

IN THE MATTER OF
SEARS, ROEBUCK AND CO., ET AL.

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

Docket 9104. Complaint, Nov. 4, 1977 — Final Order, April 28, 1980*

This order requires, among other things, a Chicago, Ill. department store chain to cease, in connection with the advertising and sale of dishwashers, representing that its dishwashers will completely clean dishes, pots and pans without prior rinsing and scraping; and claiming without substantiation that items placed in the top rack of the dishwashers will get as clean as those on the bottom rack. The company is prohibited from making claims regarding the performance of any major home appliance unless those claims are supported by reliable and competent tests. Respondent is further barred from misrepresenting the purpose, content or conclusions of tests, studies, reports or surveys, and required to maintain specified records for a period of three years.

Appearances

For the Commission: *Robert Barton, Mitchell Paul, Ronald Bogard, Laurence Kahn and Louise Kotoshirodo.*

For the respondents: *Arthur Medow, Chicago, Ill., Mark Schattner, Wald, Harkrader & Ross, Washington, D.C., Burton Y. Weitzenseld and Frank C. McAleer, Arnstein, Gluck, Weitzenseld & Minow, Chicago, Ill. for respondent Sears, Roebuck and Co.; Howard Abrahms, New York City for respondent J. Walter Thompson Co.*

INITIAL DECISION BY DANIEL H. HANSCOM, ADMINISTRATIVE LAW
JUDGE

SEPTEMBER 28, 1979

PRELIMINARY STATEMENT

On November 20, 1977, the Commission served its complaint in this proceeding on Sears, Roebuck and Co. ("Sears") and J. Walter Thompson Company charging them with disseminating deceptive and unfair advertisements in the course of an advertising campaign for Sears' dishwashing machines, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. More specifically, the complaint charged that respondents represented in national magazines

* Complaint previously published at 94 F.T.C. 331.

and newspapers and over radio and television, without having a reasonable basis therefor, that: [2]

1. the Lady Kenmore dishwasher would completely remove, without prior rinsing or scraping, all residue and film from dishes, pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers;

2. dishes in the top rack of the Lady Kenmore dishwashers would get as clean as those in the bottom rack without prior rinsing or scraping;

3. the Lady Kenmore "Sani-Wash" cycle, by giving dishes an "extra-hot 155° final rinse," destroyed all harmful and other bacteria and microorganisms on the dishes and pots and pans.

In addition to the charge that Sears and its advertising agency, J. Walter Thompson, made the foregoing representations without a reasonable basis, the complaint further charged that the advertising was false because Sears' Lady Kenmore dishwasher would not completely remove, without prior rinsing or scraping, all residue and film from all dishes including pots and pans, and because the "Sani-wash" cycle did not destroy all harmful and other bacteria and microorganisms on dishes, pots and pans.

The complaint also charged that respondents' advertisements were false in representing to the public that the demonstrations shown in the advertisements proved that Sears' Lady Kenmore dishwashers would completely remove, without prior rinsing or scraping, all residue and film remaining on dishes, pots and pans after cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers, when the contrary was the truth. Finally, the complaint charged that although respondents represented that pre-rinsing and pre-scraping were not necessary prior to washing eating and cooking dishes in the Lady Kenmore dishwasher, the Sears' Owners Manual, provided to purchasers, instructed them to pre-soak or pre-scour firmly cooked-on or baked-on foods. The complaint charged that these instructions in the Owners Manual were material "in light of the representations made in the advertising," that the advertising did not reveal the instructions, and was therefore deceptive and unfair.

Sears filed its answer to the complaint on January 19, 1978, denying most of the substantive allegations and raising four affirmative defenses. The affirmative defenses were: (1) that the challenged practices were abandoned by Sears; (2) that the challenged practices were industry-wide; (3) that the challenged advertising was insignifi-

cant and *de minimis* in scope; and (4) that the challenged advertising claims did not require prior substantiation because they [3]caused no material adverse effect upon the health or safety of consumers who, after using the product, were able to verify the claims for themselves and, if dissatisfied, could obtain a full refund.

Procedural History

The proceeding involved extensive pretrial activity including much controversy over discovery and motions of various kinds. Pretrial conferences were held on January 25, March 6, March 14, July 14 and September 26, 1978. On March 30 the undersigned denied motions of Sears and J. Walter Thompson seeking broad-scale discovery from third parties. On August 4, after oral argument held July 14, the undersigned granted complaint counsel's motion for partial summary decision with respect to Paragraphs 10, 13, 15, 18, and 20 of the complaint, ruling that the advertising conveyed the representations alleged.

In the meantime, J. Walter Thompson negotiated a consent settlement and on June 13 filed a motion to withdraw the complaint as to it from adjudication. On July 14 complaint counsel joined in this motion. The undersigned certified the motion to the Commission, and on July 19 the matter as to J. Walter Thompson was withdrawn from adjudication.

Hearings on the merits originally scheduled for September 6 were postponed to October 16 on which date the case-in-chief commenced. The presentation of complaint counsel's case took place in Washington, D.C., and concluded on November 20, 1978. Respondent Sears presented its defense in Chicago, Illinois, beginning on December 11, 1978, and concluding on January 26, 1979. Rebuttal hearings were held in Washington, D.C., on February 13-14, 1979.

On March 16, the undersigned excluded certain statistical evidence relative to Sears' advertising which had been received subject to check for accuracy by Sears, and ruled that the evidentiary phase of the case had been completed. In all, there were 28 actual hearing days. The record consists of 6,313 pages of transcript and several hundred exhibits, including a number of multipaged technical studies.

As an addendum to their proposed findings, complaint counsel moved that sanctions under Section 3.38 of the Rules of Practice should be imposed upon Sears, and disciplinary action should be taken against Sears' counsel for conduct related to discovery. Specifically, complaint counsel alleged that counsel for Sears did not comply in good faith with the orders of the undersigned to produce certain material. Sears filed

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separately its response to this motion of complaint counsel, and the undersigned has determined to address this issue in a separate document. The undersigned will not, however, exclude any documents from consideration (see CPF 364).

The proceeding is now before the administrative law judge for decision based upon the allegations of the complaint, the answer, the [4] evidence and the proposed findings of fact, conclusions and legal authority filed by the parties. All proposed findings of fact, conclusions and arguments not specifically found or accepted herein, are rejected. The undersigned law judge, having considered the entire record, and all the contentions of respondent and complaint counsel, makes the following findings and conclusions, and issues the order to cease and desist at the end hereof.

FINDINGS OF FACT

I. Identity of Respondent and Nature of Its Business

1. Respondent Sears, Roebuck and Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive office and principal place of business located at Sears Tower, Chicago, Ill. (Complaint ¶ 1 and Answer, p. 1). Sears, Roebuck and Co. is the world's largest retailer of general merchandise, is one of the nation's largest advertisers (Sears Admissions) and is known to all.

2. Respondent Sears has been and is engaged in the advertising, distribution, and sale of portable and undercounter dishwashers, many of them under the "Lady Kenmore" brand name (Complaint ¶ 3 and Answer, p. 2). Estimated total dishwasher sales by Sears during the fiscal years 1971 through 1975 were as follows: \$73,470,000 in 1971; \$89,650,000 in 1972; \$94,500,000 in 1973; \$97,427,000 in 1974; and \$114,000,000 in 1975 (CX 112A). Sears, in fact, has by far the largest percentage share of U.S. consumer dishwasher sales, its closest competitors being Kitchen Aid and General Electric (see order issued September 26, 1979, in connection with *in camera* transcript pages).

3. In the course and conduct of its business, Sears causes dishwashers when sold to be transported from its place of business in various States of the United States and in the District of Columbia. Sears maintains and, at all times mentioned herein, has maintained a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act (Complaint ¶ 4 and Answer, p. 2). In the course and conduct of its business, Sears has been

and is in substantial competition in commerce with individuals, firms and corporations engaged in the sale and distribution of dishwashers (Complaint ¶ 5 and Answer, p. 2).

4. For the purpose of inducing the sale of its dishwashers and other consumer products, Sears has disseminated and caused the dissemination of advertising in national magazines, newspapers and other print media distributed across state lines, and in radio and television broadcasts transmitted by broadcasting stations located in various States of the United States and the District of Columbia [5]having sufficient power to carry such advertising across state lines. In addition, Sears had disseminated advertising in catalogs distributed by mail, and by other means, and through various outlets including point of sale (Complaint ¶ 8 and Answer, p. 3).

5. Respondent Sears, as stated, is the largest marketer of household dishwashing machines in the United States. In general, Sears' dishwashers are marketed under the "Kenmore" and "Lady Kenmore" brand names (Clifford, Tr. 4794), and this proceeding involves an advertising campaign for "Kenmore" and "Lady Kenmore" dishwashers (Tr. 478) which commenced in 1971 and continued through 1975 when the Commission began its investigation.

6. Dishwashers sold by Sears, including those sold during the period 1971 to 1975, were manufactured by Design and Manufacturing Corporation ("D&M"), located in Connorsville, Indiana (Cannon, Tr. 2442-43; Clifford, Tr. 4792; CX 83C, 187). The line of Sears' Kenmore dishwashers marketed from 1971 through 1975 was referred to as the "7200 line" (Clifford, Tr. 4993-94). They were available in both portable and undercounter models (CX 99A, 100A). Sears' 1971-1972 dishwashers ranged in price from \$99.00 to \$284.95 (CX 277C). Sears' 1973-1974 dishwashers ranged in price from \$169.95 to \$309.95 (CX 277Z007). The Lady Kenmore was the top model as well as the most expensive Sears' dishwasher sold from 1971 through 1975 (Cannon, Tr. 2496). Sears top-of-the-line dishwasher model is now called the "Sears Best" Kenmore dishwasher (Clifford, Tr. 4981).

7. Sears' dishwashers are equipped with a "macerator" blade with stainless steel teeth in the drain of the dishwasher (CX 83E, 338). The blade cuts up food so that it can wash down the drain and out of the dishwasher (CX 83E, 338). This blade and system, however, do not amount to a "garbage disposal" unit and Sears' dishwashers cannot be used as such. Sears' 7200 line dishwashers have two internal racks to hold dishes and other utensils. The upper rack is called the Roto-Rack. It is circular and is serviced by an upper spray tube which causes the rack to revolve during water agitation cycles. The lower rack is square

and is serviced by a lower spray arm (Fraser, Tr. 5240; CX 99B, 100B; 277Z008 - Z010).

8. The "7200 line" Lady Kenmore featured a "power wash" cycle in addition to "normal wash" cycle (CX 78B, 99G, 100G). Sears' "7200 line" Kenmore models lower in price than the Lady Kenmore featured only the "normal wash" (compare CX 277Z040-044, 046-049 with CX 277Z050). Sears stated that the "normal cycle" consisted of two wash cycles (phases) and four rinse cycles (phases) (CX 83Z002). In response to a question as to the phases of the "power wash" Sears advised the Commission on November 28, 1975, that the "normal cycle" on the Kenmore was substantially the same as the "power wash cycle" on the Lady Kenmore (CX 85A-C). [6]

II. The Challenged Advertisements Made the Representations Alleged in the Complaint

9. The record contains 54 advertisements for Sears' dishwashers (CX 345, pp. 1-3). The advertisements may be grouped into six categories: print advertisements in magazines of national circulation such as *Time*, *Reader's Digest*, *Family Circle*, *Sports Illustrated*, and *Better Homes and Gardens* (CX 1-3, 72-74); advertisements broadcast over national and local television (CX 4-10); advertisements in Sears' catalogs (CX 11-26); radio advertisements (CX 27-35); point of sale materials (CX 36-38); and newspaper advertisements (CX 39-54). The films and videotapes of the television commercials (CX 55-61, 265-66) are also in the record (CX 345, pp. 3-4, 20). The films of the various TV commercials are identified as follows: "Birthday Cake" (CX 55); "Weekend Clean Up" (CX 56); "Family-Revised" (CX 58); "Vicious Circle" (CX 59); "Freedom Maker" (CX 60); and "Pennypincher" (CX 61). These advertisements, including films and videotapes, were all considered by the undersigned in granting partial summary decision finding that the representations made in Sears' advertisements were as alleged in the complaint. Examples of the advertisement in issue are reprinted herein: CX 1 and CX 2 are print ads which appeared in magazines of national circulation; CX 4 and CX 5 are storyboards of TV ads broadcast over national television.

10. The dissemination schedules of Sears' advertisements are in the record (CX 62-77). Sears admitted the dissemination of CX 1 and CX 4 (Answer, p. 3). At trial, it was stipulated that CX 1-26 and CX 36-38 were disseminated (Tr. 496-97). The undersigned found that the other advertisements were disseminated in receiving CX 1 through CX 61 in evidence (Tr. 512-18). The schedules of publication for the national magazine advertisements (CX 1-3) from 1971 through 1974 were

introduced, respectively, as CX 71 through CX 74. The dissemination schedules for the various television commercials were as follows: CX 64A-F is the schedule for the "Birthday Cake" commercial (CX 4, 55); CX 65 is the schedule for "Weekend Clean Up" (CX 5, 56); CX 66 is the schedule for "Family" (CX 6, 57); CX 67 is the network television schedule and CX 68 is the spot television schedule for "Family-Revised" (CX 7, 58, 265, 266); CX 70 is the schedule for "Vicious Circle" (CX 8, 59); CX 77 is the schedule for "Freedom Maker" (CX 9, 60); and CX 69 is the schedule for "Pennypincher" (CX 10, 61; Tr. 485). These TV commercials were broadcast in the period between 1972 and 1975. The "Birthday Cake" commercial alone was disseminated for two and one-half years, from October 1972 through April 1975 (CX 64 A-F). The dissemination schedules for the catalog ads (CX 11A-26A) are set forth on each exhibit and are verified in CX 76 (Tr. 485). The dissemination schedule for the radio ads (CX 27-35) is shown as well as verified in CX 75 (Tr. 485). The initial dissemination for the point of sale brochures is shown on the face of the brochures (CX 36A-38A), and is verified in CX 63 (Tr. 485-86). The dissemination schedules for the newspaper ads (CX 39-54) are set forth on each exhibit and are verified in CX 62 (Tr. 486).

11. The undersigned granted complaint counsel's pretrial motion for partial summary decision and found, based on an examination of the advertisements in issue, including a viewing of the tapes of the [7] television advertisements, that the advertisements made the representations alleged in the complaint (Order Granting Complaint Counsel's Motion For Partial Summary Decision With Respect to Paragraphs Ten, Thirteen, Fifteen, Eighteen and Twenty Of The Complaint, issued August 4, 1978). Sears' advertisements unequivocally represented to the public that:

1. the Sears Lady Kenmore dishwasher will completely remove, without prior rinsing or scraping, all residue and film from dishes and from pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers;
2. dishes in the top rack of the dishwasher will get as clean as those on the bottom rack after one complete set of washing and rinsing cycles, without prior rinsing or scraping;
3. the "Sani-Wash" cycle destroys all harmful and other bacteria and microorganisms on dishes, pots and pans;
4. the demonstrations depicted and referred to in CX 1 and CX 4 and other advertisements prove that Sears' Lady Kenmore dishwashers will completely remove, without prior rinsing or scraping, all

residue and film remaining on all dishes, pots and pans after cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers.

12. In granting partial summary decision as to the representations in the advertisements, the undersigned also found that the Sears' Owners Manual (CX 99, 100), which is provided to purchasers of a Sears' dishwasher, instructed users to pre-soak or scour firmly cooked or baked-on foods.

13. The following findings are included in this decision to show the basis upon which the undersigned granted complaint counsel's pretrial motion for summary decision and found that the advertising of respondent Sears made the representations alleged in the complaint.

A. No Pre-rinsing or Pre-scraping

14. CX 1, the "do-it-itself" dishwasher, reprinted herein, was published over a two year period (CX 73, 74). It shows a dirty load of dishes being washed in the dishwasher, under which illustration appears in bold type the words, "Sears Lady Kenmore. The do-it-[8]itself dishwasher." The ad states categorically, "No scraping. No pre-rinsing," and assures the reader that "Lady Kenmore has 6 powerful hot water jets for the bottom rack, surging hot water with enough force to scrub every dish, pot and pan *really* clean. Even baked-on food comes off." The advertisement tells the reader that "Sears Lady Kenmore does just about everything, itself. So you really do have freedom from scraping and pre-rinsing. That's why we call it The Freedom Maker." This advertisement also stated across the top that the demonstration pictured was "Certified by the Nationwide Consumer Testing Institute."

15. CX 2, also reprinted, was likewise published nationally. It contains a headline in bold print, "What Dishwasher Would Dare Load These Messy Dishes Without Scraping or Pre-Rinsing?" The ad assures the reader that the Lady Kenmore dishwasher gives "freedom from scraping and pre-rinsing" and states "Dishes, pots, pans, glasses, silverware all get hygienically clean . . . without any help from you." The photograph shows soiled cooking and baking dishes. This ad also contains under a picture of a loaded dishwasher the statement, "Demonstration certified by Nationwide Consumer Testing Institute."

16. CX 4, a TV commercial called "Birthday Cake," the storyboard of which is included herein, features a filmed demonstration showing the inside of the Sears' Lady Kenmore dishwasher washing eating and cooking dishes while the announcer tells the viewer that the Lady Kenmore dishwasher will give "freedom from scraping and freedom

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from pre-rinsing," and has two hot water jets that "scour dishes." CX 4 was disseminated over a two and one-half year period over national hook-ups on all three television networks (CX 64A-F). It was shown on widely-viewed television programs such as the Olympics, World Series, "Julie Andrews Show," "Today Show," "Tonight Show," "Mary Tyler Moore Show," "Bob Newhart Show" and "Bob Hope Special" (CX 64A-F).

17. CX 5, "Weekend Clean Up," was broadcast over local TV in San Antonio, Kansas City, Waco, Texas, and Little Rock (CX 65). It shows dishes being washed in the dishwasher and spotless after being cleaned. The announcer states that the viewer will "never have to scrape or rinse again. Even dishes *crusty* with leftover food." The viewer is assured that the "Kenmore's 14 powerful hot water jets scour every dish clean . . . with no scraping or rinsing."

18. CX 8, a 30-second TV commercial "Vicious Circle," broadcast in 1974 in Oklahoma City, Dallas, Dayton, San Diego, El Paso, New Orleans, Phoenix, Milwaukee, and Seattle, among other cities (CX 70), shows a housewife washing dishes with a circular counter stacked high with dirty breakfast, lunch and dinner dishes. The audio portion informs the viewer that there is "[n]o need to scrape or pre-rinse, even 12 hours after eating." This commercial also assured the viewer of the truth of the representation with the superimposed statement "Demonstration Certified By the Nationwide Consumer Testing Institute." [9]

19. CX 9, "The Freedom Maker," was broadcast over local TV in 1974 in Oklahoma City, Dallas, San Diego, New Orleans, Albany, and Seattle among other cities (CX 77). The video shows a day's stack of dirty dishes, their loading and washing in the Lady Kenmore dishwasher, and "sparkling dishes" after washing. The audio proclaims, "no need to scrape or rinse off stuck-on leftovers."

20. CX 31, another radio commercial, promised: "Now you can have the portable dishwasher you've been dreaming about . . . You'll like the way it makes pre-rinsing and soaking of heavily soiled dishes, pots and pans a thing of the past."

21. CX 33 told the listening public over radio that the Sears' Kenmore dishwasher was "precision engineered for superb dishwashing performance and reliability" and that it "[G]ets even the messiest baking dishes and roasting pans spotlessly clean . . . without prerinsing."

22. The preceding advertisements are examples of the representation by Sears that its Kenmore and Lady Kenmore required no pre-rinsing or pre-scraping of dishes, pots and pans. There are many other ads conveying this representation in the record: CX 3, 6, 7, 10, 28, 30, 32, 34, 36, 37, 38, 43, 45, 46, 47, 49 - 51, and 53.

B. Dishes in Top Rack Get As Clean As Dishes on Bottom Rack

23. CX 1 states, "And the dishes on top get as clean as those on the bottom." CX 2 states, "The exclusive revolving Roto-Rack gets dishes on top as clean as those on the bottom." The Roto-Rack is Sears' term for the revolving circular upper rack in its "7200" line of dishwashers. CX 2 shows pots and pans, as well as dishes used for eating, loaded in the "Roto-Rack." The television commercial, "Birthday Cake" (CX 55), also shows pots and pans loaded in the "Roto-Rack" of the Sears' dishwasher. [10]

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CX-1

MAY 13 1974

This demonstration recreates the powerful cleaning ability of Sears Lady Kenmore Dishwasher (Certified by the Nationwide Consumer Testing Institute)



Sears Lady Kenmore. The do-it-itself dishwasher.

