Federal Trade Commission, an advertising campaign for the product known as the "Wonder Years" campaign commenced (Thomas 2156-58). This campaign lasted until 1970, when it was replaced by an advertising campaign for Wonder Bread known as the "How Big" campaign (CX 172, Par. 1, 2). Certain of the advertisements described in Paragraph 7 of the complaint are typical of the advertising in those campaigns (CX 172, Par. 1, 2).

A. The Challenged Commercials and Advertisements for Wonder Bread

12. In the course and conduct of their said businesses, respondents ITT Continental and Bates, have disseminated, and caused the dissemination of, certain advertisements concerning the said bakery products 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 newspapers, and by means of television and radio broadcasts transmitted by television and radio 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 products, and have disseminated, and caused the dissemination of, advertisements concerning said bakery products by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or

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indirectly, the purchase of said bakery products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

1. Commercials

13. Typical of the scenes, statements and representations in the TV commercials, radio, newspapers and magazines, disseminated as aforesaid, but not all inclusive thereof, are the following:

(a) Four television commercials ask children how big they want to be and then through time sequence photography depict a child dramatically growing taller and larger. These commercials open showing a young child with "HOW BIG DO YOU WANT TO BE?" overprinted. The announcer says "Wonder asks, how big do you want to be?" Various children answer as they are photographed, "Big enough so that the barber won't have to cut my hair in a baby's chair," "Big enough to be a cheerleader," "Big enough to sink a basket," "Big enough to touch the ceiling by myself," "Big enough to dance with my girlfriend," "Big enough to go surfing," "Big enough to wear my daddy's shoes," "Big enough to see the parade," "Big enough to ride a two-wheeler," "about ten times bigger than my sister," "Big enough to reach things without a chair," and "Bigger than George, he's my dog." After the children have told how big they want to be the announcer states, "He'll never need Wonder Bread more than right now, because the time to grow bigger and stronger is during the Wonder Years—ages one through twelve—the years when your child grows to ninety percent of his adult height." During this audio message the child is pictured growing rapidly, apparently from a very young child to a twelve-year-old in physical stature. Then the audio portion continues "How can you help? By serving nutritious Wonder Enriched Bread. Wonder helps build strong bodies twelve ways. Each delicious slice of Wonder Bread supplies protein for muscle, minerals for strong bones and teeth, carbohydrates for energy, vitamins for nerves. All vital elements for growing minds and bodies." During this message a second segment of the child's growth sequence is shown. The commercial ends with parents serving their child Wonder Bread and the audio stating "During the Wonder Years—the growth years—help your child grow bigger and stronger. Serve Wonder Bread. Wonder helps build strong bodies twelve ways."

(b) Four thirty-second versions of the television commercials described in subparagraph (a) above show only one growth sequence. Two of these commercials have the following audio:

Wonder asks how big do you want to be? Big enough to sink a basket. Bigger than George. He's my dog. And the time to grow bigger and stronger is during the Wonder Years—ages one through twelve—when your child grows to ninety percent of his adult height. How can you help? By serving nutritious Wonder Bread. Each delicious slice supplies protein, minerals, carbohydrates and vitamins, so during the Wonder Years help your child grow bigger and stronger serve Wonder Bread. Wonder helps build strong bodies twelve ways.

The audio portion of the other two of these commercials is:

Wonder asks how big do you want to be? Big enough to see the parade. Big enough to ride a two-wheeler. Big enough to dance with my girlfriend. Big enough to go surfing. And you can help them grow bigger and stronger with Wonder Enriched Bread. Wonder supplies needed vitamins and minerals to help your child get bigger and stronger. During the years one through twelve when he grows to ninety percent of his adult height. Delicious Wonder Bread. Wonder helps build strong bodies twelve ways.

(c) Three thirty-second television commercials open with scenes of children playing as the announcer states, "these are the Wonder Years—ages one through twelve—when your child actually grows to ninety percent of his adult height." As the announcer explains that "each slice of Wonder Bread supplies protein for muscle, minerals for strong bones and teeth, carbohydrates for energy, vitamins for nerves, all vital elements for growing minds and bodies," a child is shown eating Wonder Bread with an insert overprinted showing a child in four different stages of growth underneath the printed words "protein," "minerals," "carbohydrates," and "vitamins," respectively. The commercials end with the announcer imploring "To help make the most of these Wonder Years, serve Wonder Bread. Wonder helps build strong bodies twelve ways."

(d) A number of television commercials broadcast on the program "Bozo Circus" on Channel 9 in Chicago, Ill., representative of which is the following audio portion of one of these commercials:

UNCLE NED: Say, how many of you would like to grow up to be as big as an elephant? That's pretty big, isn't it? And, of course, no one *really* wants to be quite that big. But you are going to do a lot of growing in the next few years, and it is fun thinking about how big you'll be. You know, one thing that's so important to your growing is the kind of food you eat. You need to eat the right kinds of food. Yes * * * foods that are good for you, like Wonder Enriched Bread. Because Wonder is baked with vitamins and other good things that help you grow up big and strong and have energy for worktime and playtime fun. And you know what fun Wonder is to eat. Yes, just look at this delicious Wonder Bread sandwich * * * so tender and light, just the way you like it. You can enjoy Wonder so many times during the day: for your sandwiches at lunch, after-school snacks * * * perhaps with your evening meal, too. So, Mom, when your kids tell you how big they want to be—remember, they'll never need Wonder more than right now. Wonder helps build strong bodies 12 ways!

(e) Numerous television commercials broadcast on the network television program "Captain Kangaroo," representative of which is the following audio portion of one of them:

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Captain Kangaroo: Mr. Moose, I have an interesting question for you. If you could be as big as you wanted * * * how big would you want to be?

Mr. Moose: Gee * * * as big * * * as big * * * I know! As big as a tree! Then I could see *everything* around me for miles and miles.

Captain Kangaroo: Wouldn't that be fun, Mr. Moose!

Mr. Moose: Yes! Do you think eating Wonder Bread would get me that big?

Captain Kangaroo: Well * * * not *quite* as big as a tree * * * but Wonder *does* help boys and girls grow up big and strong, and give them energy for work and play. Each slice of Wonder is baked with vitamins and other good things that help you grow.

Mr. Moose: And Wonder tastes so good, too.

Captain Kangaroo: It does indeed—it's so light and tender and white, baked soft just the way you like it best. Great for lunchtime sandwiches * * * and anytime snacks. You'll want to enjoy Wonder Enriched Bread soon. Mother, please look for the red, yellow, and blue balloons printed on every wrapper. Remember, Wonder helps build strong trees—uh, bodies! 12 ways!

(f) Numerous radio commercials. Representative of the copy of these commercials is the following transcript of one of them:

It's here! The nation's most famous bread is now on the shelves of your grocery store. Wonder Bread has been a household favorite in thousands of homes all over the country. Now you can discover for yourself why so many people have preferred Wonder Enriched Bread for so long.

Famous for its flavor, Wonder is also famous for helping build strong bodies 12 ways. Wonder's great 12-way nutrition helps make the most of your child's "Wonder Years." These are the growth years * * * the formative years from one through twelve when children actually grow to 90% of their adult height. To help them make the most of these "Wonder Years" serve Wonder Enriched Bread. Each slice of Wonder Bread supplies vital growth elements* * * protein, minerals, carbohydrates and vitamins. Children just love Wonder's soft, light texture—so delicious for sandwiches, so perfect for toast. So make the most of your Children's "Wonder Years;" serve Wonder Enriched Bread. It's the bread famous for helping build strong bodies in 12 ways.

(g) Advertisements appearing in national magazines picture children at play with the following copy overprinted:

Make the most of their "Wonder Years." You can do the most for your children's growth during their "Wonder Years"—ages one through twelve. These are the years when your children actually grow to 90% of their adult height. Each slice of Wonder Bread during the "Wonder Years" gives children protein for muscle, minerals for strong bones, carbohydrates for energy, vitamins for nerves * * * all vital elements for growing minds and bodies. Helps build strong bodies 12 ways!

(h) Advertisements appearing in newspapers and national magazines picture children and use the following copy:

"Big enough to make the team. That's how big I want to be." He'll never

need Wonder Bread more than right now. The time to grow bigger and stronger is during the "Wonder Years"—ages one through twelve—when a child reaches 90% of his adult height. So help your child by serving Wonder Enriched Bread. Each slice supplies vitamins, minerals, carbohydrates and protein. Delicious Wonder Bread! Helps build strong bodies twelve ways!

(i) Advertisements appearing in newspapers picture children at play and use the following copy:

Make the most of their "Wonder Years." The "Wonder Years," one through twelve, are the formative years, when you can do the most for your child's growth. During these years your children develop in many ways—actually grow 90% of their adult height. Every delicious slice of Wonder Bread is carefully enriched with foods for growing bodies and minds. The "Wonder Years" come only once. Make the most of them. Serve your children nutritious Wonder Bread. Helps build strong bodies 12 ways!

2. Advertisements

14. In the course and conduct of their businesses, respondents ITT Continental and Bates caused the dissemination of certain advertisements in commerce for the purpose of inducing the purchase of Wonder Bread (Stipulation).

(a) *The "How Big" Campaign*

15. The following exhibits are advertisements challenged in the complaint in this matter and were disseminated as part of the "How Big" campaign conducted by the respondents during 1970, and are typical of that campaign:

"How Big" Television Commercials			
Film	Storyboard	Title	Length
CX 1	CX 14	Surfing	60 sec.
	CX 15	Surfing	30 sec.
CX 2	CX 16	Basketball	60 sec.
CX 3	CX 17	Basketball	30 sec.
CX 4	CX 18	Bike/Trike	60 sec.
CX 5		Bike/Trike	30 sec.
CX 6	CX 20	Bike/Trike	30 sec.
CX 7	CX 21	Interviews	60 sec.
CX 8	CX 22	Interviews	30 sec.

"How Big" Magazine Print Advertisement

CX 29 "Big Enough to Make the Team"

16. The films, storyboards, and the magazine print advertisement in the "How Big" campaign were received in evidence at transcript pages 409, 567, 568. The parties stipulated and agreed that the advertisements set forth in Paragraphs 7(a), (b) and

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(h) of the complaint are typical of the advertisements which comprised the "How Big" campaign which began in 1970 and continued at least until January 1, 1971 (CX 172).

(b) *The "Wonder Years" Campaign*

17. The following exhibits are advertisements challenged in the complaint in this matter and were disseminated as part of the "Wonder Years" campaign conducted by respondents between 1967 and 1970 and are typical of the advertisements disseminated in that campaign:

Film	Photoboard	Title	Length
CX 9	CX 23	Cardboard House	60 sec.
CX 10	CX 24	Cardboard House	30 sec.
CX 11	CX 25	Kites	60 sec.
CX 12	CX 26	Kites	30 sec.

"Wonder Years" Newspaper and Print Advertisements

CX 28	Magazine Print Ads
	"Make the Most of their
	Wonder Years"
CX 28(a)	"
CX 30	Newspaper Ads
	entitled
	"Make the Most of their
	Wonder Years"
CX 30(a)	"
CX 30(b)	"
CX 30(c)	"
CX 30(d)	"

(Stipulation, CX 172, Par. 2)

18. Paragraph 7(f) of the complaint sets forth a typical "Wonder Years" radio advertisement used in connection with the introduction of "Wonder Bread" into a new market (Stipulation, CX 172, Par. 2).

(c) *Wonder Bread Advertisements Appearing Only on Children's Programs*

19. The advertisement excerpted in Paragraph 7(e) of the complaint, the script of which was received in evidence as CX 27, is typical of the advertisements for Wonder Bread used on the network television program "Captain Kangaroo" during 1970 and at least until January 1, 1971 (Stipulation, CX 172, Par. 4; CX 27).

20. The advertisement excerpted in Paragraph 7(d) of the complaint is typical of the advertisements for Wonder Bread used

for approximately 13 weeks during 1970 on the television program "Bozo Circus" in Chicago, Ill. (Stipulation, CX 172, Par. 3).

21. The actual films, with audio of the challenged Wonder Bread television commercials were shown at the outset of the hearing and were received in evidence (Tr. 408).

(d) Television Audience and Target Group to Which the Challenged Advertisements Were Directed

22. Respondents' television advertising was directed primarily at two groups. The primary target group was women between 18 and 49 who were mothers of children below the age of 18. The second group to whom the advertisements were directed were children between 1 and 12 years of age. A more complete description of respondents' children's advertising occurs below (Stipulation, CX 175, Par. 2).

(e) Content and Purposes of the Advertisements

23. All of the advertisements for the "How Big" campaign and all of the advertisements for the "Wonder Years" campaign including those shown on children's programming promoted the nutritional qualities of Wonder Bread. In addition between January 1, 1950 and 1964 most advertisements for Wonder Bread also promoted the nutritional qualities of the product and used the slogans "Wonder Bread Helps Build Strong Bodies 8 Ways," and "Wonder Bread Helps Build Strong Bodies 12 Ways." This latter slogan was continued in the Wonder Bread advertisements under challenge and continues to be used until the present (CX 172, Par. 5).

24. All of the Wonder Bread advertisements at least as far back as 1964 were intended by respondents to contain a unique selling proposition. A unique selling proposition is an advertising claim concerning a product which is thought to be strong enough to cause customers to buy the product about which the claim is made rather than a rival product. To be unique, the proposition must be one that the competition cannot, or does not, offer (Stipulation, CX 172, Par. 8).

25. The unique selling proposition used by respondents in advertising for Wonder Bread dealt with the nutritional qualities of the product, as typically stated in advertisements set forth in Paragraph 7 of the complaint. Such advertising in combination with other factors caused a significant number of people to buy Wonder Bread. Although from time to time other bread manufac-

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turers also advertised the nutritional properties to their enriched bread, no other manufacturer so consistently promoted these attributes of bread (Stipulation, CX 172, Par. 9).

26. Between 1964 and 1970, respondents spent at least \$57,595,-737 in advertising expenditures on Wonder Bread advertising promoting its unique selling proposition concerning nutrition (Stipulation, CX 172, Par. 11).

27. A major purpose of respondents' "nutritional advertising campaign" was to convince consumers that for nutritional reasons they should pick Wonder Bread over other brands of enriched bread. The purpose of an advertisement is to sell the advertiser's product as opposed to its competitor's (Woodward 2102).

28. The stipulation of the parties, CX 172, provides that the ads under challenge were intended to contain a "unique selling proposition." In the case of the ads under challenge nutrition was thought to be strong enough to cause customers to buy the advertised product rather than a rival (CX 172). Furthermore, both Mr. Hackett, general advertising manager of respondent ITT Continental, and ITT Continental's president testified if advertisers in general or respondent in particular were forced to disclose to consumers in their advertising the true fact that a particular advertised attribute is not unique to the product being advertised, then these advertisers would consider these advertisements less effective selling vehicles (Woodward 2082-2102; Hackett 2128-29, 2148-49).

29. Finally, ITT Continental's intention with regard to a particular advertising theme may be inferred from the reasons given for changing from one theme to another. Mr. Hackett testified that a major consideration was the belief that nutrition was no longer a "compelling strategy" for consumers to choose one brand over another (Hackett 2119-20), and that the purpose of advertising is to "give people a reason for buying a product, and staying with a product" (Hackett 2152-53).

3. General Description of the Complaint Paragraphs Relating to the Advertisements for Wonder Bread

30. The complaint spells out three basic interrelated charges concerning the advertising for Wonder Bread. First, that the advertisements themselves contain certain direct or implied false and misleading messages, as set forth in Paragraph 8(a)—8(e) of the complaint. The second charge is that these ads are false to

a certain segment of the viewing public, children between the ages of 1-12, and thereby exploit the aspirations of these children for rapid and healthy growth and development. The third charge in the complaint is that these ads are false and misleading to another segment of the viewing public, parents of these children, and thereby exploit the emotional concern of those parents for the healthy growth and development of their children.

31. By their answers, respondents denied that any of the representations alleged in Paragraph 8 of the complaint were made by advertising for Wonder Bread, and in effect further denied that the representation alleged by Paragraph 8(e) of the complaint (if made) was false. Respondents admit that Wonder Bread does not possess the properties that Paragraph 8 of the complaint otherwise alleges that advertising for the product represented it to have.

32. The bulk of the evidence at the hearing concerning the representations made by Wonder Bread's advertising relates to the allegation in Paragraph 8(a) of the complaint, which, throughout the history of this proceeding, complaint counsel have asserted to be equivalent to the question whether Wonder Bread advertising represented that product to be a nutritionally "unique" bread (Pretrial Memorandum of Counsel Supporting Complaint, October 22, 1971, at 2; *e.g.*, Tr. 8, 11, 33, 56, 81, 125, 247, 249, 2795). Inasmuch as "unique" is synonymous with "single" or "sole," the allegation in Paragraph 8(a) requires proof that Wonder Bread was advertised as nutritionally superior to all other enriched white breads.

B. Consumer Perceptions of Wonder Bread's Nutrition Advertisements

33. Complaint counsel introduced in evidence the films of 12 Wonder Bread television commercials (CX 1-12); the storyboards for 14 commercials (CX 13-26); the script for a Wonder Bread commercial on the network television program "Captain Kangaroo" (CX 27); three magazine advertisements (CX 28-28A, CX 29); and five newspaper advertisements (CX 30-30D). The television commercial alleged in Paragraph 7(d) of the complaint and the radio commercial alleged in Paragraph 7(f) of the complaint were not introduced in any form.

34. Respondent admits that although there was no testimony or other evidence to this effect, the following exhibits appear to have come from the "Wonder Years" campaign: CX 9-12, CX 13, CX

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23-26, CX 28-28A, and CX 30-30D. Although, again, there was no testimony or other evidence to this effect, the following Commission exhibits appear to have come from the "How Big" campaign: CX 1-8, CX 14-22, CX 27, and CX 29.

35. Except insofar as certain of the above commercials were shown to have been aired in connection with the on-air commercial testing program described below, there is no evidence in this record of the extent, if any, to which any of the specific commercials or advertisements introduced into evidence by complaint counsel were in fact published, or the circumstances of their publication.

36. In general, the television commercials from the Wonder Years campaign that are in evidence in this case open with scenes of children playing in various ways. Shortly after the audio begins, an insert is overprinted on this activity which, through some unexplained filming technique, shows a child growing in stature. In the sixty-second commercials this sequence occurs twice, but it only occurs once in the thirty-second commercials. In neither case does this insert occupy as much as one-half of the film (CX 9-12).

37. CX 9 is a sixty-second television commercial entitled "Cardboard House Opaque Bag" and is identifiable as such from CX 23. It appears representative of the exhibits from the Wonder Years campaign. The audio for this commercial contains the following language:

ANNOUNCER (Voice Over): These are the "Wonder Years," the formative years, one through twelve, when your child develops in many ways, actually grows to 90 percent of her adult height. To help make the most of these "Wonder Years," serve nutritious Wonder Enriched Bread. Wonder helps build strong bodies 12 ways. Carefully enriched with foods for body and mind, Wonder Bread tastes so good, and it is so good for growing child, for active adult. Each slice of Wonder Bread supplies protein for muscle, minerals for strong bones and teeth, carbohydrates for energy, vitamins for nerves, all vital elements for growing minds and bodies. To help make the most of her Wonder Years, her growth years, serve Wonder Bread. Wonder helps build strong bodies 12 ways.

38. In general the commercials taken from the How Big campaign begin by the announcer asking "How big do you want to be?" In different commercials, one, two, or three children are shown answering the question in various ways. In all these exhibits, through some unexplained filming technique, a child is depicted apparently growing in stature. In some commercials this sequence is shown twice, but in others it is shown only once.

39. CX 2 is a sixty-second television commercial entitled "Basketball," and is identifiable as such from CX 16. It appears representative of the exhibits from the "How Big" campaign. The audio for this commercial includes the following language:

ANNOUNCER (Voice Over): Wonder asks, how big do you want to be?

BOY: Big enough so that the barber won't have to cut my hair in a baby's chair.

GIRL: Big enough to be a cheerleader.

SECOND BOY: Big enough to sink a basket.

ANNOUNCER (Voice Over): He'll never need Wonder Bread more than right now, because the time to grow bigger and stronger is during the "Wonder Years," ages one through twelve—the years when your child grows to ninety percent of his adult height. How could you help? By serving nutritious Wonder Enriched Bread. Wonder helps build strong bodies 12 ways. Each delicious slice of Wonder Bread supplies protein for muscle, minerals for strong bones and teeth, carbohydrates for energy, vitamins for nerves, all vital elements for growing minds and bodies. During the "Wonder Years," the growth years, help your child grow bigger and stronger. Serve Wonder Bread. Wonder helps build stronger bodies 12 ways.

40. No evidence was offered that any of the representations alleged in Paragraph 8 of the complaint are made *expressly* in any advertising for Wonder Bread. Indeed, the Commission's only expert witness on the potential meaning of the advertising to consumers testified that Wonder Bread advertisements do not directly or "*manifestly*" contain any of the representations alleged (Mendelsohn 1888-89, 1893).

41. Review of the advertisements themselves confirms that they do not *expressly* make any representation alleged in Paragraph 8 of the complaint.

42. On the question whether any of the representations alleged in Paragraph 8 were made by *implication* in Wonder Bread advertising, most of the evidence at the hearing was directed to the allegation of Paragraph 8(a) of the complaint that Wonder Bread's advertising implied that the product was *uniquely nutritious*.

43. Although it is stipulated that the Wonder Bread advertising involved in this proceeding was intended by respondents to contain a "unique selling proposition" dealing with nutrition, it is further stipulated that a unique selling proposition is nothing more than an advertising claim that either is not or cannot be made by the advertiser's competitors (CX 172, Par. 8).

44. Other bread manufacturers have in fact advertised the

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nutritional qualities of their enriched breads (CX 172, Par. 9; RX 30; RX 43; Woodward 2071).

45. At the outset of the Wonder Years campaign the advertisements were submitted to the Federal Trade Commission in the course of its investigation in File No. 622 3357. That investigation was officially terminated by the Commission in early 1965 (Thomas 2157-58; Anderson 2507-08). No suggestion was ever made to ITT Continental, or its predecessor, that the advertising conveyed a uniqueness claim until about March 1970 when a communication was received to that effect from associates of Ralph Nader (Woodward 2080). The Commission raised no questions concerning the Wonder Years advertising until the investigation leading to the complaint in this proceeding began in July 1970 (Thomas 2167).

46. Much of the evidence introduced by complaint counsel on the question whether Wonder Bread advertising impliedly represented that the product was uniquely nutritious consisted of various surveys of consumer attitudes. Among these surveys, however, only the so-called "copy tests" purported to measure the impact on consumers of any television commercials or other advertising involved in this case.

47. The copy-testing program for Wonder Bread advertisements was initiated in July 1969 (Hackett 2118), and was conducted by a market research company in New York City, Appel, Haley, Fouriezos, Inc., formerly Grudin, Appel, Haley, Inc. (Appel 1085-86, 1088-89). Each of the tests was a separate survey designed to measure the effectiveness of the advertisement being tested (Appel 1144). Portions of a number of these surveys were offered by complaint counsel and respondent, and were received into evidence. The following lists the exhibit number, test number, and title of the advertisement being tested for each such survey, portions of which were received in evidence:

1. CX 45—Print Ad Test No. 2, "Kevin" Digest vs. Full Size
2. CX 46—On-Air Commercial Test No. 5, "Cardboard House :60";
3. CX 48—On-Air Commercial Test No. 7, "Cardboard House :30";
4. CX 50—On-Air Commercial Test No. 10, "Kites :30";
5. CX 52—On-Air Commercial Test No. 17, "Interviews :60";
6. CX 54—On-Air Commercial Test No. 18, "Interviews :30";
7. CX 56—On-Air Commercial Tests Nos. 29 and 30, "Surfing" and "Surfing II";

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8. CX 61—On-Air Commercial Tests Nos. 35 and 36, "Camper" and "Camper II";
9. CX 74—On-Air Commercial Tests Nos. 37 and 38, "New Kind of Bread" and "Take Away";
10. CX 79—On-Air Commercial Tests Nos. 39 and 40, "Squeeze Me :60" and "The Fresh One :60";
11. CX 84—On-Air Commercial Tests Nos. 46 and 47, "Punching Bag :60" and "Punching Bag :30";
12. CX 86—On-Air Commercial Test No. 48, "The Fresh One :60";
13. CX 89—On-Air Commercial Test No. 49, "The Fresh One :30";
14. CX 92—On-Air Commercial Test No. 54, "Surfing II Retest";
15. RX 48—On-Air Commercial Test No. 30, "Surfing II", other portions of which were received in CX 56; and
16. RX 49—On-Air Commercial Test No. 34, "Wonder Bread 'Art Linkletter'".

48. The object of the copy tests was to measure the effectiveness of the television commercial being tested by comparing the perception of Wonder Bread on a *variety of product attributes* by consumers not exposed to the commercial with the perceptions of Wonder Bread on the same attributes by consumers who had been exposed to the commercial (Appel 1099, 1108, 1144).

49. With one exception, CX 86, the tests were conducted in four markets: Sacramento, Calif., Youngstown, Ohio, Wash., D.C., and Buffalo, N.Y. (Appel 1096-97).

50. The universe sampled consisted of female heads of households living in these four cities, with listed telephone numbers, between the ages of 18 and 49, with a child under 19 years of age living at home, and the results of these surveys may be projected to that population (Appel 1101, 1105-06).

51. The surveys in the Wonder Bread copy testing program are more sophisticated in design than most similar research studies, and precautions were taken that made the cost per test two to three times greater than that for the standard test that most advertisers would normally use (Appel 1094-95).

52. The demographic characteristics of consumers exposed to the commercial being tested (the so-called "test group") were well matched with the characteristics of the group that was not exposed to the commercial (the so-called "control group") (Appel 1101). Exhaustive pretests of the questionnaire used in these

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surveys were conducted, the interviewers were carefully trained, and validation checks were made to insure that the interviews were conducted, and were conducted properly (Appel 1102-04).

53. Persons in both the control group and the test group were asked to rate Wonder Bread and a competing bread (the so-called "control bread") on a number of dimensions, including overall opinion, and at least five attributes of bread—nutrition, taste, freshness, for children, and quality of ingredients (Appel 1098; *e.g.*, CX 47). The attribute "for children" cannot be equated with nutrition since a bread may be regarded as appropriate for children for numerous other reasons (Bauer 2396).

54. To the extent that any differences in the ratings on Wonder Bread were statistically reliable, that is, not a result of chance, they were necessarily attributable to the fact that the test group had been exposed to a Wonder Bread commercial and the control group had not (Appel 1099).

55. The primary criteria used to assess the effectiveness of specific commercials were the ratings consumers gave Wonder Bread on "overall opinion" and "predisposition to buy" (Appel 1145). A commercial that performed well on these dimensions was judged effective without regard to its performance on other "secondary measurement criteria," which included ratings of specific attributes of bread such as taste, nutrition, freshness, and others (Appel 1145). The ratings given by consumers to the control bread were irrelevant at the time the tests were conducted and no data concerning these ratings were included in the reports of the surveys furnished to ITT Continental and introduced into evidence (Appel 1119-20, 1150, 1160; Lazarsfeld 1835-36). Persons in the test group, which had been exposed to the commercial, were also asked a series of questions intended to determine the messages consumers derived from the commercial being tested (Appel 1098-99, 1108).

56. The questionnaires used in the copy tests show that interviewers were instructed to probe fully in eliciting survey respondents' recall of the commercial being tested (*e.g.*, CX 47 at 5). The verbatim responses were examined in considerable detail by Appel/Haley and were included in the survey reports (Appel 1099-1100).

57. These "recall" questions would reveal to respondents the purpose of the survey with the result that responses to subsequent questions (including those in which the product attributes were rated) would be inflated in favor of Wonder Bread (Appel

1147). This instance of "questionnaire bias" would not constitute a serious weakness in the design of the surveys, given the purpose for which they were done, but it would quite seriously bias, to the decided advantage of Wonder Bread, any effort to compare the ratings of the control bread on the product attributes with those of Wonder Bread (Appel 1147-50; Lazarsfeld 1801-02).

58. RX 32 is a tabulation of certain of the data compiled in 19 separate surveys that were part of the Wonder Bread advertising copy testing program. RX 46 and RX 47 reflect computations made from RX 32 by respondent's expert witness Raymond A. Bauer, which computations reflect the average effects of the commercials on consumers' overall opinion of Wonder Bread and on their perception of specific attributes.

59. RX 46 shows, that for 13 tests of commercials with a nutritional theme, the difference between control and test group ratings was at least the same on attributes other than nutrition as it was on the attribute of nutrition; that is, exposure to the Wonder Bread commercial resulted in at least as much gain in the ratings of Wonder Bread on attributes other than nutrition as it did on nutrition (Bauer 2384-86). The average gains generated by nutrition commercials that were computed by Dr. Bauer and are shown on RX 46 are as follows:

Overall Opinion	+5.6
Taste	+6.9
For Children	+6.4
Quality of Ingredients	+5.0
Nutrition	+5.0
Freshness	+5.0

60. Similarly, four commercials that promoted the freshness attribute of Wonder Bread caused no greater increase in consumer ratings of Wonder Bread on freshness than they did on consumer ratings of Wonder Bread on other attributes (RX 46; Bauer 2385-86).

61. RX 47 correlates the gains caused by Wonder Bread's nutritional advertising in consumer ratings of Wonder on overall opinion and on the specific product attributes (Bauer 2386-87). With respect to the 13 nutrition commercials, RX 47 shows that when such a commercial generates an above-average increase in the ratings of Wonder Bread on overall opinion it also generates substantial increases in ratings of the specific attributes of Wonder Bread, but that those commercials that perform below aver-

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age on overall opinion do not produce substantial gains on the attributes (RX 47; Bauer 2387). The specific findings of Dr. Bauer reflected in RX 47 are as follows:

	<i>Nutrition Ads</i>	
	High Overall (5.6+)	Low Overall (5.6-)
Nutrition	9.3%	1.3%
Taste	11.8%	2.7%
For Children	8.8%	4.3%
Freshness	7.5%	2.8%
Quality of Ingredients	8.0%	2.4%
	6 ads	7 ads

RX 47 shows the same pattern for the four freshness commercials tested (Bauer 2388).

62. Together, RX 46 and RX 47 establish that Wonder Bread commercials promoting nutrition had no specific distinctive nutritional impact, but rather an undifferentiated effect; that is, if effective, the commercials caused gains in consumer perception of all attributes of Wonder Bread, not simply nutrition (Bauer 2384, 2387).

63. RX 46 and RX 47 refute complaint counsel's contention that the nutritional advertising for Wonder Bread made people think Wonder Bread was more nutritious than other breads or created an image of Wonder Bread as distinctively nutritious (Bauer 2398).

64. A regular phenomenon of both psychology in general and consumer psychology in particular is the "halo effect," by virtue of which a person's overall impression of a phenomenon will color his impression of specific attributes of the phenomenon, or by virtue of which a favorable impression of an attribute will create an overall favorable impression (Bauer 2381; Rossi 1564; Kuehn 2618). The halo effect may arise from use of a product, its general popularity, or from the undifferentiated impact of its advertising (Bauer 2401-02; Rossi 1565).

65. It is stipulated in this case that surveys of consumer attitudes towards nine well-known, popular and leading brands of common consumer products (whether or not advertised) would show that consumers usually regard these brands as better than their competitors on a variety of desirable attributes, whether or not the attributes are mentioned in advertising for these brands and whether or not the brands differ materially from their competitors with respect to the attributes on which they receive higher ratings (RX 23). It is further stipulated that these same

surveys would show that exposure to an advertisement of a well-known brand usually results in increases of consumer ratings of desirable attributes of these brands, whether or not these attributes are mentioned in the advertisement (RX 23).

66. A survey based on a probability sample of nearly 2,500 interviews selected to represent the adult population of the United States reflects that a large majority of the population believes that well-known brands are purchased simply because they are thought to be better (RX 24).

67. The halo effect is likely to be stronger in the case of an attribute such as nutrition that consumers cannot effectively measure or in the case of an attribute that is relatively unimportant to a consumer's purchase decision (Bauer 2390, 2391-92; Kuehn 2618; Rossi 1602-03).

68. The lack of relevance of nutrition to bread purchasing decisions is established by certain portions of a survey entitled the "Wonder Bread Problem Market Study" (CX 95-102; RX 41). Both complaint counsel and respondent offered portions of this survey. RX 41 consists of tables entitled "Major Reasons for Buying Brand Most Often" taken from the reports on the results of the problem market study in seven major cities. This data shows that nutrition is probably the least important reason in the eyes of consumers for choosing a particular brand of bread (Bauer 2393). RX 41 records results of roughly 500 interviews conducted in each city, and shows that in no instance in any one of these cities did as many as 1 percent of the persons surveyed cite nutrition as a reason for buying one brand of bread over another (RX 41; Bauer 2393-94).

69. Table 18 of CX 95 is entitled "The Importance of White Bread Attributes," and reflects, on a 10-point scale, the importance to consumers of 24 attributes of bread. The four listed attributes that are in any way related to nutrition are not near the top of this list, but rather fall in the middle (Rossi 1581; Bauer 2394-95). The fact that this data indicates that nutrition is viewed as having some importance, however, does not mean that nutrition is a differentiating factor among brands (Bauer 2395). Even before he was confronted with the tables later introduced as RX 41, an expert witness for the Commission had concluded that nutrition was not an important factor in bread purchase decisions (Rossi 1620).

70. RX 46 and RX 47 demonstrate that the effects of Wonder Bread commercials were not a function of the specific claims

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made and further show that the halo effect was operative in the case of Wonder Bread advertising (Bauer 2388-89). By themselves, RX 46 and RX 47 do not show whether it operated through an initial change in overall opinion or in a specific attribute (Bauer 2426-27). The minimal importance of nutrition as a reason for consumer preference of one brand of bread over another, however, indicates that the halo effect most likely operated by a change, first in overall attitude toward Wonder Bread, which then generated changes in consumer perceptions of its attributes (Bauer 2427-28). The probability of consumers responding first to information about an attribute as unimportant as nutrition is extremely low, since persons do not pay attention to things inversely to their importance (Bauer 2427-28). The content of the commercials was important only insofar as it operated as a convenient organizing theme around which a commercial could be generated that attracted attention and created a generally favorable attitude toward Wonder Bread (Bauer 2397).

71. RX 54 reflects the results of certain "regression analyses" of data contained in CX 155 (Kuehn 2563), which was identified as a printout from IBM cards prepared in connection with certain of the copy tests. CX 155 includes consumer ratings of both Wonder Bread and the control bread on overall opinion and the specific product attributes (Chamblee 1204-08).

72. RX 54 presents data from CX 155 for only four of the copy tests, because these were the only tests for which matching data for both test and control groups were available, and commercials are generally tested by using both control and test groups (Kuehn 2564). The purpose of the analysis in RX 54 was to determine the effect of the commercials being tested, two of which promoted nutrition and two of which promoted freshness (Kuehn 2576-77). The commercial tested in Test No. 5 is entitled "Cardboard House :60," CX 9 in this case (see CX 46), and the commercial involved in Test No. 10 is entitled "Kites :30," CX 12 in this case (see CX 50). RX 54 includes analysis of data underlying tests of these commercials.

73. RX 54 employs four different measures for assessing the impact of the commercials, although in each instance the most meaningful, and the one generally used more than all the others combined, is the measure based on the percentage of persons in both the control and test groups who rate Wonder Bread higher than the control bread on any given attribute (Kuehn 2567, 2626).

74. The regressions indicate that the major effect of the commercials was to increase consumer ratings of Wonder Bread on the dimension of taste (RX 54; Kuehn 2565).

75. The regressions also indicate that exposure to a Wonder Bread commercial never caused consumer perceptions of Wonder Bread on nutrition to stand out significantly from consumer perceptions of Wonder Bread on other attributes, and further that these commercials did not cause consumers to perceive Wonder Bread as more nutritious than other breads when compared to the perceptions of consumers not exposed to a Wonder Bread commercial (RX 54; Kuehn 2565).

76. In addition to the material relating to consumer ratings of Wonder Bread's attributes, complaint counsel offered in evidence those pages from most of the copy tests that recorded the verbatim responses that are described in Findings 55-56, *supra*. The verbatim responses from two additional copy tests were offered into evidence by respondent (RX 48 and RX 49).

77. Two witnesses who testified on the Commission's case-in-chief agreed that examination of these verbatim responses constituted a good, or at least acceptable way of determining how consumers understand Wonder Bread's television advertising (Lazersfeld 1829; Mendelsohn 1896). Dr. Lazersfeld had examined the verbatim responses (Lazersfeld 1828), and concluded that the persons whose responses are recorded do not say that they understand Wonder Bread commercials to say that Wonder Bread is better than other breads (Lazersfeld 1830). Two expert witnesses for respondent testified that the verbatim responses are evidence of consumer understanding of Wonder Bread's advertisements (Britt 2353; Crissy 2476).

78. Respondent presented the testimony of Donald W. Jackson, a doctoral candidate in marketing at Michigan State University (Jackson 2438). This witness had conducted a systematic content analysis of all the verbatim responses (2,065 in number) contained in 19 separate tests (Jackson 2439-41).

79. Of these, only 61 support any one of the five allegations stated in Paragraph 8 of the complaint (Jackson 2442-43).

80. With respect to those copy tests of commercials that promoted the nutritional quality of Wonder Bread only 53 of 1,320 support any one of the Commission's allegations. Of these, nine, or less than 1 percent of the total, support the allegation that Wonder Bread is represented to be uniquely or outstandingly nutritious as alleged in Paragraph 8(a) of the complaint; 24

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support the allegation in Paragraph 8(b); 12 support the allegation in Paragraph 8(c); seven support the allegation in Paragraph 8(d); and only one supports the allegation in Paragraph 8(e) (Jackson 2447).

81. On cross-examination Jackson agreed that two additional responses should be included in his tabulation (Jackson 2471). Only one of these, however, was generated by a nutrition commercial, and its inclusion would not alter the finding that less than 1 percent of the verbatim responses generated by the nutrition advertising for Wonder Bread support the allegation that consumers understand such advertising as representing Wonder Bread to be a distinctively or uniquely nutritious bread.

82. It was agreed by witnesses both for respondent and, on rebuttal, for the Commission, that customary methodology for content analysis of this kind involves a test of reliability that requires independent coding by more than one person of either all, or at least a subsample, of the items being analyzed (Crissy 2491-92; Gerbner 2786-87).

83. In fact, the verbatim responses were systematically analyzed by two different persons with results that were consistent (Crissy 2478-79, 2492).

84. Based on this consistency data, plus his own reading of roughly one-half of the responses, respondent's witness Crissy estimated that the degree of error in the Jackson tabulation would be a maximum of 1 or 2 percent and would not be a matter of any significance (Crissy 2480; see also Crissy 2492-93).

85. Complaint counsel offered most of the verbatim responses in evidence on their own case-in-chief. Although complaint counsel on rebuttal offered testimony critical of some aspects of the Crissy/Jackson analysis, complaint counsel have never offered any evidence tending to show that the verbatim responses support any allegations of the complaint.

86. Review of the verbatim responses is within the competence of the finder of fact. The verbatim responses establish that consumers do not perceive the Wonder advertising to contain the representations alleged in the complaint. The rare instances of support for the complaint allegations in the verbatim responses are of no significance since even the clearest communication will be misunderstood by some small number of persons (Bauer 2403).

87. Respondent presented the testimony of Dr. Steuart Henderson Britt, a psychologist with extensive experience in marketing,

advertising, consumer behavior, and consumer understanding of advertising (Britt 2326-29, 2348; RX 44). Dr. Britt had studied the films of the Wonder Bread commercials introduced into evidence by complaint counsel, examined print advertising for Wonder Bread, and had further examined roughly one thousand of the verbatim responses (Britt 2347, 2350, 2351-53). It was his opinion that this advertising did not represent, *and would not be understood by consumers to suggest, that Wonder Bread is an outstanding source of nutrients distinct from other enriched breads or that Wonder Bread is a uniquely nutritious bread* (Britt 2349). On the basis of his experience with other advertising campaigns that have run for a great period of time, Dr. Britt concluded that the fact that nutritional advertising for Wonder Bread was used for a number of years would not result in consumers' understanding that other breads were not as nutritious as Wonder Bread (Britt 2349-50).

88. It was further Dr. Britt's opinion that the *Wonder Bread advertisements involved in this case do not make, either expressly or by implication, any of the representations asserted in Paragraphs 8(b)-(e) of the complaint* (Britt 2349-51).

89. *The only witness that complaint counsel presented on the question of how consumers would understand Wonder Bread advertising examined these advertisements to determine both what they actually say and "what people may possibly derive from them."* (Mendelsohn 1882). *This witness agreed that none of the advertisements expressly made any of the representations alleged in Paragraph 8 of the complaint.*

90. With reference to the allegations of paragraphs 8(a) through (d), Dr. Mendelsohn testified that "it is quite possible" for some consumers to read the alleged representations into Wonder Bread television advertising (Mendelsohn 1885, 1888-89, as corrected, Tr. 1917-18).

91. In assessing what he described as the "latent content" of Wonder Bread's advertising, Dr. Mendelsohn considered, as very important, the duration of the advertisements in terms of length, scope, and frequency by which the same proposition is repeated with little variation (Mendelsohn 1881-82).

92. Dr. Mendelsohn admitted that the validity of his testimony was subject to proof or disproof based on factual data and that he would have a scientific obligation to change, or even reverse, the opinions he stated if factual data showed that consumers do not

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perceive Wonder Bread's advertising in the fashion he had described (Mendelsohn 1895). *He had not studied any of the data available in the record indicating how consumers in fact perceive Wonder Bread advertising* (Mendelsohn 1894). Also, although Dr. Mendelsohn purported to find a "powerful appeal" based on nutrition in the advertising, the record establishes that most of the commercials tested were judged ineffective on the most important criterion by which their performance was measured (Hackett 2120), and that nutritional advertising was abandoned as ineffectual (Hackett 2121-22).

93. Both Paragraphs 8(b) and (c) allege that Wonder Bread's advertising represents the products to have *all* nutrients essential to healthy growth and development. No commercial in evidence expressly makes this claim. Thus Dr. Mendelsohn's opinion that Wonder Bread's advertising might be understood in the manner alleged in Paragraphs 8(b), (c), and (d) of the complaint is in conflict not only with witnesses presented by respondent but also with the testimony of the Commission's own expert witness, Dr. Briggs.

94. Yet another Commission witness testified that although a child of 3 or 4 might understand that Wonder Bread by itself could cause a child's growth, "[t]he word 'help' that is used there is very clear to an adult * * * ." (Solnit 608) (emphasis added).

95. There is no record evidence that the reference to protein in Wonder Bread advertising expressly or impliedly represents to consumers that the protein in Wonder Bread is complete protein of high nutritional quality necessary to assure maximum growth and development, as alleged in Paragraph 8(e). Moreover, respondent denied that the protein in Wonder Bread was not of a nutritional quality sufficient to assure maximum growth and development when Wonder Bread is consumed in the customary manner that bread is used in the diet.

96. To summarize the evidence presented concerning the impact of specific Wonder Bread advertisements on consumers, they support the following findings:

a. Wonder Bread advertisements had no impact on consumers that was specific to the attribute of nutrition, or was a function of the claims made.

b. The commercials in question generated a "halo effect" which was not shown to be the result of the nutritional content of the commercials.

c. Exposure to Wonder Bread television advertising that promotes nutrition does not cause consumers to perceive Wonder Bread as more nutritious than other breads.

d. Only a small and insignificant percentage of consumers exposed to Wonder Bread television commercials understand those commercials to make any claim alleged by Paragraph 8 of the complaint.

e. None of the challenged advertising for Wonder Bread contained, either directly or by implication, any of the representations alleged in the complaint.

C. Consumer Perceptions of Wonder Bread Not Shown to Be Connected to Wonder Bread Advertising

97. In addition to the survey material and other evidence described above that related to the direct effects of Wonder Bread advertisements, complaint counsel introduced several surveys and other exhibits and related testimony concerning consumer attitudes toward Wonder Bread and other brands of bread. These surveys, which do not purport to measure the direct impact of Wonder advertising, are discussed *seriatim* below.

98. CX 112 consists of certain portions of a study entitled "BBDO Omnibus for Wonder Bread, July, 1971" conducted by the research department of Batten, Barton, Durstine & Osborn, Inc. (CX 112; Light 1346).

99. The "Omnibus" is a survey done on a quarterly basis in 60 cities throughout the United States, and the results of the Omnibus are projectable to houses with telephones in communities that represent about 70 percent of the packaged good sales in the United States (Light 1348-49).

100. Interviews for the survey were conducted by telephone, and efforts were taken to distribute the calls during the day and evening hours. Three callbacks were made to reach prospective respondents who had not otherwise been contacted (Light 1349). Two validation checks on the interviews were conducted (Light 1349-50).

101. Respondent ITT Continental participated in this survey in both April and July of 1971. The data in CX 112 reflects the results of the surveys in both months, though the tabulations in CX 112 are limited to those markets in which Wonder Bread is distributed, and the data are projectable to these markets (Light 1348, 1349, 1353). Because Wonder Bread *is the single brand distributed throughout all these markets*, it is to be expected that

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the results shown in CX 112 are inflated in favor of Wonder Bread (Light 1355-56; Rossi 1652). Because users of a product tend to regard it as better in specific attributes than products they do not use, a product's market share affects its performance in surveys of consumer attitudes (Light 1356; Rossi 1565; Bauer 2401-02).

102. Complaint counsel's expert witness on CX 112 testified that it provides a good measure of the extent to which consumers perceive Wonder Bread as superior to other breads on nutrition, although he agreed that because the data tabulated in CX 112 was limited to Wonder Bread markets, any such estimate based on this material would have to be revised downward (Rossi 1652).

103. Table 74 (page 108) of CX 112 shows that in July 1971, 72.3 percent of the respondents surveyed regarded all brands of white bread the same in terms of nutrition (Rossi 1569-70, 1628; CX 112, Table 74), and that only 5 percent of the respondents surveyed thought that Wonder Bread stands out on nutrition from other breads (CX 112, Table 74). This same table shows that 3.7 percent of the respondents surveyed thought that Wonder Bread was among the better breads on nutrition, but these responses cannot be equated with a belief *that Wonder Bread is unique or stands out on nutrition* (Rossi 1627; Light 1356).

104. Using regression analysis Professor Rossi purported to try to determine whether consumer perceptions of the nutritional attributes of Wonder Bread reported in CX 112 derived from some source other than a halo effect flowing from Wonder Bread's general popularity. The results of this analysis are contained in CX 157, and show that the halo effect cannot be discounted as the source of the ratings that Wonder Bread stands out on nutrition (CX 157; Rossi 1573). In effect, then, the 5 percent who stated that Wonder Bread stands out on nutrition (which percentage is itself inflated) cannot be found to have derived that belief from Wonder Bread's advertising, since the halo effect is as likely to have been the source of that perception.

105. CX 112 also demonstrates that consumer perceptions of the nutritional superiority of a bread may develop in the absence of nutritional advertising. Table 73 of CX 112 shows that Arnold and Pepperidge Farm, which together have about one-half the market share of Wonder Bread and have never been advertised on a nutritional basis, are mentioned as being superior on nutrition by virtually the same number of persons as the number that mentioned Wonder Bread (Bauer 2399-2401).

106. That same table also reflects that data tabulated for the Pacific region showed that between April 1971 and July 1971 there was a statistically significant increase in the percentage of persons who thought that Wonder Bread stood out on nutrition (CX 112, Table 73; Bauer 2405-06). *During this period in the Pacific region Wonder Bread was being advertised exclusively on the basis of freshness* (Bauer 2406; Hackett 2123, 2137).

107. From the data from CX 112 contained on page 3 of CX 157, prepared by Dr. Rossi, the characteristics of both Pepperidge Farm and Arnold were compared by means of regression analysis with the characteristics of Wonder Bread (Kuehn 2625). Both Arnold and Pepperidge Farm performed better than would be expected on the nutritional rating (Kuehn 2624-25; Rossi 1650), which is evidence that they are regarded as more nutritious than Wonder Bread (Kuehn 2624-25).

108. RX 11 consists of a single table taken from the report of the BBDO Omnibus for Wonder Bread conducted in April 1971 (Light 1357). This survey was done in exactly the same fashion as CX 112, but the results tabulated in RX 11 are not limited to those markets in which Wonder Bread is distributed (Light 1357). RX 11, which at one time was designated as CX 111 in this proceeding, shows that in April 1971, only 3.7 percent of the universe thought that Wonder Bread stood out on nutrition (Rossi 1628-29).

109. CX 110, RX 12, RX 13, and RX 60 all constitute portions of a survey conducted for respondent in 1966 by Oxtoby-Smith, Inc., a market research firm in New York City, which conducts consumer surveys for a broad variety of corporations in the United States (Peterson 1435, 1452). This study is entitled "A Study of the Packaged White Bread Market in Which Wonder Bread Is Sold (Final Report)" and was referred to by various witnesses at the hearing as the "Basic Bread Study." The results of this study, insofar as they relate to adults, can be projected to white English-speaking housewives residing in Wonder Bread marketing areas who, at the time of the survey, had purchased packaged white bread within the past month (Peterson 1444-45). From the evidence concerning the methodology of this survey (Peterson 1441-45), the methodology and results of this survey appear reliable, with the following qualifications: (a) the survey measures attitudes only as they existed when the interviews were conducted in early 1966, and the data in the survey cannot safely be projected to the present (Peterson 1452-53); and (b) the

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children who were surveyed in connection with the study were not chosen according to a probability sample, and the data that relates to them is not projectable to any universe beyond the sample of children itself (Peterson 1451-52).

110. RX 13 is a table from the Basic Bread Study entitled "Qualities Liked about Favorite Bread" (RX 13; Peterson 1487). With responses tabulated down to 1 percent, there is no mention of nutrition as a quality liked either by users of Wonder Bread, users of premium breads, or users of private labels (RX 13). RX 60 is a table from the Basic Bread Study entitled "Perceived Differences in Brands of Regular White Bread" (RX 60). Again, there is no mention of nutrition as an attribute on which brands of white bread differ (RX 60). This study demonstrated that no single bread was viewed by consumers as standing out on nutrition (Hackett 2118).

111. CX 108, entitled "Detailed Tabulations: A Study of the Market for White Bread in Kansas City," is a study that was conducted by Oxtoby-Smith, Inc. for respondent in the fall of 1965 in Kansas City (Peterson 1461-62). The two hundred people interviewed were not selected according to a probability sample and therefore the findings are not projectable to any population beyond the sample itself (Peterson 1463-64).

112. CX 95-102 and RX 41 constitute portions of a survey entitled the Wonder Bread Problem Market Study, conducted by Grudin, Appel, Haley, Inc. on behalf of respondent in 1969 (CX 95, at 1-2). The record concerning the methodology of this survey is extremely limited and does not disclose the procedures employed in the survey, including the manner in which the sample was selected or even if probability sampling techniques were used (Appel 1138-40). This survey must be ignored in any determination of this proceeding.

113. Two of complaint counsel's expert witnesses testified that two important criteria for assessing the quality of any survey include the design of the sample surveyed and of the questionnaire used (Lucas 750; Rossi 1548). The Commission's witness on the Problem Market Study had never seen the questionnaire on which the survey was based (Rossi 1656).

114. CX 156 reflects some measure of consumer perceptions of Wonder Bread on 28 dimensions *vis-a-vis* other breads in five of the eight cities in which the Problem Market Study was conducted (Rossi 1559). By simply running an arithmetical count, Dr. Rossi concluded that on four dimensions related to nutrition,

Wonder Bread had a statistically significant advantage 34 out of 40 times, whereas on all other qualities, which Dr. Rossi lumped together, Wonder Bread had a statistically significant advantage 139 times out of 240 (CX 156, page 2; Rossi 1560, 1610).

115. Dr. Rossi concluded from this fact that, although Wonder Bread was seen as superior by and large *on almost every quality* (an indication of "some kind of halo effect"), its superiority on nutrition was more pronounced (Rossi 1560, 1566).

116. From the underlying tables, which are in the record, it is possible to make the same comparison for attributes other than nutrition that Dr. Rossi performed with respect to nutrition. There are at least two such attributes, "freshness" and "gives better value for your money," on which Wonder Bread's relative performance is as strong as it is on nutrition (Rossi 1610-12).