No scraping. No pre-rinsing. Lady Kenmore has 6 powerful hot water jets for the bottom rack, surging hot water with enough force to scrub every dish, pot and pan really clean. Even baked-on food comes off.

And the dishes on top get as clean as those on the bottom. Because every cup and glass is scoured inside and out by a field of eight upper jets.

Then there's Lady Kenmore's protected pulverizer for leftovers. It's kind of a mini-grinder with 12 stainless steel teeth that grind soft foods into tiny particles that wash right down the drain. (Of course, water is always

fresh and clean—the water that rinses your dishes hasn't washed them.)

And our 8 different cycles include Sani-wash, which gives your dishes an extra-hot 155° final rinse. So everything is hygienically clean.

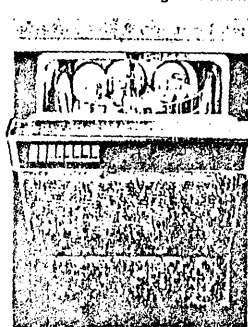
What's more, Sears Lady Kenmore is built to perform. But if you ever do have a problem, you can rely on Sears service.

Sears Lady Kenmore does just about everything, itself. So you really do have freedom from scraping and pre-rinsing. That's why we call it The Freedom Maker. The Freedom Maker, both built-in and portable, is

available at Sears, Roebuck and Co. stores and through the catalog.

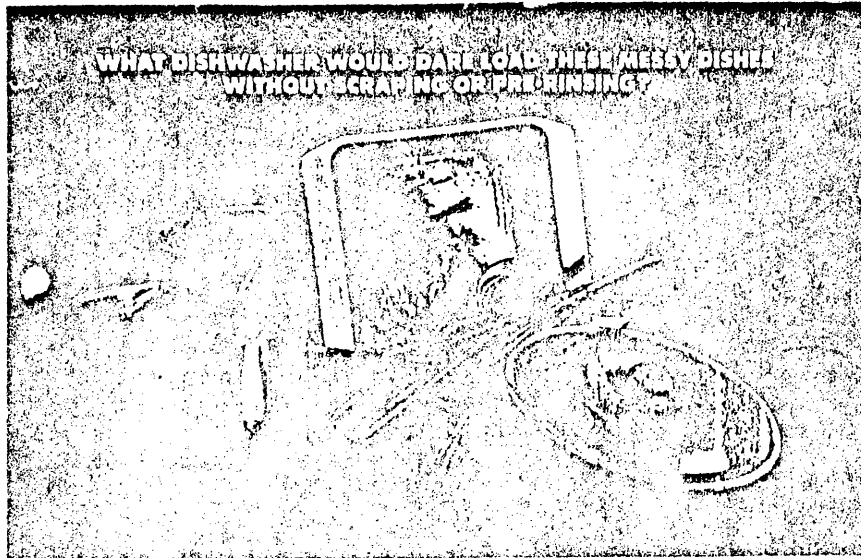


Sears



The
Freedom Maker

Cx-2



Sears Lady Kenmore...
the Freedom-Maker.

It gives you freedom from scraping and pre-rinsing because it has two hot water jets to scour soft food off dishes, and a built-in stainless steel pulverizer that grinds up leftover food.

Just load and choose from the automatic Cycle Selector. The exclusive revolving Roto-Rack gets dishes on top as clean as those on the bottom. And forced air drying allows dishes to be used the minute the cycle is over.



Now all you have to do to dishes before you load them is pick them up from the table (and remove

bones, of course). Dishes, pots, pans, glasses, silverware all get hygienically clean . . . without any help from you.

We call our dishwasher the Freedom-Maker. Because it gives you freedom to do more important things.

See all the Freedom-Makers, portable and built-in, at Sears, Roebuck and Co. stores. Or in the Sears catalog. They're available in White, Copbertone, Avocado, and Tawny Gold. This one is Model #7215. For more information, write to Sears, Roebuck and Co., Department 665, 925 So. Wabash Avenue, Chicago, Illinois 60607.

Sears Lady Kenmore
Dishwasher.

The Freedom Maker



Demonstration certified by National Consumer Testing Institute

House Beautiful's
Building Manual
Fall-Winter 1972-7

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J. WALTER THOMPSON COMPANY
 875 NORTH MICHIGAN AVENUE, CHICAGO, ILLINOIS 60611



TELEVISION COMMERCIAL

FILM CODE: 2684
 CLIENT: SEARS, ROEBUCK AND COMPANY
 PRODUCT: LADY KENMORE DISHWASHER
 DATE: "A" 6/5/72

TITLE: "BIRTHDAY CAKE"
 LENGTH: 30 SECONDS
 STATUS: AS FILMED
 SEARS #: 116-1072-6530

VIDEO

MOTHER FINISHES FROSTING A CAKE. LITTLE
 GIRL LICKS FROSTING FROM. CU DISHES
 GOING INTO DISHWASHER.

INSIDE SHOT OF DISHWASHER CLEANING.
 SUPER: DEMONSTRATION CERTIFIED BY
 NATIONWIDE CONSUMER TESTING INSTITUTE.

CU DISHWASHER. SUPER: THE FREEDOM
 MAKER

CU MOTHER, LITTLE GIRL AND CAKE.

AUDIO

(MUSIC)

ANNCR (VO): Sears Lady Kenmore Dishwash-
 gives you freedom from scraping and
 freedom from pre-rinsing. Because it has
 two hot water jets that scour dishes
 and a stainless steel pulverizer for soft
 food waste. We call Sears Lady Kenmore

THE FREEDOM MAKER. Because it gives you
 freedom to do more important things.

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J. WALTER THOMPSON COMPANY
373 NORTON BURGAN AVENUE CHICAGO ILLIN 45-4211

CX-5

TELEVISION COMMERCIAL

JOB NO 4417-C	TITLE WEEKEND CLEAN UP
CLIENT SEARS ROEBUCK & CO	LENGTH :25 + :05 LOCAL ANNCR
PRODUCT DISHWASHERS RETAIL	STATUS
DATE 6/25/73	SEARS # 01-973-6530
REV 2	
OPEN ON MAT WHOSE WIFE IS OBVIOUSLY GONE AWAY. THERE ARE DIRTY DISHES STACKED ALL AROUND.	SFX: MAN MUNCHING, DISHWASHER SOUNDS ETC. ALSO MUSIC TRACKS
HOLDS UP PLATE WITH LEFTOVER SPAGHETTI	ANNCR (VO): Now's the time to really clean up during Sears gigantic dishwasher sale.
MATCH DISS TO PLATE IN MACHINE	With a Kenmore you'll never have to scrape or rinse again. Even dishes <u>crusty</u> with leftover food. Kenmore's 14 powerful hot water jets scour every dish clean . . . with no scraping or rinsing.
MATCH DISS TO SAME PLATE SPOTLESS, AFTER WASHING TEEN FAMILY ENTERS AND WIFE THROWS ARMS AROUND HUSBAND, KISSES HIM	Make your dish happy. Kenmore portable and built-ins are on sale now.
FREEZE FRAME: SEARS LOGO KENMORE DISHWASHER	:05 LOCAL ANNCR TAG:

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[14]C. "Sani-Wash" Cycle Destroys All Harmful and Other Bacteria and Microorganisms on Dishes, Pots and Pans

24. Use of the term "Sani-Wash" (CX 1, 3), the statement that the dishwasher gives dishes an "extra-hot 155° final rinse," the promise that "everything is hygienically clean," and the reference, in connection with this promise, in CX 3 that this is "especially nice for . . . baby bottles," have the tendency and capacity with respect to each advertisement to convey that the Sears' Lady Kenmore dishwasher kills "all harmful and other bacteria and microorganisms on the dishes, pots and pans." There are other similar advertisements: CX 2, CX 11D, 13B, 15B, 15C, 18C, 19B, 22B, 23C, 24B, 25C, 45 and 46.

25. Not every member of the public may have derived from the advertisements the foregoing meaning that the "Sani-Wash" cycle sterilized the dishes by killing all harmful and other bacteria and microorganisms on the dishes, pots and pans. Some individuals may have perceived a possible difference between "hygienically clean" and sterile. However, significant segments of the public may not be sophisticated enough or analytical enough to consider such a possible difference. These persons could have concluded from the advertisements that all dishes, after being washed in the dishwasher, would be sterile, all bacteria and microorganisms having been killed. It is not necessary that the challenged advertisements inevitably convey the representation alleged to *every* reader, viewer or listener. Rather, it is only necessary that the advertisements have the tendency and capacity to convey such representation.

26. Even if the term "hygienically clean" means to a microbiologist, or to those working in the field of sanitation, the reduction of bacteria to a safe level, something which is in serious dispute in this record (Dr. Ordal, Tr. 5641, 6026-27; Dr. Charache, Tr. 6081, 6084-86), that meaning is not controlling if the advertising in its overall net impression had the tendency and capacity to convey the representation that the "Sani-Wash" cycle sterilized dishes, pots and pans. The undersigned found, in granting partial summary decision, that Sears' advertisements had the tendency and capacity to convey this representation.

D. The Demonstrations Shown in Sears' Advertisements Purport To Prove That No Pre-rinsing and Pre-scraping Is Necessary

27. CX 1 prominently featured in italics at the top of the ad, as described, "This demonstration recreates the powerful cleaning ability of Sears Lady Kenmore Dishwasher (Certified by the Nationwide Consumer Testing Institute)." The advertisement contained pictures

representing the interior of the dishwasher during the washing cycle, the dishwasher with a clean load of dishes, and a woman holding a clean plate.

28. At the top of CX 2 there was a picture of what appeared to be heavily soiled pots and pans which would be difficult to clean. [15] In the center of the lower half of the ad there was a picture of an open dishwasher with visibly clean dishes, pots and pans in it. Under that picture was the statement "Demonstration Certified by Nationwide Consumer Testing Institute."

29. CX 4, "Birthday Cake," showed what apparently were heavily soiled and difficult to clean baking and cooking dishes being loaded into the Sears' dishwasher. The interior of the dishwasher was then shown during the washing cycle while the TV screen displayed the words, "Demonstration Certified by Nationwide Consumer Testing Institute."

30. In CX 8, "Vicious Circle," the video portrayed a housewife surrounded by a circular counter covered with dirty breakfast, lunch and dinner dishes. The dishwasher is shown being loaded. An interior picture of the dishwasher is then shown during the washing cycle while the words, "Demonstration Certified by the Nationwide Consumer Testing Institute," are superimposed on the television screen.

31. The law judge concluded in granting partial summary decision (Order of August 4, 1978) based on the preceding advertisements that:

The pictured demonstrations were in conjunction with the representations "No scraping . . . No pre-rinsing", "you'll never have to scrape or rinse again", "No need to scrape or pre-rinse, even 12 hours after eating", etc. Such advertisements unquestionably made the representation that demonstrations were being shown which proved the allegation that "Sears Lady Kenmore dishwashers will completely remove, without prior rinsing or scraping, all residue and film remaining on all dishes, pots and pans after cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers."

The contention that the demonstrations pictured in the advertisements represent that the dishwasher will completely remove, without prior rinsing or scraping *only* the specific foods shown in the demonstrations, spaghetti and cake residue, borders on the frivolous.

E. Sears Owners Manual

32. In granting partial summary decision as to the representations in the advertisements, the undersigned also found [16] that the Sears' Owners Manual which is provided to purchasers of a Sears' dishwasher, instructed users to pre-soak or scour firmly cooked or baked-on foods (CX 99, 100). This instruction is stated in the directions to users for preparing dishes, pots and pans for loading (CX 99D, 100D).

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III. The Cleaning Performance Claim

A. General Considerations

33. Sears' no scraping, no pre-rinsing representation is unlimited in scope. There are no qualifications. The complaint, however, did graft a limitation by alleging that the representation promised cleaning without pre-rinsing or scraping of dishes, pots and pans soiled from "cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers." The Sears' advertisements were not construed by the complaint to promise cleaning without pre-scraping or pre-rinsing of eating and cooking dishes soiled in a kitchen disaster such as where something is left in the oven or on the stove for an excessive length of time and is severely burned.

34. Ruling out cooking disasters, it is true that there are all kinds of cooks, an almost infinite variety of cooking procedures, many types of cooking equipment, and many types of foods cooked in the U.S. These differences produce a tremendous range of food soils that require cleaning. The language of the complaint, "normal consumer recipes and under other circumstances normally and expectably encountered by consumers," encompasses all these myriad cooking conditions and resultant food soils, although precluding food soils caused by a cooking disaster. As complaint counsel correctly states, "There is no clear boundary in this area, nor are there any boundaries in the advertisements disseminated by Sears" (CPF 88).

35. Severely "stuck-on" or adhered food soils, baked-on food, and even blackening from burned-on food¹ are common phenomena in normal cooking. Although Sears has taken the position that burned-on food would not result from ordinary or typical procedures, the testimony in this case does not support that position. For instance, it is well known that some degree of baked-on food, blackening or burned-on food can result from browning foods, reheating foods in the same dishes in which they were cooked, or spilling foods onto the edge or outer surface of the dishes in which they were cooked. Such [17] adhered food soils do not result from disaster but, rather, from the many variables prevalent in normal cooking procedures. Sears' advertisements represented to the public that Sears' dishwashers would "completely remove" all of such soils, "No Scraping . . . No Prerinsing" being required. In short, except for cooking disasters and

¹ "Burned-on food" refers to "material that has blackened and carbonized such as the sugar solution or sugar granules that you would take through the caramelization process browning them until they turn black" (Ferguson, Tr. 1689). "Baked-on food" refers to "food that adheres to the sides or bottom of utensils due to cooking procedures, such as baking or broiling or frying" (Ferguson, Tr. 1678).

unreasonable procedures, the representations in Sears' advertising encompassed the universe of cooking methods, soils, foods, utensils and dishes such as occurs in the kitchens of the nation's households.

36. A dish, pot or pan is clean when it is free of residue and film, and is not clean if it has soil on it following washing in a dishwasher. Food particles remaining on a dish or a utensil are not acceptable to most consumers whether the particles can be removed or not (Sullivan, Tr. 1640-41; Ferguson, Tr. 1690-91, 1747; Annis, Tr. 2285-86, 2312-13). This was also the view of Sears, which submitted as part of its substantiation for the cleaning performance claim a test conducted by Ms. Barbara Fraser, who testified for respondent, wherein it was stated: "any soil remaining at all on dishes is unacceptable" (CX 94C).

B. Sears Did Not Have a Reasonable Basis for the Cleaning Performance Claim

1. The Applicable Standards

37. Sears was required to possess a "reasonable basis" for the affirmative no scraping, no pre-rinsing product claim disseminated to the public. In view of the blanket and unlimited claim of no scraping, no pre-rinsing used by Sears to persuade the public to buy its dishwashers, such "reasonable basis" had to truly reflect the universe of food soils encountered in the nation's households, excluding only kitchen disasters and unreasonable cooking procedures.

38. Sears submitted prior to the issuance of the complaint in this case certain documentation in response to an order of the Commission under Section 6(b) of the Act ("6(b) Order"). This material is discussed in the next section of this decision. Some of the material can loosely be described as "tests." Although, as later described, the undersigned has concluded that Sears, under the circumstances of this case, was not required to have had as substantiation "scientific" tests, to the extent Sears relied on tests they were required to be competent and reliable. To be competent and reliable, the substantiating tests relied upon by Sears had to truly reflect the universe of food soils encompassed by its unqualified representation.

Competent and reliable tests further had to demonstrate that consideration had been given, in substantiating the claim, to the many variables which affect the cleaning performance of Sears' dishwashers. Among these factors are the following: detergent used and amount, voltage, mechanical function of dishwasher, number of washes and rinses and their precise duration, water temperature, [18]water hardness, type and number of cooking and eating dishes washed,

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loading of dishwasher, food soils used, method of food preparation and soiling of dishes, counteraging, cooking temperatures.

The foregoing are illustrative only and are listed simply to provide an indication of the factors competent and reliable tests should have given consideration to in determining, prior to dissemination of the representation, whether or not the Sears' dishwashers would perform in accordance with the representation.

Competent and reliable tests should have included information as to the scoring procedure used and the analysis of the results. Records should have been kept in sufficient detail so that the tests could be conducted again, and similar results obtained (Eberwein, Tr. 997-1133, 1387-94, 1399; Sullivan, Tr. 1517-21; Ferguson, Tr. 1664-66; Annis, Tr. 2267-71, 2273-75, 2277; CRB, p. 4).

39. Sears' "tests" did not meet the requirements for, and consequently were not, competent and reliable tests.

2. The Section 6(b) Order Material

In its proposed findings, Sears did not cite the material furnished to the Commission pursuant to the 6(b) Order as substantiation for its no scraping, no pre-rinsing representation (RPF, pp. 5-13). Instead, Sears submitted findings based upon different evidence introduced during its case-in-defense. According to Sears, "the documents submitted in response to the 6(b) Order reflect the dishwasher's cleaning ability *under conditions which are more rigorous than those experienced in the home*" (RRB, p. 5). Sears contends that the complaint limited the 6(b) documents "corroborate" the testimony on reasonable basis of a Sears' employee and an employee of the manufacturer of its dishwasher offered during its defense (RRB, pp. 5-6). Inasmuch as Sears does not disavow its 6(b) documentation as substantiation and as providing a reasonable basis for the no scraping, no pre-rinsing claim, that material is analyzed in the following findings.

40. Sears, Roebuck and Co. was served with an Order To File Special Report, dated July 10, 1975, issued under Section 6(b) of the Federal Trade Commission Act (CX 79) which required it to submit to the Commission the substantiation it possessed and relied upon for its advertisement, "Sears Lady Kenmore, The do-it-itself dishwasher" (CX 1, 79F, L). This ad was the last of a series of similar print advertisements for Sears' Lady Kenmore dishwashers, 1973-1974 models, which appeared in various national magazines during 1973 and 1974 (CX 82A, 83A). The 6(b) Order required substantiation for the claim that (CX 79F):

The Lady Kenmore dishwasher will, after one complete dishwashing cycle and when loaded according to instructions, remove [19]every visible particle of every type of cooked-on food from any pot or pan washed in the dishwasher, without prior scrubbing, scraping or rinsing of the pot or pan, and without regard to:

1. the type of, condition of, or surface of the pot or pan;
2. the length of time which the food was cooked;
3. the temperature at which the food was cooked;
4. the amount of food remaining and adhering to the pot or pan;
5. whether the food which remains in and adheres to the pot or pan has been burned and/or is crusty;
6. the length of time the food remains in the pot or pan before rinsing or washing in the dishwasher; and
7. the brand of dishwashing detergent used.

41. The 6(b) Order required that if Sears maintained that the claim was substantiated by materials in its possession, copies of all such materials were to be submitted, including expert opinion which was to be reduced to writing with the basis therefor (CX 79E, F). The 6(b) Order further required that if Sears possessed only part of the information demanded in any question, then such information as was available was to be provided along with an explanation of why the answer was incomplete. Sources from whom Sears knew further information could be obtained were to be identified. If Sears neither possessed the information demanded nor knew where it could be obtained, or believed that the claim was not capable of objective measurement, then the company was to state such facts (CX 79D).

42. By letter dated August 15, 1975, Sears submitted its response (CX 80). Mr. V.J. Graham, Vice President of Merchandising Administration for Sears, stated in a sworn affidavit accompanying the response that the response had been prepared with due care and was, to the best of his knowledge and belief, accurate, complete and responsive to the Order (CX 81).

43. Sears' response to the 6(b) Order consisted of a Special Report Summary (CX 82), the Special Report (CX 83), and 22 exhibits (see, CX 78A-C). All of these exhibits were offered in evidence by complaint counsel and were received by the undersigned.

44. Sears stated in its response: "The basis for substantiating the claim made in the advertisement, which is the subject of this Order, either as interpreted by the Commission . . . or as interpreted by Sears . . . [CX 83Z015-Z020], exists in the documents attached to this Report. Most of the documents attached are reports [20]of tests performed in 1972 and 1973 by the manufacturer of Sears' dishwashers, Design and Manufacturing Corporation, Connorsville, Indiana (hereinafter referred to as D&M)" (CX 83C).