117. Wonder Bread's performance on qualities other than nutrition depends on both the kind and the number of attributes that were rated. Thus the results of Dr. Rossi's computations would vary according to changes in the number of factors surveyed, their quality, and the way they are stated, that is, whether in positive or negative terms (Rossi 1616-17, 1637-38).

118. CX 159 reflects the results of regression analyses run by Dr. Rossi for the purpose of comparing the ratings of the importance to consumers of 24 characteristics of white bread shown in Table 18 of CX 95 with the actual ratings given Wonder Bread on these attributes in the four control markets where Wonder Bread was performing successfully (Rossi 1581).

119. The results of this analysis showed a fairly strong relationship between the importance of the attributes to consumers and the actual rating of Wonder Bread on those attributes; that is, if a quality was deemed important, the rating of Wonder Bread on that quality was also found to be high (Rossi 1582). This is evidence that the halo effect is operating (Rossi 1581).

120. Although Wonder Bread performed consistently better than the "ideal bread" on the nutrition attributes, Dr. Rossi found that by and large all brands performed better on these qualities and that, therefore, no firm conclusion of any sort can be drawn from CX 159 concerning whether anything in addition to the halo effect accounted for Wonder Bread's performance on the nutrition attributes in CX 159 (CX 159, p. 2; Rossi 1583-86).

121. In CX 160 mean consumer ratings of the attributes of Wonder Bread were compared with consumer ratings on each of

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two other breads in five of seven cities studied in the Problem Market Study (Rossi 1586-87).

122. Although Wonder Bread was found to perform better than the competing breads on the four nutrition attributes, further investigation employing the same technique and all seven markets revealed that the performance of two other breads on the same dimensions was not significantly different from the results observed for Wonder Bread (RX 53; Kuehn 2554-57; 2562-63). A third brand exhibited the same pattern as Wonder (RX 53; Kuehn 2557). Other breads, in other words, exhibit the same characteristics with respect to the nutrition attributes that Rossi found for Wonder in his analysis in CX 160 (Kuehn 2558).

123. The data on which CX 160 is based is limited to a comparison of Wonder Bread with certain named brands in each of the five cities studied and does not purport to compare Wonder against all breads (Rossi 1649). RX 53 demonstrates the variability of the performance of various breads, at least within the framework of the technique employed by Dr. Rossi, and shows that the results in CX 160 depend on the set of brands used (RX 53; Kuehn 2557). *It is likely that had other breads been used, some would have outperformed Wonder Bread on nutrition* (Kuehn 2557).

124. Regression analysis of the type employed by Dr. Rossi in preparing CX 157-160, is a sophisticated mathematical procedure in which a line is fitted among points on a graph (here ratings given to various attributes of bread). Conclusions based on regression analysis of Wonder Bread's nutrition ratings depend on (1) the number and kind of other attributes that are rated, (2) the ratings given the attributes that are included, (3) the form (positive or negative) in which the ratings are compiled, and (4) attribute ratings for other brands. Changes such as deletion of any attribute, or in ratings given another brand, would change the location of the regression line and thereby affect the conclusions inferable as to Wonder Bread's nutrition rating (Kuehn 2573-74; Rossi 1642-43).

125. Because the results obtained by regression analysis depend on all these variables, the results reflect a substantial amount of judgment as to what data to include and exclude (Rossi 1636-37; Kuehn 2574). The results also depend upon what some market researcher chose to measure and not to measure (Rossi 1636). Dr. Rossi himself recognized the importance of the element of judgment involved in the use of regression analysis when he sought to

explain the inconclusive results shown in CX 157 on the grounds that he had included "garbage as well as some fine material" in his analysis (Rossi 1573).

126. Moreover, in those regression analyses in which a comparison is drawn between Wonder and another brand, the conclusions as to Wonder ratings necessarily depend upon the perception which the other brand has created among consumers through its own advertising, merchandising, pricing, and the like (Rossi 1641-42).

127. None of the computations Dr. Rossi performed permitted him to render an opinion, or even a "best estimate," as to the proportion of the housewife population that regards Wonder Bread as nutritionally superior (Rossi 1660). On direct examination, Dr. Rossi estimated that from 10 to 25 percent of the housewife population in the United States considers Wonder Bread to have superior nutritional qualities (Rossi 1594-95), but on cross-examination, it was shown that this estimate, which was little more than a guess (Rossi 1653-54), in some fashion combined data concerning two quite distinct subjects (Rossi 1652-53). Whatever that estimate was intended to reflect, it did not take account of relevant material that he had not studied—those tables from the Problem Market Study, which were later received in evidence as RX 41 (Rossi 1655-57). Confronted with these tables on cross-examination, the witness revised the lower bounds of his "estimate" to zero (Rossi 1657).

128. CX 155 and CX 165 constitute printouts from IBM cards used in the on-air commercial testing program, and according to complaint counsel, contain essentially the same information (Tr. 1751-52). These printouts tabulate how respondents in some of these surveys rated both Wonder Bread and the various control breads on overall opinion and on the separate product attributes (Chamblee 1205-08). CX 166-170 constitute tables prepared by complaint counsel's witness, Dr. Paul F. Lazarsfeld, from the data contained in CX 155.

129. In preparing CX 166-169 from CX 155, Dr. Lazarsfeld compared the number of persons who rated Wonder Bread higher than the control breads on the various attributes with the number of persons who rated the control breads higher than Wonder Bread, and computed a ratio for each attribute. He found that for the cases for which he had data the ratio for the nutrition attribute consistently fell in the upper one-half of the ratios for all

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attributes rated when these ratios were ordered according to magnitude (CX 169; Lazarsfeld 1778).

130. This result does not occur because more people regard Wonder Bread as better than the control breads on nutrition than regard it as superior on the other attributes, because more people do not do so (Lazarsfeld 1809-10). Instead, it occurs because fewer people rate the control breads higher than Wonder Bread on nutrition than rate them higher on the other attributes (Lazarsfeld 1810-1816). Because the denominator of the ratio on nutrition (the number of persons who rate the control breads higher than Wonder Bread on that attribute) is so low, there is a high standard error factor in that ratio, and it is also subject to great variability (Lazarsfeld 1811-14). Despite this expected high standard error factor, however, no test for statistical significance was ever conducted in connection with CX 166-169, and there is no assurance that the results observed in any one case, or, indeed in all of them, did not come about solely as the result of chance (Lazarsfeld 1814).

131. Even accepting that advertising plays some unexplained role in producing the results shown in CX 166-169, there is no way to exclude the possibility that those results are as much attributable to the manner in which the control breads were advertised and promoted as to the manner in which Wonder Bread was advertised (Lazarsfeld 1817-18, 1830). Advertising for the control breads may have caused them to perform better than Wonder on attributes other than nutrition, a fact which would account for the advantage observed for the Wonder Bread nutrition ratio and make that advantage more apparent than real (Lazarsfeld 1818, 1830-31). In other words, the results of the computations shown in CX 166-169 reflect, at most, the "advertising structure" in markets in which the surveys were conducted, that is, the effects of advertising for both Wonder and other breads, and the results would differ in markets where the advertising structure was different, such as where both breads were advertised or promoted on a nutritional basis (Lazarsfeld 1797-98, 1820-21, 1830-31).

132. "An Analysis of Wonder Bread's Nutritional Advertising" (CX 114A) prepared by Dr. Leonard M. Lodish and Dr. Thomas S. Robertson, who are teachers at the Wharton School of Finance and Commerce at the University of Pennsylvania (Lodish 936, 944; Robertson 1219), purports to be a survey of consumer attitudes toward Wonder Bread and of the effects of the advertising

involved in this case. For numerous reasons, CX 114A is not a proper and reliable survey (Britt 2330), and should not be accorded any weight.

133. The project that resulted in CX 114A was initiated when Henry Banta, prior complaint counsel in this case, addressed three classes at the Wharton School in late January or early February 1972 (Robertson 1230-32, 1275-76). One intent behind the proposal to conduct a survey was to provide it to the Commission as evidence in the hearing in this case (Robertson 1229).

134. RX 14 is a copy of a letter dated March 13, 1972 from Dr. Lodish to Mr. Banta containing a formal request for Federal Trade Commission funds to underwrite the expense of the research project (RX 14; Lodish 2004). As stated by RX 14, the objectives of the study were:

1. To estimate the extent of the population who believe that Wonder bread is more nutritional than other brands because of its advertising.
2. To estimate the effect of Wonder bread's nutritional advertising on people's purchase patterns.
3. To estimate the recall of Wonder bread's nutritional theme advertising that has been taken off the air.
4. To estimate the influence of FTC publicity on people's attitudes about Wonder bread.
5. To investigate significant interactions and patterns among the above phenomena [sic] in various segments of the population.

135. CX 114A represented Dr. Lodish's "maiden effort" in devising a questionnaire in connection with a consumer survey involving advertising (Lodish 987-90). In addition, Dr. Lodish had no prior experience with the use of the sampling technique employed in CX 114A (Lodish 990). Although Dr. Robertson claimed that he had been involved in a small number of research projects in various capacities (Robertson 1224-26), there is no evidence that he had any previous experience in questionnaire or sample design in a survey comparable to CX 114A (see also Britt 2330).

136. Although it was originally planned that 1400 interviews would be conducted with women in shopping centers in Penn., N.Y., and N.J. (RX 14; CX 114A, at 2), less than two-thirds that number of interviews were in fact completed (Lodish 2046). The selection of these respondents did not comply with standard criteria of probability sampling, and therefore the sample did not constitute a basis upon which the results of the survey can validly be projected to any larger population (Lodish 1045-46; see also

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Lucas 766). The interviewers who conducted the survey were given a range of discretion concerning whom to interview (Lodish 953) and had difficulty complying with their instructions concerning whom to interview (Lodish 1015-16; RX 6); these are problems to be avoided at all costs in doing a probability sample (Peterson 1451). Finally, no effort was made to match the demographic characteristics of the sample with those of the populations in the areas where the interviewing was done (Lodish 974-75).

137. There are numerous problems of bias and other defects in the questionnaire used in the survey (Britt 2332). Question three of the questionnaire (CX 114A, Exhibit 3), which sought respondents' views concerning the nutritional superiority or inferiority of Wonder Bread compared to other breads, was potentially quite ambiguous (Lodish 975; RX 16-21, Lodish 2012-15).

138. The questionnaire revealed to respondents a good deal about the nature of the survey (Lodish 1021), and such exposure, which may result in leading respondents, should be avoided (Lucas 710-11; Rossi 1550-51; Britt 2334). Some of the questions themselves were leading, and because the survey respondents were not "qualified," there is no way to determine whether or not their responses were true (Britt 2341).

139. "Unaided recall" is generally tested by giving a minimum of aids to trigger memory (Lucas 745-46). Because of the frequent mentions of Wonder Bread on the questionnaire used in CX 114A, none of the questions on which recall data were based can be said to have measured unaided recall; rather, they measured aided recall (Britt 2333; see also Lucas 745).

140. A major defect in the design of the questionnaire was failure to make any provision for gathering information concerning brands of bread other than Wonder Bread (Britt 2333; Kuehn 2536; RX 52). The absence of such information makes it impossible to compare the results observed for Wonder Bread with the results that might have been observed for other breads had they been included, and further makes any test of the halo effect impossible (Kuehn 2536).

141. The questionnaire further made no provision for obtaining any data concerning consumer perceptions of any attribute of Wonder Bread other than nutrition (Robertson 1314). It is therefore impossible to conduct any test for the halo effect by comparing consumer perceptions of Wonder Bread on nutrition with their perceptions of Wonder Bread on other attributes.

142. The interviewing for the survey was conducted principally by students at the University of Pennsylvania, some of whom were undergraduates, and at least some of whom, who also were "supervisors" of other interviewers, were aware of the purpose of the survey and the fact that it was being done at the instance of the Federal Trade Commission for use in this proceeding (Lodish 947, 1019-20). Indeed, three of the four "supervisors" were among the students whom Mr. Banta addressed at the University of Pennsylvania (Robertson 1276).

143. The training of these student interviewers apparently amounted to no more than three hours of classroom discussion (Lodish 947). Inexperienced, inadequately trained interviewers can do or say things that affect the results of a survey and their use here was not proper (Britt 2335, 2363-64). For the same reason, the fact that at least some of the interviewers were aware of the purpose of the survey renders the results invalid (Britt 2335-36, 2365).

144. Respondent presented the testimony of Dr. Steuart Henderson Britt, an expert witness with extensive experience in the field of marketing and advertising research (Britt 2328-29). His analysis of CX 114A demonstrated that it failed to meet any important criteria that would qualify it as being a reliable survey or, indeed, as being a survey at all in anything more than name (Britt 2330-32).

145. The above findings summarize the survey evidence and related testimony concerning consumer perceptions of Wonder Bread and other brands of bread. They support the following findings:

1. Three-quarters of the population as to which evidence was produced (that is, housewives) perceives no difference among bread on nutrition.

2. As of the spring of 1971, only about 5 percent of persons regarded Wonder Bread as standing out on nutrition and the perceptions of this legally insignificant number of persons have not been shown to be the result of Wonder Bread's advertising.

3. Even viewing the testimony of Dr. Rossi and Dr. Lazarsfeld in its most favorable light, that testimony does not support any conclusion that Wonder Bread is perceived as outstandingly or uniquely nutritious by any significant number of people or that any such perception would be the result

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of any advertisement that is in the record in this case or of the nutrition advertising for Wonder Bread in general.

D. The Impact of Wonder Bread Advertising on Children and Parents

1. Children

146. Paragraph 10 of the complaint alleges that certain advertisements for Wonder Bread tended to exploit the aspirations of children for rapid and healthy growth and development by falsely portraying Wonder Bread to be an extraordinary food for producing dramatic growth in children. The charge is based principally on the pictorial portrayal in the television advertising of a child growing to 90 percent of adult height in the space of a few seconds.

147. The primary target group for Wonder Bread television advertising has always been women between the ages of 18 and 49 who are mothers of children below the age of 18 (CX 175, Par. 2; Richel 2731-32). For a number of years prior to September 1970, a small amount of the advertising budget for Wonder Bread was also devoted to purchase of time on programs addressed specifically to children (RX 59; Richel 2732-36). Since September 1970 no Wonder Bread television commercials have been broadcast on programs principally directed at children (CX 175, Par. 2). The decision to discontinue all advertising directed specifically at children was made after a consumer survey revealed to ITT Continental that children influence bread purchases in less than 1 percent of all households (Hackett 2125, 2143).

148. The nature of mass media is such that television commercials inevitably reach segments of an audience to which they are not directed (Richel 2741). In 1970, respondents deliberately adopted a strategy designed to minimize the incidence of potential exposure (or "impressions") of Wonder Bread commercials to children under the age of 12, and to increase impressions against the primary target group, women 18-49 (Richel 2739). By purchasing television time in accordance with this strategy, respondents were able to deliver substantially more impressions against the primary target group, and substantially fewer against children, than could have been achieved by purchasing time indiscriminately (Richel 2739, 2740, 2744).

149. Questions concerning the impact of television commercials on children have been the subject of only a very limited amount of empirical research (Ward 2186-87; Solnit 633-34; Littner

2284). The principal body of research that does exist consists of studies directed by Scott Ward under grants received from the National Institute of Mental Health which deal with the effects of television advertising on children from the ages of 5 to 12 (Ward 2180-82). The results of this research are generally consistent with the other published studies that have been done (Ward 2193-94). Although originally listed as a witness for complaint counsel, Ward testified as a witness for respondent ITT Continental.

150. In general, Ward's research reflects that there is a potential for either literal belief of, and/or confusion concerning, television commercials among a small proportion of very young children (Ward 2200-01). Even by the age of 5 to 7 there are substantial numbers of children who are skeptical about television commercials (Ward 2201). The potential for literal belief or confusion that does occur in some young children decreases with age, to a point around age 8 where children generally exhibit a clear, consistent and widespread reaction that television commercials cannot be taken as literally true (Ward 2200-01). Even young children who are exposed to fantasy in television commercials may disbelieve it because it does not conform to their own experience with reality (Ward 2206).

151. A substantial amount of opinion testimony from three psychiatrists and a pediatrician was also received on these issues. This testimony was not based on empirical work in general, or as to television advertising, or as to the challenged Wonder Bread advertising. Insofar as broad conclusions of damage were asserted, it consisted merely of inferences as to the supposed impact of Wonder Bread advertising on children based on the general background and experience of the witnesses.

152. There is a concept in child psychology known as "magical thought," a term that describes the hope exhibited by the very young child that he can magically control events around him (Littner 2285). Magical thought is believed to be at its height during the first two years of life; it is accompanied by a skepticism concerning the child's ability magically to influence the world. As children learn to walk, magical thinking decreases, while skepticism increases, enabling the child increasingly to distinguish what is real from what is magical (Littner 2285).

153. How an advertisement is perceived is more a reflection of the child's age and developmental level rather than of the content of the commercial (Littner 2308-09; Granger 502). Because of

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the tendency to magical thinking, some children between the ages of 3 and 6 may perceive the filmed growth sequence in Wonder Bread television commercials as literally true; that is, as a promise that merely by eating Wonder Bread they could suddenly spurt from a small to a large child (Littner 2286-87; Solnit 616). However, these children will also be skeptical, and tend to disbelieve this perception (Littner 2305-06).

154. Over the age of 6, children increasingly recognize that the fantasy present in Wonder Bread television commercials constitutes a "television trick" (Solnit 609), and are increasingly skeptical about it (Littner 2287).

155. The fantasy element contained in Wonder Bread television commercials differs from other fantasies to which children are exposed in their early years only in that it is a diluted version of most normal children's fantasies (Littner 2290). There are numerous other instances of the same sort of fantastic or magical appeals made on television (Galdston 467; Solnit 638), and some younger children will also literally believe some other television commercial to mean that biting into a piece of chewing gum will transport him instantaneously from indoors to a beach (Galdston 471). Similarly, younger children may believe that Superman is a real phenomenon (Littner 2315; see also Granger 503), and that there are 9-foot-tall-talking birds, such as the featured character on the widely acclaimed children's television program, Sesame Street (Granger 546-47).

156. A child's perception of any television commercial may be affected by a number of factors other than his normal tendency to magical thinking, including the nature of his relationship with his family, his previous experience with television, his parents' reaction to what he sees on television or the questions he asks about television, and the influence of any friends with whom he may be watching (Littner 2289). Generalizations, therefore, are difficult (Solnit 644-45).

157. Similarly, whether a child requests his parents to purchase a product he has seen advertised on television depends more on the nature of the parent-child relationship and other factors than on the persuasiveness of the commercial to the child (Littner 2293). Available empirical data shows that the incidence of children's efforts to influence bread purchases is relatively small, if not virtually nonexistent (Ward 2222).

158. Two of complaint counsel's witnesses raised objections to CX 27, the script of a commercial for Wonder Bread used on a

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children's program, Captain Kangaroo (Granger 528-30; Solnit 622-23). The gist of this testimony was that children are more susceptible to an advertising message communicated by an entertainer. Even if true, neither CX 27 nor any other evidence contains any indication that Wonder Bread commercials on Captain Kangaroo contained the filmed growth sequence, or any other element, that might give rise to the assertedly false portrayal alleged in Paragraph 10 of the complaint.

159. There is no empirical evidence that children would suffer psychological damage from learning that not everything seen on television is literally true (Ward 2210). Even complaint counsel's witness did not claim that television advertising has any demonstrable adverse impact on normal children (Galdston 472-73). All witnesses agreed that the impact on children of television advertising is far outweighed by other factors, particularly the nature of the child's relationships with other human beings, and especially his parents (Galdston 458-59; Granger 553; Solnit 630-31; Littner 2292).

2. Parents

160. Paragraph 11 of the complaint alleges that certain Wonder Bread advertisements tended to exploit the emotional concern of parents for the growth of their children by falsely portraying Wonder Bread to be a necessary food for children to grow and develop to the fullest extent during the preadolescent years (Complaint, Par. 11).

161. There has been no testimony that the representation alleged in Paragraph 11 of the complaint was made in any advertisement for Wonder Bread. The television commercials and other advertisements placed in evidence in this case *do not represent, directly or by implication, that Wonder Bread is a necessary food for children to grow and develop to the fullest extent during the preadolescent years.*

162. Although parents are, of course, normally desirous of healthy physical and mental growth for their children, there is no evidence that these concerns are of such dimensions as to render parents defenseless to the ordinary commercial appeals contained in Wonder Bread commercials.

E. Paragraph 16(b)

163. Paragraph 16(b) of the complaint alleges that certain surveys of consumer attitudes conducted on behalf of ITT Conti-

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mental contained findings that certain of the television commercials for Wonder Bread involved in this proceeding generated a significant increase in the number of consumers who rated Wonder Bread excellent or very good as compared to other breads in terms of the quality of nutrition and value of the bread for use by children. Paragraph 16 further alleges that on the basis of these survey findings, ITT Continental knew or had reason to know or should have known that certain of its advertisements for Wonder Bread constituted "false advertisements" as that term is defined in the Federal Trade Commission Act.

164. At the hearing, complaint counsel stated that the surveys referred to in Paragraph 16(b) of the complaint were those from the on-air commercial testing program (Tr. 1114).

165. Nothing in these exhibits purports to make any comparison between Wonder Bread and other breads (Appel 1119; Lazersfeld 1835-36). The increases reported in the surveys involved differences in consumer attitudes toward Wonder Bread between groups who had been exposed to the commercial being tested and groups who had not been so exposed (Appel 1119; Lazersfeld 1835-36). Moreover, this data in fact shows that nutrition commercials for Wonder Bread did not represent, directly or by implication, that Wonder Bread was an outstandingly nutritious bread.

F. The "Uniqueness" Theory

166. By the first defense to its answer respondent ITT Continental asserted that it would not be in the public interest to adopt a standard of illegality that would prohibit a manufacturer from advertising attributes of its product that are not unique to that product.

167. It would not serve the public interest to prohibit respondent ITT Continental from advertising its bread as nutritious simply because other enriched breads are as nutritious. Complaint counsel's own expert testified that nutritional advertising of enriched bread is "commendable" (Briggs Tr. 907-08).

III. Hostess Snack Cakes

The Products

168. From September 1970 until the present, respondent ITT Continental has manufactured and distributed, and does manufacture and distribute, a product line of fortified snack cakes desig-

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nated as Hostess cakes, muffins, and pies, and hereafter referred to as "Hostess snack cakes" (Cotton 392; CX 126A-B).

169. The line of Hostess snack cakes is manufactured by the continuous method or by the batch method. In both of the manufacturing processes, the enrichment materials are added early in the manufacturing process. The fillings and icings, where applicable, are also made by the continuous or batch method and are applied to the cakes after cooling (Cotton 362-69). The ingredients of each Hostess snack cake and a description of the enrichment tablets used therein is provided in CX 127A-G.

A. The Complaint Allegations

170. Paragraph 13 of the complaint alleges that through the use of certain advertisements for Hostess snack cakes respondents have represented, directly and by implication, that:

(a) The fortification of said Hostess snack cakes with vitamins and iron constitutes a major nutritional advance that has just been developed for providing children with good nutrition.

(b) The fortification of said Hostess snack cakes with vitamins and iron constitutes a major nutritional advance that is unavailable in other baked goods used for snacks by children.

(c) Said Hostess snack cakes provide all the vitamins recognized as essential to the healthy growth and development of children.

(d) Said Hostess snack cakes provide children with good nutrition.

171. Paragraph 14(a) of the complaint alleges that the fortification of Hostess snack cakes with vitamins and iron does not constitute a major nutritional advance that has just been developed for providing children with good nutrition because it is the nutritional equivalent of using enriched flour to make the cakes, a process that has been developed and used for more than 30 years. Paragraph 14(b) alleges that the fortification does not constitute a major nutritional advance that is unavailable in other baked goods used for snacks by children because any baked goods made with enriched flour provide the same nutrients in similar amounts.

172. Paragraph 14(c) asserts that Hostess snack cakes do not provide in significant quantities all vitamins recognized as essential to the healthy growth and development of children, and Paragraph 14(d) alleges that the representation that Hostess snack cakes provide children with good nutrition is false, misleading,

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and deceptive because it fails to disclose the material fact that the cakes are composed primarily of sugar (Complaint, Pars. 14(c), (d)).

173. By its answer, respondent ITT Continental denied the allegations of Paragraphs 14(a) and (b) except to admit that one print advertisement for Hostess snack cakes represented that enrichment of these products constituted a major nutritional advance (Ans. of ITT Continental). Respondent denied that any advertisement for Hostess snack cakes had ever contained the representation asserted by Paragraph 13(c) of the complaint, and admitted that certain advertisements for Hostess snack cakes did represent that the products contain good nutrition (Ans. of ITT Continental). Respondent denied that any of the representations that it admitted were made in Hostess snack cake advertising were false and denied that the sugar content of Hostess snack cakes was a material fact required to be asserted in its advertising (Ans. of ITT Continental).

174. The complaint did not assert, and the Commission therefore did not endorse, an allegation that the advertising was false and misleading because Hostess snack cakes do not satisfy some broad and undefined test of "good nutrition." Moreover, the proposed order issued by the Commission and served with the complaint also shows that the Commission did not intend to assert in the complaint this claim of violation. The proposed order nowhere seeks a bar against representing that enriched Hostess snack cakes contain good nutrition.

175. However, seven months after the issuance of the complaint, complaint counsel for the first time asserted that the complaint raises the broad question whether Hostess snack cakes constitute "good nutrition," though complaint counsel have never defined the term (Prehearing Conference, May 1, 1972, Tr. 194-95). In a pretrial memorandum dated October 22, 1971, complaint counsel had submitted a list of factual issues they claimed were raised by the pleadings. No issue was listed therein as to whether Hostess snack cakes provide children with "good nutrition." Between these two dates the identity of complaint counsel had entirely changed.

176. No issue was properly raised by the pleadings as to whether the Hostess snack cake advertising was unlawful because it represented that Hostess snack cakes were "good nutrition." Neither complaint counsel nor the administrative law judge has authority to amend Commission pleadings.

B. The Challenged Commercials and Advertisements for Hostess
Snack Cakes

177. CX 31-35 were identified by complaint counsel as five films of television commercials for various Hostess snack cakes; CX 36-40 were identified as storyboards for certain Hostess snack cake television commercials, and CX 41 was identified as a magazine advertisement for Hostess snack cakes (Tr. 794-96).