45. In determining whether Sears' submission in response to the

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Section 6(b) Order provided substantiation and constituted a reasonable basis for Sears' no pre-scraping, no pre-rinsing representation, the unqualified nature of that representation must be kept in focus. The materials submitted by Sears do not substantiate the no scraping, no pre-rinsing representation or show a reasonable basis for its dissemination.

46. The exhibits attached to the Sears' Special Report allegedly substantiating its claim were the following: Exhibit C, "Report on Comparison of Sears Dishwasher Model 587.71460 and Whirlpool Dishwasher Model STP-90E" (CX 88); Exhibit D, "D&M Performance, Revised March 1969" (CX 89); Exhibit E, "Adhered Soil" (CX 90); Exhibit F, a letter from D&M to Sears dated August 1, 1975 (CX 91); Exhibit G, "Extended Wash Time Tests (Baked-on Soil Tests)" (CX 92); Exhibit H, "D&M Dishwasher Performance Tests, Revised-July 1974" (CX 93); Exhibit I, "Engineering Report, I.E.C. Method for Testing Washing Performance of Pots and Pans" (CX 94); Exhibit J, "Technical Committee No. 59, Performance of Household Electrical Appliances" (CX 95); and Exhibit K, "Demonstration of Washing Ability of Sears Lady Kenmore Automatic Dishwasher" (CX 96). Sears also submitted as Exhibit B (CX 87) an additional report by "National Consumer Testing Institute" entitled, "Demonstration of Washing Ability of Sears Lady Kenmore Automatic Dishwasher, dated January, 1973" (CX 87). This test was performed in conjunction with preparation of the "do-it-itself" advertisement (CX 1, 83A-B).

47. The first D&M test discussed in Sears' response to the 6(b) Order was attached as Exhibit C (CX 88), "Report on Comparison of Sears Dishwasher Model 587.71460 and Whirlpool Dishwasher Model STP-90E," dated July 1969 (CX 83D-E). In its Special Report, Sears stated (CX 83E):

Although Exhibit C (CX 88) is a report of a test of an earlier model of Sears dishwashers than the 1973-1974 model shown in the ad, which is the subject of this Order, the capability of the Sears dishwasher tested in 1969 and of the 1973-74 model to clean dishes which have not been pre-rinsed or pre-scraped is the same. . .

. . . Exhibit C is illustrative of many tests performed at the D&M Center which demonstrate the capability of Sears dishwashers to clean dishes which have not been pre-rinsed or pre-scraped.

[21]48. The second D&M test document attached as an exhibit to the Special Report is Exhibit D, "D&M Performance Test" (CX 89), dated March 1969, in which D&M established testing procedures for evaluating the capability of dishwashers to remove adhered soils from the surfaces of dishes and handle various types of solid food particles that might remain on dishes due to the absence of pre-scraping or pre-

rinsing (CX 89D). Since CX 89 is merely a test procedure to follow in a dishwasher performance test and does not entail any actual testing, it cannot provide a reasonable basis, by itself, for the cleaning performance claim. The test procedure followed in CX 88 was the procedure established in CX 89 (CX 88F).

49. The purpose of the test reported in CX 88 was "to compare the ability of two dishwashers, Sears Model 587.71460 and Whirlpool model STP-90E, in their abilities in both aspects: removal of soil from dishes and removal of soil from the dishwasher" (CX 88E). As described later herein, the Sears' dishwasher did not get the cooking and eating dishes used in this test clean. Sears' argues, citing Mr. Eberwein, an expert called by complaint counsel, that this result should not be considered in judging CX 88 from the standpoint of substantiation of the Sears' claim because comparison tests are designed so that neither machine will get all of the dishes clean all of the time, thereby allowing some soil to remain for comparison purposes (Eberwein, Tr. 1178-80). There is no proof, however, that the food soils used in CX 88 and set out in CX 89 were so designed. In fact, the foods, soiling procedures and loading procedures utilized in this test (CX 89H-J, M-N) resulted in the types of food soils and dishwashing loads that fall within the ambit of Sears' unqualified claim as specified in the complaint. Foods such as french fried potatoes, canned cream corn, milk and corn flakes, coffee and pot roast were prepared much as the consumer would at home and the soils that resulted were not difficult to remove in a dishwasher (Sullivan, Tr. 1440-42). Respondent's contention that neither the soils nor the loading procedure were proper for tests of the Sears' dishwasher is rejected (see, RPF, p. 14; Fraser, Tr. 5198; Tr. 5206).

50. The utensils in which the food soils were prepared were not included in the test loads (CX 88E-G, O, P, R, S, 89D-E). Thus, test conditions were narrower in scope than a consumer would experience in home dishwashing conditions and were more limited than the advertising claim which stated that dishes, pots and pans used in cooking and baking would be completely cleaned without any prior treatment (Eberwein, Tr. 1041; Sullivan, Tr. 1440-42).

51. Above all, CX 88 does not substantiate the claim that the Sears' dishwasher will completely clean all dishes of all food soils without scraping or pre-rinsing because the report itself shows, as stated, that the Sears' dishwasher did not get the dishes clean. The washing results are clearly displayed on bar graphs (CX 88I, 88L) and show that the Sears' dishwasher tested did not clean the dishes by obtaining, at any time, a score of clean (Eberwein, Tr. 1041; Sullivan, Tr. 1446). [22]

52. In addition to the bar graphs, visual examination scores of the washing results are detailed at CX 88Z and CX 88Z001. These scores

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show dirty dishes after washing and, therefore, do not show that the Sears' dishwasher can completely clean dishes without pre-scraping and pre-rinsing. In one test, the average percent clean was only 36% in the upper rack and 37% in the lower rack (CX 88Z). The following is quoted from Exhibit C showing the percent of unclean dishes after washing in the Sears dishwasher (CX 88Z):

RESULTS OF 13-POINT TESTS VISUAL EVALUATIONS

Test Number	Dishwasher		Average
	Sears	14	
China	39.0	36.0	37.5
Silver	13.0	16.0	14.5

Notwithstanding these results showing an average in two tests of retained soil of 37.5% on china and 14.5% on silver, Sears in its response to the 6(b) Order stated, as just quoted, that "Exhibit C is illustrative of many tests performed at the D&M Center which demonstrate the capability of Sears dishwashers to clean dishes which have not been pre-rinsed or pre-scraped" (CX 83E). In view of the test results set out in Exhibit C showing unclean dishes after washing in the Sears' dishwasher, the foregoing statement in its answer to the Commission's Special Report Order is difficult to accept.

53. As further "substantiation" of its no pre-scraping, no pre-rinsing claim, Sears attached a handwritten record by D&M laboratory technicians of various types of tests performed from September 1, 1972 to October 25, 1972, as well as two tests performed on August 4, 1973 and September 26, 1973 (CX 83H, 91A). This notebook was introduced into evidence as CX 90.

54. CX 90 reflects a series of developmental or exploratory tests whose purpose was to develop a reliable and repeatable testing procedure for difficult, baked-on food soils (Eberwein, Tr. 1080, 1082, 1382-83; Annis, Tr. 2380-81; Fraser, Tr. 5094, 5107).

55. Respondent contends that in most instances "the series of tests reflected in CX 90 do not reflect normal consumer recipes and [23] other circumstances normally and expectably encountered by consumers" (RPF 37). Respondent argues that in many of the instances in CX 90 where food soil was left on dishes after dishwashing, the food preparation procedure represented abnormal conditions because foods

were especially prepared to adhere to the cooking surface while, on the other hand, where the utensil was completely cleaned in the dishwasher, the food preparation procedure was normal (RPF 23-25, 31-36). Respondent relies on its witness Ms. Barbara Fraser, who testified that the CX 90 tests did not reflect normal consumer conditions because standard cooking procedures and recipes were usually manipulated or altered so as to produce atypical food soils which were more difficult to remove than typical food soils (Fraser, Tr. 5089, 5094-95, 5108-09). However, this testimony is neither persuasive nor credible. Furthermore, it is somewhat strange for Sears to make this objection to CX 90 because Sears did not advertise its dishwasher as a machine which had trouble removing difficult food soils from cooking and eating dishes. On the contrary, Sears' no scraping, no pre-rinsing representation was designed to convince the public that its dishwasher would remove the most difficult food soils from dishes including pots and pans, *e.g.*, "Lady Kenmore has 6 powerful hot water jets for the bottom rack, surging hot water with enough force to scrub every dish, pot and pan *really* clean. Even baked-on food comes off" (CX 1). But the food soils in CX 90 were not even unusually difficult to remove, as described in the next finding.

56. Many of the foods and soiling procedures used in CX 90 did not result in soils that were unusually difficult to remove in a household dishwasher. For example, packaged macaroni and cheese, packaged cake mix, beans and egg soils, as well as other foods, prepared according to reasonably typical procedures or as per package directions, do not present particularly difficult conditions for a household dishwasher (Sullivan, Tr. 1470-71, 1475-76, 1478-79, 1484-85, 1522-23, 1531-37, 1550; Ferguson, Tr. 1694-97, 1701-06, 1708-12, 1722, 1732-33; Annis, Tr. 2288-90). The CX 90 tests did not include the tenacious types of food soils that would result from high temperature cooking in the 450°-500° range, such as for frying, roasting or broiling poultry, fish or meats (Sullivan, Tr. 1476; Ferguson, Tr. 1729-31; Annis, Tr. 2289). In fact, the cooking temperatures used in the testing were all in the low to moderate oven-temperature range, rarely going over 400° (Sullivan, Tr. 1476; Ferguson, Tr. 1729-31). Thus, the food soils tested by D&M and reported in CX 90 are food soils of the type which would frequently occur in the nation's households. Despite the relative ease of removal of some of the food soils, the tests resulted in cooking and eating dishes that were not clean in many instances (Sullivan, Tr. 1529-1638; Ferguson, Tr. 1722-24; CX 90C, D, E, H, J, L, M, N, O, P, Q, R, V, W, Z, Z003, Z005, Z012, Z015, Z034).

57. There are several methods used in conducting the CX 90 tests, moreover, that optimized the performance of the dishwasher. For

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example, the use of rubber bands and weights to hold utensils down would result in increased, but atypical, water action and [24]cleaning performance (Sullivan, Tr. 1469-70, 1474, 1484; Ferguson, Tr. 1724-27; Annis, Tr. 2295-96; CX 90Z, Z001, Z005, Z007, Z009-10). Placing utensils horizontally on the dishwasher racks as was done in the CX 90 tests was the best position for optimum cleaning results. When utensils are placed at an angle so that more utensils fit into the dishwasher, which is typical of the home situation, the water spray may not hit every part of the dish and cleaning results are not as good (Eberwein, Tr. 1015-16; Sullivan, Tr. 1485-86, 1551). This was exactly the finding of the researcher who compiled CX 90 in noting, for an October 20, 1972 experiment, that when a casserole was placed at an angle, "The results were bad but perhaps typical of a home situation." (CX 90Z016).

58. There are other significant departures in the CX 90 test methodology from what would probably occur in substantial numbers of the nation's households. In one of the few instances where a water temperature was recorded, a temperature of 159° is shown (CX 90Z012). This is an unusually high temperature and would enhance cleaning performance (Sullivan, Tr. 1485, 1520). In a large number of the tests recorded in CX 90, from September 1, 1972 to September 19, 1972, "only the pots and pans in which food was baked were placed in the dishwasher for testing" amounting only to "one to five" items (CX 83Z). This constituted a light load such that it would be easier for the dishwasher to clean the few utensils inside. Furthermore, many of the tests extended the dishwasher wash phase beyond the normal cycle available to consumers, thereby allowing greater wash time than would be typical in the consumer's home (Sullivan, Tr. 1483, 1490-94, 1504-07, 1536, 1538; CX 83Z002-003, 90Z, R, C, Z014; Appendix A).

59. As a report, CX 90 does not comport with basic standards for a "competent and reliable" test. The recordkeeping procedures followed are inadequate (Sullivan, Tr. 1469, 1474, 1516; Ferguson, Tr. 1706, 1718-19, 1721; Annis, Tr. 2291). In many instances, CX 90 omits significant information and there are inaccuracies in the information reported (Eberwein, Tr. 1079-83; Sullivan, Tr. 1469-75, 1478-90, 1507-16, 1543-44; Ferguson, Tr. 1702-05, 1718-19, 1722, 1727; Annis, Tr. 1192, 1194, 1196, 2303; CX 90F-G, K-R, T-U).

60. More fundamentally, CX 90 does not substantiate or show that Sears had a reasonable basis for the claim that the Sears' dishwasher will completely remove, without prior rinsing or scraping, all residue and film from all dishes, pots and pans normally and expectably encountered by consumers (Eberwein, Tr. 1083, 1987-89; Sullivan, Tr. 1539-40; Ferguson, Tr. 1737-38; Dr. Godwin, Tr. 2146; Annis, Tr. 2305-06) because, like CX 88 (Sears Exhibit G to its Special Report), CX 90

shows that the dishes, pots and pans washed in the Sears' dishwasher still were not clean in many instances after washing. [25]

61. As part of its response to the 6(b) Order, Sears submitted charts which summarize the CX 90 tests (CX 83Z007-Z012). The charts have been included herein in Appendix A. The test results reported in these charts show that dishes and utensils, with considerable frequency, emerged from the Sears dishwasher not clean. In fact, out of a total of 211 instances reported in the chart summary of CX 90 tests, only 26 or 12.3% show results of clean, 100% clean or no retained soil. In those 26 experiments, furthermore, some cycles were extended beyond the time of the normal wash cycle available to consumers on production models. For example, seven of the eight tests run on August 4, 9 and September 26, 1973 show dishes "100%" clean, but the washing was all on an extended wash cycle not available to consumers purchasing the Lady Kenmore dishwasher (CX 83Z010). There are other examples in the Sears' submission which report extended wash cycles, rendering results showing clean dishes. These are of no relevance because the extended cycles used were not available to the purchasing public (CX 83Z008 - Z011). Excluding the CX 90 data for extended wash cycles from consideration, only 14 instances, or 6.6% of the 211 involved in the tests, resulted in completely clean dishes (Appendix A provides data supporting these figures). The tests recorded in CX 90 demonstrate a regular and consistent pattern of soil retention following washing in the Sears' dishwasher. Dirty dishes clearly do not provide substantiation or a reasonable basis for a claim of complete cleaning without pre-scraping or pre-rinsing (Eberwein, Tr. 1083-84; Sullivan, Tr. 1475, 1539-40; Ferguson, Tr. 1719-20, 1737-38; Annis, Tr. 2305-06).

62. Exhibit F (CX 91) is a letter with enclosures from William H. Yake, Staff Engineer at D&M, to Mr. Dave Raymond, of Sears' Law Department, dated August 1, 1975. The letter attempts to explain some terms and references in CX 90, and states that the dishwasher used in CX 90 had the same wash system as the Lady Kenmore of the "do-it-itself dishwasher" ad, CX 1. Exhibit F (CX 91) had also attached a copy of the D&M report, dated September 5, 1973, on tests conducted during September and October 1972. This report is also contained in Exhibit G and was introduced into the record as CX 92, discussed in the next finding (CX 83H). CX 91 does not provide a reasonable basis for the cleaning performance claim.

63. CX 92, "Extended Wash Time Tests (Baked on Soil Tests)," dated September 5, 1973, was offered by Sears as Exhibit G to substantiate the claim in CX 1 (83H). CX 92 was a test conducted by D&M with the purpose of devising an adhered or "baked-on" soil for cooking ware and a proper test load pattern, determining an optimum

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time for an extended wash period in the D&M (Sears) dishwasher using the devised soil load, and to compare the D&M (Sears) machine, using such wash period, with the G.E. power scrub cycle (CX 92A).

64. CX 92 does not substantiate the claim that the Sears' dishwasher will completely clean all types of food residue from all [26] types of dishes without pre-scraping or pre-rinsing (Sullivan, Tr. 1557, 1559-60; Ferguson, Tr. 1742-43; Annis, Tr. 2310-11). This is true, again, because of the fact that the dishes emerged from the dishwasher not clean. As reiterated, a claim that the Sears' dishwasher cleans dishes, pots and pans without pre-scraping or pre-rinsing can not be substantiated by tests showing that dishes were still dirty after being washed in the Sears' machine.

65. Most of the tests reported on in CX 92 also deviated from what was available to the public in that they were run using extended wash cycles that were unavailable to consumers purchasing a Sears' dishwasher (CX 92A-B and 85B). Even these tests, with greater washing times, did not result in completely clean dishes (CX 92A-B) as promised in Sears' claim. CX 92 also reported three tests of the Sears' Lady Kenmore using the regular cycle (CX 85A-B) available to consumers who buy the machine with the following results (CX 92B):

* * * * *

4. Also 3 tests using regular cycle:

W R R W R R (WITH TIMER)

TEST #	% RETAINED SOIL			
	OATMEAL	MACARONI	CAKE	OMELET
1	2%	30%	20%	5%
2	20%	50%	20%	2%
3	35%	60%	60%	20%

The term "retained soil" means precisely what one would assume, i.e., food soil was left on the dishes and they were not clean after washing in the dishwasher. Averaging the three tests for each food soil tested, 19% of the dishes in which oatmeal was cooked had retained soil, 46% of the dishes in which the macaroni was cooked had retained soil, 33% of the dishes in which cake had been made had retained soil and 9% of the dishes in which omelets had been cooked had retained soil. Such statistics obviously do not substantiate or show a reasonable basis for Sears' unqualified claim (Sullivan, Tr. 1559-60; Ferguson, Tr. 1742-43; Annis, Tr. 2310-11).

66. Beyond the fact that CX 92 shows that the dishes washed in the Sears' dishwasher emerged still largely dirty, and hence cannot substantiate a no scraping, no pre-rinsing claim, the test methodology

in CX 92 reveals inadequate test procedures. There are no indications of how any of the foods were prepared, how the food soils were applied, how the dishes were scored following washing, what model dishwasher was tested and what water temperature was used (Ferguson, Tr. 1738-39, 1741, 1746; Annis, Tr. 2307-08). The only four food soils tested were cake, macaroni and cheese, oatmeal and egg omelets (CX 92A). The soils do not cover the range of soils [27] encountered in the nation's households (Ferguson, Tr. 1738, 1743; Annis, Tr. 2307). The dishwasher was not loaded to produce a representative and fair test. The soiled cooking dishes were all placed in a horizontal position on the bottom rack so that, as stated in the report, they would receive "maximum water action" (CX 92A). This loading procedure is not typical of consumer use since the placement of dishes solely on the lower rack could cut off water to the top rack and would maximize the cleaning performance of the dishwasher (Sullivan, Tr. 1557-58; Ferguson, Tr. 1741-42; Annis, Tr. 2309-10). The only items loaded into the dishwasher in the tests were the four utensils containing the four types of food soils tested, also atypical of normal consumer procedures (Fraser, Tr. 5199-5200; CX 92D-G).

67. Exhibit H (CX 93) is the D&M test protocol, as revised in July 1974, entitled "D&M Dishwasher Performance Tests," which incorporated the procedure that was developed in 1972 to test for baked-on food removal (CX 83H). Sears stated in its response to the 6(b) Order that this procedure was used from 1972 to 1974 by D&M in its testing to develop a new model dishwasher, and that tests utilizing this procedure were run on dishwashers modified from the 1973-1974 model depicted in the advertisement, *i.e.*, CX 1, subject of the 6(b) Order (CX 83H, 93D). Since CX 93 is merely a test procedure to follow in a dishwasher performance test and does not entail any actual testing, it cannot provide a reasonable basis, by itself, for the cleaning performance claim.

68. Another of the documents provided by Sears to substantiate the no scraping, no pre-rinsing claim was CX 94, Exhibit I of the Sears' Special Report, entitled "I.E.C. Method For Testing Washing Performance of Pots and Pans," and dated October 31, 1974 (CX 83H-I). The letters "I.E.C." stand for "International Electrotechnical Commission." Exhibit J (CX 95) is a proposed test protocol issued by the I.E.C., dated September 1974, for measuring washing performance of pots and pans, including types of soil and test procedures to be followed. This test protocol was followed in the test reported in CX 94. Since CX 95 is merely a test procedure to follow in a dishwasher performance test and does not entail any actual testing, it cannot provide a reasonable basis, by itself, for the cleaning performance claim.

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69. CX 94 does not substantiate Sears' advertising claims or provide a reasonable basis for those claims. The dishwasher tested was not even a Sears dishwasher; instead, it was a "Gibson" (CX 94D). The Gibson dishwasher has a square upper rack, not the round, rotating rack of the Sears' Lady Kenmore (CX 94D, 99D, 100D). See also the picture in Sears' advertisements, for example, CX 2. The fact that D&M also manufactures the Gibson dishwasher, according to Sears to "similar" operating specifications (CX 83G), does not qualify tests on the Gibson as substantiation for claims regarding Sears' Lady Kenmore. The substantial difference in construction might well mean other differences not shown by this record and not mentioned by Sears. [28]

70. The food soils tested in CX 94 resulted from boiling milk, preparing Wheatena and preparing a macaroni and cheese mixture; two stainless steel saucepans and two glass casserole dishes were soiled (CX 95B-C, 94B). The milk was brought to boiling temperature, allowed to boil for 10 minutes and emptied, leaving milk residue in the pan which was allowed to cool at room temperature. After applying a thin layer of Wheatena to a saucepan, the soiled pan was placed in an oven at 200° (95° C.) for 15 minutes and then allowed to cool at room temperature. A thin layer of the macaroni and cheese mixture was applied to each casserole dish which was then baked at 400° F. (200° C.) for 20 minutes and allowed to cool at room temperature (CX 95C, 94B). In preparing the Wheatena the directions given to the D&M technician were not followed in that skim milk was not used (CX 94B). The report noted that "[t]he baking time (15 minutes at 200° F.) was not nearly enough to have the soil adhere" (CX 94B). The caseinates found in milk are well-known adhesives and the omission of skim milk from the Wheatena plus the low baking temperature would make that test much easier (Sullivan, Tr. 1448-50, 1452). The milk residue would have been a difficult soil to remove (Sullivan, Tr. 1453).

71. The test protocol called for the four soiled utensils to be loaded into the dishwasher along with the maximum number of unsoiled place settings that would fit (CX 94B, 95B-D). Six 11-piece place settings, along with the four utensils, were loaded into the dishwasher for a total of 70 pieces (CX 83Z001). A grid scoring system was used to evaluate the cleaning results on the casserole dishes and a visual estimate of the percentage of area cleaned to evaluate the saucepans. The grid system involved a sheet of paper with 1832 squares drawn on it, cut to the shape of the surface area of the casseroles. The soil not removed by the dishwasher was then equated into grid squares of soil and the percent clean determined (CX 94C, 95D).

72. Aside from the fact that CX 94 tested a Gibson dishwasher and

not a Sears', the results, even if given consideration, do not substantiate Sears' advertising claims. As in the case of previous substantiating documents furnished by Sears and received in evidence in this proceeding, the dishes in the test came out dirty (CX 94C). In comment on the cooking, according to the report, the baked macaroni and cheese mixture was "burned black" (CX 94B). In reporting the results, Ms. Fraser, an employee of D&M, stated in the test document that, "The dishwasher was covered as well as the dishes with burned particles of macaroni and cheese. I question whether the dishes should be evaluated also" (CX 94C). The casserole washed in the upper rack was evaluated and 93 squares were reported as soiled out of 1832 squares of area. How it could transpire that "the dishwasher was covered as well as the dishes with burned particles of macaroni and cheese" and yet only 93 squares of area out of 1832 of the casserole remain soiled is not explained by CX 94. Ignoring that, however, 93 soiled squares out of 1832 still mean the casserole was not clean. Furthermore, the other three utensils did [29]not come out entirely clean either (CX 94C). In this report, Ms. Fraser states, "any soil remaining at all on dishes is unacceptable" (CX 94C). Since the utensils tested were still dirty to some degree after washing, CX 94 is rejected as substantiation for Sears' no scraping, no pre-rinsing claim (Ferguson, Tr. 1747-48; Annis, Tr. 2313-14).

73. As already described, CX 4 told the viewing public: "Sears Lady Kenmore gives you freedom from scraping and freedom from pre-rinsing Because it has two hot water jets that scour dishes" This TV commercial, "Birthday Cake," superimposed the representation, "Demonstration Certified By Nationwide Consumer Testing Institute," onto the TV screen (CX 4). The same representation was also included in the two print ads, CX 1 and 2. Sears submitted in substantiation of the no scraping, no pre-rinsing claim, and to support this representation, Exhibit K, entitled, "Demonstration of Washing Ability of Sears Lady Kenmore Automatic Dishwasher," dated May 1972 (CX 96).

74. As substantiation or a reasonable basis for the representation in CX 4, the CX 96 report is unacceptable. The purpose of CX 96 was to support the advertised capability of the 1973-74 Sears' Lady Kenmore dishwasher to remove baked-on food without pre-scraping or pre-rinsing (CX 83I). To "test" the Lady Kenmore, Nationwide Consumer Testing Institute used a food soil resulting from baking two "Betty Crocker German Chocolate Cakes" and preparing a "Betty Crocker Frosting Mix." The chocolate cake was baked in Pyrex Corning cake dishes. The frosting mix was prepared in a Pyrex Corning bowl. Baking of the cakes was at 325° for 30 minutes (CX 96C, F). The two

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Pyrex cake dishes and the bowl in which the frosting mix was prepared were washed in the Lady Kenmore using 100 grams, slightly over 3 ounces, of Cascade detergent (CX 96C). Pyrex glass utensils, such as were used in this demonstration, would be easier to clean than metal utensils (Sullivan, Tr. 1568-69). After the wash cycle, the report stated that the utensils were free of any traces of chocolate residue (CX 96C, 83G).

75. Chocolate cake and frosting are not truly representative of the enormous variety of food soils "normally and expectably encountered" in the public's kitchens. Chocolate cake and frosting mix are food soils that are easy to remove; they melt away with hot water (Eberwein, Tr. 1073-77; Sullivan, Tr. 1570-71; Ferguson, Tr. 1749-50; Annis, Tr. 2316). Even without any detergent in the dishwasher, these soils surely would have been removed (Eberwein, Tr. 1078). Only two "Pyrex Corning Cake Dishes" and a "large Pyrex Corning bowl" were washed in the Lady Kenmore according to CX 96; no other dishes were washed (CX 96C, 83Z001). A dishwashing load of three utensils would constitute a very light load which would be easier to clean than a full load (Eberwein, Tr. 1077; Ferguson, Tr. 1753; Annis, Tr. 1319-20). CX 96 does not make clear whether counteraging procedures were followed. If the utensils were washed when the soils were still fresh, the dishwasher's cleaning performance would be enhanced (Eberwein, Tr. 1074; Sullivan, Tr. 1570; Ferguson, [30]Tr. 1750; Annis, Tr. 2315-16). Nationwide used 100 grams (3 ounces) of detergent, an excessive amount even for a full load (Eberwein, Tr. 1077-78; Sullivan, Tr. 1564, 1567-69, 1571-73; Ferguson, Tr. 1751-53, 1756, 1759, 1765; Annis, Tr. 2321-22, 2324). Such an excessive amount of detergent would not usually be used in the household, might even damage delicate dishes, far exceeds the amount recommended for a dishwasher load on the detergent package itself (2 to 2-1/2 tablespoons) and far exceeds the amount of detergent (28.4 grams) used in all tests at D&M or any other test involved in this proceeding (Sullivan, Tr. 1562, 1567-69, 1571, 1753; Ferguson, Tr. 1751, 1753, 1756, 1759; Annis, Tr. 2324, 2326; CX 83Z001, 337A-D). CX 96 does not constitute adequate substantiation for the no scraping, no pre-rinsing claim (Eberwein, Tr. 1067-68, 1078; Sullivan, Tr. 1567, 1569, 1571-72; Ferguson, Tr. 1759-62; Annis, Tr. 2326-28).

76. Aside from the factors in the preceding finding, there are other aspects of CX 96 which create substantial question as to the adequacy of that exhibit to substantiate or to provide a reasonable basis for the no scraping, no pre-rinsing claim of the TV commercial "Birthday Cake." CX 96 does not explain why so much detergent was placed in the dishwasher and doesn't describe the "rinse solution." The report fails to note the water temperature, voltage, water hardness or water

pressure. The method of food preparation and the soiling procedure are not specified in detail. The method of scoring is not explained and any counteraging procedures which might have been followed were omitted (Eberwein, Tr. 1066-67; Sullivan, Tr. 1567, 1570; Ferguson, Tr. 1749, 1753; Annis, Tr. 2315-17, 2319, 2321, 2329; CX 83Z001). The recordkeeping procedures are so inadequate that others cannot properly evaluate the demonstration and cannot draw conclusions about the performance of the dishwasher. There is insufficient disclosure of details to permit anyone to evaluate and reproduce the test procedures. CX 96 is not an acceptable report of a test (Eberwein, Tr. 1066; Sullivan, Tr. 1567, 1572; Ferguson, Tr. 1749; Annis, Tr. 2314-15) and does not constitute a "competent and reliable" test.

77. Another report of a demonstration certified by the Nationwide Consumer Testing Institute, Inc., was supplied by Sears in its Special Report as Exhibit B (CX 87) to substantiate the no scraping, no pre-rinsing claim made in CX 1, the "do-it-itself dishwasher" ad. This demonstration was also referred to in the "Vicious Circle" television commercial, CX 8 (CX 59 is the film of the commercial), disseminated in 1974 (CX 8, 59, 70). The CX 87 report is entitled, "Demonstration of Washing Ability of Sears Lady Kenmore Automatic Dishwasher," dated January 1973 (CX 87). The purpose of the demonstration was to "recreate" the dishwasher's cleaning ability for use in a print advertisement (CX 87B).

78. In general, the factors discussed in the preceding findings relating to CX 96 apply to CX 87. CX 87 does not substantiate or provide a reasonable basis for the claim that the Sears Lady Kenmore will completely clean all types of food residue from all types of [31] dishes without pre-scraping and pre-rinsing (Eberwein, Tr. 1061-62, 1064; Sullivan, Tr. 1578-79; Ferguson, Tr. 1765-66; Annis, Tr. 2342-44). The food soils are far too limited and the test conditions are too easy to support the unqualified, blanket Sears claim. The soils tested in this demonstration were spaghetti with meat sauce, meat loaf with mushroom sauce, scalloped potatoes, spinach, molasses, and thousand island dressing (CX 87C). These food soils are generally not difficult soils to remove in a household dishwasher (Eberwein, Tr. 1050-51; Sullivan, Tr. 1576-77; Ferguson, Tr. 1763; Annis, Tr. 2334; Cannon, Tr. 2567-68). The food soils are not fully representative of the universe of food soils "normally and expectably encountered" in the kitchens of the public (Eberwein, Tr. 1061-62; Ferguson, Tr. 1765-66; Annis, Tr. 2342-43). The report states that the dishes were allowed to counterage for two hours, after which they were placed in the dishwasher without any pre-treatment (CX 87B). Twenty-six dishes, eight glasses, two casserole dishes and one pan, for a total of 37 pieces, along with 29

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pieces of cutlery, were loaded into the dishwasher for washing with 50 grams of Cascade Dishwashing Detergent (CX 87B, D).

79. For the results of the demonstration, the report states that after normal operation, "[a]ll dishes were washed perfectly clean. Each dish was inspected and showed no residue of any kind remaining on the dish" (CX 87B). However, in direct contradiction to the statement that each and every utensil was inspected, Ms. Judy Cannon, who was the Sears Home Economist involved in the demonstration (CX 87B), testified that the dishes but only selected and inspected several from each rack (Cannon, Tr. 2576-77). Thus, the conclusion that all the dishes were clean is without verification and is rejected.

80. As in the case of CX 96, there were other basic deficiencies rendering CX 87 not a methodologically competent and reliable test. The report fails to explain the test procedure such as the food which soil, fails to show how much food residue was on the utensils and how the soil was applied, fails to describe water temperature and voltage, and fails to provide any information on the loading and scoring procedure utilized (Eberwein, Tr. 1059-61, 1064; Sullivan, Tr. 1575-78; Ferguson, Tr. 1763-64; Annis, Tr. 2332-37). The available data would not allow a researcher to reproduce the demonstration or evaluate the test (Ferguson, Tr. 1763; Annis, Tr. 2333).

81. None of the other documents furnished by Sears in its Special Report substantiate the claim. CX 89, 91, 93, and 95 do not provide substantiation for the reasons set forth in earlier findings. CX 97 is a copy of an ad, CX 2. CX 98 is a diagram of Kenmore portable dishwasher parts, and CX 99 and CX 100 are Sears' Owners Manuals.

82. None of the documents submitted by Sears in its Special [32] Report (CX 78 through CX 100) substantiate or provide a reasonable basis for the no scraping, no pre-rinsing representation in Sears advertisements.

3. The Evidence Offered by Sears during the Case-in-Defense

83. During hearings in this proceeding in December 1978 and January 1979, Sears attempted to substantiate and to show that it had a reasonable basis for the no scraping, no pre-rinsing claim by eliciting testimony from James H. Clifford, a long-term Sears' employee and "national buyer" for Sears' dishwashers, who handled procurement of Sears' dishwashers from D&M, and from Barbara Fraser, an employee of D&M, the firm which manufactured Sears' Kenmore dishwashers, including the Lady Kenmore.

84. This testimony was brought up for the first time during hearings in this proceeding. None of it was mentioned by Sears as substantiation in its Special Report filed August 20, 1975, even though the Commission specifically instructed Sears in its Order to include substantiation in the form of expert opinion together with the bases therefor to "be signed by the person whose opinion is relied upon" (CX 79E). In submitting its Special Report in 1975, Mr. V.J. Graham, Vice President of Merchandising Administration for Sears, stated under oath (CX 81):

Attached is Sears Response to the Commission's Order to Sears, Roebuck and Co. to file a Special Report concerning a magazine advertisement for Sears Lady Kenmore dishwashers run by the Company in the December 1974 issue of Reader's Digest.

The attached Response was prepared by personnel under my supervision from the books and records of the Company, as well as from the direct knowledge of the personnel who prepared the responses.

The Response has been prepared with due care and is, to the best of my knowledge and belief, accurate, complete and responsive to the Order.

Notwithstanding this sworn representation to the Commission in 1975 that the material submitted with its Special Report was "complete and responsive to the Order," Sears offered other and new evidence in this proceeding in the form of the testimony of Mr. Clifford and Ms. Fraser. [33]

85. Complaint counsel objected to receipt of the testimony of Mr. Clifford and Ms. Fraser, contending that "Sears is totally estopped from asserting evidence of a new form of alleged reasonable basis at this point in these proceedings," that the evidence is "directly inconsistent with [Sears] prior sworn statement to the Commission" that its 1975 Special Report was "complete," and that "Sears is thus allegedly liable under Section 10 of the FTC Act for making a false statement of fact in a required report" (CRB, p. 2).

86. Sears was served with the 6(b) Order and submitted its Special Report prior to the time Section 3.40 of the Commission's Rules was amended to prohibit the reception of evidence in an adjudicative proceeding to substantiate a claim when such evidence was not provided in a prior Special Report. In view of this fact, the Commission's decision in *Ford Motor Company*, 87 F.T.C. 756, 797-98 (1976), and the decision in *Peacock Buick*, 86 F.T.C. 1532, 1533-34 (1975), appear to require that consideration be given to the testimony of Mr. Clifford and Ms. Fraser, notwithstanding Sears' failure to make any reference to this testimony in its Special Report provided to the Commission in 1975.

87. James H. Clifford has been Sears' national buyer of dishwash-

ers since April 1972 (Clifford, Tr. 4789). From 1972 through 1974, his offices were located across the street from the Sears Home Economics laboratory which evaluated various appliances sold by Sears (Clifford, Tr. 4818-19, 4821-24). Mr. Clifford frequently visited the laboratory, as often as two or three times per week (Clifford, Tr. 4820-21, 5058). This facility included a kitchen where various small kitchen appliances were tested (Clifford, Tr. 4822-24). The kitchen was equipped with a 1972 Lady Kenmore dishwasher for washing, cooking and eating utensils which had been used for various purposes (Clifford, Tr. 4822, 4825-27). However, the kitchen did not conduct any testing as such of Sears' dishwashers (Clifford, Tr. 4821-22, 4825, 5013-14). Mr. Clifford had the practice of "dropping in" on this facility from time-to-time, often during his lunch hour or at "cookie time" when he would have a bite to eat and visit with the personnel (Clifford, Tr. 4820, 4826-28). During these informal and unplanned visits he occasionally observed the Lady Kenmore dishwasher in use (Clifford, Tr. 4826). Among the types of foods which Mr. Clifford recounted seeing prepared in the Home Economics kitchen were roasts, chicken, casseroles, spaghetti, cookies, cakes, pies and sauces (Clifford, Tr. 4828). Mr. Clifford testified (Tr. 4826):

Q. Were you familiar with the - this is now during the period of 1972 through 1974, were you familiar with the dishwasher that was installed in the home ec kitchen?

A. I was familiar to the point in seeing [it] in action. As I mentioned [34]earlier, I believe in stopping over to the home ec into the laboratory, the home ec kitchen was about two doors down from the young lady that was doing our dishwashers all the time.

And usually, being kind of nosey, I would go over there with her and/or she might even be in the other room working with the other girls for some reason, and I would at that time usually coming back from lunch or going to lunch occasionally we sort of arrange to stop when they were taking something out of the oven to enjoy a little bit of their cooking, and then we would have a chance occasionally, if we were fortunate to be there right at the time they were loading the dishwasher or unloading the dishwasher, it gave us a little opportunity to sort of see in-home use and how the machine was performing.

According to Mr. Clifford, the personnel of the Home Economics kitchen were instructed not to pre-scrape or pre-rinse any dishes prior to washing them in the dishwasher and followed this instruction (Clifford, Tr. 4829-30). Mr. Clifford testified that on many of the foregoing occasions he observed the personnel in the Home Economics kitchen load soiled cooking and eating dishes into the Sears dishwasher and was thereafter present for the entire cycle of the dishwasher, observing the dishes as they were removed from the dishwasher (Clifford, Tr. 4830-31, 5059-60, 5077). On those occasions when Mr. Clifford had observed dishes and utensils after they had been washed

in the Home Economics dishwasher, he examined the dishes and utensils and testified that he found them to be clean (Clifford, Tr. 4830-33, 5077-78). However, Mr. Clifford also conceded that he was only occasionally present during the entire period from the time the dishes were soiled and loaded into the dishwasher, until the dishwasher was emptied; sometimes he saw only a loading procedure, other times only an unloading procedure (Clifford, Tr. 4826, 4830, 5014-16, 5058-60). This undermines his prior testimony.

88. As the national buyer of dishwashers, Mr. Clifford reviewed and approved advertising claims for Sears' dishwashers. More specifically, he approved some of the advertising challenged by the complaint in this proceeding, including the no scraping, no pre-rinsing claim (Clifford, Tr. 4858-59, CX 1; Tr. 4869-70, CX 20; Tr. 4871, CX 22; Tr. 4875-76, CX 51). He testified that his approval of this advertising included the approval of statements that no pre-scraping or pre-rinsing was necessary (Clifford, Tr. 4859, 4867, CX 1; Tr. 4870, CX 20; Tr. 4871-72, CX 22; Tr. 4876, CX 51). The [35]basis on which he approved these statements was his observation of the use of the dishwasher in Sears' Home Economics kitchen (Clifford, Tr. 4859, 4868, 4870-70A, CX 20; Tr. 4872, 4876, CX 51).

89. Mr. Clifford's testimony was unsupported by any records, documents or other objective verification. Mr. Clifford's testimony simply amounts to undocumented assertions that the Sears' Lady Kenmore will perform as the Sears' advertisements represented. It is impossible to determine from Mr. Clifford's testimony significant details concerning the food soils left on the dishes, the conditions of washing, or other material aspects surrounding his view of the dishwasher in operation. He enumerated a number of foods prepared in the home economics laboratory but his recital was general (Clifford, Tr. 4828). It is impossible to evaluate the nature of the food soils on the cooking and eating dishes washed in the dishwasher. Based upon Mr. Clifford's enumeration (Tr. 4828), however, it is evident that these food soils and cooking procedures were not representative of the universe of food soils and cooking procedures encountered "normally and expectably" by the nation's public in household cooking. This is of fundamental importance and, by itself, renders the testimony of Mr. Clifford of no probative value as support for the unlimited claim of Sears that dishes, pots and pans washed in the Lady Kenmore required no pre-scraping or pre-rinsing. Furthermore, Mr. Clifford not only is a Sears employee but he was the Sears' official responsible for procurement of dishwashers for Sears, including the Lady Kenmore, and approved the claim challenged in this proceeding. Taking into consideration all the

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circumstances surrounding Mr. Clifford's testimony, the undersigned finds it self-serving, unreliable and unworthy of serious consideration.