178. CX 31 is the film of a sixty-second television commercial entitled "Snack Cake Jungle/Fruit Pies." The film opens by showing a mother in a supermarket with the following words spoken by announcer:

Snacks, snacks, everywhere snacks. Welcome to the snack cake jungle. Everywhere you look, snack cakes for the kids.

The mother then asks:

Are there any that have more than good taste?

As the visual portion depicts a display of Hostess fruit pies the announcer responds:

Yes. Hostess announces snack cakes now fortified with vitamins and iron.

The mother is shown choosing the Hostess fruit pies and then serving them, with a pitcher of milk, to her children. The audio continues with the announcer saying:

You can thank the Hostess bakers for new vitamin-fortified snack cakes, with the good taste kids love, and good nutrition they need. Like new Hostess fruit pies. That tender pastry crust with luscious fruit filling, now gives your children more than good taste. It gives them important nutrition, too. Because now Hostess fruit pies are fortified with body-building vitamins and iron to grow on. Yes, now there are snack cakes with more than good taste. New vitamin-fortified Hostess snack cakes. Look for the "V" on packages of Hostess fruit pies. Thank Hostess for the good taste kids love, and good nutrition they need.

179. Other alleged Hostess commercials in evidence are generally similar, with the exception that some are only thirty seconds in length and therefore do not include all of the text quoted above, and with the further exception that different products, that is, cup cakes and Twinkies, are promoted in other commercials.

180. CX 41 purports to be a magazine advertisement. A child with a football is pictured eating a Hostess Twinkie. Across the top of the picture are the words "A major nutritional advance from Hostess," and, at the side of the picture, "Snack cakes with body-building vitamins and iron." Inserted in the lower half of

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the picture, together with pictures of packages of Hostess fruit pies, Twinkies, and cup cakes, is the following text:

Look for the big "V" on every new package of Hostess Cup Cakes, Twinkies and Fruit Pies! It's the nutritional advance that takes the guesswork out of which snack cakes to buy! These famous Hostess Snack Cakes now give your children more than good taste * * * they give them important nutrition, too. So, why settle for just any snack cake—give them Hostess Snack Cakes fortified with body-building vitamins and iron to grow on.

Across the bottom of the advertisement is a line that states: "Thank Hostess * * * for the good taste kids love *and* good nutrition they need."

181. The phrase "major nutritional advance" appeared only in print advertising for Hostess products; it did not appear in any television commercials (Hackett 2134-35). The total budget for the nutritional advertising in print media for Hostess products was \$130,786 (CX 172, Par. 14).

182. There is no evidence or estimate of the number of consumers who may have seen the print advertisement on this small budget. There is no evidence in the record that CX 41, or any other advertisement using the "major nutritional advance" phrase, was disseminated in "commerce," as commerce is defined in the Federal Trade Commission Act, or that any such advertisement was disseminated for the purpose of inducing, or was likely to induce, the purchase of Hostess products in "commerce," as commerce is defined in the Federal Trade Commission Act.

183. No reliable expert testimony was received concerning consumer understanding of the Hostess snack cake television commercials involved in this case.

184. The enrichment advertising for the Hostess products involved began September 15, 1970 and concluded May 10, 1971 (Hackett 2133). That advertising was designed to stress that the Hostess products advertised were different from comparable products because they provided certain newly developed nutritional benefits that other snack cakes did not have (Hackett 2133-34). The campaign was abandoned when other manufacturers began enriching their snack cakes (Hackett 2134).

185. Review of the Hostess snack cake television advertisements in evidence in this proceeding clearly shows that the claims made for the product were comparative in nature and stressed the difference between the new enriched product and comparable products that were not enriched. No advertisement contains any

express or implied representation that Hostess snack cakes contain all essential vitamins.

186. These television commercials making this comparative claim were disseminated only during the period in which no competitive products offered similar enrichment—about 8 months (Hackett 2134).

187. Although evidence of the nutritional composition of a wide variety of products sold under the Hostess label was received (e.g., CX 126, 127 (*in camera*)), the Hostess advertisements introduced at the hearing relate to only three Hostess products, Hostess cup cakes, fruit pies, and Twinkies. None of the television commercials, nor the single magazine advertisement, refers to, or depicts any other Hostess product. The evidence received that relates to products other than Hostess cup cakes, fruit pies, and Twinkies is therefore irrelevant to the representations in issue.

C. Background of Hostess Enrichment

188. CX 127, Table II (*in camera*) shows that Hostess snack cakes were enriched with thiamine (vitamin B₁), riboflavin (vitamin B₂), niacin, and iron. These nutrients were added in amounts sufficient to make the levels of them in the snack cakes comparable, on a weight basis, to the enrichment formula for enriched bread, the importance of which is described in Findings 7-9, *supra* (RX 29; Cotton 379-80; Sebrell 2644). Each of the Hostess products shown in CX 127 is, in final form, substantially identical in nutrient composition on a weight basis (Cotton 368-69). The effort to enrich Hostess snack cakes was prompted by evidence disclosed at the White House Conference on Food, Nutrition, and Health, and in the preceding months spent in preparation for the conference, that considerable malnutrition continues to prevail in the United States (Cotton 386, 390; Woodward 2084).

189. The White House Conference on Food, Nutrition, and Health was held in 1969 (Cotton 386). Participants were drawn from a wide range of industrial and scientific disciplines and were convened by the President to consider problems of malnutrition recently uncovered in this country (Cotton 386-87). Dr. Robert H. Cotton, ITT Continental's vice president for research and development who supervised the enrichment of Hostess snack cakes, was a member of the conference and had been active in preparing for it in the months that preceded it (Cotton 355, 356, 386).

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190. RX 38 constitutes portions of the Ten-State Nutrition Survey in the United States, 1968-1970, Preliminary Report to the Congress, conducted by the United States Department of Health, Education and Welfare. This study includes the following finding:

[P]ossible iron-deficiency anemia is a major problem in most segments of the populations surveyed. Any measures designed to alleviate this problem should be directed at all segments of our population with emphasis on the poor, the minority groups among us, children, and elderly individuals (RX 38, at 10).

191. RX 38 also presents data that shows that children have more deficiencies and low values for riboflavin than other age groups (RX 38, at 34). On the basis of a study performed by the United States Department of Agriculture, complaint counsel's expert witness, Dr. George M. Briggs, concluded that substantial numbers of households in the United States were not getting enough, or even two-thirds enough, of a variety of nutrients, including iron and riboflavin (Briggs 870). Dr. Briggs also agreed that both as of March 25, 1970, and as of today there is malnutrition on a large scale in this country (Briggs 871; see also Latham 1720-21). It was a matter of great concern to Dr. Briggs that, with regard to intake and availability, iron and niacin levels in this country are not much above those that existed in 1909, a time when nutritional disease occurred in this country (Briggs 866-67). In addition, thiamine is not supplied in abundant amounts in many foods (Briggs 865-66).

192. The most common nutritional deficiency disease among children in the United States is probably iron deficiency (Fomon 2707). Iron is not clearly abundant in food, and it is particularly difficult to achieve the Recommended Daily Dietary Allowance (RDA) for iron (Briggs 865-66). There is less iron in foods today than was true 60 or 70 years ago, the iron level in American diets is lower than it should be, and iron deficiency is a significant dietary problem in the United States (Briggs 872; Latham 1721). Besides children, girls and women during the menstruating years are another substantial segment of the population as to which iron deficiency is a problem (Briggs 910-11).

193. Recommended Daily Dietary Allowances have been established by the Food and Nutrition Board of the National Academy of Sciences—National Research Council for some nutrients known to be essential to sustain human life (Briggs 815, 916; CX

70). Such allowances have been established for all the nutrients with which Hostess snack cakes were enriched (CX 70).

194. RX 1 constitutes a table from a survey conducted by the Agricultural Research Service of the United States Department of Agriculture entitled "Food Consumption of Households in the United States, Spring, 1965." This table indicates that between 1955 and 1965 per capita consumption of bread in the United States declined between 7 or 8 percent whereas per capita consumption of other bakery products, which would include cake products, increased well over 60 percent (RX 1; Cotton 394). In recent years, dietary patterns in the United States have reflected a shift toward convenience and snack foods (Briggs 872-73; Latham 1722-23), with more food consumed outside the home, purchased from vending machines, or consumed in snacks (Fomon 2709).

195. RX 2 constitutes some of the recommendations published by the White House Conference on Food, Nutrition, and Health referred to above. Among these recommendations are the following: (1) efforts must be directed to increasing availability and intake of iron-fortified foods in light of widespread iron deficiency anemia among infants and preschool children in the United States; (2) promotional programs to disseminate information about fortified foods should be instituted and the widespread use of such foods should be promoted; and (3) the food industry should consider enriching the nutritional content of snack foods and accelerate its efforts to make nutritious snack foods available (RX 2, at 1, 3, 4).

D. The Enrichment of Hostess Snack Cakes

196. ITT Continental, acting on the indications of widespread nutritional deficiencies that were emerging from the planning stages for the White House Conference, undertook in October 1969 the development of an enrichment program for Hostess snack cakes (Cotton 390-91; Woodward 2084). At the time, William Henry Sebrell, Jr., one of the most distinguished nutritionists in the United States (RX 55; Sebrell 2635-38) advised ITT Continental that enrichment of Hostess snack cakes should conform to the enrichment formula established for enriched bread because of the evidence that consumption of such sweet goods has been increasing while the consumption of bread has been decreasing (Sebrell 2643-44).

197. The enrichment goal could not have been met simply

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through the use of enriched flour to make the cakes for a variety of reasons. First, the amount of flour used in the snack cakes is less than the amount used in bread and would have contributed only one-third to one-tenth the nutrient levels that were ultimately achieved (Cotton 396-97). Second, the addition of enriched flour to chocolate-containing products would have resulted in the destruction of at least the thiamine in enriched flour (Cotton 366, 397). Finally, enriched flour would have caused bad "off flavors" which would have made the products unacceptable to consumers (Cotton 366).

198. The development of the enrichment of Hostess snack cakes was a difficult, expensive and time-consuming task (Cotton 380; Woodward 2085-86). In the course of this work, difficult problems concerning the stability of the nutrients to be added and the off flavors that such nutrients could cause in the final product had to be overcome (Cotton 380; Sebrell 2645-46). The products were not marketed until ITT Continental was confident that the problem regarding the stability of the added nutrients had been solved (Cotton 382, 395-96). At the time the products were introduced on the market, no other manufacturer was selling comparably enriched snack cakes (Woodward 2085). The enrichment of these snack cakes by ITT Continental constituted, in the words of a Commission witness, "a unique contribution" (Briggs 911).

199. Experience with the bread enrichment program establishes that the vitamins added to Hostess snack cakes are absorbed and utilized by the human body (Cotton 382-83). Enrichment with iron that the body will utilize is often difficult (Fomon 2708). ITT Continental discovered that Hostess snack cakes could be enriched with ferrous sulfate, the most available, or readily absorbed, form of iron that exists, and ferrous sulfate was used to enrich the snack cakes (Cotton 383). Ferrous sulfate is well absorbed from a variety of grain-based products and is ordinarily used by nutritionists as a standard against which other forms of iron are compared; it may be presumed that it is a considerably better type of iron to have used for fortification than is commonly used in other fortified foods (Fomon 2708-09).

200. Contrary to the allegation of Paragraph 14(a) of the complaint, the enrichment of Hostess snack cakes was not the nutritional equivalent of using enriched flour. The Hostess process produced a considerably higher level of enrichment (Cotton 396-97; Briggs 911).

201. Since the allegation that the Hostess enrichment was only

the equivalent of using enriched flour is false, the companion allegations of Paragraphs 14(a) and (b) concerning the enrichment process used for Hostess snack cakes are also false.

E. Nutritional Qualities

202. Although the issue whether Hostess products constitute "good nutrition" is not presented by the pleadings, evidence has been taken and the following findings are made.

203. Complaint counsel's claim that the Hostess advertising is unlawful because Hostess snack cakes do not satisfy some undefined test of "good nutrition" is based upon the statement in the advertisements "Thank Hostess for the good taste kids love, and good nutrition they need." When fairly read, in the context of the entire advertisements as it must be, this statement and other references to nutrition in the advertisements are no more than claims that Hostess products provide both good taste and good nutrition. In the light of the evidence concerning the need for, and benefits of, the added nutrition afforded by the Hostess enrichment, this claim is not false.

204. Hostess advertising nowhere makes a broad claim that these products are themselves "good nutrition" as compared with all other foods.

205. The question whether a specific food constitutes "good nutrition" is entirely a matter of opinion and there is no generally accepted definition of the phrase "good nutrition" as applied to a single food (Sebrell 2646). The science of nutrition is relatively young, new knowledge is constantly being acquired, and perfectly competent nutritionists can look at the same objective facts and reach opposite conclusions about them (Briggs 860-62). Nothing better illustrates the ambiguity of the concept "good nutrition" as reflected in complaint counsel's theory of this case than the fact that every expert witness who testified on this issue at the hearing applied a different standard in assessing the nutritional value of Hostess snack cakes (Briggs 894; Latham 1683-84; Sebrell 2648; Fomon 2703-04).

206. As enriched, Hostess snack cakes supply significant amounts of thiamine, riboflavin, niacin and iron, all of which are essential nutrients, and in addition provide some protein (Sebrell 2648; see also Briggs 829).

207. A single Hostess fruit pie provides 44 percent of the RDA for thiamine, 20 percent of the RDA for riboflavin, 21.8 percent of the RDA for niacin, and 21.8 percent of the RDA for iron (RX

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33). Other products similarly provide significant percentages of the RDA's for these four nutrients (RX 33; Sebrell 2648).

208. The calories provided by Hostess snack cakes are themselves nutritious, especially for children, who need calories for energy and growth in relatively greater amounts than adults (Sebrell 2647; Briggs 862).

209. Good nutrition for children after infancy requires a diet in which calorie intake is distributed in specified amounts among protein, fats, and carbohydrates (Fomon 2704). Examination of Hostess Twinkies in the context of a diet consisting of 500 calories of milk and 500 calories of Twinkies reflects a reasonable distribution of calories from protein, fat and carbohydrates (Fomon 2705; RX 58). Even assuming that a child consumes daily 500 calories from Twinkies, or nearly four Twinkies, this abnormal amount of Twinkies would not unbalance such a child's diet (Fomon 2715-16). If fewer calories were consumed daily from Hostess Twinkies, there would be no opportunity to unbalance the diet with respect to distribution of calories from protein, fat, and carbohydrates (Fomon 2716).

210. The enrichment of Hostess snack cakes to the levels ITT Continental achieved is extremely important in light of the shifting dietary trends in this country (Sebrell 2644). The added amount of iron provided in a diet that includes Hostess Twinkies is of considerable nutritional importance, especially when the iron contribution of a diet containing Twinkies is compared with a diet that includes some other food, such as plain chocolate cake, that a child might eat as a snack (Fomon 2706-07; RX 58). RX 58 shows that a diet that includes Hostess Twinkies provides about two more milligrams of iron than a diet that includes the same number of calories from plain chocolate cake (Fomon 2706).

211. Very few 10 or 11-year-old children in the United States meet the Recommended Daily Dietary Allowance for iron, and for this reason every additional milligram of available iron in the diet represents a significant nutritional advantage (Fomon 2719).

212. Although diseases related to deficiencies in the B vitamins added to Hostess snack cakes have largely disappeared as public health problems in the United States, the increasing use of baked snack goods and decreasing use of enriched bread makes it important that snack goods be enriched with the B vitamins as a preventive measure against the possible recurrence of such diseases in this country (Sebrell 2667-68; Fomon 2709-10). Public

health nutrition should not wait for deficiency diseases to develop but should attempt to prevent them in advance (Fomon 2709-10).

213. Most children in the United States desire and need supplementary nourishment after school, and prefer something sweet for a snack (Briggs 878, 880-81, 890; Sebrell 2650-51). Many snacks (such as leftover meats or fresh vegetable wedges) recommended by some nutritionists simply will not be consumed by many children (Briggs 880), and no matter how nearly perfect a food is nutritionally, it has no value unless consumed (Sebrell 2650).

214. Although Hostess snack cakes do not contain every essential nutrient, no food, whether a snack food or not, does (Briggs 889-90). Even "snacks" recommended by complaint counsel's expert witness show low values in a number of important nutrients when compared to Hostess Twinkies (Briggs 882-86; RX 56).

215. There was some testimony at the hearing that Hostess snack cakes could not be considered good nutrition because they contained substantial amounts of sugar (Latham 1690-91). It was asserted that sugar in the form contained in the snack cakes may be a cause of dental disease in the United States (Latham 1691).

216. The fact that a product may contain a substantial amount of sugar does not disqualify it from being a good source of nutrition (Sebrell 2649-50; Briggs 886-87). The cause of dental caries is not really known, and although sugar may be one factor that can produce dental caries in some people, the development of dental caries depends on numerous factors, *e.g.*, the amount of bacterial flora in the mouth and the amount of flouride in drinking water (Sebrell 2652, 2668-69). No witness who testified at the hearing could cite any research that showed that sugar in Hostess products, or in cake products generally, is a cause of dental caries (Sebrell 2652; Latham 1719-20).

217. Official notice may be taken of the recent announcement by the Commission of an agreement containing a consent order *In re Sugar Association Inc.*, File No. 712 3635. In that matter, in which the Commission has provisionally accepted a consent order, proposed respondents are required to disseminate a mandatory corrective advertisement. The text of that advertisement, as quoted in the official Commission press release announcing provisional acceptance of the order, contains the following statements:

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[S]ugar is most definitely a good and useful food;

You need vitamins, minerals, proteins, fats and carbohydrates. And it just so happens that sugar is the best-tasting carbohydrate.

The "logo" for this advertisement is: "SUGAR. It isn't just good flavor; it's good food."

218. Although this consent order has not been finally approved by the Commission, even the provisional acceptance of the corrective advertisement containing the above-quoted statements is completely inconsistent with the position taken by complaint counsel in this case. It would be arbitrary and capricious to require one advertiser to promote sugar as "most definitely a good and useful food," while prohibiting respondent here from advertising enriched Hostess snack cakes as a source of good nutrition because of its sugar content.

219. It was also asserted at the hearing that the fat content of Hostess snack cakes, which varies among the products, may be detrimental because of the asserted relation between saturated fat intake, serum cholesterol levels, and coronary heart disease. The witness who expressed this assertion did not know the proportions of saturated and unsaturated fats in Hostess products (Latham 1692).

220. Coronary heart disease is very rare in children (Latham 1731-32). The fat content of a food does not disqualify it from being recommended by nutritionists as a snack (Briggs 886-87). In fact, complaint counsel's own witness recommends as snack foods containing higher quantities of fat than Hostess snack cakes (Briggs 831, 882-83).

221. Cholesterol is itself an essential nutrient, and the fat content of Hostess snack cakes is desirable for children, whose diets should include a substantial proportion of calories from fat (Sebrell 2672-73; Fomon 2704). One nutritionist who testified for complaint counsel expressed opposition to recommendations that the American public stop eating cholesterol-containing foods and reduce its intake of saturated fats (Briggs 913). Children are not among those persons likely to be associated with a cholesterol problem, and only a small minority of children should not eat Hostess snack cakes (or a variety of other foods) because of potential cholesterol problems (Briggs 914-15).

222. Even assuming that the broad question whether Hostess snack cakes constitute "good nutrition" is an issue raised by the pleadings in this case (which it is not), complaint counsel have failed to carry their burden of proof on this issue. The weight of

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the evidence does not establish that enriched Hostess snack cakes do not constitute good nutrition.

F. Exploitation of Guilt Feelings

223. Paragraph 15 of the complaint alleges that certain advertisements for Hostess snack cakes tended to exploit the guilt feelings regarding the nutritional effect of snack cakes on children's diets of those mothers of children who have in the past been infrequent users or purchasers of snack cakes by making falsely unqualified claims that children need Hostess snack cakes in order to have good nutrition.

224. A market research firm in New York, Grudin, Appel, Haley, Inc., conducted a survey among snack cake purchasers, the results of which were received by ITT Continental in February 1970 (Heller 1846; Hackett 2133). Portions of this survey were introduced into evidence as CX 105, CX 106, and RX 39.

225. This survey demonstrated nothing more than that there was, among snack cake consumers, a pre-existing market or demand for enriched snack cakes, a product which ITT Continental had already begun to develop (Woodward 2084-87; Heller 1860). Ascertaining felt consumer needs and supplying those needs are the very essence of marketing in the American economy (Woodward 2086-87; Heller 1860-62). In marketing enriched Hostess snack cakes, and in advertising them on an enrichment basis, respondents were not seeking to exploit "guilt feelings" but only sought to respond to articulated consumer needs (Woodward 2087; Hackett 2133).

226. One conclusion stated by the authors of the report of the snack cake survey was that some consumers tended to have "guilt" feelings about the consumption of snack cakes (CX 105, at 16). This interpretation of the data was based on a "factor analysis" which tended to show that some women surveyed tended to have similar reactions or attitudes toward five statements about snack cakes as to which they were asked to rate the degree of their agreement or disagreement (Hiller 1854-56).

227. The data on which the interpretive text was based does not support the complaint's allegation that infrequent snack cake purchasers feel "guilty" about the effects of snack cake consumption on their children's diets. Table 166, Vol. II of the report, which is part of RX 39, lists the five statements to which respondents stated agreement or disagreement (RX 39; Heller 1855-56). Only one relates to snack cake consumption by children at all, and

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that statement simply indicates that some people would feed more snack cakes to their children if they were vitamin-enriched (RX 39; Heller 1855-59). None of the data supports a claim that consumers had any guilt feelings about serving snack cakes to children that could be "exploited" by the Hostess advertising involved in this case.

228. No evidence was presented that the Hostess snack cake advertisements in evidence in this proceeding tended to exploit any "guilt" feelings of mothers.

229. Paragraph 15 also requires proof that the supposed guilt feelings alleged would tend to be exploited by falsely unqualified claims that children need Hostess snack cakes in order to have good nutrition. No advertisement for Hostess snack cakes in evidence in this case contains any representation that children need Hostess snack cakes to achieve good nutrition.

G. Paragraph 16(a)

230. Paragraph 16(a) of the complaint alleges that ITT Continental knew or had reason to know or should have known that certain Hostess snack cake advertisements constituted "false advertisements" on the basis of alleged findings from consumer surveys that for certain consumers who have guilt feelings about using or purchasing snack cakes for their children, a nutrition claim might be an effective method of changing their attitudes and one of the Hostess snack cake television commercials was effective in utilizing a nutrition/vitamin claim to change the attitudes of consumers who had been reluctant to use or buy snack cakes because of guilt feelings regarding the possible nutritional effect of such snack cakes on children's diets.

231. As framed by the Commission, Paragraph 16(a) requires proof that some survey found that a television commercial for Hostess snack cakes had in fact been effective in using a nutrition claim to change the attitudes of certain specified consumers. However, no evidence was introduced, either in the form of a survey or otherwise, that any Hostess snack television commercial was effective in employing a nutrition/vitamin claim to change attitudes among the consumers specified.

IV. Corrective Advertising—Wonder Bread

A. "Carry-Over Effect"

232. Paragraph II of the proposed order served with the com-

plaint in this case would require that 25 percent of any advertisements for Wonder Bread for a period of one year contain a clear and conspicuous disclosure that the Federal Trade Commission has alleged that Wonder Bread has been falsely advertised as more nutritious and appropriate for children than other enriched breads. Complaint counsel has sought to justify this relief on the grounds that a conventional cease and desist order would be insufficient to remedy the effects of Wonder Bread's advertising, should that advertising be found to be false. Specifically, it has been asserted that the impact of advertising may continue even after the advertisements themselves are no longer disseminated, first, through memory or recall of allegedly false claims, and second, through its asserted influence on future sales because of "brand loyalty" (Tr. 352-53).

233. The record does not establish the degree, if any, to which past Wonder Bread advertising induced past sales, or may induce future sales.

234. It is stipulated that advertising for Wonder Bread "in combination with other factors" has been a cause of Wonder Bread sales (CX 172, Par. 9). It is apparent, however, that the role of advertising in contributing to sales is at best dimly understood (Morrison 1512; Lucas 717, 781-82; Walsh 1412). Bread is purchased for numerous reasons, and advertising is only one factor in a marketing mix that includes price, quality, shelf space and shelf position, packaging, and numerous other factors (Bauer 2397, Woodward 2073-74; Walsh 1410-11; Morrison 1532). None of these variables, moreover, may properly be evaluated only with regard to a single brand in any product category, since the performance of that brand's competitors on all these variables must also be taken into account (Morrison 1533).

235. Respondent presented the testimony of Dr. Alfred A. Kuehn, who has conducted numerous studies to analyze and estimate the effect of past advertising expenditures on current sales (Kuehn 2518-20). In general, Dr. Kuehn has found that the carry-over or lag effects of advertising are something less than 50 percent per month, or less than 1 percent per year (Kuehn 2520). The published literature that relates to the lag effect of advertising is consistent with the results of Dr. Kuehn's research (Kuehn 2521-23). In one such study, while no effect found was statistically significant, one campaign showed negative effects on sales (Kuehn 2522). Another researcher, in a study extending over a number of years, never found an effect that lasted for longer than

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2 months (Kuehn 2522-23). As a result of his own work and his familiarity with the work of others, Dr. Kuehn no longer includes "lagged" advertising effects as a factor in his analyses, predictive models, and studies except with regard to extremely short-term effects, for example, in connection with advertising expenditures related to a seasonal heat wave (Kuehn 2523).

236. There is a concept known as "pay out planning" by virtue of which advertising is viewed as an investment which may return profits to the advertiser after it has ceased (Lucas 717-18). There has been only very limited use of pay out planning, however, because of the lack of traceable effects of past advertising and the problems that exist in isolating the effects of past advertising from the impact of current advertising and all other factors that contribute to sales (Lucas 171-18, 743-44).

237. The concept of pay out planning is little more than a device by which advertising agencies may seek to justify ineffective advertising campaigns to their clients on the ground that expenditures will produce a benefit at some future time (Kuehn 2524).

238. The evidence introduced in this case concerning recall of Wonder Bread's past nutritional advertising is not a sufficient basis upon which to order the relief contained in Paragraph II of the proposed order.