90. The law judge finds that Mr. Clifford's testimony does not substantiate or establish that Sears had a reasonable basis for the representations in its advertising, described earlier herein and challenged in the complaint, that the Lady Kenmore will "completely remove, without prior rinsing or scraping, all residue and film from dishes and from pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers."

91. The factors bearing upon the testimony of Ms. Barbara Fraser are similar in many respects to those relating to the testimony of James H. Clifford. Ms. Fraser has been employed by D&M since 1969, first as a lab technician and later on as an engineer (Fraser, Tr. 5080). She has been involved in the testing of Sears' dishwashers, designing cleaning ability, testing of Sears' competitors' dishwashers, designing tests, doing research on wash systems and designing dishwasher cycles (Fraser, Tr. 5080-83, 5113). Although no records were kept, Ms. Fraser testified that in August 1972 a D&M employee under her supervision undertook a project to prepare baked-on and difficult to remove food soils to use in dishwasher testing, and to compare the performance of different brands of dishwashers (Fraser, Tr. 5084-90, 5092-96). The technician prepared various foods, including macaroni and cheese, canned pork and beans, [36] packaged cake mix, and different styles of eggs and omelets (Fraser, Tr. 5092-93, 5101-03, 5115). After the foods were cooked, they were removed from their containers by scooping out the center so as to leave an adhered coating on all of the dishes and were subsequently allowed to counterage for "one to two" hours (Fraser, Tr. 5103-04). The soiled cooking and eating dishes were washed in a "middle-of-the-line" Sears Kenmore dishwasher model because this machine was used rather than the Lady Kenmore model because the former had knobs by which the cycles could be controlled manually while the Lady Kenmore had pushbuttons which were inconvenient for testing purposes (Fraser, Tr. 5098-99, 5161-62). According to Ms. Fraser, dishes were not scraped, rinsed or soaked prior to washing (Fraser, Tr. 5104). The soiled dishes were washed on the dishwasher's "normal" cycle (Tr. 5097-5100, 5104), which was equivalent to the "power wash" cycle on the 1972 Lady Kenmore (Fraser, Tr. 5250).

92. Ms. Fraser testified that in all instances the dishes came out of the Sears' dishwasher clean (Fraser, Tr. 5094, 5105-07, 5183). As a result, Ms. Fraser testified that she concluded that the dishwasher

made by D&M for Sears would remove baked-on food soil without pre-scraping or pre-rinsing (Tr. 5188).

93. Following the August 1972 tests, Ms. Fraser testified that experimentation continued with different food soils to find a soil which would adhere well enough for use as a soil to test dishwashers and to compare different dishwashers (Fraser, Tr. 5094, 5108-09). This time a record was kept which is in evidence in this proceeding as CX 90, already discussed. According to Ms. Fraser, most of the food soils recorded in CX 90 were not prepared "the way that they would normally be prepared" (Tr. 5109). This has been discussed earlier in this decision. In connection with this testimony, it is necessary to state that Ms. Fraser is an engineer and not an expert on the manner in which the public prepares food "normally" if, indeed, there exists such an expert (see Tr. 5110-12). In testifying whether or not the food soils described in CX 90 were "normal" or "abnormal," the testimony of Ms. Fraser is simply that of [37]a lay person who has done some cooking.^{1a} As stated earlier, the public prepares food in myriad ways, all of which fall into the category of the complaint, "cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers," excluding only kitchen disasters where, for example, cooking food is forgotten on the stove or in the oven.

94. According to Ms. Fraser, the tests reflected in CX 90 together with the unrecorded August 1972 tests caused her to have the opinion that "the Lady Kenmore 1972 dishwasher will remove normally prepared baked-on soils, normal recipes without pre-scraping or pre-rinsing" (Fraser, Tr. 5188; see also, RPF 19-22, 24-25).

95. The foregoing testimony, limited by Ms. Fraser's mental reservation to what she considered "normally prepared" soils and "normal" recipes, does not literally support the unqualified Sears' no scraping, no pre-rinsing claim. Beyond that, as in the case of Mr. Clifford, Ms. Fraser's testimony recounting the August tests is unsupported by any records, documents or other objective verification (Fraser, Tr. 5304). No records were made of these tests because,

^{1a} During the examination of another Sears' witness, Ms. Shari Bryant, counsel for Sears attempted to elicit testimony that the food soils reported in CX 90 were not "normal." Inasmuch as Sears counsel had not given notice to complaint counsel that Ms. Bryant would be questioned on this important point, as required by pretrial orders even as late as the day before her testimony, and complaint counsel had good reason to assume, based upon Ms. Bryant's pretrial deposition taken much earlier, that she had no knowledge of CX 90 and had never seen or reviewed CX 90, the law judge sustained complaint counsel's objection and refused to allow Sears' counsel to question Ms. Bryant on the point (Tr. 4294-4308). The ruling was grounded by the law judge on his authority to control the proceeding and to prevent prejudice as well as unfair surprise. Sears' counsel had more than ample opportunity prior to the appearance of Ms. Bryant to give notice that the area of her questioning would include whether the food soils reported in CX 90 were "normal" or "abnormal." Counsel did not do so. In the opinion of the law judge, Ms. Bryant's expertise, however, did not in any event encompass expertise which would have qualified her to render opinion on the issue of whether or not the food soils reported in CX 90 were representative of the universe of food soils "normally and expectably encountered by consumers" in their kitchens.

according to the testimony of Ms. Fraser, "[i]n preliminary testing, or testing of casual nature, it is very common not to record proceedings that lead up into something else" (Fraser, Tr. 5092, 5095-96, 5100-5100A). Thus, the only record evidence of these "tests" is contained in Barbara Fraser's testimony. However, at one point in her testimony, when asked to recall certain specifics, she stated: "It's very hard to remember when things are unrecorded just what you did do" (Fraser, Tr. 5102). Her testimony considered most expansively, like Mr. Clifford's, is simply a series of unsupported assertions. The loading and washing conditions of the Sears' dishwasher are unknown, although there are indications that a full [38]dishwasher load was not used, and possibly only the few dishes soiled in the cooking experiments were washed (Fraser, Tr. 5314). Nothing permits a judgment as to whether the food soils were representative to any degree of the universe of food soils encountered "normally and expectably" by the public in cooking. As in the case of Mr. Clifford's testimony, this deficiency by itself, removes any probative value from Ms. Fraser's testimony as substantiation for Sears' unlimited claim or to show that Sears had a reasonable basis for the claim at its dissemination, as charged in the complaint.

96. The experiments or tests reported in CX 90 have already been discussed extensively. Sears states in its proposed findings that: "In several instances, food soils used in the tests reflected in the notebook (CX 90) were prepared according to normal consumer procedures. In these instances, all of the food soil was removed during the dishwashing process" (RPF 25). Sears claims that these results support Ms. Fraser's testimony that "the Lady Kenmore 1972 dishwasher will remove normally prepared baked-on soils, normal recipes without pre-scraping or pre-rinsing." As discussed in detail in earlier findings, the law judge rejects the contention that the food soils reported in CX 90 were not within the category of food soils "according to normal consumer recipes and normally and expectably encountered by consumers" in household cooking. However, it is not necessary to ground the conclusion that CX 90 fails to support Ms. Fraser's testimony on this basis. The food soils Sears claims were prepared according to "normal" recipes and procedures were few, cake, scalloped potatoes and beans (RPF 25), and there is no basis for believing that these food soils are representative of the universe of food soils encompassed by Sears' unqualified claim. The fact that CX 90 reports that the Sears' dishwasher washed a few soils clean from the dishes used in those tests neither supports Ms. Fraser's opinion nor substantiates Sears' claim nor provides a reasonable basis for it.

97. Taking into consideration all the circumstances surrounding Ms. Fraser's testimony, the undersigned finds it essentially self-

serving and unreliable, as that of Mr. Clifford. In connection with her testimony, it should be noted further that the Sears' no scraping, no pre-rinsing representation was being disseminated in early 1972, well prior to the August 1972 tests. See CX 2, and CX 72 which show dissemination of the advertisement, "What dishwasher would dare load these messy dishes without scraping or prerinsing," in the "Spring-Summer" 1972 issue of "Better Homes and Gardens Building Ideas". The August 1972 tests relied on by Ms. Fraser obviously cannot substantiate or provide a reasonable basis for claims made before the tests were conducted.

98. At the time Sears made the representation in its nationwide advertising that the Sears' dishwasher would "completely remove, without prior rinsing or scraping, all residue and film from dishes and from pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers," Sears did not possess and rely [39] on a reasonable basis.

C. Sears' Representation That Its Dishwasher Will Completely Remove, Without Prior Rinsing or Scraping, All Residue from Dishes, Pots and Pans Normally and Expectably Encountered by Consumers Is Not True, and the Advertising Containing That Representation Was Unfair, False and Deceptive.

99. As the preceding findings demonstrate, neither the 6(b) materials submitted by Sears nor the testimony of Mr. Clifford or Ms. Fraser, whether considered separately or overall, establish the truth of Sears' representation that the Sears' dishwasher will "completely remove, without prior rinsing or scraping, all residue and film from all dishes and from pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers."

100. Indeed, the 6(b) materials submitted by Sears, and analyzed in the preceding findings, establish beyond question that food soils prepared "according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers" were not completely removed by the Sears' dishwasher. These 6(b) materials, submitted by Sears, in themselves establish that the no scraping, no pre-rinsing representation was false and untrue. There is, however, additional evidence that the claim was false and untrue which is set out in the following findings.

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1. Opinion

101. Complaint counsel called an expert, Mr. Anthony Eberwein, to testify with respect to the no scraping, no pre-rinsing representation in Sears' advertising. His qualifications are set out in the Appendix at the end of this decision. Mr. Eberwein is an expert in dishwasher performance. After many years of service as a specialist in the technology of dishwashers and their performance with General Electric, Mr. Eberwein now maintains his own household appliance installation business (Eberwein, Tr. 950). Mr. Eberwein is familiar with a variety of household dishwashers, including those of Sears (Eberwein, Tr. 952-53).

102. Before he left General Electric, Mr. Eberwein tested Sears' dishwashers, including the Lady Kenmore, during the period 1972 through 1975 (Eberwein, Tr. 1096-97). He specifically tested Sears models marketed in those years with respect to cooked-on or baked-on soils, including macaroni and cheese, eggs, baked beans, sausage, hamburger, and other adhered food soils (Eberwein, Tr. 1100-01). He ran a minimum of eight wash tests, including replications (Eberwein, Tr. 1102). He found that the Lady Kenmore did not completely clean the dishes, pots and pans (Eberwein, Tr. 1102). Mr. Eberwein [40] testified that if all dishwashers were categorized from A to C with respect to cleaning performance, with A indicating the best washing performance, the Sears Lady Kenmore "would fall under C category" (Eberwein, Tr. 1102-03). In fact, the Lady Kenmore never cleaned all of the baked-on food soils completely clean (Eberwein, Tr. 1104). The fact that for tests of dishwasher performance Mr. Eberwein did not want a test where the dishes would always come out 100% clean does not detract from the significance of his testimony that, in testing the Lady Kenmore, "there was never total 100% soil removal." (see RRB, p. 14; Eberwein, Tr. 1104).

103. Mr. Eberwein testified that gross food soil must be removed from any dish, pot or pan before placing it in a household dishwasher (Eberwein, Tr. 1131). A dishwasher is not a garbage disposer and cannot be treated as such because the pump openings, pump mechanism, and water jets and other operating parts can become clogged from trapped food soils (Eberwein, Tr. 1130-31).

104. Mr. Eberwein testified more broadly that it would be impossible for Sears to test the cleaning ability of a dishwasher for all types of foods and cookware because of the many types of foods and methods of preparation (Eberwein, Tr. 980). Moreover, as described earlier, he stated that there are numerous variables which can affect dishwasher performance, such as the water temperature, water hardness, type of

food, manner of preparation, counteracting, etc. Even the size and shape of the pan to be washed can affect cleaning performance because size and shape affect whether the item can be placed in the dishwasher in a good cleaning position (Eberwein, Tr. 1019). In sum, based upon years of experience studying and testing household dishwashers and their cleaning ability, including specific tests of the Sears Lady Kenmore dishwasher of the type involved in this proceeding, Mr. Eberwein's expert opinion was that pre-treatment of dishes was frequently necessary to obtain optimum cleaning performance from the Sears' Lady Kenmore and other Kenmore dishwashers (Eberwein, Tr. 1132).

105. A former Sears' employee, Judith W. Cannon, who worked as a home economist for Sears from January 1970 through November 1974, and while in that position tested Sears' dishwashers, was subpoenaed by Commission attorneys (Cannon, Tr. 2412-13, 2417). Ms. Cannon was responsible from September 1972 through November 1974 for testing the cleaning performance of Sears' dishwashers and competitive machines (Cannon, Tr. 2412-17, 2430-37, 2443-44). Ms. Cannon has a Masters degree in Home Economics and ten years experience in the evaluation of household appliances, including dishwashing machines (CX 291A). Ms. Cannon's responsibilities at Sears included performance evaluation of home appliances and development and improvement of such appliances (CX 291A). During 1972-1974, Ms. Cannon spent approximately seventy percent of her time testing dishwashers, including testing the cleaning performance of the Lady Kenmore and other Sears' models (Cannon, Tr. 2445-47).

106. Part of Ms. Cannon's duties at Sears included review of [41] Sears' TV advertisements for dishwashers prior to their filming and dissemination (Cannon, Tr. 2548-52; CX 132, 141F). Among the TV ads reviewed by Ms. Cannon while at Sears were two advertisements for dishwashers entitled "Vicious Circle" (CX 8) and "Freedom Maker" (CX 9, 141; Cannon, Tr. 2554). In a memorandum to superiors at Sears, dated November 14, 1973, with respect to the claim in the TV commercial, "The Freedom Maker," "No need to scrape or rinse off stuck-on leftovers," later broadcast in major cities throughout the country (CX 9, 77), Ms. Cannon stated the contrary (CX 141A):

... Baked or burned-on soil (cooking utensils: casseroles, pans, etc.) usually requires some additional effort for complete removal in a dishwasher.

107. While testifying, Ms. Cannon was shown CX 31, a 60-second Sears' radio commercial broadcast over local stations in August 1972 (CX 75) which made the representation:

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... You'll like the way it makes pre-rinsing and soaking of heavily soiled dishes, pots and pans a thing of the past.

Contrary to this representation, Ms. Cannon testified that it was necessary to pre-treat heavily soiled pots and pans before washing them in the dishwasher (Cannon, Tr. 2545-46).

108. Ms. Cannon was also shown CX 33, another 60-second Sears' radio commercial broadcast over local stations in September 1972 and July 1973 (CX 75), which made the claim:

... Gets even the messiest baking dishes and roasting pans spotlessly clean ... without prerinsing!

Ms. Cannon disagreed with this representation on the ground that it was untrue (Cannon, Tr. 2547).

109. Based on her experience testing Sears' and other dishwashers and her background as a home economist, Ms. Cannon testified that the Sears' Lady Kenmore will not completely remove, without scraping, pre-rinsing, pre-soaking or other pre-treatment, all food residue from all dishes, pots and pans, especially severely adhered soils such as baked-on or burned-on food residue (Cannon, Tr. 2545-48, 2555-58; CX 141A).

110. Complaint counsel called as an expert Mr. Frederick [42] Sullivan, who is a Senior Research Chemist and a Project Director at Arthur D. Little, Inc., an internationally known research firm (Sullivan, Tr. 1403-04). Mr. Sullivan has been with Arthur D. Little, Inc. for 31 years (Tr. 1403). Mr. Sullivan works in the Food and Agribusiness Section and supervises other professional employees (Sullivan, Tr. 1404, 1406). He has had experience with cleaning compounds and detergents and had conducted experiments with these cleaning agents and with dishwashers (CX 295A-B). His qualifications are set out in Appendix B. Mr. Sullivan testified that pre-treatment is necessary for stubborn baked-on food soils to be washed clean in a dishwasher (Sullivan, Tr. 1561-63, 1565). In fact, the manufacturer of Cascade Automatic Dishwasher Detergent recommends that utensils with tough baked-on food should be pre-soaked before washing in the dishwasher (CX 337A; Sullivan, Tr. 1561-62).

2. Sears Owners Manual

111. The Sears' Owner's Manual for the Kenmore line of dishwashers, including the Lady Kenmore, specifically instructs purchasers to pre-soak or "lightly" scour firmly cooked or baked-on foods before loading dishes in the dishwasher for washing (CX 99D, 100D). Sears contends that this instruction was an "error" and does not reflect the

cleaning ability of the 1972 Lady Kenmore (RPF 193-197; RRB, pp. 48-49). This contention is based on the testimony of Sears' national purchaser for dishwashers, Mr. Clifford, which has been found to be self-serving and unreliable. The contention is rejected. It is considered in subsequent findings and the discussion later in this decision.

3. Sears Internal Documents

112. CX 186 is a letter from Sears' Consumer Services Manager to a purchaser of a Sears dishwasher who had apparently complained about its cleaning performance. The letter is dated April 29, 1975, and the dishwasher in question was a "7200 line" dishwasher, the model involved in this proceeding, according to Ms. Cannon, who based her identification on the features described in the letter (Cannon, Tr. 2513-14). Sears' Consumer Services Manager included the following statement in his letter to the complaining purchaser "A light scouring may be necessary for satisfactory results" (CX 186). The argument that this statement of Sears' Consumer Services Manager should be disregarded because it may have been made to "placate the customer" by telling her "what she expected or wanted to hear" (RRB, p. 18) is frivolous and is rejected. Moreover, this statement is consistent with the Owner's Manual instructions provided to purchasers of Sears' dishwashers.

113. In June 1973, Sears' Merchandising Research Department prepared a report based on a survey of Sears dishwasher purchasers entitled, "Sears' Dishwasher Purchasers — Satisfaction and Usage [43] Survey" (CX 125). The purpose of the Survey was to acquire information from recent purchasers of Lady Kenmore dishwashers about their usage and degree of satisfaction with the machine in order that Sears might better evaluate alternatives for the development of its 1975-1976 dishwasher line (CX 125C, 272A). Four-page questionnaires were mailed out March 1, 1973 to 800 recent purchasers of Lady Kenmore dishwashers. Each questionnaire was accompanied by a 25-cent piece as an incentive. Returns were obtained from 373 for a 47% rate of return (CX 125B-C, Z071, Z084, 272A).

114. Dr. Harold J. Kassarian, Professor of Marketing at the University of California at Los Angeles (CX 294A), was called by complaint counsel and testified as an expert in this proceeding to interpret and evaluate the Sears' survey of dishwasher purchasers. Dr. Kassarian's background is set out in Appendix B and his curriculum vitae is in the record as CX 294.

115. Dr. Kassarian testified that the sample of 800 persons used in CX 125 was a good size and ensured a low probability of error (Dr.

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Kassarjian, Tr. 1816-17). The survey sampled a good cross-section of American households; the geographical distribution of the questionnaires mailed out closely paralleled the geographical distribution of Sears' total dishwasher sales (CX 125C, Z061; Dr. Kassarjian, Tr. 1815). The 47% rate of return was very high since a mail survey with a rate of return over 15% or 20% is a high return (Dr. Kassarjian, Tr. 1815-16). The high rate of return was due, in Dr. Kassarjian's opinion, to the 25¢ incentive mailed with the questionnaire and to the fact that those surveyed were recent purchasers of Sears' Lady Kenmore dishwashers who would likely want to talk about their new acquisition (Dr. Kassarjian, Tr. 1816). In Dr. Kassarjian's opinion, the findings of Sears' survey could be projected beyond the actual sample used. If other surveys of Sears' Lady Kenmore purchasers were done, he would expect approximately the same results (Dr. Kassarjian, Tr. 1845-46). In sum, Dr. Kassarjian believed the survey was well done (Dr. Kassarjian, Tr. 1844).

116. Survey respondents were asked a series of questions concerning their satisfaction with their Sears dishwasher (CX 125Z084-Z092). Of the Sears' dishwasher owners responding to the survey, 58% were "completely satisfied" and 38% were "mostly satisfied" with their units (CX 125Z049). However, in answering question 7 of the survey, respondents were able to indicate their specific degree of satisfaction on a scale of one to seven, from completely agreeing with a particular statement to completely disagreeing (CX 125Z088). The statements put to respondents in question 7 that are relevant to this proceeding were "gets dishes as clean as I would like them," "does not require prerinsing of dishes," and "washes pots and pans thoroughly" (CX 125Z088). The responses in the survey to these statements were as follows: [44]

		Gets Dishes As Clean As I Would Like Them	Does Not Require Pre-rinsing	Washes Pots and Pans Thor- oughly
Agree				
Completely	7	60%	49%	27%
	6	17%	14%	13%
	5	5%	10%	16%
	4	7%	6%	14%
	3	3%	5%	8%
	2	2%	3%	5%
Disagree				
Completely	1	5%	11%	13%
No				
Answer				
Analyzed		1%	2%	3%

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Respondents	373	373	373
	100%	100%	100%

(CX 125Z028-Z030).

Significantly, only 27% of the respondents agreed completely with the statement in question 7 that the dishwasher "washes pots and pans thoroughly" (CX 125D, Z030), and 13% disagreed completely with this statement (CX 125Z030). No other statement in question 7 evoked more disagreement (CX 125Z024). In fact, in its "Summary of Findings," the survey itself reported, "Only 27% agreed completely with the statement that the dishwasher 'washes pots and pans thoroughly'. . ." (CX 125D). Over half of recent purchasers refused to agree completely with the statement, "does not require prerinsing of dishes" (CX 125Z029). It is evident from this that a very substantial percentage of purchasers answering the survey found that the dishwasher did not always get pots and pans clean without scraping, pre-rinsing or other treatment. Obviously, if purchasers found that dishes were not always clean after washing in the Lady Kenmore, pre-scraping, pre-rinsing or other pre-treatment would be necessary for the dishes to emerge clean. The survey itself stated, under "Conclusions," that "there are indications of some dissatisfaction . . . with cleaning, particularly of pots and pans" (CX 125F).

117. The survey questionnaire included several open-ended questions which required respondents to write in a response. Typically, the response rate for open-ended questions is much lower than for closed-ended questions where the respondent need only check off the response (Dr. Kassarian, Tr. 1821-22). One of the open-ended questions asked if the purchaser had experienced problems with the new dishwasher (CX 125Z090). About 27%, or 100 indicated that they had experienced problems. Only these 100 customers were asked by the questionnaire to go on and specify the nature of the problem [45](CX 125Z090).

118. Among the responses to the question eliciting customer problems were the following (CX 125Z062-067):

- 0003 - It doesn't always clean dishes as thoroughly as I expected it to.
- 0028 - Didn't wash dishes well. Left egg, spaghetti sauce on plates and silverware; and film on glasses. . . .
- 0069 - Glasses on top rack do not come clean.
- 0098 - Glasses are milky. Dishes are not clean sometimes.

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- 0208 - The top rack of dishes doesn't come clean as they should. Have lots of trouble with glasses filling up with particles of food and then drying on.
- 0209 - It does not operate well . . . pots and pans do not come clean. The dishes spot and sometimes come out dirty.
- 0253 - Soft food particles were left on top of glasses. I was under the impression no preparation of dishes would be necessary with sani wash and had to change detergents.
- 0262 - Leaving food particles on dishes.
- 0267 - Cottage cheese/tomato juice does not wash off plus others. . . .
- 0364 - Some food sticks to glassware. Glassware and silverware "spot."
- 0366 - Can not get dishes clean enough. . . . [46]

In Dr. Kassarian's opinion, these responses were very significant because the surveyed person had to go to the trouble of actually writing out the response (Dr. Kassarian, Tr. 1821-22).

119. In Dr. Kassarian's opinion, the Sears' survey provided strong evidence that a substantial proportion of purchasers of the Sears' Lady Kenmore found the no scraping, no pre-rinsing representations to be untrue (Dr. Kassarian, Tr. 1831-33). As to the conclusion to be drawn from the survey, overall, Dr. Kassarian testified (Dr. Kassarian, Tr. 1842):

. . . Well, let's summarize it. What do consumers say, and what comes out of this study is that basically, you must prerinse and prescrape at least some dishes. And the pots and pans are not always thoroughly cleaned. . . .

120. The Sears' survey of Lady Kenmore dishwasher purchasers established that a substantial number of purchasers had cleaning problems with the dishwasher, especially as to washing of pots and pans. The survey shows that such purchasers had found from actual use in their kitchens that the Sears' dishwasher would not completely remove, without prior rinsing or scraping, all residue and film "normally and expectably encountered by consumers" from dishes, pots and pans. Sears' contention that the survey should not be given any weight because "there was no way to determine whether the dishwasher owners responding to the survey had properly used the machine" (RRB, p. 21) is without merit. Although this argument might

be true if only a few purchasers had responded, the large number of those responding eliminates doubt that the survey was valid. The negative responses obtained by the Sears' survey from recent purchasers concerning the cleaning performance of new Lady Kenmore dishwashers are particularly significant, according to Dr. Kassarian, because of what he terms "cognitive dissonance" (Dr. Kassarian, Tr. 1822-24). Dr. Kassarian defined this as meaning that "when someone owns something new, it's very, very difficult to see something negative about it" (Dr. Kassarian, Tr. 1822). Thus, the degree of negative responses that came through is impressive in light of the consumer's propensity to see only the positive in the product purchased.

121. Sears published many of its advertisements making the no scraping, no prerinsing representation subsequent to June 1973 (CX 1 and 73; CX 2 and 72; 73; CX 4 and 64A-C; CX 5 and 65), the date of the Sears internal report on its survey of Lady Kenmore dishwasher purchasers. The survey results are evidence from actual consumer usage that the Sears' no scraping, no prerinsing claim was not true. Furthermore, the survey establishes, furthermore, that, as of June 1973, Sears had reason to know that the broad no scraping, no [47] prerinsing claim it was disseminating nationwide for its Lady Kenmore dishwasher was not true. Notwithstanding, Sears continued to disseminate this untrue representation by television, radio, magazine and print advertisements.

4. The IIT Tests

122. During pretrial proceedings, in April 1978, Sears engaged personnel at the Illinois Institute of Technology (IIT) in Chicago to conduct a series of tests of the Lady Kenmore dishwasher under conditions of "normal consumer usage" for use in this litigation (Dr. Norman, Tr. 3189a-91). To evaluate its cleaning ability Dr. Renny Norman, Engineering Advisor at IIT, directed the tests (RX 99, p. 3). He was fully informed that the tests were being conducted for litigation purposes and that Sears' advertising claims of no pre-scraping and pre-rinsing were at issue (Dr. Norman, Tr. 3191-92). Dr. Norman was assisted by Ms. Shari Bryant, a home economist (Dr. Norman, Tr. 3193-94). Both Dr. Norman's and Ms. Bryant's qualifications are set forth in Appendix B. The IIT tests were conducted as follows: two loads in April 1978; two loads in June 1978; and one load in July 1978 (Norman, Tr. 3200, 3211-12, 3217, 3226, 3269; RX 99, 173). For the two dishwasher loads in April, May and June, one load was done using the normal cycle and the other using the power wash cycle; the normal cycle loads were referred to as May Load 1 and June Load

1, respectively, and the power wash cycle loads were referred to as May Load 2 and June Load 2 respectively (Bryant, Tr. 4084; CX 354D; RX 99, p. 15). The one test load in July was done using the power wash cycle (Bryant, Tr. 4212).

123. Sears provided a 1971 model dishwasher to IIT for the April test; this dishwasher did not have a serial number or a nameplate on it (Dr. Norman, Tr. 3200, 3218, 3651). Two identical model 1973 Lady Kenmore dishwashers, one of which was new, were supplied by Sears to IIT for the May, June and July tests (Dr. Norman, Tr. 3218-19; RX 99, p. 4, 173, p. 1).

124. According to Dr. Norman and Ms. Bryant, the purpose of the April test was to conduct a dry-run in order to become familiar with all of the test procedures as well as to determine that everything was working properly (Dr. Norman, Tr. 3204-06, 3209-10; Bryant, Tr. 4078-79). No report was prepared on the April test (Dr. Norman, Tr. 3209; Bryant, Tr. 4086). Although Polaroid photographs had been taken of the dishes in the test, both Dr. Norman and Ms. Bryant testified that the photographs were of poor quality and were discarded (Dr. Norman, Tr. 3210; Bryant, Tr. 4086). Dr. Norman testified that he and Ms. Bryant "didn't really evaluate the results [of the April test]." (Dr. Norman, Tr. 3209). Since the dishwasher used in the April test was not the correct year dishwasher involved in this proceeding and since the procedures followed in the April test and the results are fragmentary, at best, the April test carries no probative value as to the truth of Sears' cleaning performance claim. [48]

125. Photographs were taken of the dishes in the May, June and July tests at the various stages of the test procedure (May: Dr. Norman, Tr. 3219-22; CX 352A-V. June: RX 99, photographs 1-24; CX 360A-Y. July: RX 173, p. 6; RX 173, photographs 1-20). Photographs were taken of the two dishwashers, the pots and cooking utensils with the food contained in them for the June test and after the food had been removed, the dishes both after they had been initially soiled² and after the dinner plates had been resoiled (for the June test), the dishes after they had been loaded into the upper and lower racks of both dishwashers, and the dishes after they had been washed, both while still in the dishwasher and after being unloaded (May: Dr. Norman, Tr. 3225, 3230-31, 3235, 3239-41, 3245-48; June: Dr. Norman, Tr. 3294-95, 3301-02, 3311, 3323-35 and Bryant, Tr. 4123, 4127-28, 4131-35 and RX 99, p. 4, 16-17; July: Dr. Norman, Tr. 3485-87, 3489, 3492-98 and Bryant, Tr. 4213-15, 4217-24 and RX 173, pp. 5-6). All photographs

² One of the dinner plates and both of the casseroles used in the July tests had minor flaws in their finish which the IIT testing group thought would appear as soil in the photographs. Therefore, diagrams and photographs of the items showing the location of the flaws were prepared prior to the application of any food soil (RX 173 - photos 18, 19, 20; Dr. Norman, Tr. 3496-99, 3879; Bryant, Tr. 4222-24; CX 353Z029, Z032, Z034).

taken during the May, June and July IIT tests were taken by a professional photographer, employed by IIT and working under Dr. Norman's direction (Dr. Norman, Tr. 3220). The same photographer was used in each of the tests (Dr. Norman, Tr. 3221, 3485). The photographs were printed by an independent photo processing service which had no knowledge of the test program; the photographs were not retouched in any way (RX 99, p. 5; Dr. Norman, Tr. 3221, 3485). The purpose of the photographs was to provide a record of the "before" and "after" condition of the dishes (Dr. Norman, Tr. 3221-22). After the dishes and utensils were inspected and photographed, they were immediately placed in plastic bags, labeled, sealed and stored; subsequently, they were brought to the hearings in this proceeding, where they were opened and inspected (May: Dr. Norman, Tr. 3219, 3241-43, 3245, 3248 and see BX 183, 184; June: Dr. Norman, Tr. 3311, 3902-08 and Bryant, Tr. 4127-28 and see RX 181, BX 185; July: Dr. Norman, Tr. 3519, 3902-08 and Bryant, Tr. 4220-21 and see RX 182).

126. During defense hearings, Sears offered in evidence only the test reports, photographs, and dishes of the June Load 2 test, and the dishes washed in the July load (June, RX 99; July, RX 173). Sears did not offer in evidence the results of June Load 1 or either May Load 1 or May Load 2. At the suggestion of complaint counsel, in order that the record contain the complete series of tests run at IIT, the law judge received on his own initiative the dishes from June Load 1 (BX 185) and the dishes from both May Load 1 and May Load 2 tests (BX 183, 184).

127. Because the Sears' IIT tests conducted during the course of this litigation are obviously subsequent to the dissemination of the advertisements featuring the no scraping, no pre-rinsing [49]representation (CX 62-77), the tests can have no bearing on the "reasonable basis" issues raised in Paragraphs 11 and 14 of the complaint. The Sears tests conducted by IIT can only bear on the truth or falsity of Sears no scraping, no pre-rinsing claim (Tr. 4766-67).

128. The test conducted on May 8 and 9, 1978, followed procedures set out in a dishwasher performance test protocol promulgated by the Association of Home Appliance Manufacturers ("AHAM") (CX 355A, K, L, M, P, CX 185I, J, K; Dr. Norman, Tr. 3218). The food soils used in the May test loads were: spaghetti sauce, scrambled eggs, cream-style corn, hamburger patties, mashed potatoes, oatmeal, scalloped potatoes, yellow cake, sirloin tip roast, macaroni and cheese, mustard, blueberry pie filling, molasses, peanut butter, jelly, coffee, tea, milk, tomato juice, egg, butter, spinach and Wheatena (CX 355C, H, J). The dishload consisted of various aluminum and stainless steel utensils, Corning and Pyrex casserole dishes, Corning Corelleware dishes, stainless steel

flatware and assorted glassware (CX 355C, H, J). Although these food soils may appear extensive on a superficial examination, thoughtful analysis discloses that a number of them may be prepared in a countless variety of ways, each of which may result in a different soil left for cleaning even though the same ingredient is used. Moreover, numerous other factors, such as cooking time, cooking temperatures, age of utensils, type of utensils, quality of ingredients, etc., may affect the adherence of the food soil. Thus, the food soils in the May IIT tests do not represent the universe of food soils encompassed by Sears' unlimited claim and described in the complaint as resulting from "cooking and baking according to normal consumer recipes and under the circumstances normally and expectably encountered by consumers."

129. After the foods were cooked, the dishes were soiled and allowed to counterage overnight. A similar procedure was followed for the utensils whereby the baked-on foods were left in the utensils overnight and were removed on the morning of the second day (Dr. Norman, Tr. 3224-25). Ms. Bryant generally followed the AHAM testing procedures regarding soil application (Dr. Norman, Tr. 3224; CX 355J).

130. There was no pre-treatment, i.e., pre-rinsing, pre-soaking or scraping, of any of the dishes prior to washing (Dr. Norman, Tr. 3239). Cascade dishwashing detergent was placed in both machines pursuant to the instructions in the Owners Manual (Dr. Norman, Tr. 3255-56).

131. After the dishwashers were unloaded by Dr. Norman and Ms. Bryant, they made an inspection of the dishes and utensils and photographed them (Dr. Norman, Tr. 3219).

132. On June 1 and 2, 1978, another test was conducted at IIT by Dr. Norman and Ms. Bryant (RX 99, p. 3). The purpose of the June test was to evaluate the dishwasher's cleaning capability using foods [50] prepared pursuant to "normal" consumer recipes and other "normal" consumer conditions (Dr. Norman, Tr. 3270; Bryant, Tr. 4110; RX 99, p. 3). RX 99 is the report prepared on the June test (Dr. Norman, Tr. 3269-70).

133. The foods and dishload used in the June test loads were virtually identical to those used in the May test (see F. 127; CX 355C, H, J; RX 99, pp. 5-6). The conclusion in F. 127 that the food soils in the May tests do not represent the universe of food soils encompassed by Sears' unlimited no scraping, no pre-rinsing claim and described in the complaint as resulting from "cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers" applies to the food soils used in the

June test. The foods were prepared by Ms. Bryant on June 1 (Dr. Norman, Tr. 3279). In preparing the foods, Ms. Bryant followed "normal" consumer recipes and procedures, including package directions where available (Dr. Norman, Tr. 3764; Bryant, Tr. 4110, 4112-14; RX 99-112).

134. In the June test, all the cooking and baking utensils, except for a cake pan, were counteraged overnight with the cooked food remaining in the utensils (Dr. Norman, Tr. 3809-11; Bryant, Tr. 4118; RX 99, pp. 6-11). On the next morning, June 2, at about 11:00 a.m., the cooked foods were removed from the utensils, according to the types of procedures that would "ordinarily" be used by consumers in serving such food and so that a typical amount of food residue remained in the utensils (Dr. Norman, Tr. 3866-67; RX 99, pp. 13, 15). After the foods had been removed, the utensils containing the food residue were allowed to counterage until they were loaded into the dishwasher at 2:20 p.m. and 3:58 p.m. the same day for Loads 1 and 2, respectively. The utensils were counteraged for 3 hours, 20 minutes for Load 1 and 4 hours, 38 minutes for Load 2 (RX 99, p. 16; Dr. Norman, Tr. 3289-90).

135. The dinner plates used in the June test were initially soiled by Ms. Bryant on June 1 with eggs, spinach, butter and Wheatena (Dr. Norman, Tr. 3279; Bryant, Tr. 4115). Dr. Norman testified that when he first saw the soiled plates on June 2, it was his opinion that the dishes should have been more heavily soiled (Dr. Norman, Tr. 3285-86, 3981). Subsequently, the dinner plates were washed and resoiled on June 2, applying a heavier amount of soil than had first been used (Dr. Norman, Tr. 3287; Bryant, Tr. 4115-17). After resoiling the plates, they were allowed to counterage for 3 hours, 50 minutes and 5 hours, 10 minutes for Loads 1 and 2 respectively, before being loaded for washing (Dr. Norman, Tr. 3287; RX 99, pp. 7, 9).

136. None of the items to be washed were pre-scraped, pre-rinsed, pre-soaked or pre-treated in any way (Dr. Norman, Tr. 3292; Bryant, Tr. 4124-25; RX 99, p. 15). The dishwasher was loaded according to the directions contained in the Owners Manual, with the dishes and utensils divided between Loads 1 and 2 so as to create two dishwasher loads (Dr. Norman, Tr. 3291-94; Bryant, Tr. 4124-25, 4560-61; RX 99, [51]p. 15). After the dishwasher was loaded, Ms. Bryant filled the two dispenser cups on the Load 1 dishwasher and the two cups in the Load 2 dishwasher with Cascade dishwashing detergent in accordance with the Owners Manual instructions (Bryant, Tr. 4491-92; RX 99, p. 15). At this point, Ms. Bryant put both dishwashers into operation (Dr. Norman, Tr. 3726; Bryant, Tr. 4126).

137. After the completion of the dishwashing cycle, the dishwasher was unloaded by Ms. Bryant and Dr. Norman who then inspected the

dishes and utensils for cleanliness (Dr. Norman, Tr. 3311; Bryant, Tr. 4127-28).

138. Another test was performed at IIT on July 27, 1978 (Dr. Norman, Tr. 3479, 3481). The purpose of the July test was to duplicate a test procedure for the evaluation of dishwashers that was developed by Mr. Anthony Eberwein, a former employee of General Electric and one of complaint counsel's expert witnesses (Dr. Norman, Tr. 3479-80, 3484; Bryant, Tr. 4204; RX 173, p. 1). RX 173 is the report which Ms. Bryant prepared on the July test (Bryant, Tr. 4203-04).

139. Mr. Eberwein's test protocol is reflected in RX 174, pp. 31-64 (Bryant, Tr. 4204-06). The particular procedure used in the July test was Mr. Eberwein's type 8 test, which he designed in 1972 as a means to test a dishwasher's ability to remove baked-on foods (Bryant, Tr. 4204-06; Eberwein, Tr. 1232-34).

140. In conducting the July test, Ms. Bryant used the following food soils which were specified under Mr. Eberwein's type 8 test procedure: pork and beans, coffee, macaroni, oatmeal, evaporated milk, preserves, tomato sauce, beef gravy, beef ravioli, sugar, mustard, cheddar cheese, butter, homogenized milk, flour, salt and pepper (RX 173, p. 2, 174, p. 36). Mr. Eberwein's type 8 procedure permits the person conducting the test to choose between "Option (a)," in which a baked bean casserole and a macaroni and cheese casserole are used as baked-on soils, and "Option (b)," in which an oatmeal pan and an omelet fry pan are used for baked-on soils (RX 174, p. 59). In conducting the July test, Ms. Bryant chose "Option (a)," because the option included soils which had not been used in prior IIT tests (Bryant, Tr. 4206-07). The dishload consisted of assorted china, glassware, stainless steel flatware, and porcelain china casserole dishes (RX 173, p. 1, and pp. 34-35; Bryant, Tr. 4210-11).