239. Commercials, for example, the well-known "try it, you'll like it" advertising, can produce substantial memory effects without having any impact whatsoever on sales, and "one is really on dangerous grounds, really, if you play around primarily with memory" (Kuehn 2622-23; see also Lucas 776; Morrison 1527). As stated by the witness whom complaint counsel have described as "probably the nation's leading economic expert on the bread industry" (Trial Memorandum, June 12, 1972, at 5):

Our studies show advertising has a slight effect on sales, but they don't know which part of the advertising has that effect. It is widely said that ninety percent of advertising is waste. But they don't know which ninety percent, so they continue to try to get that ten percent that is effective. (Walsh 1412).

240. This record contains evidence that brand loyalty to packaged white bread is not strong, and that the increasing importance of private label bread in the baking industry is causing higher priced brands such as Wonder to lose sales to private labels (Woodward 2069-70, 2076-77, 2096). Even if brand loy-

ality is operating in the case of packaged white bread (Morrison 1504), it is operating no more strongly in favor of Wonder Bread than it is in the case of brands other than Wonder, some of which are not advertised at all (Morrison 1526, 1531). In any event, there is no evidence that the past nutrition advertising for Wonder Bread is presently contributing to continuing purchases of that product in any significant degree.

241. To the extent that Wonder Bread's advertising in fact may have contributed, along with the other factors in the marketing mix, to sales of the product, there is no reliable evidence in this case that the assertedly false aspects of that advertising contributed to sales. Complaint counsel's own expert witness concluded that it is unknown what aspect of advertising produces advertising's "slight effect" on bread sales (Walsh 1412).

242. It is established on this record, moreover, that nutrition is not a differentiating factor that would lead consumers to choose among brands of bread (Bauer 2395).

B. Impact on ITT Continental

243. In FTC Docket No. C-2015 [79 F.T.C. 248] respondent agreed to the entry of a consent order that required it for the period of one year to devote 25 percent of its advertising budget for Profile bread to a corrective advertising message. Unlike Paragraph II of the proposed order in this case, the advertising disseminated in accordance with the order in C-2015 did not require a confession by respondent that the Commission had found prior advertising for Profile to be false. As a result of the order in C-2015 and of the publicity surrounding it, Profile sales have declined between 20 to 25 percent (Woodward 2077-78). If these percentages are applied to Wonder Bread sales, the loss could amount to \$50 million per year (Woodward 2077-79). The publicity surrounding this proceeding has already affected Wonder Bread sales, causing loss of shelf space in supermarkets which is extremely difficult to recover (Woodward 2078). Complaint counsel have acknowledged that the concept of confession-of-guilt advertising is in part punitive (Tr. 2164), and it is obvious that the penalty in this case would be severe. Moreover, not only would the company be directly affected, but so also would the driver-salesmen. These men work on a commission basis of about 10 percent, and any sort of so-called "corrective" advertising could reasonably be expected to cause lost income to driver-salesmen of about \$5 million per year.

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C. Prior Investigations of Wonder Bread's Nutritional Advertising

244. By its fourth defense, respondent ITT Continental asserted that corrective, or *mea culpa*, advertising could not lawfully be imposed with respect to the nutritional advertising for Wonder Bread involved in this proceeding for the reason, among others, that substantially similar Wonder Bread advertising had been reviewed by the Commission in the past and respondent had been given no notice that the Commission considered such advertising unlawful.

245. It is stipulated that most Wonder Bread advertising since 1950 promoted the nutritional qualities of Wonder Bread and used slogans "Wonder bread helps build strong bodies eight ways" and "Wonder bread helps build strong bodies twelve ways." (CX 172, Par. 5).

246. ITT Continental, and its predecessor, Continental Baking Company, Inc., have for many years followed internal procedures that required that proposed advertising be reviewed and approved by its legal department prior to dissemination to ensure that such advertising complied with the requirements of law, and outside counsel have participated in this process as well (Anderson 2498-99; Thomas 2154-56; Woodward 2079-80).

247. In 1954 respondent's predecessor, Continental Baking Company, Inc., entered a stipulation with the Commission in which it agreed to include a specified disclaimer in the nutritional advertising for Wonder Bread that it was then using (Anderson 2499-2500; 51 F.T.C. 1430 (1954)). The following year, Continental approached the Commission to determine whether the advertising slogan for Wonder Bread could be changed from "helps build strong bodies eight ways" to "helps build strong bodies twelve ways." (Anderson 2501; RX 31, Pars. 2, 3). It is stipulated that RX 22 is a memorandum submitted to the Chairman of the Commission in November 1955 and further that RX 22 contains proposed Wonder Bread advertising employing the "twelve ways" slogan (RX 31, Par. 4; RX 22, Appendix A). Examination of the proposed advertising reveals numerous points of similarity to the advertisements challenged in this case.

248. The Commission's examination of this advertising was not restricted to determining whether or not it would violate the 1954 stipulation; rather, it was examined to determine its lawfulness from every point of view (Anderson 2503). About 2 months after

RX 22 had been submitted, an attorney retained by Continental was advised by either the Commission Chairman, or another member of the Commission, or both, that the proposed advertising campaign would not be challenged (RX 31, Par. 5). In addition, an attorney employed in Continental's corporate legal department was assured by Commission personnel that there was no risk in employing the proposed advertising (Anderson 2503). At the time these events occurred, there was no advisory opinion procedure at the Commission, and approval in writing of the advertising was never sought or given (Oral Stipulation, Tr. 2509-10). The proposed advertising was not employed by Continental until after it had been informed that the Commission did not intend to challenge it (RX 31, Par. 6).

249. Again, in 1958, pursuant to a request from the Commission, Continental supplied to the Commission all of its current advertising for Wonder Bread, which was essentially all nutrition advertising (Anderson 2503-04; RX 35). No response or further inquiry was made by the Commission as a result of this submission (Anderson 2504).

250. In 1962 the Commission began an extensive investigation in File No. 622 3357 into the then current Wonder Bread advertising, which was largely based on a nutritional theme (RX 34, Memoranda dated November 3, 1961 and November 6, 1961; Anderson 2505; Thomas 2156-59). The documentation that was submitted was extensive (Anderson 2505), and included substantiating the claims made in the advertising, which included the "twelve ways" slogan (Thomas 2156-57; RX 37).

251. Certain concerns voiced by Commission staff members to then current Wonder Bread advertising were accommodated by Continental on the basis of an informal agreement (Thomas 2166). Two years after the investigation began, the "Wonder Years" campaign began, in the spring of 1964, and commercials from this campaign were submitted to the Commission before the investigation was concluded in 1965 (Thomas 2157-58; Anderson 2507-08).

252. RX 34 includes a memorandum authored by Charles A. Sweeney, Chief of the Commission's Division of Food and Drug Advertising, dated January 11, 1965. It is addressed to the Secretary of the Commission and sets forth, at Pages 1-2, some of the advertising for Wonder Bread that the Commission had examined. With reference to the slogan "Wonder Bread helps build strong bodies twelve ways" this memorandum states:

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This same statement appears on the label and the Food and Drug Administration does not see fit to challenge it. The claim is literally true and we are of the opinion that we could not read into it any deceptive implications. (RX 34, Memorandum of January 11, 1965, at 2).

253. This same memorandum recommended that a closing letter be sent to Continental (RX 34, Memorandum of January 11, 1965, at 5-6), and early in 1965 Continental received a letter from the Secretary of the Commission informing it that the file in this investigation was being officially closed (Anderson 2506; Thomas 2167; RX 36-37).

254. Throughout the period between 1964 and 1970 the same basic Wonder Years commercials were employed but respondent received no further questions concerning any of its advertising for Wonder Bread until the investigation in this case began in early July of 1970 (Thomas 2167).

D. Summary

255. This record fails to establish any basis upon which corrective advertising might properly be ordered. There is no reliable evidence that the past nutrition advertising for Wonder Bread is contributing to present sales of that product. The record fails, by a wide margin, to show that the assertedly false aspects of that advertising are presently contributing to Wonder Bread sales, or that such aspects ever have had any impact on sales. Moreover, it has not been established that advertising for Wonder Bread has created the belief in any significant percentage of consumers that Wonder Bread is nutritionally distinct among white breads.

V. Corrective Advertising—Hostess Snack Cakes

256. Paragraph II(a) of the proposed order served with the complaint would require that 25 percent of any advertising for Hostess snack cakes for a period of one year be devoted to a clear and conspicuous disclosure that the Commission has alleged that the enrichment of these cakes has been falsely advertised as a major nutritional breakthrough.

257. Nutritional advertising for Hostess snack cake slasted only about 8 months and was discontinued in May 1971 after competitive brands copied the Hostess enrichment (Hackett 2133-34). The use of the phrase "major nutritional advance," was confined to some print advertising, and dollar expenditures for this advertising were insignificant (Hackett 2134-35).

258. Complaint counsel have produced no evidence whatever that would support the need for imposition of corrective advertising on this advertising slogan used at most in a few magazines for a few months.

VI. Bates

259. For many years, Bates has utilized procedures for the clearance of all advertising copy by its legal department to insure that there is a proper basis for statements made in advertising copy and that advertising copy does not convey misleading or deceptive impressions. Said procedures were utilized in connection with the clearance of the advertisements challenged in this proceeding (Frothingham 2759-64).

260. Bates was one of the first advertising agencies to establish mandatory procedures for the clearance of all advertising copy by its legal department (Frothingham 2763).

261. It did not come to Bates' attention that anyone was interpreting the challenged Wonder Bread advertisements as implying uniqueness until a few days before Bates received the complaint in this proceeding (Frothingham 2763).

262. Bates was aware of Commission's investigations of Wonder Bread nutritional advertising as early as 1955. Bates participated in the collection of advertising materials for certain of these investigations and Bates was informed of the results thereof (Frothingham 2762-63).

263. Complaint counsel did not call a single witness to testify as to the extent to which Bates participated in the creation of the advertising themes challenged in this proceeding, and the sole piece of evidence relating to this question is a stipulation, CX 173, in which it is stipulated that Bates participated in the creation of the "Wonder Years" and "How Big" themes for Wonder Bread and in the creation of the vitamin fortification theme for Hostess snack cakes.

264. The proper criterion in deciding in a case of this kind whether a cease and desist order should issue against the advertising agency is "the extent to which the advertising agency actually participated in the [alleged] deception. This is essentially a problem of fact * * *." *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921 (6th Cir. 1968); *Carter Products, Inc. v. FTC*, 323 F.2d 513, 534 (9th Cir. 1963).

265. There is no evidence in the record to support a finding that Bates actively participated in the creation of the advertising

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themes challenged in this proceeding.

a. No evidence was submitted in this proceeding showing that Bates knew or had reason to know that any of the challenged Wonder Bread advertisements communicated a claim that Wonder Bread was an outstanding source of nutrients, distinct from other enriched white breads.

b. No evidence was submitted in this proceeding showing that Bates knew or had reason to know that any of the challenged Wonder Bread advertisements communicated a claim that consuming Wonder Bread in the customary manner that bread is used in the diet will provide a child from the ages 1 through 12 with all the nutrients, in recommended quantities, that are essential to healthy growth and development.

c. No evidence was submitted in this proceeding showing that Bates knew or had reason to know that any of the challenged Wonder Bread advertisements communicated a claim that parents can rely on Wonder Bread to provide their children with all nutrients that are essential to healthy growth and development.

d. No evidence was submitted in this proceeding showing that Bates knew or had reason to know that any of the challenged Wonder Bread advertisements communicated a claim that the optimum contribution a parent can make to his child's nutrition during the formative years of growth is to assure that the child consumes Wonder Bread regularly.

e. No evidence was submitted in this proceeding showing that Bates knew or had reason to know that any of the challenged Wonder Bread advertisements communicated a claim that the protein supplied by Wonder Bread is complete protein of high nutritional quality necessary to assure maximum growth and development.

f. No evidence was submitted in this proceeding showing that Bates knew or had reason to know that any of the challenged Wonder Bread advertisements communicated a claim that Wonder Bread was an extraordinary food for producing dramatic growth in children.

g. No evidence was submitted in this proceeding that Bates knew or had reason to know that any of the challenged advertisements exploited the aspirations of children for rapid and healthy growth or development, or that Bates knew or had reason to know that any of the challenged advertisements appealed unfairly to children.

h. No evidence was submitted in this proceeding that Bates knew or had reason to know that any of the challenged Wonder Bread advertisements communicated a claim that Wonder Bread was a necessary food for children to grow and develop to the fullest extent during the preadolescent years.

i. No evidence was submitted in this proceeding that Bates knew or had reason to know that any of the challenged Wonder Bread advertisements exploited the emotional concern of parents for the healthy physical and mental growth of their children, or that Bates knew or had reason to know that any of the challenged advertisements appealed unfairly to parents.

j. No evidence was submitted in this proceeding showing that Bates knew or had reason to know that any of the challenged Hostess snack cake advertisements communicated a claim that Hostess snack cakes provide all the vitamins recognized as essential to the healthy growth and development of children.

k. No evidence was submitted in this proceeding showing that Bates knew or had reason to know that any of the challenged Hostess snack cake advertisements exploited the guilt feelings of mothers regarding the nutritional effect of snack cakes on their children's diets, or that Bates knew or had reason to know that any of the challenged advertisements appealed unfairly to mothers.

266. The proposed order would have potentially drastic effects on Bates in that food and beverage products alone account on the average of one-half to one-third of Bates' billing volume (Frothingham 2766).

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 their bakery products Wonder Bread and Hostess snack cakes as alleged in the complaint.

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3. In the *Firestone* case, *In the Matter of The Firestone Tire and Rubber Company*, Docket No. 8818 [81 F.T.C. 398], the Commission sets forth and makes it abundantly clear that if it chooses it need not rely on any surveys to determine the meaning of advertising to the public and whether or not it has the tendency or capacity to deceive the public. "The law is clear that the Commission's expertise is sufficient and that it need not resort to survey evidence or consumer testimony as to how an advertisement may be perceived by the public or whether they relied upon the ad to their detriment. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965); *J. B. Williams & Co. v. FTC*, 381 F.2d 884, 890 (6th Cir. 1967); *Niresk Industries, Inc. v. FTC*, 278 F.2d 337, 342 (7th Cir.), *cert. denied*, 364 U.S. 883 (1960); *E. F. Drew & Co. v. FTC*, 235 F.2d 735, 741 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957), *Charles of the Ritz Distributors Corp. v. FTC*, 143 F.2d 676, 680 (2d Cir. 1944)."

As stated in this decision the undersigned can ascribe little probative weight to the statistics reporting to reflect consumer perception about the advertisements contained in this proceeding and does not believe therefore that the surveys provide sufficient insight into how the advertisements were in fact perceived by the consuming public.

Complaint counsel's case was based upon a false assumption (to wit, the respondents' advertising said certain things which it did not say either directly or by implication) and in order to bolster their position, they based their case on the testimony of opinion witnesses. Regardless of the eminent background of most all of complaint counsel's witnesses, a case of this kind cannot be successfully sustained by following opinion upon opinion upon opinion. Opinion based upon opinion is like stepping on the springboard of imagination and springing into the realm of conjecture.

The failure of complaint counsel to sustain the burden of proof leaves the administrative law judge no alternative but to issue an order dismissing the proceeding against all respondents.

ORDER

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

STATEMENT OF CHAIRMAN ENGMAN, DISSENTING IN PART

OCTOBER 19, 1973

I find I am unable to concur in that portion of the majority

opinion which dismisses charges of unfairness against advertising claims directed primarily at children. A number of the advertisements containing an implied claim that Wonder Bread is an extraordinary growth-producing food, which the Commission has found to be false, were either specifically directed to children or seen by a substantial number of children. In my opinion, the display of these advertisements also constitutes an unfair practice with respect to children within the meaning of Section 5 of the Federal Trade Commission Act.

The fantasy growth sequence was used both in the earlier "Wonder Years" campaign and the more recent "How Big" campaign. Respondents freely admit that some of the TV commercials were specifically directed to children. (ITT and Bates Answers, paragraph 10). The record also indicates that the challenged TV commercials were addressed primarily to children or to audiences which included a large number of children. (Hackett Tr. 2142, 2144-45; Richel Tr. 2751; CX 175, paragraph 2; CX 176, paragraph 1). From 1961 to 1970, most of the challenged TV commercials were broadcast before 11:00 p.m. and they were viewed by a substantial number of children. (Solnit Tr. 624; Granger Tr. 525; CX 175, paragraphs 6-9, 14, 15; CX 176, paragraph 1).

There is persuasive record evidence that children under six years of age tend to perceive these advertisements as promising that they will grow as quickly as the child depicted in the fantasy growth sequence. Dr. Littner, respondents' expert witness, conceded that "this is the message in the ad, it may cause them to grow suddenly." (Tr. 2305). This perception is likely to be induced both by the fantasy growth sequence and other elements in the advertisements that appeal to children, such as the question "How big do *you* want to be?" and pictures showing children possessing various physical skills. (Solnit Tr. 599-602, 608, 616-19; Granger Tr. 507, 508, 511-12; Galdston Tr. 424, 428-32). This is easier to perceive with respect to the Captain Kangaroo show commercials and the Bozo Circus show commercials where the hosts of these children's shows delivered the advertising messages. (Solnit Tr. 622-23; Granger Tr. 528).

The record further indicates that, although children do not fully comprehend their physical growth process, they have strong aspirations for rapid and healthy growth. (Solnit Tr. 599-600; Granger Tr. 509; Galdston Tr. 420). Moreover, there is also evidence in the record that children under the age of six tend to confuse fantasy and reality and that this tendency decreases as

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they grow older. (Solnit Tr. 604-06; Granger Tr. 507, 508; Galdston Tr. 420-21; Ward Tr. 2200; Littner Tr. 2285-86). And this tendency of children to confuse fact and fiction holds true with respect to TV commercials. (Solnit Tr. 616-18, 633, 637; Granger Tr. 502).

In sum, the record evidence confirms what our accumulated knowledge and experience tell us: namely, that children of tender years, especially children under six years of age, are highly vulnerable to the type of subtle psychological claim promising rapid growth contained in the Wonder Bread advertisements.¹ Recent empirical studies appear to confirm the conclusion that children under six years of age may tend toward a confused perception about whether something they see on television is absolutely true or not.²

In these circumstances, I am persuaded that the challenged advertisements, in addition to being deceptive, also constitute unfair practices within the meaning of Section 5 because they capitalize on children's anxiety about growth and exploit their difficulty or inability to differentiate between reality and fantasy. In my opinion, the unfairness doctrine endorsed by the Court in *FTC v. Sperry & Hutchinson Co.*, 40 U.S. 233, 239-46 (1972) is peculiarly appropriate in the circumstances of this case.

I am not suggesting here either that Section 5 condemns every psychological advertisement directed to children or that advertising directed to children is inherently suspect. But the advertiser who chooses a child audience as the target group for his selling message is subject not only to standards of truthful advertising; he is, in my judgment, also bound to deal in complete fairness with his young viewers. In my opinion, advertising directed to or seen by children which is calculated to, or in effect does, exploit their known anxieties or capitalize upon their propensity to confuse reality and fantasy is unfair within the meaning of Section 5 of the Federal Trade Commission Act.

¹ The NAB TV Code now prohibits the use of hosts of children's programs or the "primary cartoon characters" featured in such programs for delivery of commercials within or adjacent to such programs. The Code also bans them from endorsing a product while leading into a commercial. See Ward, "Kids TV—Marketers on Hot Seat," *Harv. Bus. Rev.*, July-Aug., 1972, pp. 16, 22. (Galdston Tr. 420; Granger Tr. 509; Solnit Tr. 599-600).

² Blatt, Spencer and Ward, "A Cognitive Development Study of Children's Reaction to Television Advertising," *Television in Day-to-Day Life: Patterns of Use*, 4 TELEVISION AND SOCIAL BEHAVIOR—REPORTS AND PAPERS: A Technical Report to the Surgeon General's Scientific Advisory Committee on Television and Social Behavior, pp. 452, 456-57 (1972); Ward, Reale and Levinson, "Explanations and Judgments of Television Advertising: A Further Exploration," *Id.*, pp. 468, 474-75. See Ward Tr. 2200-01.

DISSENTING STATEMENT OF COMMISSIONER JONES

The Commission finds that the allegations of Paragraph 8 of the complaint have not been proven. I agree with this conclusion. I also agree with the Commission's finding that the representations alleged in Paragraph 10 that Wonder Bread is an extraordinary food for producing growth were contained in respondents' advertisements and were false.

I disagree, however, with the balance of the Commission's conclusions that respondents' Wonder Bread ads did not represent Wonder Bread as an essential food for children's growth and healthy development, that respondents' Hostess cake ads were not deceptive as alleged in Paragraphs 13(c) and (d) and finally, that corrective advertising is not a proper relief measure in this case. I will discuss my reasons for my disagreement with each of these findings and conclusions.

It is impossible for me to make the hairline distinction which the Commission apparently sees in respondents' claims which it believes promote Wonder Bread as an extraordinary value for children's growth and yet do not promote it as necessary for that growth. The Commission specifically noted that respondents' ads promote Wonder Bread as containing "vital elements" for children's growth, that children will never "need" Wonder more than when they are in their "formative years." It is difficult—nay impossible—for me to conceive of any product fulfilling respondents' glowing promises for it which would be regarded by viewing or listening audiences as unnecessary or nonessential.

I agree with the Commission that the allegations of Paragraphs 13(a) and (b) respecting respondents' Hostess cake advertisements have not been proven on the record. I disagree that respondents' ads did not claim that Hostess cakes provided children with all vitamins essential to healthy growth and with good nutrition as alleged in Paragraphs 13(c) and (d) and 15. Consumers are certainly entitled to assume that a product containing body-building vitamins or represented as vitamin fortified will fulfill all their vitamin needs and will not notice fine distinctions in advertising texts as to whether the words "all" or "some" were included or omitted. Respondents prepared their advertisements with care. It is their responsibility to see to it that ambiguities do not exist such as might mislead consumers as to such an important property as vitamins which they have made a central focus of their message. Accordingly, I am convinced that respondents' advertisements clearly exaggerated the vitamin content of Host-

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ess snack cakes and had the capacity to mislead consumers as to whether the advertised product contained all vitamins necessary for good nutrition and healthy growth or only, as was actually the case, some of the vitamins necessary to such growth.

I am also convinced from my reading of the record that respondents' use of the term "good nutrition" in connection with its Hostess snack cakes represented their snack cakes as an affirmatively good nutritional food whereas in fact even respondents' own expert witnesses testified that at most eating these products will contribute only a few nutrients to a diet. No witness claimed that eating Hostess snack cakes would provide a whole balanced diet. At most, respondents' witnesses claimed eating these snack foods would *not* unbalance a diet. Yet this was not what respondents claimed. It is interesting to note that the results of one of respondents' Hostess snack cake attitudinal surveys indicates that a high percentage of mothers were of the view that snack cakes are all right if children are also provided with a balanced meal. (CX 106, Table 159) Respondents' advertising claims, rather than portraying their snack cakes in this light, instead seemed to be directed at overcoming this view by representing, that eating Hostess snack cakes provided the nutrients customarily thought of as constituting a balanced meal, *i.e.*, "good nutrition."

Respondents chose to make their claims of good nutrition absolute and unqualified. They must be held to this standard of absoluteness. I believe that the evidence makes it clear that these claims were false and hence I dissent from the Commission's contrary conclusion.

I also disagree with the Commission's disposition of the arguments of complaint counsel and the *amicus* intervenors as to the need for corrective advertising in this case in order to ensure a realistic dissipation of the deceptive advertising claims in the future. It is the Commission's responsibility to order the form of relief which in its view is necessary in order to eliminate all vestiges of the deceptions which it has found from existing and future advertisements whether these vestiges will inhere in the ads themselves or are believed to be still operating on consumer attitudes towards the advertised product. Therefore, it is immaterial in my judgment as to whether a particular relief provision was or was not requested by the parties or with respect to which deceptions it was sought. In *Firestone*, corrective advertising was sought only by the intervenors.

I am convinced that the corrective advertising remedy is essential in this case not just to erase consumer recollections of these particular advertising messages but to ensure that these deceptions will not be communicated to consumers in the *future* advertising of respondents.

Based on the evidence in this record as to how advertising and communications works on consumers,¹ it would be impossible in my judgment for this respondent to advertise its Wonder Bread product without evoking this growth image even if it made no reference to nutrition and growth at all. The very name of the product, associated as it is in the consumers' mind with nutrition and growth, must inevitably carry with it the essence of respondents' advertising message which we have found to be false.

Each of respondents' advertising themes featured the trade name of the product. As such an integral part of their message, the reiteration of the Wonder Bread name is likely to constantly evoke the other aspects of the advertising message which have been found to be false.²

One role of advertising slogans is to capsule an entire product concept into an easy to remember slogan so that at some point the specific claims making up that concept can be dropped and their meaning captured by the mere iteration of the slogan. Wonder Bread found its slogan in its very name, in its "builds bodies twelve ways" and in its visual depiction of a child's actual growth. It used its name as the central theme of its Wonder Years campaign. This campaign had a single message: eat Wonder Bread and grow. Growth and Wonder were the buzz words which have continued to be central to every single advertisement disseminated by respondent since 1952. Respondents' How Big campaign carried the identical message. Its name, its growth sequence and its "builds bodies twelve ways" slogan were central features of both campaigns and formed the bridge which connected the two campaigns and ensured a continuity of respondents' central message: Wonder Bread and growth. Thus an examination of respondent's advertisements makes clear to me that respondents' misrepresentations are of such a nature that an order limited to a simple prohibition of the claims or words making up these deceptions will never effectively eliminate them. I cannot imagine any

¹ See Lucas Tr. 709, 715-716, Lodish Tr. 1985-1990. For carryover effect of advertising see Lodish Tr. 1984, Morrison Tr. 1497, 1507, 1508, 1510-1511, Robertson Tr. 1296-1300, 1233-1234. For effect of advertising on sales see Lucas Tr. 706, 729, Robertson Tr. 1252, Lodish Tr. 1984.

² See Note, "Corrective Advertising" Orders of the Federal Trade Commission, 85 Harv. L. Rev. 477, 494 (1971).

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form of advertising which respondents could engage in which will not further this deceptive image of Wonder Bread unless that message affirmatively disclaims these essential growth producing and nutritional characteristics of respondents' product. I am convinced that only an affirmative disclosure by respondent in its advertisements that the nutritional properties of its bread were falsely portrayed to consumers offers any reasonable likelihood that the deceptions can be eradicated from future advertisements of Wonder Bread.

I find nothing in the record before us which differentiates this case in any way from any other false advertising case which the Commission has decided. Nor do I find anything in the corrective advertising relief which renders it an unusual or inappropriate remedy for advertising misrepresentations. The Commission has traditionally required affirmative disclosures of one kind or another when in its judgment mere negative prohibitions would be insufficient to stamp out the misrepresentations found to have been made.

The misrepresentations which the Commission has found to be contained in the Wonder Bread advertisements involved claims which relate to the efficacy of these products for the good health of consumers. Moreover, they relate to properties of the product which cannot be independently verified by consumers. Finally, these claims were specifically directed to children and to parents on matters of special concern to them, the healthy growth and development of children. Thus respondents' advertisements which have here been found to have been deceptive have a potentially serious impact on the health of individuals. Moreover these Wonder Bread advertisements have been disseminated to the consuming public for some 21 years.³ Respondent stipulated that Wonder Bread costs 2-25 percent more than its unadvertised private label counterparts. Yet 600 million more loaves of Wonder Bread were sold in each of the years from 1964 to 1971 (CX 172, par. 12). The survey evidence indicates that consumers have a high recall of specific aspects of the Wonder Bread advertisements, 83.4 percent of the survey population remembered aspects of Wonder Bread advertisements and 66.1 percent specifically remembered the rapid growth sequence in the advertisements showing the child literally growing to adolescence (CX 112 A, Table 79). The record also established that a substantial number of consumers will remember the Wonder Bread advertisements for many years

³ CX 172, CX 175, Hackett Tr. 2140-2141.

after the advertisements cease, and that a significant portion of the population will remember the advertisements for five years or more.⁴

It is clear to me that if respondents' deceptive advertising claims are to be eliminated from its future advertisements of Wonder Bread, the Commission has no other choice than to order respondents to disclose in its advertisements the fact that its prior nutritional claims for its product were false.

OPINION OF THE COMMISSION

In August 1971, the Commission issued a complaint against the ITT Continental Baking Co., (herein ITT)¹ and Ted Bates & Company, Inc. (herein Bates), charging them with violations of Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. § 45 and § 52 (1970) in making certain advertising claims as to the nutritional value of ITT's product, Wonder Enriched Bread and Hostess Snack Cakes, which are variously alleged to be deceptive and unfair.² Both respondents, by their respective answers filed in October 1971, denied the essential allegations of the complaint and urged various affirmative defenses raising issues as to the power of the Commission to issue the complaint and order and the propriety of doing so.

After several prehearing conferences extending from October through June of 1972, the case proceeded to hearing in June of 1972. The administrative law judge handed down his initial decision on December 18, 1972, in which he concluded that respondents' Wonder Bread advertisements did not make the representa-

⁴ See Lodish Tr. 1989-1991; see also, CX 112 A (Table 79), in conjunction with Hackett Tr. 2120-2123; Lucas 722.

¹ Hereinafter, ITT refers to both ITT Continental and its predecessor, Continental Baking Co., which was acquired by ITT in September of 1968. (Tr. 2068)

² The following abbreviations will be used for citations:

Comp.—Complaint

Ans.—Answer

I.D.—Initial Decision of Administrative Law Judge (FF—Findings)

Tr.—Transcript of Testimony

CPF—Complaint Counsel's Proposed Findings of Fact

RPF—Respondents' Proposed Findings of Fact

CX—Commission Exhibit

RX—Respondent Exhibit

C.C. App. Br.—Brief on Appeal of Complaint Counsel (C.C.)

Amicus App. Br.—Brief on Appeal of *amicus curiae* (hereinafter amicus) Consumer Federation of America; Consumers Union of the United States, Inc.; Federation of Homemakers, Inc.

R(ITT) Ans. Br.—Answering Brief of respondent ITT Continental Baking Co., Inc. (ITT)

R(Bates) Ans. Br.—Answering Brief of respondent Ted Bates & Co., Inc. (Bates)

C.C. Reply Br.—Reply Brief of Complaint Counsel (C.C.)

Amicus Reply Br.—Reply Brief of Amicus

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tions alleged in the complaint, either directly or impliedly, and that the Wonder Bread advertisements did not unfairly exploit their audiences. (FF 95, 151, 161, 162; I.D. 75-76) [pp. 939-40 herein] The law judge also found that respondents' Hostess Snack Cake advertisements did not make several of the representations alleged in the complaint; that where the alleged representation was made by the advertisements, it was in fact true; and that these advertisements did not unfairly exploit their audiences. (FF 185, 201, 222, 228, 229; I.D. 75-76) [pp. 939-40 herein]

With respect to respondents' various affirmative defenses, the law judge concluded that it would not serve the public interest to prohibit ITT from advertising its bread as nutritious simply because other enriched breads are equally nutritious and that corrective advertising is not an appropriate remedy in this particular case. (I.D. FF 40, 96(e), 167, 232-258) (I.D. 75-76) [pp. 939-40 herein] The law judge, therefore, concluded that no basis existed for the order proposed by complaint counsel and issued his own order dismissing the proceeding against both respondents. (I.D. 75-76) [pp. 939-40 herein]

This matter is now before the Commission on complaint counsel's appeal from the initial decision.³

Respondents have not filed any appeal but, in their briefs in opposition to complaint counsel's appeal, have pressed their contentions as to the correctness of the law judge's findings and conclusions that the advertisements did not make the alleged representations; that where those representations were made, they were in fact true; that the advertisements did not unfairly exploit their audiences; and that the complaint, particularly Paragraph 8(a), is not in the public interest. Respondents further urge that the Commission in its framing of the complaint has prejudged the issues of what representations are in fact made by respondents' advertisements, that the relief sought would violate

³ Complaint counsel have not appealed the law judge's dismissal of Paragraph 16 of the complaint which alleged that on the basis of the surveys made for respondent ITT, ITT knew or should have known that its advertisements were false and that the continued dissemination of those advertisements constituted "unfair or deceptive acts or practices." (See C.C. App. Br. p. 2, n. 1) In addition to the brief of complaint counsel, a brief by *amicus* also urging reversal of the law judge's initial decision was filed by Consumer Federation of America; Consumers Union of United States, Inc.; and Federation of Homemakers, Inc.; three organizations representing a substantial number of consumers who had originally petitioned on January 5, 1973, to intervene in this case. The Commission denied their motion but granted these groups permission to file an *amicus* brief and present oral argument by its order of February 16, 1973, with Commissioner Jones dissenting from the denial of the motion to intervene. Docket No. 8860 Order (1) Denying Motion to Intervene, and (2) Granting Permission to File Amicus Brief and Present Oral Argument, February 16, 1973, and Dissenting Statement by Commissioner Jones, February 16, 1973 [82 F.T.C. 699].

the First Amendment, and that the Commission lacks constitutional and statutory authority to order corrective advertising.

We will first discuss the issues raised by the parties with respect to Wonder Bread; second with respect to Hostess Snack Cakes; and, finally, we will discuss the order with particular reference to the need for corrective advertising as contended for by complaint counsel. We have not separately considered the affirmative defenses. We have, however, dealt with them with respect to the particular issues to which they pertain.

WONDER BREAD ALLEGATIONS

A. Respondents' "Wonder Years" and "How Big" Advertisements

The allegations respecting the Wonder Bread commercials are contained in Paragraphs 8, 10, and 11 of the complaint. Paragraph 8 of the complaint alleged respondents falsely represented that:

Wonder Bread is an outstanding source of nutrients, distinct from other enriched breads; (Para. 8(a))

Consuming said Wonder Bread in the customary manner that bread is used in the diet will provide a child age one to twelve with all the nutrients, in recommended quantities, that are essential to healthy growth and development; (Para. 8(b))

Parents can rely on Wonder Bread to provide their children with all nutrients that are essential to healthy growth and development; (Para. 8(c))

The optimum contribution a parent can make to his child's nutrition during the formative years of growth is to assure that the child consumes Wonder Bread regularly; (Para. 8(d))

The protein supplied by said Wonder Bread is complete protein of high nutritional quality necessary to assure maximum growth and development. (Para. 8(e))

Paragraph 10 of the complaint challenged certain of respondents' advertisements as both deceptive and unfair insofar as they tend to exploit the aspirations of children for rapid and healthy growth and development by falsely portraying, directly or by implication, said Wonder Bread as an extraordinary food for producing dramatic growth in children.

Paragraph 11 of the complaint challenged certain of respondents' advertisements as both deceptive and unfair insofar as they tend to exploit the emotional concern of parents for the healthy physical and mental growth and development of their children by

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falsely portraying Wonder Bread as a necessary food for their children to grow and develop to the fullest extent during pre-adolescent years.

The Wonder Bread advertisements on which these allegations are based appeared in one form or another in all media, TV, radio, and print, during the period from 1964-1971 as part of two principal advertising campaigns: the so-called "Wonder Years" campaign instituted in the spring of 1964 and replaced in 1970 by the "How Big" campaign, which was terminated sometime during 1971. (CX 172 §1 and §2; Thomas Tr. 2157-2158; Hackett Tr. 2120-2123; Bates Ans., First Defense §7; ITT Ans., Fifth Defense §7) ⁴

Respondents stipulated that their television advertisements were primarily directed at two groups: mothers between the ages of 18 and 49, and children between the ages of 1 and 12. (CX 175, Para. 2) Respondents also admitted that substantial numbers of children under the age of 12 were in the television viewing audience when these commercials were run. (CX 176 §1, CX 175 §6-15)

The themes of respondents' two advertising campaigns were essentially the same, although their format and emphasis differed slightly.

Respondents' 60-second commercial entitled "Cardboard House" is typical of the ads appearing in respondents' Wonder Years campaign. (CX 9, film and CX 23, photoboard) ⁵ It depicts several young children playing in a cardboard house. The commercial opens with the announcer stating:

These are the "Wonder Years," the formative years one through twelve when your child develops in many ways, actually grows to 90% of her adult height.

* * * * *

To help make the most of these "Wonder Years," serve nutritious Wonder Enriched Bread. Wonder helps build strong bodies in 12 ways. Carefully enriched with foods for body and mind, Wonder Bread tastes so good, and it is so good for growing child, for active adult.

While the announcer is talking, the TV screen shows a child

⁴ There is a conflict in the record concerning the exact termination date of respondents' "How Big" campaign. Respondents stipulated that the challenged "How Big" advertisements were disseminated until January 1, 1971.

⁵ See CX 11 and 25 (60-second commercial, "Kites") and their 30-second shortened counterparts, CX 10 and 24 ("Cardboard House"), and 12 and 26 ("Kites"). The description of this commercial appearing in the text follows closely the law judge's description of its 30-second counterpart. (FF 13(c))

eating Wonder Bread and then actually growing rapidly from a very young child to a twelve-year-old. While this visual rapid growth is taking place before the viewer's eyes, first the word "protein," then "mineral," then "carbohydrates," and finally "vitamins," are flashed in rapid succession above the growing child, each one coinciding with each growth sequence depicted. This visual depiction of the child growing while eating Wonder Bread appears twice in the 60-second commercial.⁶ When it appears the second time, the announcer asserts that "each slice of bread supplies protein for muscle, minerals for strong bones and teeth, carbohydrates for energy, vitamins for nerves, all vital elements for growing minds and bodies." The commercial ends with the announcer urging parents:

to help make the most of her "Wonder Years," her growth years, serve Wonder Bread. Wonder helps build strong bodies 12 ways.

Essentially the same message appeared in respondents' print ads and radio commercials disseminated as part of its Wonder Years campaign.⁷

Respondents' "How Big" campaign which was introduced in 1970 to replace the Wonder Years campaign contained essentially the same representations with greater emphasis on the theme "How Big" instead of the "Wonder Years." Four of respondents' commercials in the "How Big" campaign were described by the law judge as follows.

These commercials open showing a young child with "HOW BIG DO YOU WANT TO BE?" over-printed. The announcer says, "Wonder asks, how big do you want to be?" Various children answer as they are photographed:

Big enough so that the barber won't have to cut my hair in a baby's chair, Big enough to be a cheerleader, Big enough to sink a basket, Big enough to touch the ceiling myself, Big enough to dance with my girlfriend, Big enough to go surfing, Big enough to wear my daddy's shoes, Big enough to see the parade, "Big enough to ride a two-wheeler, About ten times bigger than my sister, Big enough to reach things without a chair, and Bigger than George, he's my dog.

⁶ It appears only once in respondents' 30-second version of this commercial.

⁷ Respondents' print ads appeared in national magazines and newspapers. They showed still-life pictures of children at play and included various representations also made in the challenged television commercials from the Wonder Years campaign such as, "Make the most of their 'Wonder Years,'" "You can do the most for your children's growth during their 'Wonder Years'—ages one through twelve." (FF 13(1)(g) and CX 28 and 28(a); FF 13(1)(i) and CX 30 a-d) This message was also contained in a series of radio commercials. (FF 13(1)(f), 18 CX 172 §2, and Bates Ans., First Defense §7)

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After the children have told how big they want to be, the announcer states:

He'll never need Wonder Bread more than right now, because the time to grow bigger and stronger is during the Wonder Years—ages one through twelve—the years when your child grows to ninety percent of his adult height.

During this audio message, the same Wonder Years visual growth sequence is used and the child is pictured on the screen actually growing from a very young child to a twelve-year-old.

Then the audio portion continues:

How can you help? By serving nutritious Wonder Enriched Bread. Wonder helps build strong bodies twelve ways. Each delicious slice of Wonder Bread supplies protein for muscle, minerals for strong bones and teeth, carbohydrates for energy, vitamins for nerves. All vital elements for growing minds and bodies.

Again the child is shown actually growing from a very young child to a twelve-year-old, and the commercial ends with parents serving the child Wonder Bread and the audio stating:

During the Wonder Years—the growth years—help your child grow bigger and stronger. Serve Wonder Bread. Wonder helps build strong bodies twelve ways.⁸

The "How Big" advertising message also appeared in national magazines.⁹

Respondents' "How Big" campaign also included television advertisements which appeared on two children's programs, Captain Kangaroo and Bozo Circus. (FF 147, CX 59, Richel Tr. 2731-2735) Respondents admitted and the law judge found that the following audio from one of these advertisements is representative of all the ads aired on the Captain Kangaroo show (CX 172, §4; FF 13(e)):

Captain Kangaroo: Mr. Moose, I have an interesting question for you. If you could be as big as you wanted to be * * * how big would you want to be?

Mr. Moose: Gee * * * as big * * * as big * * * I know. As big as a tree. Then I could see *everything* around me for miles and miles.

Captain Kangaroo: Wouldn't that be fun, Mr. Moose?

Mr. Moose: Yes. Do you think eating Wonder Bread would get me that big?

⁸ Four "How Big" 60-second commercials containing this same message but in different outdoor settings are in the record, CXs 1, 14 ("Surfing"), CXs 2, 16 ("Basketball"), CXs 4, 18 ("Bike-Trike"), and CXs 7, 21 ("Interviews"). Their 30-second counterparts containing essentially the same text but showing the actual growth of the child sequence only once are contained in CXs 15, 3, 17, 5, 6, 20, 1, 21, 84 and RX 49.

⁹ CX 44.

Captain Kangaroo: Well * * * not quite as big as a tree * * * but Wonder does help boys and girls grow up big and strong, and give them energy for work and play. Each slice of Wonder is baked with vitamins and other good things that help you grow.

Mr. Moose: And Wonder tastes so good, too.

Captain Kangaroo: It does indeed—it's so light and tender and white, baked soft just the way you like it best. Great for lunchtime sandwiches * * * and anytime snacks. You'll want to enjoy Wonder Enriched Bread soon. Mother, please look for the red, yellow, and blue balloons printed on every wrapper. Remember, Wonder helps build strong trees—uh, bodies 12 ways.¹⁰

B. The Issues Raised by the Parties on Appeal

The crux of the issues between the parties with respect to these Wonder Bread advertisements turns essentially on what representations are contained in them, whether they were deceptive, and whether the representations alleged in Paragraphs 10 and 11 of the complaint were also unfair in that they exploited the special vulnerabilities of parents and children respecting the healthy growth and development of children.

The parties offered and relied upon various results of a series of market surveys, commissioned for the most part by ITT, in support of their respective positions on the nature of the representations contained in the Wonder Bread advertisements. The parties also urge several legal and factual contentions about the relevance, probity, and reliability of this survey evidence.

It is now axiomatic that mere capacity or tendency to mislead is enough to make out a Section 5 violation and that the law does not require proof of actual deception or injury. *E.g.*, *FTC v. Raladam Co.*, 316 U.S. 149 (1942); *Charles of the Ritz Distributing Co. v. FTC*, 143 F.2d 676 (2d Cir. 1944); *Benrus Watch Co. v. FTC*, 352 F.2d 313 (8th Cir. 1965). It is equally well established

¹⁰ Similar "How Big" advertisements for Wonder Bread were also aired on the local children's program "Bozo Circus" in Chicago, Illinois for 13 weeks in 1970. (CX 175 §2 and 3) The Bozo Circus campaign contained essentially the same nutritional claims. The following audio from one of the advertisements appearing on "Bozo Circus" is representative of all of them (CX 172 §3, FF 13(d)):

UNCLE NED: Say, how many of you would like to grow up to be as big as an elephant? That's pretty big, isn't it? And, of course, no one *really* wants to be quite that big. But you are going to do a lot of growing in the next few years, and it is fun thinking about how you'll be. You know, one thing that's so important to your growing is the kind of food you eat. You need to eat the right kinds of food. Yes * * * foods that are good for you, like Wonder Enriched Bread. Because Wonder is baked with vitamins and other good things that help you grow up big and strong and have energy for worktime and playtime fun. And you know what fun Wonder is to eat. Yes, just look at this delicious Wonder Bread sandwich * * * so tender and light, just the way you like it. You can enjoy Wonder so many times during the day: for your sandwiches at lunch, after-school snacks * * * perhaps with your evening meal, too. So, Mom, when your kids tell you how big they want to be—remember, they'll never need Wonder more than right now. Wonder helps build strong bodies 12 ways. (Compl. Para. 7(d); CX 172 §3)

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that the Commission may rely on its own accumulated knowledge and experience for the determination of whether an advertisement is deceptive or misleading, without resorting to extrinsic evidence of deception. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965). The Commission "may draw its own inferences from the advertisement and need not depend on testimony or exhibits" in the record, aside from the advertisements themselves. *Carter Products, Inc. v. FTC*, 323 F.2d 523, 528 (5th Cir. 1963). Indeed, the Commission is not bound to conduct surveys to determine the meaning and impact of the advertisements. *J. B. Williams Co. v. FTC*, 381 F.2d 884, 890 (6th Cir. 1967). If the law were otherwise, every deceptive advertisement litigation would be turned into a war of experts and surveys.

However, in cases where, as here, extrinsic evidence exists in the record, the Commission should take it into consideration. The question of probity or weight of course depends on the qualification and experience of the particular expert involved and the validity and soundness of methodology utilized in the survey. *Rhodes Pharmacal Co. v. FTC*, 208 F.2d 382, 386-87 (7th Cir. 1953), *per curiam* order reinstating Commission order *in toto*, 348, U.S. 940 (1955); *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970).

1. The Market Survey Evidence

Complaint counsel offered excerpts from six market surveys searching consumer attitudes towards respondents' product Wonder Bread as well as towards their Wonder Bread advertisements in order to support their contentions as to how advertisements in general and the Wonder Bread advertisements in particular were perceived by consumers¹¹

¹¹ Five of these surveys were conducted at the instance of respondent ITT Continental Baking Co.:

CX 108 Oxtoby-Smith 1965 survey the purchase behavior and attitude of 200 Kansas City white bread users and their comparative rating of Wonder Bread and other breads on specific bread attributes as well as their recall of Wonder Bread advertisements.

CX 109-110(a) Oxtoby-Smith 1966 survey of 900 white bread purchasers in 26 cities on their bread purchase habits and their comparative rating of Wonder Bread and other breads on enumerated bread attitudes.

CX 44-93 G/A/H July 1969 survey of the attitudes towards Wonder Bread of some 200 housewives divided into two groups consisting of those who had viewed Wonder Bread commercials and those who had not.

CX 96(a)-102(a) G/A/H October-November 1969 Problem Market Study surveying consumer attitudes towards Wonder Bread and competitive breads, their brand usage and awareness, their advertising awareness, and their competitive ratings of these brands on a variety of product attributes.

CX 112(a) BBDO April-July 1971 national telephone survey of consumer attitudes towards a series of different products including their comparison of Wonder Bread with other breads in terms of nutrition, growth potential.

A sixth survey was conducted in March 1972 by Drs. Leonard Lodish and Thomas Robertson, professors at the Wharton School of Business of the University of Pennsylvania after some discussion of the Wonder Bread complaint with complaint counsel. (CX 114(a)) This survey interviewed shoppers in 12 shopping centers in New York, New Jersey, and Pennsylvania, asking them a series of questions relating to Wonder Bread advertising and to their comparative rating of Wonder against the general category "other brands of white bread" on nutrition.

Complaint counsel rely on specific results from four of these surveys to support the complaint allegations that respondents' advertisements represent Wonder Bread as an outstanding source of nutrients distinct from other breads.

We do not agree with respondents that market surveys directed at measuring consumer attitudes toward a *product* offer no guide or are probatively inferior to market surveys testing consumer recall of advertising messages. Respondents themselves commissioned various market research firms to conduct surveys which included numerous questions specifically designed to gauge consumer attitudes toward Wonder Bread. Respondents themselves utilized these survey results in order to monitor the effectiveness of their advertising messages and to guide the development of new advertising strategies for Wonder Bread.¹² Accordingly, we conclude that market surveys of consumer attitudes toward the advertised product are relevant to the issues raised with respect to the representations made by respondents' advertisements.

In the instant case, however, respondents sought to demonstrate that in fact whatever consumer attitudes may exist toward its product were not in fact influenced by the specific content of its advertisements but rather may have been produced by a phenomenon known as the halo effect of advertising. (R (ITT) App. Br. pp. 9-11) This halo phenomenon in essence can be defined as a general aura of superiority ascribed by consumers to a specific product or product attribute which is generated not by a particu-

¹² Mr. Randall Hackett, respondent ITT's vice president in charge of advertising since 1968, gave detailed testimony on ITT's use of product attitude surveys in measuring the effectiveness of specific advertising campaigns. (Tr. 2118-2124) In trying to evaluate the effectiveness of ITT's Wonder Bread advertising strategies after his assumption of the advertising vice presidency in 1968, he studied the prior market surveys of consumer attitudes toward Wonder Bread which ITT had commissioned, and indeed on the basis of this study, concluded that the advertising should be changed. He also testified that he greatly expanded the company's involvement in market survey research.

ITT commissioned the BBDO survey (CX 112(a)) which asked consumers questions designed to elicit their opinions about the advertised product.

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lar claim in an advertisement about that product or product attribute but merely by either the fact that the product was widely used by consumers or by the fact that the advertisements made only generalized claims about the product itself or stressed an entirely different attribute. This is an interesting argument.

The record on this halo effect theory, however, is at best inconclusive.¹³ Moreover, this argument is inconsistent with respondents' established practice, evidenced in this record by the various market surveys it conducted, of constantly monitoring the effectiveness of its advertising themes by measuring attitudes toward products.

We also reject respondents' argument that because of the existence of the verbatim responses, the Commission is no longer free to exercise its own expertise in determining the meaning of the challenged advertisements. (R (ITT) App. Br. pp. 8, 26-30) See *supra*, p. 10 [pp. 953-54 herein].

We conclude, therefore, that market surveys demonstrating consumer attitudes toward advertised products are relevant to questions of what representations were made about these products. They are clearly admissible for this purpose even though their probative weight and relevance to the particular issues involved in a case will depend on the particular facts surrounding the format, methodology, and relevance of the survey questions and design.