141. In preparing and applying the food soils for the July test, Ms. Bryant followed the cooking preparation and soiling procedures described by Mr. Eberwein in his type 8 test procedure (Compare RX 173, pp. 2-5 with RX 174, pp. 55-58). In Mr. Eberwein's type 8 test procedure, the cooking procedures contained in cookbook recipes that were used in preparing some of the foods were modified in order to "obtain more severe soil adhesion" (RX 174, pp. 56-58; Eberwein, Tr. 1230-31). Nonetheless, the food soils that were used in the July test are among those "normally and expectably encountered by [52]consumers." However, for the same reasons discussed in reference to the foods used in the May and June tests, the food soils used here do not represent the universe of food soils that was addressed by Sears in its unqualified claim.

142. Ms. Bryant departed from Mr. Eberwein's procedures in that

she did not remove excess food soils from the plates used in the test (Dr. Norman, Tr. 3483; Bryant, Tr. 4211). In Mr. Eberwein's opinion, the plates washed in the July test were in the condition they would have been had he prepared them under his protocol, except that excess food was not scraped off as his protocol recommended (Eberwein, Tr. 1246). The result of this departure from Mr. Eberwein's procedure was that the July test involved an excess amount of ravioli, beef gravy and tomato sauce on the plates and forks (Eberwein, Tr. 1246; Bryant, Tr. 4214; RX 173, p. 2). However, Sears' witness Dr. Norman admitted that the ravioli used in the July test was soft and moist to the point that it fell off the dishes as they were being loaded in the dishwasher; Dr. Norman testified that such food residue would not be adhered and would be relatively easy to remove in the dishwasher (Dr. Norman, Tr. 3899-3900).

143. After the food soils were prepared and applied, the baked-on soils were allowed to counterage for three hours and the other food soils for one hour, as specified in Mr. Eberwein's type 8 procedure (Compare RX 173, pp. 2-5; with RX 174, pp. 55-58).

144. The dishes were then loaded into the dishwasher according to the directions in the Sears' Owners Manual (Bryant, Tr. 4213; RX 173, p. 56; Eberwein, Tr. 1336-37). Ms. Bryant added detergent and started the machine (Bryant, Tr. 4217).

145. After the dishwasher was unloaded by Ms. Bryant, she and Dr. Norman inspected the utensils for cleanliness (Dr. Norman, Tr. 3519; Bryant, Tr. 4220).

146. Complaint counsel attack the IIT tests as unreliable and poorly conducted alleging many irregularities and defects. Complaint counsel contend that, far from supporting Sears' defense, the IIT tests are further evidence that the no scraping, no pre-rinsing claim is false.

147. The undersigned law judge finds that the IIT tests do not establish that the Sears' Lady Kenmore "will completely remove, without prior rinsing or scraping, all residue and film from dishes, pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectedly encountered by consumers." Indeed, as complaint counsel contend, the IIT tests tend to show that the Sears Lady Kenmore will not perform as Sears told the public in its advertisements.

148. As described, Sears did not offer in evidence the results of all the IIT tests, but only the results of the June Load 2 test and the results of the July test. In other words, Sears relied on only [53]two test operations of its Lady Kenmore. The June Load 1 was not offered by Sears on the ground that the "power wash" cycle should have been used rather than the "normal wash" cycle, and the May tests were not

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offered on the ground that the food soils, or at least some of them, did not reflect "normal consumer usage" (RRB, 23-29).

149. Operating the Lady Kenmore twice, which many consumers may do in a single day, with a consequent limited number of food soils, is grossly inadequate to support the truth of Sears' representation. As stated several times in this decision, cooking and eating dishes are soiled an enormous number of ways in daily cooking in the nation's households. Sears represented that its Lady Kenmore would wash all these myriad food soils, many severely stuck-on but nonetheless "normally and expectably encountered" in cooking, from all dishes, pots and pans without pre-treatment of any kind. There is no basis in the record to conclude that the food soils on the dishes, pots and pans washed in the June Load 2 and in the July single load tests were representative of the whole spectrum of food soils "normally and expectably encountered" in the public's kitchens. At the very least, Sears did not show this to be the case, if such a showing were even possible in view of the claim. The unlimited claim of Sears, in short, is not established by operating the dishwasher twice and washing a few food soils when there are thousands of food soils in the universe of food soils covered by the claim, unless those few food soils are shown to be representative of all the food soils "normally and expectably encountered" in the nation's households. Broad and unverified assertions by Ms. Bryant, the home economist who prepared the foods used in the IIT tests, or others, that the food soils were "representative" does not constitute such proof, and to the extent Sears contends that it does, that contention is rejected.

150. Although the Sears dishwasher was tested in May with two loads, one using "normal wash" and the other "power wash," Sears did not offer the results of either of these tests in evidence. Specifically, Sears contends "The May IIT tests do not reflect the dishwasher's ability to remove food soils prepared 'according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers,' as required under the terms of Paragraph 12 of the Complaint, since the AHAM procedures used in those tests do not in any way reflect normal consumer usage." (RRB, p. 24). In support of this claim, Sears relies on a memorandum from Ms. Bryant to Dr. Norman, dated June 19, 1978, and the testimony of Ms. Bryant in this proceeding. Ms. Bryant, as described, prepared the food soils used to soil the dishes and utensils used in all the IIT tests. Her memorandum to Dr. Norman makes the following statement (CX 355P):

[I]t is my opinion that the AHAM food preparation standards (prepared by me on May 8) for egg, Wheatena and spinach are mixtures to be applied on plates and flatware for

testing not eating purposes. In fact none of the three [54]foods as they are suggested to be prepared provide the flavor and/or consistency of what the same foods would be if we served them to be eaten as a typical meal. The AHAM Wheatena recipe, for example, is not even what the package suggests.

While a witness in this proceeding, Ms. Bryant testified that the "AHAM" food soils used in the May IIT tests, *i.e.*, the Wheatena, eggs, and spinach, were "abnormal," stating "I just didn't think it was the way someone would do something in the home." (Bryant, Tr. 4384). The tenuous basis for Ms. Bryant's opinion that the food soils used in the May IIT tests were "abnormal," however, was brought out during complaint counsel's cross-examination of Ms. Bryant.

151. According to Ms. Bryant, the spinach used in the May tests was abnormal because, prior to being applied to the dishes, it was neither heated nor seasoned with salt, pepper, etc., as would happen in a normal consumer household (Bryant, Tr. 4385, 4405-06). The Wheatena was "abnormal" in Ms. Bryant's view because milk was used to prepare it rather than water (Bryant, Tr. 4406); however, she conceded on cross-examination that the Wheatena package states, "When preparing Wheatena, milk may be used in place of water." (Tr. 4408). The eggs used in May were "abnormal" according to Ms. Bryant because only the yolk was used as a test soil (Bryant, Tr. 4409). In answer to the question, "What was abnormal about the egg, Ms. Bryant," she testified, "Well, do you usually prepare eggs and just serve the yolk?" (Bryant, Tr. 4409). Ms. Bryant had "no idea" whether the abnormalities she detected in the AHAM food soils affected the adherence of those soils to dishes and utensils (Bryant, Tr. 4386).

152. The reasons for Ms. Bryant's opinion that the AHAM test soils used in the May IIT test of Sears' Lady Kenmore dishwasher were "abnormal" are insubstantial; indeed, they border on the frivolous. Sears' objection on this ground that the May tests are to be disregarded is without merit and is rejected.

153. The AHAM test protocol (CX 185) was designed "to establish a uniform and repeatable procedure or standard method for measuring specified product characteristics of dishwashers," and was "intended to provide a means by which different brands and models of dishwashers can be compared and evaluated with respect to characteristics of significance in the use of the product." (CX 185E). The AHAM test protocol is an industry standard. An examination of the food soils and food preparation procedures set out in the AHAM test protocol reveals nothing that appears to be extraordinary. Spinach, wheat cereal (Wheatena) made with skim milk, soft-boiled egg yolks, margarine, tomato juice and tea, are the test soils specified for use (CX 185H). Very explicit instructions are given for food soil preparation (CX

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185H-K) to enable the protocol to be replicated with precision so that the test will be the same whoever uses it. There is nothing to suggest that the food soils are [55]unusually difficult to remove. Mr. Eberwein testified that the AHAM test protocol, according to Mr. Eberwein, Tr. 1132-35). In fact, the AHAM food soils were realistic (Eberwein, Tr. 1132-35). In fact, the AHAM test protocol, according to Mr. Eberwein, was not designed to test food soils which were difficult to remove such as "baked-on" or "cooked-on" foods, but rather, was designed "to test dishwasher performance in general, normal cycle, no pot and pan cycle" (Eberwein, Tr. 1135). Ms. Bryant, a Sears' witness, testified that the AHAM test protocol was "designed so that foods do remain on the plates" so that you can compare one dishwasher with another (Bryant, Tr. 4412). However, there is nothing in the AHAM test protocol to this effect. The Sears' unqualified, unlimited no scraping, no pre-rinsing claim plainly encompassed the food soils contained in the AHAM test protocol as did the complaint.

154. Load 1 of the May test and Load 1 of the June test both resulted in a number of still dirty dishes after washing in the Lady Kenmore (Dr. Norman, Tr. 3925-26, 3928-29, 3936-46; Bryant, Tr. 4627-29, 4633-36, 4638-43; BX 183, 185). Sears objects to consideration of these test loads on the ground that the "normal wash" cycle was used rather than the "power wash" cycle. During the investigation of this proceeding, Sears informed the Commission that the normal cycle was "substantially the same" as the power wash cycle (CX 85B). In its Special Report Sears stated that the phases and times of the normal cycle were the following (CX 83Z002):

First Wash:	8 minutes
First Rinse:	3-1/2 minutes
Second Rinse:	3-1/2 minutes
Second Wash:	8 minutes
Third Rinse:	4 minutes
Fourth Rinse:	5 minutes
Total Time:	32 minutes

In a letter to the Commission's staff thereafter, house counsel for Sears provided the phases and times of the power wash cycle as follows (CX 85B):

First Wash:	8 minutes
First Rinse:	3 minutes
Second Rinse:	4 minutes
Second Wash:	8 minutes
Third Rinse:	4 minutes [56]
Fourth Rinse:	5 minutes
Total Time:	32 minutes

Obviously, as Sears' house counsel indicated, the difference in the cleaning phase of the foregoing normal cycle and power wash cycle is insignificant. The Sears' Owners Manual, however, described the power wash cycle of the Lady Kenmore as having "2 extended washes" and lists the total time of the power wash cycle as 4 minutes longer than the total time of the normal cycle (CX 99G and 100G). Sears has also stated that the cleaning ability of the Kenmore dishwasher is the same as the Lady Kenmore. Sears' Kenmore dishwashers do not have the power wash cycle. In its proposed findings, Sears stated in comment on the testimony of Ms. Fraser relative to the alleged August 1972 tests at D&M which were done with a Kenmore dishwasher: "The dishwasher used in this testing was a middle-of-the-line 1972 Sears machine, mechanically equivalent to the 1972 Lady Kenmore . . . The cleaning capability of this dishwasher was identical to the 1972 Lady Kenmore" (RPF 15). Shortly following the preceding finding, Sears stated that in the August 1972 tests at D&M the dishes "were washed in the [Kenmore's] normal cycle, as was D&M's standard practice . . . This cycle was equivalent to the 'power wash' cycle on the 1972 Lady Kenmore" (RPF 18).

155. Sears did not resolve the ambiguity created by the information it gave the Commission in connection with its Special Report, CX 83Z002 and CX 85B, the statements in the Sears' Owners Manual, CX 99G and 100G, and the statements by Sears that the Kenmore dishwasher's normal cycle has the same cleaning capability as the Lady Kenmore. The ambiguity can be resolved by an inference that the normal wash cycle of the Lady Kenmore differs from the normal wash cycle of the Kenmore. That inference, however, may or may not be true. Further, IIT tests were conducted to validate the no scraping, no pre-rinsing claim, and counsel for Sears was closely involved. The IIT tests used the normal cycle as May Load 1 and June Load 1 demonstrate. The reason this was done, if only tests with the power wash are valid, has not been explained by Sears.

156. Sears advertised the no scraping, no pre-rinsing claim in connection with its Kenmore dishwashers having "normal wash" cycle, not merely its top of the line Lady Kenmore (see, *e.g.*, CX 6-8, 10). Significantly, Sears' no scraping, no pre-rinsing claim was not limited to the "power wash" cycle of the Lady Kenmore. Nothing in Sears' advertisements or in the Owners Manual stated, even indirectly, that neither scraping nor pre-rinsing was necessary, provided purchasers used "power wash." On the contrary, the claim was made in a blanket fashion by Sears for its dishwashers generally.

157. Sears has the burden of justifying its objection to consideration of the May Load 1 and June Load 1 tests, and it did not establish,

although Sears obviously has full information about its machines, that its objection was valid. Sears' contention that May Load 1 and June Load 1 should not be considered in judging the truth [57] of the no scraping, no pre-rinsing claim is rejected.

158. Some of the items washed in the June Load 2 test and the July single load, upon which Sears relies, were not washed clean, in any event. See as to June Load 2 the Pyrex baking dish and the aluminum roasting pan, and as to the July load two saucers, a bowl, a number of plates, knives, forks and spoons (RX 181 and 182). Results showing that some of the items emerged from the Lady Kenmore with food residue remaining on them (Dr. Norman, Tr. 3915-18, 3920-25, 3928-34; Bryant, Tr. 4615-25) clearly do not prove that Sears' no scraping, no pre-rinsing claim is true. The dishes from June Load 2 and the July single load are in the record for examination (RX 181, and 182). Some of them undeniably are not clean. A dish is not clean when it has food residue still remaining on it even if in the form of small specks or spots. Some of the dishes and silverware do have such food soil remaining on them, as stated.

159. Sears contends that the dirty dinner plates which emerged from the July IIT test should be disregarded in considering this test because photographs of the dishes after loading show one of the dinner plates — specifically, the second plate from the left in the rear section of the lower rack — was tipped over against the face of the one plate and a way as to block the spray of water to the face of the one plate and the reverse of the other (RX 173 - photos 2, 3, 4; Dr. Norman, Tr. 3488; Bryant, Tr. 4216-17). Both Dr. Norman and Ms. Bryant testified that the tipping of the plate was caused by moving the dishwasher, a portable model, after loading (Dr. Norman, Tr. 3487-88; Bryant, Tr. 4215-16). Photographs taken after the cycle was completed, but before the dishwasher was unloaded, show that these two plates remained in the same relative position during washing (RX 173 - photos 5, 6). Consequently, the face of one plate did not receive the full force of the water during the wash cycle and was not cleaned (Dr. Norman, Tr. 3493; Bryant, Tr. 4221; RX 173 - photo 13). The argument of Sears in this respect is without merit, and soiled plates resulting from tipping should not be ignored in considering the results of the July test. Tipping of dishes, or changes in the position of dishes and other items in the dishwasher, can occur very easily either when the racks are pushed in and the door closed or as a result of the agitation and impact of the water during washing action (Eberwein, Tr. 1337-38). Where a portable is used, the consumer plainly may move it to connect it to a water faucet (Dr. Norman, Tr. 3899). Sears' witness Dr. Norman acknowledged that such tipping would not be an extraordinary

occurrence in the consumer's use of a dishwasher (Dr. Norman, Tr. 3899). Dr. Norman also acknowledged that another plate in the same load was tipped; however, this plate was cleaned (Dr. Norman, Tr. 3897-98; RX 173 - photographs 4, 5, 6). Thus, these are completely normal circumstances and provide no basis for excluding from consideration the still-dirty dinner plates when evaluating the July test.

160. There is no valid reason for excluding the May Load 2 test from consideration on the issue of the truth of Sears' no scraping, no pre-rinsing representation. The fact is that a number of items [58] washed on the "power wash" cycle of the Lady Kenmore dishwasher emerged from the washing, like a number of July test load items, not clean (Dr. Norman, Tr. 3930-32, 3934; Bryant, Tr. 4630-32). See aluminum roasting pan, plates, Corningware casserole dish, forks, spoons and knives (BX 184). As stated with respect to the June Load 2 test and the July single load test, the claim that the Sears' no scraping, no pre-rinsing representation is true obviously cannot be established by a test in which a number of the items washed emerged dirty.

161. The IIT tests, as the foregoing findings show, not only failed to support the truth of Sears' no scraping, no pre-rinsing claim, but constitute evidence that it was false. Beyond that finding, it is found that there were substantial deficiencies both in the IIT tests themselves and in the evidence introduced by Sears to show the results of those tests.

162. Photographs are inadequate to establish that the cooking and eating dishes were washed clean of all residue and film by the dishwasher. It cannot be determined from an examination of photographs whether dishes, pots and pans are, in truth, clean. Although some photographs may be satisfactory for this purpose, others are not. For example, it cannot be determined from the photograph of two aluminum cooking utensils washed in the May Load 2 test whether or not they are clean of all residue and film (CX 352U). Furthermore, photographs are deficient as evidence that the dishes, pots and pans are clean because they do not show all surfaces; even in those instances where the cooking and eating surface is shown, Sears' photographs do not show the back or underside surface (CX 352B-V, 360B-Y; RX 99, photos 2-25, RX 173, photos 2-7, 9-20) upon which it is perfectly possible that "redeposited" soil may have been placed by the washing action of the dishwasher, resulting in a dish which is not clean. Witnesses testified in this proceeding that photographs have serious limitations as a means of determining whether dishes, pots and pans are clean (Eberwein, Tr. 991-92, 994; Ferguson, Tr. 1674-76; Annis, Tr. 2276-77). For instance, photographs do not always show grease, film or

gritty, but otherwise invisible, dirt and may exhibit distortion due to lighting (Ferguson, Tr. 1674, 1676; Annis, Tr. 2276). Mr. Eberwein testified that he was of the opinion that photographs were appropriate only to show the condition of dishes and utensils before being put into the dishwasher, *i.e.*, before and/or after soiling (Eberwein, Tr. 991-92). Ms. Annis, a household equipment professor at Kansas State University, testified that photographs alone are an inaccurate and unacceptable scoring system (Annis, Tr. 2276-77). The law judge observed during the course of the hearings in which the dishes used in the IIT tests were examined in the hearing room, that photographs do not accurately reflect the food soil left on the dishes and that the food residue became much more apparent in looking at the dishes themselves than in looking at the photographs (Tr. 4777).

163. The fact that photographs are inadequate as evidence to establish that cooking and eating dishes have been washed clean is [59] not corrected by the presence in this record of the cooking and eating dishes washed in the Sears' IIT tests. Food soil not removed from the dishwasher, does not always remain permanently after the dishes have been removed from the dishwasher. The dishes used in the IIT tests, therefore, do not necessarily have the same amount of food residue on them as they did when they were first removed from the dishwasher in May, June and July of 1978 (Tr. 4777). In order to establish the condition of dishes after a test washing in a dishwasher, the dishes must be examined at the time they are removed from the dishwasher, and accurate records prepared at that time. Food soils not removed from cooking and eating dishes, and food soil "redeposited" during the dishwashing process, may dry up and flake off or fall off the dishes with the passage of time (Tr. 3937, 3940-41, 3948-49, 4633-34, 4637, 4640). In such instances, dishes which emerged from the dishwasher with food particles on them may appear clean after a period of time because the food particles have dried up and fallen off. Some of the plastic bags in which the dishes were stored had particles of food in them, thereby demonstrating that food residue had been knocked off or had fallen off the washed items before hearings in this proceeding began or during the course of the hearings (*e.g.*, Tr. 3527, 3937, 3940-41, 3949-50, 4633-34, 4637, 4640). The law judge, in fact, observed actual instances where food particles fell off the IIT test dishes during the hearings (Tr. 4777). In one instance, while respondent's counsel was handling a cup, the food residue was dumped out of the cup (Tr. 3949-50). Although some of the plastic bags had food residue in them, the food residue that fell off the stored dishes is not necessarily to be found in the plastic bags in which the dishes were

stored because there were examples at the hearings of plastic bags that had been turned inside out or had become torn (*e.g.*, Tr. 3352, 3360-61, 3371-73, 3436-38, 3440-41, 3539-40; 3542-43, 3554-55, 3557, 3560; Dr. Norman, Tr. 3948-49). Furthermore, the dishes were packed and repacked by Sears during this proceeding and were shown by Sears' counsel to witnesses during questioning. In such cases, the dishes had to be handled by counsel for both sides and were examined by the law judge. Dried food spots or particles inevitably could have become dislodged under the circumstances. The dishes, pots and pans washed in the IIT tests are clearly not in the same condition as they were when removed from the dishwashers. The dishes, as a consequence, are reliable evidence only to show the food soil *still* remaining on them. They are not reliable evidence that the Sears' dishwasher washed them clean of all food residue and film, and the law judge specifically so finds.