2. The Representations Contained in Respondents' Advertising

Complaint counsel pose three main issues for decision with respect to the complaint allegations as to the representations

¹³ Numerous expert witnesses for both complaint counsel and respondents offered their own definitions of the halo effect. (See Rossi Tr. 1564-1566; Bauer Tr. 2381, 2389; Kuehn Tr. 2618-2619) Both complaint counsel's witness, Dr. Rossi, and respondents' witness, Dr. Kuehn, indicated that the halo effect was primarily generated through the consumer's use of a particular brand. (Rossi Tr. 1564-1566; Kuehn Tr. 2618-2619) Dr. Bauer, another of respondents' witnesses, testified that a halo effect as to a specific attribute may result from generalized product claims made about a product. (Tr. 2412-2427)

Dr. Rossi, an expert witness for complaint counsel, testified that although he believes the halo phenomenon was valid, the halo effect did not fully account for Wonder Bread's superior nutritional image among consumers. (Ross Tr. 1554, 1564-1566) However, Dr. Rossi later conceded that his estimates as to the exact operation of the halo effect were only "guess estimates" which were in no way conclusive because of the scanty information available about the operation of the halo effect from the survey data contained in the record. (Rossi Tr. 1663-1664) Dr. Bauer, an expert for respondents, testified that while advertising content may play a role in shaping consumers' attitudes toward a given product, it is not of the greatest importance. (Bauer Tr. 2417) However, Dr. Bauer admitted this theory would be "heresy in the halls of certain advertising agencies," and it is inconsistent with opinions previously expressed in a book co-authored by Dr. Bauer in 1968. (Bauer Tr. 2417-2420; see also Kuehn Tr. 2618-2620)

made by respondents' advertising. The first is what the parties have referred to as the uniqueness issue which involves essentially Paragraph 8(a). The second involves the question of whether the representations alleged in the remaining subparagraphs (b)–(e) of Paragraph 8 and in Paragraphs 10 and 11 were made and were false. The third is whether the false representations alleged in Paragraphs 10 and 11 were also unfair. We will consider these *seriatim*.

a. The Uniqueness Issue Posed by Paragraph 8(a)

The parties raise a threshold issue with respect to this subparagraph as to whether it charges that respondents represented Wonder Bread as an outstanding source of nutrients, distinct from "all" other enriched breads or whether, as complaint counsel urge, it simply charges Wonder Bread's superiority over "some" other enriched breads. We have carefully considered the arguments of counsel as to which interpretation of the complaint is the proper one. We do agree with respondents that the wording of complaint Paragraph 8(a) is ambiguous. Moreover, we believe that complaint counsel's statements framing this issue during the course of the trial were also vague and did nothing to resolve this ambiguity. We conclude that the ambiguity must be resolved in favor of a literal reading of the complaint. We will, therefore, rule that the complaint alleged a superiority to Wonder Bread as against all other brands rather than simply against some.¹⁴

Turning to the question of whether this representation of superiority was made in respondents' advertisements, we conclude that the record does not support the allegation. Our own examination of these advertisements makes clear that no express claims of nutritional superiority are made. We have difficulty in determining whether these specific comparative nutritional superiority claims can be implied from the totality of these advertising mes-

¹⁴ Respondent ITT in its answering brief states that it is not sure whether complaint counsel is urging an additional issue with respect to complaint Paragraph 8(a); namely, whether it is *per se* violation to advertise a nonunique attribute without disclosing its non-uniqueness without regard to the claims actually made in the advertisement. (R (ITT) Ans. Br. p. 26) However, respondent ITT also correctly points out that complaint counsel specifically denied they were advancing this theory during the course of the trial below. (Tr. 2150–2151) At the oral argument, complaint counsel again noted that they were challenging the specific content of the advertisements which complaint counsel contend was false. (Tr. of Oral Argument pp. 18–20) Therefore, we do not believe this additional issue noted by respondents was raised in the instant case and, accordingly, we cannot make any determination on the basis of this record. This also renders moot respondents' affirmative defense relating to their First Amendment right to communicate truthful information to the public which was apparently raised with respect to this additional issue. (ITT Ans., Third Defense, p. 3; Bates Ans., Second Defense §c, p. 8)

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sages. We have carefully considered all of the evidence on which complaint counsel rely in support of their position.¹⁵

Complaint counsel's survey evidence indicates that consumers, when asked to evaluate Wonder Bread with other breads in connection with a series of enumerated attributes such as freshness, taste, growing power, and nutrition, rated nutrition as one of a number of attributes which they associated with Wonder Bread. The survey results differed with respect to consumer ranking of Wonder Bread on this attribute. The surveys indicated some number of consumers who regard Wonder Bread as nutritionally valuable and a smaller percentage who regarded it as nutritionally superior to other enriched breads.¹⁶

However, we believe this market survey evidence, when coupled with the highly conflicting expert testimony as to the proper interpretation of the survey results and the probative value of the methodologies utilized in the various surveys, is too ambiguous to enable us to conclude that the specific representation of nutritional superiority alleged in Paragraph 8(a) is contained in these advertisements. Accordingly, we believe that this paragraph of the complaint must be dismissed as not proven.

b. The Paragraph 8(b)-(e) Representations

We agree with the law judge that none of the specific representations alleged by Paragraph 8(b)-(e) to be made by respondents' advertisements are expressly contained in any of these advertisements. Our examination of these advertisements impels us to the further conclusion that it is impossible to imply from these commercials the very specific representations which Paragraph 8 alleges are contained in respondents' advertisements. For example, subparagraphs (b) and (c) allege that respondents' advertisements represented that Wonder Bread would supply "all the nutrients" "in recommended quantities" that are "essential to healthy growth and development." Subparagraph (d) alleged that the "optimum contribution a parent can make to his child's nutrition during the formative years of growth is to ensure that the

¹⁵ The principal evidence relied upon by complaint counsel consists of the testimony of Dr. Mendelsohn, an expert in mass communications theory, as to the implied messages that the challenged advertisements would project to consumers; various portions of the results from four market surveys showing the comparative rating of Wonder Bread vis-a-vis other enriched breads on nutrition as well as on nutritionally related attributes, such as helping children grow; and expert testimony relating to the interpretation of these surveys. (CXs 96(a)-102, 112, 114(a), 155, 165-66, 168, 170 and Tr. 1748-76)

¹⁶ See, e.g., BBDO Omnibus Survey Tables 73-74 (CX 112) and the Lodish-Robertson Survey, Tables 6 and 11 (CX 114).

child consumes Wonder Bread regularly." Subparagraph (e) alleges that Wonder Bread supplies "complete protein of high nutritional quality necessary to assure maximum growth and development." We do not believe that it is possible under this pleading for us to imply from respondents' advertisements these very specific representations as to the precise claims which these subparagraphs allege and we decline to do so. Accordingly, we will not disturb the law judge's dismissal of these subparagraphs.

c. The Paragraph 10 and 11 Representations

We do not reach the same conclusion with respect to the representations alleged by Paragraph 10 to be contained in respondents' advertisements. Paragraph 10 alleges that respondents have represented Wonder Bread as "an extraordinary food for producing dramatic growth in children." Although this representation was not expressly made by the advertisements in the precise language of the complaint, we believe that these representations are the clear and necessary message of respondents' advertisements when viewed in their entirety.

The audio portions of both the Wonder Years series as well as the How Big series repeatedly make statements about children's "formative or growth years, the years 1 to 12 when the child develops in many ways, actually grows to 90% of his adult height." Wonder "builds strong bodies." Wonder is good "for the growing child." Wonder supplies proteins, minerals, carbohydrates and vitamins, "all vital elements for growing minds and bodies." Indeed the very use of the term "Wonder Years" itself implies that Wonder Bread is extremely important for this growth, and this message is reinforced and expanded through the use of phrases such as "To help make the most of these 'Wonder Years,' her growth years, serve Wonder Bread."

A prominent feature of both the Wonder Years and How Big TV commercials was the superimposed time sequence picture in the middle of these commercials of a child seen growing rapidly from a young child to a 12-year-old while the audio was telling parents how they can help by serving Wonder Bread to their children.

Wonder Bread's children's commercials stressed over and over the importance of the right kind of foods for growing up, "foods like Wonder Bread," and ended with a specific alert to "Mom" to "remember, they'll never need Wonder more than right now." Magazine and newspaper ads told readers that kids will "never need Wonder Bread more than now" or that "The Wonder Years

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come only once." "Make the most of them." "The formative years when you can do most for your child's growth."

Respondents' selling message in the challenged advertisements was clearly designed to convince parents as well as children that Wonder Bread had very important properties for children's healthy growth and development. The constant stress on children's growth years, the use of such words as "vital elements," "the formative years" when children attain 90 percent of their growth, the dramatic visual depiction of virtually instantaneous growth, the appeal to parents to help their child grow bigger and stronger, that children will never "need" Wonder more than right now certainly all convey a message of extraordinary value.

Respondents argued that the allegations of Paragraph 10 cannot properly rest on the appearance of the fantasy growth sequence in its commercials since it was not seen on children's programs. In the first place, it should be noted that the record makes clear TV commercials containing this sequence were shown on programs appearing from 10 a.m. to 11 p.m. and that children viewed adult programs which did show the sequence. (CX 175-176) Moreover, our conclusion that respondents' advertisements had the capacity to deceive children and parents because they portrayed Wonder Bread as an extraordinary food for producing dramatic growth does not rest solely on the fantasy growth sequence contained in these advertisements. Our conclusion is based on the totality of the impression and representations which we believe are conveyed by respondents' advertisements of which the fantasy growth sequence was only one part.¹⁷

In reaching this conclusion, we have also examined the other evidence in the record in addition to the advertisements themselves to see whether it had any bearing on the issues raised in Paragraph 10 as to the representations made in respondents' commercials. We believe that insofar as this evidence is relevant to the types of representations made by respondents, it is entirely consistent with our own analysis of these advertisements. Expert witnesses offered by both parties believed the advertisements could be perceived as representing Wonder Bread as an extraordi-

¹⁷ That most people above age six might view the literal message of the "fantasy growth sequence" with skepticism [as argued by respondents (R (ITT) Ans. Br. 30-31)] does not eliminate the deceptiveness of it nor the campaign of which it was a part. As noted in the text, we conclude that the inference to be drawn from the sequence, and others, is clearly misleading, apart from whether or not most consumers would regard the literal purport of the sequence with skepticism. Moreover, the fact that even a large number of people may view false representations with skepticism does not eliminate their potential deceptiveness for others.

nary food for producing growth in children.¹⁸ We have also examined the survey evidence in the record and find no instance in which any of the survey results either with respect to consumer perceptions of the advertisements themselves or with respect to consumer attitudes toward the product are inconsistent with our conclusions.¹⁹

We conclude, therefore, that respondents' advertisements do represent Wonder Bread as having extraordinary properties to produce growth in children.

We also conclude that these representations are false. Neither respondent specifically admitted that if these representations are made by the challenged advertisements, they are, in fact, false. (ITT's Ans., Fifth Defense §10; Bates Ans., First Defense §10) However, both respondents have admitted in their respective answers that consuming Wonder Bread will not provide a child with all the nutrients essential to healthy growth and development, that Wonder Bread is not the optimum contribution that a parent can make to his child's nutrition during the formative years of growth, and that Wonder Bread is not an outstanding source of nutrients, distinct from other enriched breads, but is in fact a

¹⁸ Dr. Mendelsohn testified to his view that the growth sequence "presents an aspect of awe or wonder regarding the growth process, and has a great element of fantasy." (Tr. 1882) Respondents' expert witness, Dr. Littner, a child psychiatrist, admitted that the literal message projected by these advertisements is that Wonder Bread will cause children to grow suddenly. (Littner Tr. 2305) However, Dr. Littner felt that around the ages of 7 to 9, children will tend to lose their reliance on magical thinking and the balance of skepticism will take over and cause older children to disbelieve this literal message. (Tr. 2286) Nevertheless, Dr. Littner also stated that there is a resurgence of magical thinking in early adolescence and magical thinking is present to some degree in adults. (Tr. 2286)

¹⁹ Table 68 from the BBDO Omnibus Survey results (CX 112) shows that in April 1971 almost 7 percent of consumers surveyed believed that Wonder Bread was the one brand that stood out in helping children grow while nearly 6 percent of consumers held a similar belief in July 1971. An additional 3 percent of consumers surveyed in April and 3.3 percent in July 1971 believed that Wonder Bread was one among several brands that are better than others in helping children grow. Wonder Bread was rated first above the other six specified brands in every one of the seven individually calculated regional markets in both April and July 1971. Table 69 discloses that both regular and nonregular Wonder Bread users ranked Wonder Bread first in helping children grow.

The content analysis of the verbatim responses from the G/A/H copy tests supervised by Dr. Crissy and performed for respondents did not extend to the representations alleged in complaint Paragraphs 10 and 11. (Crissy Tr. 2478, Jackson Tr. 2442-2447) However, we have independently analyzed the 709 verbatim responses directly resulting from consumers who viewed advertisements challenged by complaint counsel in this proceeding. Almost every one of the verbatim responses mentions the concept of growth. Nearly 50 of these 709 verbatim responses specifically indicate that consumers perceived these commercials to represent that Wonder Bread induces remarkable growth. Some consumers apparently accepted the commercial at face value as can be seen from the following reaction: "It tells you Wonder Bread helps your children grow ten feet tall." (RX 48, Response 62) Others viewed these representations with some degree of skepticism: "There is one thing that really irritates me about this commercial and that is when the child is growing. It bothers me because he grows too fast." (CX 48, Response #31)

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standardized enriched bread conforming to the Standard of Food Identity for enriched bread promulgated by the Food and Drug Administration. (ITT Ans., Fifth Defense §9(a), (b), (c) and (d); Bates Ans., First Defense §9(a), (b), (c) and (d); and CX 172 §10)

Two of complaint counsel's expert witnesses, both medical doctors, agreed that eating Wonder Bread does not enhance growth,²⁰ and respondents' own nutritional expert testified that in his view the enrichment of bread was designed to prevent diseases caused by a deficiency of the nutrients thiamine, riboflavin, niacin, and iron which had been added. (Sebrill Tr. 2641)

We conclude that Wonder Bread is not an extraordinary food for producing growth in children and that the representations alleged in Paragraph 10, which we have found are contained in respondents' advertisements, therefore are false.

In respect to the deception charged in Paragraph 11 of the complaint, we dismiss for failure of proof. We are unable to conclude from record evidence that the challenged advertisements amount to a direct or implied claim that Wonder Bread is a "necessary food" for the healthy growth of children during their pre-adolescent years as alleged in the complaint.

d. The Unfairness Issue

Complaint counsel's essential argument on unfairness, as we understand it, is that respondents' false portrayal of Wonder Bread as an extraordinary and necessary growth producing food unfairly exploits children's aspirations and parental concerns about their healthy growth and development.

Complaint counsel argue that children are particularly vulnerable to the false representations contained in respondents' advertisements because of their natural emotional concern for proper growth and that children are injured by respondents' advertisements because the inability of the advertised product, Wonder Bread, to fulfill this promise of extraordinary growth, results in

²⁰ Dr. Galdston testified that growth is a function of biological cells in the body and is not determined by the consumption of Wonder Bread or any other specific food. (Galdston Tr. 431) Dr. Granger testified that Wonder Bread cannot really enhance growth in any way, and certainly not more than any other equally enriched bread. (Granger Tr. 513-514)

Dr. Briggs, an expert nutritionist, testified for complaint counsel that he does not believe the enrichment of bread could be characterized as providing good nutrition and stated that the levels of nutrients contained in enriched white bread are small. (Tr. 824)

The record also shows that on an equi-calorie basis, the level of nutrients contained in enriched white bread is approximately the same as the level of nutrients contained in a number of other common products such as cereals not usually regarded as extraordinary or necessary for growth. (CX 163, Latham Tr. 1697)

feelings of inadequacy in children, will cause children to distrust the adult world, and will teach children that it is acceptable to be untruthful. (C.C. App. Br. pp. 39-42)

Complaint counsel's arguments in support of the unfairness allegation in Paragraph 11 dealing with respondents' false portrayal to parents and general audiences, including children, of Wonder Bread as a necessary food to ensure healthy growth in children parallels in concept its unfairness arguments under Paragraph 10. Thus complaint counsel argue that parents watching these commercials will also be injured because of their special vulnerability to the growth appeals of these commercials and the inability of Wonder Bread to fulfill the parents' expectations created by the false promises made about Wonder Bread in respondents' advertisements. (C.C. App. Br. pp. 43-44)

Respondents argue with respect to complaint Paragraph 10 that the testimony of the various witnesses as to children's psychological damage is purely conjectural and is unsupported by empirical evidence. Respondents further contend that the record shows that television advertising is relatively unimportant in affecting children's emotional makeup. (R (ITT) Ans. Br. pp. 32-33) Respondents' argument with respect to complaint Paragraph 11 is simply that there is no record support for complaint counsel's contentions as to the special vulnerability of or injury to parents caused by these advertisements. (R (ITT) Ans. Br. pp. 33-34)

As complaint counsel develop their unfairness argument, it rests almost entirely on the fact that the advertisements make *false* promises rather than that they address themselves to particularly vulnerable aspects of their audiences which might conceivably render even truthful messages unfair. Any element in the alleged injury flowing to either children or to parents from such promises appears to be inseparable from the falseness of these promises. Therefore, we have difficulty in the context of the record in this case in seeing how these injuries flowing from the falseness of respondents' promises add up to a separate charge of illegality of these advertisements as unfair.

In no way are we condoning, as complaint counsel cautioned us, a finding that distrust, cynicism, and frustration in little children caused by false advertising is acceptable under the law. Nor are we denying that these false promises may cause short and long-range injuries to their audiences. Rather we are simply saying that these are consequences of deception which are already pro-

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hibited by the law and that, therefore, we need not in this case go beyond the deception in order to find the violation of law prohibited by Congress. We can conceive, of course, as a general proposition, that the same practices can give rise to two separable offenses under the law. We can further conceive that there may be a need in terms of remedy to plead such offenses as separable law violations. However, in the instant case we do not believe that this record and the order which is sought here demonstrate any necessity for us to view respondents' false portrayal of Wonder Bread also in terms of whether these constitute separable offenses of unfairness.²⁶ Accordingly, for these reasons we dismiss the unfairness allegations of Paragraphs 10 and 11 and conclude only that respondents' advertisements did falsely portray Wonder Bread as an extraordinary food for children's growth. We stop short, however, of finding whether these false promises also constituted unfair acts under Section 5.

II. HOSTESS SNAKE CAKE ADVERTISEMENTS

The advertisements for Hostess snack cakes challenged in Paragraph 13 of the complaint essentially involved a short-term campaign announcing fortification of Hostess snack cakes, a major technological breakthrough resulting in an important nutritional advance. This series of enrichment advertisements began in September 1970 and ended in May 1971, when competitors commenced marketing enriched snack cakes. (Hackett Tr. 2133) The claim for "a major nutritional advance" was made only in print advertisements, the total budget for which amounted to about \$130,000. (Stipulation, CX 172, Paragraph 14)

The "good nutrition" claim challenged in the complaint appeared in both print advertisements and TV commercials announcing the fortification of Hostess snack cakes. (CXs 31-41). The central message of these advertisements, however, was not that Hostess snack cakes offered "good nutrition" for children as food. Rather, it was that Hostess snack cakes were now enriched

²⁶ Respondents argue in their appeal brief that in order to hold them liable under Paragraph 10 of the complaint, *both* falsity and exploitation must be proven. (R (ITT) App. Br. pp. 30 and 33) If respondents mean by this statement that complaint counsel's unfairness claim seems to be premised on the falseness claim contained in Paragraph 10, we are in accord with this argument as discussed above. However, if respondents are arguing that complaint counsel must prove more than the fact that respondents disseminated a false advertisement in interstate commerce in order to establish a violation of Sections 5 and 12 of the Federal Trade Commission Act, their argument receives no support under the cases decided under Sections 5 and 12 nor under the specific provisions of the Act itself. (See 15 U.S.C. §§ 5 and 12)

with vitamins and minerals for the first time, and that they now had something more than mere good taste: they also had good nutrition. We are not persuaded that these advertisements constitute an express or implied claim that children can eat Hostess snack cakes to the exclusion of other foods and still get "good nutrition." Thus viewed in proper context, the "major nutritional advance" claim and the "good nutrition" claim were substantially true when they were made and did not tend, nor have the capacity, to mislead the consumer.

Complaint counsel's argument that the claim for "good nutrition" is misleading because the advertisements fail to disclose the fact that Hostess snack cakes contain large amounts of sugar raises a fundamental question of affirmative disclosure. It is well established that an advertisement may be misleading "because things are omitted that should be said." *Donaldson v. Read Magazine*, 333 U.S. 178, 188 (1940). The Commission realizes the importance of requiring affirmative disclosure of material facts in advertising, particularly with respect to food, drugs and cosmetics. *J. B. Williams v. FTC*, 381 F.2d 884 (6th Cir. 1967).

The instant case involves a nutritional claim with respect to a food product. And an absolute claim for good nutrition may well be objectionable for the reason that the advertisement omits things that should be said. On the other hand, it would be unrealistic to impose upon the advertiser the heavy burden of nutritional education, especially with respect to radio and TV commercials which in many cases are shorter than 30 seconds and seldom as long as 60 seconds. Therefore, we should not attempt to establish an overly restrictive standard of general application in this regard. To do so would be tantamount to a *de facto* ban on all nutritional advertising through the radio and TV media. In the final analysis, the question whether an advertisement requires affirmative disclosure would depend on the nature and extent of the nutritional claim made in the advertisement.

In the instant case, the "good nutrition" claim is qualified in the advertisements themselves. The message is clearly that Hostess snack cakes are fortified with vitamins and minerals and have something more than mere good taste: they have "good nutrition." We do not believe that such a qualified claim requires further affirmative disclosures. Moreover, housewives are well aware, as a matter of common knowledge and experience, that snack cakes, whether home-made or commercially manufactured,

(1968) (hereinafter referred to as *Doherty*).

The type of activities engaged in by Bates are virtually identical to those of the advertising agency held liable in *Doherty*.²⁸

Respondents' argument that it is not established that Bates "actively" participated in the challenged advertising lacks any basis in law or fact and will not bar liability here.²⁹

By the same token, Bates' argument that it did not know or had no reason to know that the challenged advertising for Wonder Bread contained the implied misrepresentations set out in the complaint is similarly no defense to its liability for their false and deceptive nature.

It is not necessary to establish that the agency knew or had reason to know that the specific representations found to exist here were being made in the challenged advertisements. Clearly, it is the advertising agency which is the expert in determining what representations are made in a given advertisement.³⁰ Indeed this is the very role which it is called on to perform for its client. It hardly lies in Bates' mouth to assert now that it had no responsibility for the representations which are implied in its advertising.

An agency is clearly liable for the advertising it has created, produced, or assisted in producing unless it can be shown that it did not know or could not know that the challenged advertising was false.³¹

²⁸ The activities of an advertising agency considered determinative in finding the agency liable in *Doherty* included the following:

- (1) offering general marketing consultation for the advertised products,
- (2) formulating advertising plans,
- (3) preparing layouts and copy for advertisements,
- (4) originating advertising ideas and strategies, or
- (5) developing and putting into final form the challenged advertising. (392 F.2d at 928)

Respondent has attempted to differentiate *Doherty* on the grounds that there the agency was found to have *originated* the challenged advertisements. Here Bates stipulated that it participated in the *creation* of the "Wonder Years" and "How Big" themes. (CX 173) We find the distinction meaningless in the light of the court's opinion.

²⁹ See also, *Carter Products v. FTC*, 323 F. 2d 523 (5th Cir. 1963) where it was found that the agency had worked for Carter for years and had handled the account of the product in question before the product even had a name. In addition, the advertising agency in Carter conceived the challenged approach, agreed on the motif of the program, wrote the story boards, and assigned the job to a film producer in Hollywood; *In the Matter of Colgate-Palmolive Co., Inc.*, 62 FTC 1269, *aff'd* 380 U. S. 374 (1965) where the Commission found that the advertising agency conceived and prepared television commercials which made the challenged claims. Similarly, respondent Bates admitted here that it participated in the creation of the major advertising themes for Wonder Bread ("Wonder Years" and "How Big" themes) and also admitted that it had for some time participated in the preparation and publication of challenged advertising material.

³⁰ *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC (In Re Merck and Company, Inc.)*, 69 FTC 526 (1968), *aff'd*, 392 F.2d 921, 928 (1968):

The agency, more so than its principal, should have known whether the advertising had the capacity to mislead or deceive the public. This is an area in which the agency has expertise * * *. (*Id* at 559)

Bates can hardly be heard to argue that it had no reason to know the deceptive nature of these advertising claims. It was Bates which developed the good nutrition theme which was the cornerstone of respondents' advertising campaign for Wonder Bread and which was the source of the deception which we found in this advertising campaign. Bates had a clear duty to assemble all of the facts bearing on the nutritional value of these products if it intended to use this product attribute as its central selling message, its unique selling proposition as it termed it. (CX 172, 174) Unless advertising agencies were under a duty to make independent checks of information relied upon to frame their advertising claims, the law would be placing a premium on ignorance. *In Re Dolcin*, 247 F.2d 524, 534 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 988 (1957).

No issue is raised in the instant case of agency reliance on the accuracy of a scientific test conducted by third parties. What is in issue is the agency's responsibility for knowing exactly what limitations exist in the state of knowledge surrounding a product claim which it has decided to use as part of its advertising message. The agency must assume full responsibility for the claims which it makes about a product. If it is unable to do so, it should not make the claims. If it can only do so to some limited degree, it must frame its claims accordingly. It cannot make sweeping absolute claims or ambiguous claims and later assert in defense to charges of misrepresentation that it had no reason to know that the state of scientific knowledge on which these claims rested would not support them in the form in which they were made in the advertisement. Bates selected the central selling messages. It had a clear duty in these circumstances to make certain that these advertisements did not have a capacity to deceive. It clearly violated this duty.³² We hold that the law judge was in error in dismissing this complaint against respondent Bates. Bates clearly participated in the development of the challenged advertisements and it clearly knew or should have known that these representations were false.

³¹ "In order to be held to be a participant in such deception, the agency must know or have reason to know of the falsity of the advertising." (Emphasis added) *Carter Products v. FTC*, 323 F.2d 523, 534 (1963); *Doherty, Clifford, Steers & Shenfield v. FTC*, 392 F.2d 921 (1968). Therefore, we completely reject the administrative law judge's findings 265(a)-(k) because Bates' "non-liability" is predicated on an incorrect legal standard.

³² Bates asserts that it took "reasonable steps to assure that its advertising for Wonder Bread would not convey false or misleading impressions." ((Bates) Ans. Br. 14) This assertion is based on the judge's findings that Bates utilized procedures for clearance of advertising copy by its legal department. (FF 259, 260) We completely reject the contention that such clearance procedures are a defense to liability. (Cf. *Doherty, supra*, at 927-28, note 4)

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IV. THE ORDER

Respondents urge two basic objections to the order proposed by complaint counsel.

Respondent Bates objects essentially to the broad product coverage proposed by complaint counsel and argues that the order should be limited to the specific product Wonder Bread. We can find no basis for such an undue unrealistic narrowing of the order.

We believe our order must preclude the kind of deception which has been established in this proceeding not only with respect to Wonder Bread but all food products. The proscriptions of our order will be limited to the type of deceptive claims found in Wonder Bread advertising. But such deception, relating to claims of nutritional value, is not uniquely suited to promotion of bread or baked goods. It is a theme which may be abused in the promotion of any food product. In this context, broad product coverage is essential if adequate protection of the consuming public is to be obtained in this case.

In addition, Bates is already subject to a series of cease and desist orders entered both after litigation and on consent based on challenges to advertising in which it participated as illegal under Section 5 of the FTC Act.³³ In such an instance, "[T]he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past."³⁴

³³ *FTC v. Colgate-Palmolive*, 380 U. S. 374 (1965). In Docket 7737, June 1, 1960 [56 FTC 1491, 1493], Bates was ordered to cease and desist from using in connection with the advertising of oleomargarine, "any pictorial presentation or demonstration purporting to prove, or representing in any manner, that moisture drops appearing on said oleomargarine cause such oleomargarine to taste more like butter, or to be more similar in flavor, than competitive oleomargarine."

In Docket 7688, February 24, 1960 [56 FTC 956, 958], Bates was ordered to cease and desist from using, in connection with the sale of filter cigarettes, "any pictorial presentation or demonstration purporting to prove that the filter * * * absorbs or retains more of the tars or nicotine in cigarette smoke than the filter used in other cigarettes [when such is not the fact] * * *" and from representing that any filter cigarette has the approval of any agency of the United States Government or has been found by any such agency to be lower in tar or nicotine content than other filter cigarettes.

In Docket No. C-2015, August 17, 1971 [79 F.T.C. 248] Bates was ordered to cease and desist from representing in connection with any bread product of ITT Continental Baking Company "that the consumption of any such product is in any way necessary or essential for * * * controlling body weight * * * is lower in calories than ordinary bread * * * use of any such product for appetite appeasement will cause a loss of body weight without adherence to a reduced calorie diet * * *."

In Docket No. 8840, June 23, 1972 [80 F.T.C. 975], Bates was ordered to cease and desist from representing in connection with the sale of any beverage product of Ocean Spray Cranberries "that any such product contains nutrients of equivalent or greater variety or in greater quantity than those nutrients found in orange juice, tomato juice or any other beverage * * * Any such product has more food energy * * * any such product is a 'juice' unless it consists of not less than 100% natural * * * fruit juice * * *."

We conclude that the order with respect to Bates can justifiably extend to "any food product." We have, however, modified the prohibitory language proposed by complaint counsel in Paragraph I so as to avoid any undue limitations on respondents' ability to make truthful representations. Paragraph I of our order reflects these revisions.

CORRECTIVE ADVERTISING

We agree that corrective advertising is a remedy within the Commission's power to impose. *Firestone Tire & Rubber Co.*, 3 Trade Reg. Rep. ¶ 20,002 (FTC 1972) [81 F.T.C. 398]. A major obstacle to imposition of that remedy here is that the allegation of the complaint on which the argument for corrective advertising is based has not been sustained.

The notice order served with the complaint in this matter would have required respondents to disclose in a certain number of their advertisements that:

the Federal Trade Commission has alleged that Wonder Bread has been falsely advertised as more nutritious and appropriate for children than other enriched breads.

The order proposed by complaint counsel on appeal to the Commission after hearings in this matter would require respondents to advertise that:

The Federal Trade Commission has found that Wonder Bread has been falsely advertised as more nutritious and better for the growth of children than other enriched breads, and that Wonder Bread is nutritionally identical to other white enriched breads. (RB, p. 77)

Amici, on appeal to the Commission, would have us require ITT to advertise that:

"cont'd"

In Docket C-2377, April 9, 1973 [82 F.T.C. 1176], Bates was ordered to cease and desist from representing in connection with Fleischmann's Margarine or any other margarine or any other food fat or food oil that "children incur the same risks of heart and artery diseases as middle-aged men, or that children incur risks of cholesterol or that such risks require of children the same steps of prevention or treatment required of middle-aged men * * *"

³⁴ *Federal Trade Commission v. Ruberoid*, 343 U. S. 470, 473 (1952). See also *FTC v. Colgate-Palmolive Co.* 380 U.S. 374, 395 (1964); see also *Niresk Industries v. FTC*, 278 F.2d 337, 343 (7th Cir.) [6 FTC 727, 7351], cert. denied, 364 U.S. 883 (1960); *American Tack Co. v. FTC*, 211 F.2d 239 (2d Cir. 1954) [5 FTC 633]; *Hershey Chocolate Corp. v. FTC*, 121 F.2d 968, 971-72 (3d Cir. 1941) [3 FTC 392, 396-97].

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* * * the Federal Trade Commission has found that Wonder Bread has been falsely advertised as more nutritious and appropriate for children than other enriched white breads; all enriched white breads must meet governmental nutritional standards and Wonder Bread is no more nutritious than other brands of white enriched bread. (AB, p. 80)

Inasmuch as the Commission has not held respondent ITT to have violated the law by making the representation included in the proposed corrective advertisements, it can hardly insist that ITT inform its customers to the contrary.

We might still, based upon our findings of a different false representation by respondents, order corrective advertising to remedy this. We do not, however, believe that the record before us provides an adequate basis upon which to order corrective advertisements with respect to the false claim found to have been made.

The evidence presented in this case by complaint counsel and *amici*, relative to corrective advertising, was principally addressed to consumer perceptions of Wonder Bread as a source of nutrition distinct from other breads. Evidence that consumers may retain this perception of Wonder Bread is not equivalent to evidence that consumers retain the view that Wonder Bread is an extraordinary source of nutrition.³⁵

The evidence in this case indicates that respondents have falsely implied in advertisements for their product that it was an extraordinary source of nutrients. We have further evidence that, many months after conclusion of the advertising campaign, a small percentage of consumers recall the nutritional advertising of respondents, though it is not clear from this evidence to what extent those consumers continue to believe that Wonder Bread is an extraordinary food (the misrepresentation found to have been made) as opposed simply to a superior source of nutrition compared to other breads (a misrepresentation charged by the complaint and which respondents are not found to have made). Under these circumstances, we cannot find in the record a sufficient basis upon which to conclude that corrective advertising is needed to eliminate the misrepresentation found.

FINAL ORDER

This matter having been heard by the Commission upon the

³⁵ Of course, evidence that Wonder Bread is not a distinctive source of nutrition is probative of whether or not it is a necessary source or an extraordinary source, and evidence that respondent Bates knew that Wonder Bread is identical to other enriched breads is probative of its knowledge that Wonder Bread is not a necessary or extraordinary source of nutrition.

appeal from the initial decision of counsel supporting the complaint, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission, for the reasons stated in the accompanying opinion having granted in part the appeal:

It is ordered, That the following Findings of Fact of the administrative law judge are adopted as Findings of Fact of the Commission:

Findings 1-5, 7, 13-16, 18-21, 23-27; the first two sentences of Finding 28; Findings 36-37; the first sentence of Finding 46; Findings 47-50, 52; the first sentence of Finding 53; the first sentence of Finding 64; Finding 65; the first sentence of Finding 97; Findings 98-100; the first two sentences of Finding 101; Finding 109; the first sentence of Finding 111; the first two sentences of Finding 112; Findings 114, 128, 168-169, 224 and 226.

It is further ordered, That the following cease and desist order be, and it hereby is, entered:

I. *It is ordered*, That respondent ITT Continental Baking Company, Inc., a corporation, and respondent Ted Bates and Company, Inc., a corporation, their successors and assigns and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any food product, do forthwith cease and desist from:

1. Dissemination, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents, directly or by implication:

a. The nutritional properties of any such product in generalized terms such as "rich in nutrients," vitamins or iron fortified, "enriched," or other similar nutritional references, without identifying the basis relied upon for the nutritional claims, and unless the advertised nutritional value can be substantiated for the average and ordinary use of the product by consumers or by particular groups of consumers provided they are specified.

b. The comparative nutritional efficacy or value of the product without stating the brand, product or product category to which the comparison is being made.

c. The essentiality of the product as a source of a particular nutritional value if there are other food prod-

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uct categories which are also sources of the same or similar nutritional values, and unless the claim can be substantiated for the normal use of the product by consumers or by a particular group of consumers provided that they are specified.

d. The functional value or other attributes of any such product to a user through the use of demonstrations or other visual techniques unless the demonstrations are actual depictions of the actual value of the product by actual persons and represent the average and ordinary experience of consumers with the use of the product.

2. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents, directly or by implication, that any such product will contribute to the rapid or proper growth of children by providing dramatic or substantial benefits for such growth or development unless such product, by itself, will in fact make a significant contribution to such rapid or proper growth.

3. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which misrepresents, in any manner, the nutritional content, efficacy or functional value to the user for the normal use of any such product by consumers.

4. Disseminating, or causing the dissemination of, any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, which contains any of the representations prohibited in Paragraph 1 above or the misrepresentations prohibited in Paragraph 2 above.

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions.

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

It is further ordered, That respondents shall, within sixty (60) days after service of this order upon it, file with the Commission a report in writing setting forth in detail the manner and form of its compliance with the order to cease and desist.

It is further ordered, That the remainder of the initial decision be vacated and the following supplementary Findings of Fact made by the Commission itself, after a consideration of the entire record, be substituted therefor:

Chairman Engman not concurring in that portion of the opinion which dismisses charges of unfairness against advertising claims directed primarily at children and submitting a separate statement; Commissioner Jones recorded as dissenting in part for the reasons set forth in her dissenting statement; and Commissioner Thompson not participating since this matter was tried and argued before he was sworn in.

SUPPLEMENTARY FINDINGS OF FACT

1. In September of 1968, respondent ITT Continental Baking Company ("ITT Continental") acquired its successor, the Continental Baking Company. (Woodward 2068)

2. Respondent ITT Continental Baking Company, Inc., in the course and conduct of its aforesaid business, and at all times mentioned herein, 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 respondent (ITT Ans. Para. 18)

Respondent Ted Bates & Company, Inc. ("Bates"), in the course and conduct of its aforesaid business, and at all times mentioned herein, has been and now is in substantial competition, in commerce, with other advertising agencies. (CX 173)

3. In the course and conduct of their said businesses, respondents ITT Continental and Bates have disseminated and caused the dissemination of certain advertisements concerning the said bakery products, Wonder Bread and Hostess Snack Cakes, 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 newspapers, and by means of television and radio broadcasts transmitted by television and radio 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,

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directly or indirectly, the purchase of said products, and have disseminated and caused the dissemination of, advertisements concerning said bakery products 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 bakery products in commerce, as "commerce" is defined in the Federal Trade Commission Act. (ITT Ans., Fifth Defense § 6, 7, 12; Bates Ans., First Defense § 6, 7, 12; CX 172-175)

4. Wonder Bread is a standardized, enriched white bread conforming to the standards of food identity promulgated by the Food & Drug Administration and is not an outstanding source of nutrients as distinct from other enriched white breads. (CX 172, Para. 10 ITT Ans., Fifth Defense, Para. 9(a); Bates Ans., First Defense, Para. 9(a))

5. Consuming "Wonder Bread" in the customary manner that bread is used in the diet will not provide a child age 1-12 with all the nutrients in recommended quantities that are essential to healthy growth and development. (ITT Ans., Fifth Defense, Para. 9(b); Bates Ans., First Defense, Para. 9(b))

6. The following exhibits are advertisements challenged in the complaint in this matter and were disseminated as part of the "Wonder Years" campaign conducted by respondents between 1964 and 1970 and are typical of the advertisements disseminated in that campaign.

Film	Photoboard	Title	Length
CX 9	CX 23	Cardboard House	60 sec.
CX 10	CX 24	Cardboard House	30 sec.
CX 11	CX 25	Kites	60 sec.
CX 12	CX 26	Kites	30 sec.

"Wonder Years" Newspaper and Print Advertisements

CX 28	Magazine Print Ads
	"Make the Most of their Wonder Years"
CX 28(a)	Newspaper Ads
CX 30	entitled
	"Make the Most of their Wonder Years"
CX 30(a)	"
CX 30(b)	"
CX 30(c)	"
CX 30(d)	"

(Stipulation, CX 172, Para. 2)

7. In addition to the material relating to consumers' ratings of Wonder Bread's attributes, the G/A/H Copy Tests also recorded interviewees' verbatim responses to a series of questions asking about a particular Wonder Bread commercial to which the interviewees had recently been exposed. Included among the questions were the following:

- a. You just told me that you remember seeing a commercial for Wonder Bread. Please tell me everything you remember about the commercial.
- b. What did it say? Anything else?
- c. What did it show? Anything else?

On some of the tests the interviewees were also asked the following question:

- d. What is the most important thing the commercial told you about Wonder Bread?

(CX 44-54, 61-64, 74-90, 92-94; RX 48-49)

The questions asked, as well as the verbatim responses themselves, demonstrate that these questions were not designed and would not be likely to elicit consumers' perception of the latent or implied messages contained in the advertising such as those challenged in the complaint. Rather, the questions asked were designed to and usually only elicited the interviewee's recall of the explicit message projected by the advertisement. (Gerbner 2784-2785; CX 44 pp. 1-3)

Complaint counsel's expert, Dr. Gerbner, in contrast to respondents' experts, Dr. Crissy and Dr. Britt, has had extensive academic training and experience in the field of communications research; and his particular specialty is content analysis which establishes objective procedures to measure the meaning of messages and is better qualified to evaluate the significance of survey material such as the G/A/H Copy Tests and verbatim responses than the other witnesses. (Gerbner 2772-2775; CX 184; Crissy 2472-2474, 2490-2491; Britt 2326-2327, 2347-2348)

8. Almost all of the 709 verbatim responses of consumers who had viewed one of the Wonder Bread advertisements challenged by complaint counsel in the instant proceeding mention the concept of growth, and nearly 50 of the verbatim responses specifically indicate that consumers perceived these commercials to represent that Wonder Bread induces remarkable growth. (CX 45-52, 54, 56; RX 48)

Examples of these types of responses can be seen from the following responses to the questions asked:

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It tells you Wonder Bread helps your children grow ten feet tall. (RX 48, Response 62)

Others viewed these representations with some degree of skepticism:

There is one thing that really irritates me about this commercial and that is when the child is growing. It bothers me because he grows too fast. (CX 48, Response 31)

9. Table 68 from the BBDO Omnibus Survey results (CX 112 A) shows that in April 1971 almost 7 percent of consumers surveyed believed that Wonder Bread was the one brand that stood out in helping children grow while nearly 6 percent of consumers held a similar belief in July 1971. An additional 3 percent of consumers surveyed in April and 3.3 percent in July 1971 believed that Wonder Bread was one among several brands that are better than others in helping children grow. Wonder Bread was rated first above the other six specified brands in every one of the seven individually calculated regional markets in both April and July 1971. Table 69 discloses that both regular and nonregular Wonder Bread users ranked Wonder Bread first in helping children grow.

Table 73 from the BBDO Omnibus Survey results (CX 112 A) shows that in April 1971, 4.5 percent of consumers surveyed believed that Wonder Bread was the one brand that stood out in nutrition while 5 percent of consumers held a similar belief in July 1971. An additional 4.2 percent in April and 3.7 percent in July believed that Wonder Bread was one among several brands that are better than others in nutrition. (CX 112 A; Tables 68, 69 and 73)

10. "An Analysis of Wonder Bread's Nutritional Advertising" (CX 114 A), prepared by Dr. Leonard M. Lodish and Dr. Thomas S. Robertson, who are teachers at the Wharton School of Finance and Commerce at the University of Pennsylvania (Lodish 936, 944; Robertson 1219), is a survey of consumer attitudes toward Wonder Bread and of the effects of the advertising involved in this case. The project that resulted in CX 114 A was initiated after Henry Banta, prior complaint counsel in this case, had addressed three classes at the Wharton School of Business in late January or early February 1972. (Robertson 1230-1232, 1275-1276)

11. The Lodish-Robertson Survey was performed in certain metropolitan areas in Philadelphia, New Jersey, and New York.

This survey included a question requesting the interviewee's opinion as to whether the nutritional value of Wonder Bread was higher, about the same or lower than the general category "other brands" of bread. It can be calculated from the results of this survey (Table 11) that approximately 17 percent of those interviewed believed that Wonder Bread was superior in nutritional value to the general category "other brands" of bread and that this belief in Wonder Bread's nutritional superiority was particularly marked among Wonder Bread users, 43.8 percent of whom thought Wonder Bread superior. (CX 114 A; Lodish 944-958)

12. Advertising content is an important factor in shaping consumers' attitudes towards attributes such as the nutritional value of an advertised product. (Rossi 1593, 1603; Lazarfeld 1785-1787, 1798; Hackett 2120-2125, 2151)

13. Respondent ITT relied on surveys measuring consumers' attitudes towards the advertised product, Wonder Enriched Bread, as a means of measuring the effectiveness of their advertising. ITT paid particular attention to how consumers evaluated different brands of bread from the standpoint of nutrition in conducting the reanalysis of the Oxtoby-Smith Basic White Bread Study. (Hackett 2118) The key dimension on which ITT evaluated the results from the G/A/H Copy Tests was to determine whether the Wonder Bread commercials generated attitude shifts toward the product itself. (Hackett 2120) ITT also relied on data from the G/A/H Problem Market Study showing consumers' ranking of various product attributes. (Hackett 2120-2123) The data described above which measured consumers' attitudes towards the advertised product was sufficient to cause ITT to consider a change in the theme of its Wonder Bread advertisements. (Hackett 2122-2124)

Respondent, ITT, also commissioned the BBDO survey in April and July of 1971. (CX 112 A) Mr. Marvin Light, vice president of the BBDO advertising agency, stated that the BBDO survey is conducted "for the express purpose of tracking advertising effectiveness." (Light 1346) In order to determine advertising effectiveness, the BBDO surveys asked consumers questions designed to elicit their opinions about the advertised product. In fact, none of the results from the BBDO survey in evidence relates to a single question concerning the actual content of Wonder Bread advertisements. (CX 112 A)

14. The challenged Wonder Bread television advertisements were primarily addressed to children and parents of children or

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to general audiences which included substantial numbers of children and parents of children. (CX 175-176)

15. Complaint counsel's expert witnesses, Dr. Richard Galdston, Dr. Richard H. Granger, and Dr. Albert J. Solnit, have had experience with both emotionally well and disturbed children including the way such children perceive television. Each of these witnesses is qualified, on the basis of his experience, to testify how children would perceive the challenged Wonder Bread television advertisements and whether those advertisements exploit children's aspirations and concerns for growth and development. (CX 136, Galdston 411-419; CX 140, Granger 494-502, 507-508, 520; CX 139, Solnit 588-596)

16. Various healthy children between the ages of one and twelve perceived the "How Big" and "Wonder Years" campaign advertisements and the Captain Kangaroo and Bozo Circus advertisements as promising some special growth capacity which would not be available without eating Wonder Bread. (Solnit 609, 618, 622, 623, 638-640; Granger 508, 516, 528, 549; Littner 2305)

17. The challenged Wonder Bread television advertisements represent to viewers that Wonder Bread is an extraordinary food for producing dramatic growth in children. (CX 1-26, 28-30(d))

18. Wonder Bread is not an extraordinary food for producing dramatic growth in children nor a necessary food for children to grow and develop to the fullest extent during the preadolescent years. (CX 172, Para. 10)

Wonder Bread will not enhance growth in any way that is different than other enriched breads. (Granger 513-514)

Growth and development of a child normally is a function of biological cells, rather than the presence of Wonder Bread. (Galdston 431)

19. The Line of Hostess Snack Cakes consists of products marketed under the following names: Ho Ho's, Ding Dongs (Dark Chocolate), Ding Dongs (Milk Chocolate), Twinkies, Orange Cupcakes, Devil's Food Cakes, Big Wheels, Brownies, Sno-Balls, Suzie Q's, Hostess Cake Doughnuts, Cherry Fried Pies, Apple Fried Pies, and Lemon Fried Pies. (CX 126 A-126 B; Cotton 369)

20. The following exhibits are television advertisements challenged by the Complaint in this matter and were disseminated by respondents ITT Continental Baking Company, Inc., and Ted Bates & Company, Inc., and are typical of the advertisements

disseminated in a series of advertisements entitled "Snack Cake Jungle."

Film	Storyboard	Title	Length
CX 31	CX 36	"Snack Cake Jungle, Fruit Pies"	60 sec.
CX 32	CX 37	"Snack Cake Jungle, Fruit Pies"	30 sec.
CX 33	CX 38	"Snack Cake Jungle, Cupcakes"	30 sec.
CX 34	CX 39	"Snack Cake Jungle, Cupcakes"	60 sec.
CX 35	CX 40	"Snack Cake Jungle, Twinkies"	60 sec.

The following exhibit is a print advertisement challenged by the complaint in this matter and was disseminated by respondents ITT Continental Baking Company, Inc. and Ted Bates & Company, Inc. and is typical of a series of print advertisements disseminated for Hostess Snack Cakes entitled "A Major Nutritional Advance From Hostess."

Exhibit	Title
CX 41	"A Major Nutritional Advance From Hostess"

(ITT Ans., Fifth Defense § 12; Bates Ans., First Defense § 12; CX 31-41)

21. CX 35, respondents' 60-second television commercial entitled "Snack Cake Jungle/Twinkies," is typical of respondents' Hostess cake advertising themes. The film opens by showing a mother in a supermarket alongside of a store display with different types of Hostess Snack Cakes with her arms full of Twinkies which she has taken from the shelves.

The announcer and Mother dialogue makes up the audio portion of the commercial with the opening from the announcer:

Snacks, snacks, everywhere snacks. Welcome to the snack cake jungle. Everywhere you look snack cakes for the kids.

The mother then asks:

Are there any that have more than good taste?

The announcer responds:

Yes. Hostess announces snack cakes now fortified with vitamins and iron.

And then continues:

You can thank the Hostess bakers for new vitamin-fortified snack cakes, with the good taste kids love, and good nutrition they need.

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The scene then shifts to a table with two children sitting around it holding four Twinkies on a plate, two unopened packages also holding four Twinkies, and a partly visible pitcher of milk in the background. While the girl and boy are shown eating Twinkies, the announcer states:

Like new Hostess Twinkies that tender golden sponge cake * * * with creamy filling * * * now gives your children more than good taste. It gives them important nutrition, too. Because now Hostess Twinkies are fortified with body-building vitamins and iron to grow on.

At this point and again when the announcer says, "Look for the 'V' on packages of Hostess Twinkies," a huge V is flashed on the screen with the words "Vitamin fortified" printed inside it. The announcer then goes on to say:

Yes. Now there are snack cakes with more than good taste. New vitamin-fortified Hostess snack cakes. Look for the "V" on packages of Hostess Twinkies. Thank Hostess for the good taste kids love, and good nutrition they need. (CX 35)

Other alleged Hostess commercials in evidence are generally similar, with the exception that some are only 30 seconds in length and therefore do not include all of the text quoted above, and with the further exception that different products, that is, cupcakes and fruit pies, are promoted in other commercials.

22. CX 41, a magazine advertisement. A child with a football is pictured eating a Hostess Twinkie. Across the top of the picture are the words "A major nutritional advance from Hostess," and, at the side of the picture, "Snack cakes with body-building vitamins and iron." Inserted in the lower half of the picture, together with pictures of packages of Hostess fruit pies, Twinkies, and cupcakes, is the following text:

Look for the big "V" on every new package of Hostess Cupcakes, Twinkies and Fruit Pies! It's the nutritional advance that takes the guesswork out of which snack cakes to buy! These famous Hostess Snack Cakes now give your children more than good taste * * * they give them important nutrition, too. So, why settle for just any snack cake—give them Hostess Snack Cakes fortified with body-building vitamins and iron to grow on.

Across the bottom of the advertisement is a line that states:

Thank Hostess * * * for the good taste kids love and good nutrition they need. (CX 41)

23. The enrichment advertising for Hostess Snack Cakes began on September 15, 1970, and concluded on May 10, 1971. (Hackett 2133)

24. The enrichment of Hostess Snack Cakes was accomplished by dissolving a large fortification tablet containing thiamine, riboflavin, niacin and iron in water which is then mixed in with the other ingredients to make either the cake, the filling, or the icing for the snack cakes. (Cotton 364-371)

25. The fortification of Hostess Snack Cakes with niacin, thiamine, riboflavin and iron raised the level of these nutrients in Hostess products to approximately the level of these nutrients contained in enriched white bread. (Cotton 369; Brigg 849) However, these enrichment levels could not be achieved by simply using enriched flour in making Hostess Snack Cakes because Hostess products only contain 20 to 30 percent flour in the dough and no flour in the filling or icing. (Cotton 380, 397) In addition, the use of enriched flour would create bad off-flavors that consumers would not accept. (Cotton 379-380) Therefore, in order to achieve these levels of nutrients, some of the nutrients were added directly to the filling and icing. (Cotton 366-369; CX 127 F)

26. The greatest problem encountered in the fortification process was bad off-flavors caused by the addition of certain nutrients. Other problems were how to stabilize the nutrients added to the snack cakes and what form of iron to add to the products. (Cotton 366-370; 380-383) A year of testing both in the laboratory and in the plants was needed to solve these problems. (Cotton 380)

27. The advertisements for Hostess Snack Cakes under challenge, as typified by CX 41, represent that the fortification of Hostess Snack Cakes with vitamins and iron constituted a major nutritional advance. (CX 41; ITT Ans., Fifth Defense, Para. 13(a) and (b); Bates Ans., First Defense, Para. 13)

28. The advertisements for Hostess Snack Cakes, as typified by CX 31 through CX 41, represent that Hostess Snack Cakes provide good nutrition in addition to good taste because they are fortified with vitamins and minerals.

29. Bates participated in the creation of the "Wonder Years" and "How Big" themes for Wonder Bread and in the vitamin enrichment themes used for Hostess Snack Cakes. Bates has offered to ITT Continental consultation on general advertising strategy for the advertising of Wonder Bread and Hostess Snack Cakes. (CX 173, Para. 4)

30. Bates received at some point after their submission to ITT Continental and prior to the filing of the Complaint herein copies

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of studies conducted by Grudin/Appel/Haley; Batten, Barton, Durstine and Osborn, Inc.; Oxtoby-Smith, Inc.; and R. H. Bruskin Associates concerning the advertisements of Wonder Bread and Hostess Snack Cakes, which studies are listed in the Exhibit List of complaint counsel in this proceeding. In the case of certain copy test studies by G/A/H, Bates received from G/A/H drafts of the studies before G/A/H submitted them to ITT Continental. (CX 173, Para. 5)

31. Bates knew or had reason to know at the time the ads in question were prepared that Wonder Bread is a standardized enriched white bread and is not an outstanding source of nutrients distinct from other enriched bread. (CX 172, Para. 10; CX 173, Para. 6)

32. Bates actively participated in and was instrumental in creating and disseminating the Wonder Bread and Hostess advertisements as alleged in Paragraphs 6 and 7 of the complaint.

33. Contrary to representations in advertising, as alleged in Paragraph 10 of the complaint, Bates knew or had reason to know that Wonder Bread is not an extraordinary food for providing dramatic growth in children.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of this proceeding, of the respondents, and of the acts and practices of the respondents.

2. The implied representations that Wonder Bread was an extraordinary growth-producing food were false and misleading, and both respondents ITT and Bates have engaged in deceptive acts in violation of Sections 5 and 12 of the Federal Trade Commission Act.

3. This proceeding is in the public interest.

IN THE MATTER OF

AVALON INDUSTRIES, INC., ET AL.

Docket 8925. Interlocutory Order, Oct. 23, 1973.

Order denying petition to stay proceedings pending Commission investigation and promulgation of industry guides relating to packaging of toy craft and hobby products. Petition is being taken under advisement as though filed pursuant to Sections 1.6 and 1.15 of Commission's rules.