164. Beyond the foregoing, complaint counsel question the IIT tests because of the failure to use any systematic scoring procedure, because of the alleged involvement of Sears' counsel in the tests, and on the ground that a number of procedures were followed which would maximize the cleaning ability of the Sears' dishwasher (CPF 168-70, 183-92). In view of the findings herein that there are fundamental and fatal deficiencies in the IIT tests as evidence that the Sears' dishwasher would perform as advertised because (1) the [60]food soils were not representative of the universe of food soils encompassed by the claim and the Commission's complaint, and (2) a number of the dishes came out of the dishwasher dirty, it is not necessary to evaluate in detail these other objections to the IIT tests. The following findings, nevertheless, are made.

165. Neither RX 99, the June test report, nor RX 173, the July test report, contained any scoring procedure to evaluate the cleanliness of the items washed (Dr. Norman, Tr. 3742). The May test also did not involve a scoring procedure (Dr. Norman, Tr. 3742). Instead, the test reports relied solely on the photographs to provide the results (RX 99, p. 18, 173, p. 6). A protocol for testing the cleaning ability of dishwashers should contain an objective procedure for scoring the dishes (Eberwein, Tr. 988-94, 1251-52; Sullivan, Tr. 1431; Annis, Tr. 2274-77). Dr. Norman, who conducted the IIT tests, conceded that it is not customary in scientific design and experimentation to use photographs alone to determine the results of a test (Dr. Norman, Tr. 3742-43. See also Fraser, Tr. 5273-74).

166. Sears' counsel was involved in the actual testing procedures more than seems proper for allegedly objective and important tests conducted by an academic institution (See, Dr. Norman, Tr. 3681-83,

3727-29). Sears' counsel directed the use of the AHAM test protocol in the May test (Dr. Norman, Tr. 3690; Bryant 4384), as well as the use of Mr. Eberwein's General Electric test protocol in July (Bryant, Tr. 4593). Sears' counsel furnished a list of foods (RX 179) from which foods to be used in the May and June IIT tests were selected (Dr. Norman, Tr. 3692-93; Bryant, Tr. 4398). Although all of these foods were not used, there were no food soils used in May or June that were not on RX 179 (Bryant, Tr. 4393, 4403). Counsel was also present at certain stages of the actual testing (Bryant, Tr. 4366, 4441-42, 4588-89) and participated in various operational details of the tests, such as determining the amount of food residue that would be applied to some of the dishes (Dr. Norman, Tr. 3704-05; Bryant, Tr. 4590-91), choosing a method of counteraging (CX 353E), determining the wash cycles to be used (Bryant, Tr. 4366), choosing the temperature setting on the hot water heater (Dr. Norman, Tr. 3647-48, Bryant, Tr. 4366-67) and suggesting the use of photographs as the major means of evaluating the test results (Dr. Norman, Tr. 3727).

167. Sears' counsel was involved in writing the test report which has been introduced as RX 99. Before the final report was prepared and subsequently, introduced into evidence, Dr. Norman submitted a draft report (CX 356) to the office of Sears' counsel, where certain revisions were discussed and made (Dr. Norman, Tr. 3827). Consequently, there are some substantive differences between the draft (CX 356) and the final report (RX 99). The draft stated: "The objective of the program was to evaluate the cleaning capability of the dishwasher under carefully controlled conditions. Cooking utensils, dishes, and silverware were to be soiled using normal cooking and baking procedures." (CX 356B-C). However, this was changed, based upon discussions with Sears' counsel (Dr. Norman, Tr. [61]3824) so that the final report stated: "The objective of the program to test the cleaning capabilities of the dishwasher in accordance with procedures which would ordinarily be used by a typical or average user of the dishwasher. Therefore, cooking utensils, dishes and silverware were to be soiled using normal cooking and baking procedures." (RX 99, p. 3).

168. The draft report of Dr. Norman did not contain any reference to the surface temperature of utensils, stating only that "an internal heater raised the rinse water temperature to 69°C (156.2°F)" (CX 356Z005). However, the final report referred to a surface temperature of utensils stating that the "69°C (156°F) water temperature result[ed] in a utensil surface temperature during this cycle of the same temperature" (RX 99, p. 16). Dr. Norman testified that the reference to utensil surface temperature was an assumption based on measurement of the temperature of the drain discharge water, and that there was

never any actual measurement of the surface temperature of the utensils (Dr. Norman, Tr. 3985-88). The additional language as to utensil surface temperature was added between the time the draft report was submitted to Sears' counsel and the completion of the final report (Dr. Norman, Tr. 3988). The involvement of Sears' counsel in the actual conduct of the IIT tests is a factor to consider in judging these tests.

169. A water softener was used in the IIT tests (Dr. Norman, Tr. 3796). Soft water does enhance the cleaning action of a dishwasher (Eberwein, Tr. 1035-37; Dr. Norman, Tr. 3796). Failure to mention in the test report (CX 99) that a water softener was used, however, is a questionable factor.

IV. Sears Did Not Have a Reasonable Basis for the Representation That Dishes in the Top Rack Will Get As Clean As Those in the Bottom Rack

170. Paragraph 13 of the complaint alleges that Sears' advertisements represented that dishes in the top rack of the dishwasher will get as clean as those on the bottom rack without prior rinsing or scraping. As has already been found, this representation was made by Sears. CX 1 specifically states:

And the dishes on top get as clean as those on the bottom. Because every cup and glass is scoured inside and out by a field of eight upper jets.

See also CX 2.

171. Paragraph 14 of the complaint charges that when Sears made this representation, it had no reasonable basis for it and, therefore, the claim was deceptive and unfair. The complaint does not charge that the representation was false.

172. The upper rack on the Sears' dishwasher, which Sears advertises as the "Roto-Rack," is a circular rack which is designed [62] water pressure (CX 2, 277Z014, Z054; Fraser, Tr. 5240). Sears has promoted the Roto-Rack as an exclusive Sears feature, as an advantage over competitors' square racks and therefore, as another reason to purchase Sears' dishwashers. For instance, CX 3, a print advertisement stated:

Lady Kenmore's upper rack is the revolutionary Roto-Rack. It holds as much glassware as square racks, yet has no 'dead corners'. And it revolves to make sure not a dish is missed.

See also CX 14B and CX 42.

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173. In its 6(b) report, Sears did not submit any tests which compared the cleaning performance of the upper rack with the lower rack utilizing the same types of foods and dishes. Sears' witness Ms. Fraser could not identify any tests which were run specifically to compare the cleaning performance of the upper rack with the lower rack using the same types of food soils on the same dishes for each rack (Fraser, Tr. 5231-33). Mr. Clifford also could not identify any specific tests done by Sears or the maker of its dishwashers, D&M, that were run to compare the cleaning performance of the lower rack with the upper rack. He knew of no tests in which identically soiled utensils were placed in the upper and lower racks of Sears' dishwashers to compare cleaning performance (Clifford, Tr. 4995-96).

174. In defense on this aspect of the proceeding, Sears relies on the testimony of Ms. Fraser concerning her work at D&M on the testimony of Mr. Clifford and on the IIT tests conducted in 1978 which, Sears asserts, "verify the results observed by Ms. Fraser and Mr. Clifford" (RPF 73-77).

175. According to Ms. Fraser, in her August 1972 work at D&M, she examined dishes from both racks of the Lady Kenmore and found them equally clean (Fraser, Tr. 5183-85). In other tests, according to Ms. Fraser, the upper rack and lower rack scores were the same statistically (Fraser, Tr. 5184). As stated earlier, no record was made of the August 1972 tests; these oral assertions of Ms. Fraser are unverified and unsupported by any documentation. They amount simply to testimony with an interest in the outcome of this proceeding that the dishwasher manufactured by D&M for Sears would perform as Sears represented to the public. As already found, Ms. Fraser's testimony is unconvincing and unreliable as proof of such crucial facts. Furthermore, although Ms. Fraser testified in this proceeding that the washing performance in the upper rack and the lower rack were the same (Fraser, Tr. 5227), her testimony is contradicted by her own statement in a 1974 D&M test report submitted by Sears as part of its 6(b) documentation, where Ms. Fraser specifically stated with respect to the dishwashers manufactured for Sears that "the washing action is better in the lower rack." (CX [63]94B).³ In still another report authored by Ms. Fraser in 1975 on "Sears Dishwashing Tests" the following conclusion, inconsistent with her testimony on this issue was stated (CX 280C):

RESULTS

Three tests were run at the D&M Test kitchen - one each of "B", "1", and "2". The dishes

³ Although this document does not specifically mention the Sears' dishwasher, it was submitted by Sears as substantiation material for claims made for its dishwashers in its 6(b) report.

which were soiled with very adhesive soils - particularly egg and oatmeal, retained these soils. The silver with dried-on egg appeared as though it had not even been touched by any wash action. The oatmeal in the upper rack was as bad, *but the lower rack items that were soiled with oatmeal did not come out much cleaner.* (Emphasis added).

176. Similar considerations bear on Mr. Clifford's testimony also discussed earlier. According to Mr. Clifford, during his visits to the Home Economics kitchen of Sears, across the street from his office, sometimes made so as to be there "when they were taking something out of the oven to enjoy a little bit of their cooking" (Clifford, Tr. 4826), he observed the performance of the Sears dishwasher and found dishes in both racks to be equally clean (Tr. 4869). As previously stated, Mr. Clifford was responsible for procurement of Sears' dishwashers and was also involved in the representations disseminated in Sears' advertising of dishwashers (Clifford, Tr. 4792, 4794-4800). He approved ads containing the top rack claim (Clifford, Tr. 4868). As in the case of Ms. Fraser, Mr. Clifford's testimony amounts simply to an unverified assertion unsupported by any documentation a witness one [sic] with an interest in the outcome of this proceeding that the Sears' dishwasher will perform as advertised. Again, such testimony is unconvincing and unreliable to prove facts of crucial significance in this proceeding.

177. Neither the testimony of Ms. Fraser nor that of Mr. Clifford is reliable, probative or substantial evidence that Sears had a reasonable basis for representing to the public that "dishes in the top rack of the dishwasher will get as clean as those on the bottom rack."

178. Although the truth of Sears' representation that dishes in the top rack of the dishwasher get as clean as those on the bottom rack is not in issue, the truth or falsity of that claim is relevant to the issue of reasonable basis. From the 6(b) materials that were submitted by Sears, it is apparent that the lower rack performed much better than the upper rack. CX 90 shows a considerable difference [64] between the cleaning of dishes in the upper rack and in the lower rack, the lower rack being superior. (Sullivan, Tr. 1479, 1502-03, 1590-92). Sears' 6(b) report (CX 83) contains charts showing the results of the CX 90 tests performed at D&M in 1972. These charts are included in this decision in Appendix A. In some of these tests, the same type of cooking dish soiled with the same food was washed in the upper rack and lower rack. The charts show that, in the majority of instances, the dishes washed in the lower rack were cleaned more thoroughly than those washed in the upper rack (CX 83Z007-Z009).

179. Mr. Eberwein testified that he performed many tests on Sears' dishwashers and that there were technical reasons why the Roto-Rack would not clean as thoroughly as the lower rack, such as greater water

pressure from the lower spray arm servicing the lower rack than from the upper spray tube servicing the Roto-Rack, difficulties in weight distribution in the Roto-Rack which affect its rotation, and possible clogging of the upper spray tube (Eberwein, Tr. 1026, 1115-18, 1125-26). In tests of Sears' dishwashers, Mr. Eberwein found that the lower rack performed much better than the Roto-Rack in cleaning pots and pans with baked-on foods. The upper rack's overall performance was not nearly as good as the lower rack (Eberwein, Tr. 1114-15, 1121).

180. The evidence establishes that when Sears advertised that dishes on the top rack would get as clean as those on the bottom rack, Sears did not possess any reasonable basis for making such a claim. Not only did Sears lack a reasonable basis, but the documentation submitted by Sears in its 6(b) report showed that the upper rack did not get dishes as clean as the lower rack, results directly contradictory to Sears' representation.

V. The Demonstrations Do Not Prove, the No Scraping, No Pre-rinsing Claim

181. Paragraph 18 of the complaint charged that Sears represented that the demonstrations used in its advertisements, proved the no scraping, no pre-rinsing claim, and Paragraph 19 charged that the representation was deceptive because the demonstrations did not, in truth, prove the claim. As set out in prior findings, CX 1 contains a picture of the inside of a Sears' Lady Kenmore under the statement, "This demonstration recreates the powerful cleaning ability of Sears Lady Kenmore Dishwasher (Certified by the Nationwide Consumer Testing Institute)." CX 4, a TV commercial broadcast over network television (CX 64A-F), entitled "Birthday Cake," shows the inside of the Lady Kenmore washing dishes during which the following words are superimposed on the TV screen, "Demonstration Certified by Nationwide Consumer Testing Institute" (see CX 55 which is the videotape of CX 4. See also CX 2 and 8). As has already been found in the order granting partial summary decision, Sears' advertisements did represent that these demonstrations proved the no scraping, no pre-rinsing claim.

182. The Nationwide Consumer Testing Institute prepared a [65] "research report" which was submitted to the Commission by Sears as part of its response to the 6(b) Order to file a Special Report substantiating the no scraping, no pre-rinsing claim in CX 1. This report has been received in evidence as CX 87. CX 96 was also submitted by Sears to substantiate the no scraping, no pre-rinsing claim conveyed by the demonstration referred to in CX 2 and other ads.

Like CX 87, CX 96 has been analyzed in detail earlier in this decision. Neither CX 87 nor CX 96 establish that the demonstrations depicted in CX 1, 2, 4, and 8 (CX 55) prove that the Sears' Lady Kenmore will completely remove, without prior rinsing or scraping, all residue and film from all dishes, pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers.

VI. The Owners Manual Instruction

183. The Sears' Owners Manual directed users to "pre-soak or lightly scour firmly cooked or baked-on foods" (CX 99D, 100D). This manual was provided to purchasers of Sears' dishwashers, including the Lady Kenmore, at the same time as Sears' no scraping, no pre-rinsing claim was being made in Sears' advertising. The instruction in the Owners Manual to pre-soak or scour firmly cooked-on foods is directly contradictory to and materially inconsistent with the no scraping, no pre-rinsing representation disseminated in Sears' advertising. The Owners Manual instruction was, therefore, a material fact requiring disclosure.

184. The instruction in Sears' Owners Manual was factually correct since pre-treatment of firmly adhered food soil on dishes, pots and pans was required for them to be washed clean. The instruction appeared not only in the 1972 Owners Manual, but in all Owners Manuals until the 1976 line, when Mr. James Clifford, Sears' national dishwasher buyer, substantially changed the instruction (Clifford, Tr. 4844, 4991). The instruction in the Owners Manual to pre-rinse or scour firmly adhered food soil was correct, the argument of Sears that this instruction appeared in the Owners Manual through "error or oversight" (RPF 193-97; RRB, pp. 48-49) lacks credibility. The contention is discussed later in this decision. The argument is based on the testimony of Mr. Clifford, which has been found to be self-serving and unreliable in this respect. The instruction was disseminated to thousands of purchasers and directly contradicted the advertising representations that Sears was disseminating at the time. Under the circumstances, the instruction was a material fact, as stated, which, in view of Sears' no scraping, no pre-rinsing representation, should have been disclosed. Failure of Sears to disclose that the Owners Manual directed pre-soaking and scouring when it was disseminating its no scraping, no pre-rinsing claim nationwide was deceptive and unfair.

VII. The "Sani-wash" Cycle

185. In the order granting partial summary decision, the law judge

found with respect to the "Sani-wash" that Sears' [66]advertisements represented to the public that the Lady Kenmore kills all harmful and other bacteria and microorganisms on the dishes, pots and pans as charged in Paragraph 15 of the complaint. Sears contends that this ruling was erroneous, and asks that it be reconsidered and vacated (RB, p. 23).

186. Sears' contentions are as follows: the term, "hygienically clean," has been used and approved by GSA and the U.S. Department of Agriculture in contexts making clear that these Federal agencies do not equate the phrase with literal sterilization (RB, pp. 24-25); there is no evidence that Sears' advertisements would be perceived by consumers "as a representation that the dishwasher would literally sterilize dishes and utensils" (RB, p. 29); even if the ads were so perceived, the consumer's understanding of the term, "sterilization" is not necessarily the killing of *all* bacteria and microorganisms because the consumer equates sterilization with the process used to treat baby bottles which is not, in truth, complete sterilization (RB, pp. 27-30); and the Sears' dishwasher does, in fact render dishes "hygienically clean" and "sanitized" "by reducing bacterial populations to levels which are safe from a public health perspective" (RB, p. 30). Complaint counsel vigorously contests the truth of these assertions of Sears.

187. The net impression conveyed by the advertisements to the public controls, and that net impression is not determined by the technical meaning, if any, accorded to the term "hygienically clean" by specialists in GSA or elsewhere.

188. The terms, "sterile" or "sterilization," are not used in Sears' advertisements or in the complaint. In any event, there is no evidence or basis to conclude, as Sears contends (RB, p. 28), that the public understands and believes that "sterilization is what one does to a baby bottle" and that such will not result in the elimination of all bacteria.

189. That the Sears' "Sani-wash" cycle reduces bacteria, if it does, to levels which are safe from a public health standpoint and thus "sanitizes" dishes and gets them "hygienically clean"⁴ (RPF 98, *et seq.*; RB, p. 24) is irrelevant to this proceeding. The law judge has found that Sears' advertisements conveyed to the public, or had the capacity to convey, that all harmful and other bacteria and microorganisms on the dishes, pots and pans were killed. If that finding is incorrect, Paragraphs 15, 16 and 17 of the complaint fail. As the law judge ruled during hearings, the question of whether or not the Sears' dishwasher "sanitized" dishes in the sense of reducing bacteria to a safe level of 100 or fewer colonies per utensil is not an issue in the proceeding (Tr.

⁴ Complaint counsel contend this has not been proven by Sears (see CRB, pp. 20-26).

5648). The undersigned reiterates that ruling and no findings on that subject will be made in this decision. [67]

190. Sears' request that the ruling granting summary decision as to the meaning of the "Sani-wash" portion of Sears' advertisements be vacated is denied. Upon review of Sears' arguments, the law judge finds no reason to change the ruling. As set out in that order, based on a reading of the advertisements themselves, the Sears' advertisement conveyed, or had the tendency and capacity to convey, the representation that the "Sani-wash" cycle of the Lady Kenmore destroyed "all harmful and other bacteria and microorganisms on the dishes, pots and pans." There are two issues remaining under Paragraphs 16 and 17 of the complaint. The first is whether or not Sears possessed and relied on a reasonable basis for this representation. The second is whether or not the representation is true. The answer to both of these issues is negative.

A. Lack of Reasonable Basis

191. During this proceeding, on application of complaint counsel, Sears was ordered to produce all documentation upon which it based its statements in CX 1 relating to the "Sani-wash" cycle (CX 239F, specification 2). In compliance with this subpoena, Sears produced 10 documents (CX 240B) which have been received in evidence as CX 242 through CX 251 (see CX 345, pp. 19-20).

192. James Brown, an expert called by complaint counsel, testified on these documents. Mr. Brown's qualifications are set out in Appendix B. Mr. Brown holds a Master's degree in public health from the University of Michigan. He is currently Managing Director of Customer Service, National Sanitation Foundation ("NSF"), Ann Arbor, Michigan. The NSF works with industry, user groups and regulatory agencies to establish standards for food service equipment including dishwashers (CX 302-05, 319; Brown, Tr. 2814-17, 2824). Mr. Brown has studied dishwashers and evaluated their performance (Brown, Tr. 2819, 2827-30). He has authored a publication, "Mechanical Dishwashing," which is used to train sanitary workers in the field evaluation of dishwashers (CX 309; Brown, Tr. 2841-42).

193. Mr. Brown testified that the documents supplied by Sears, CX 242 through CX 251, do not establish that the Lady Kenmore "Sani-wash" cycle will destroy all bacteria and other microorganisms on dishes, pots and pans (Brown, Tr. 2884-85).

194. Dr. Frank Bryan, Chief of Foodborne Disease, Center for Disease Control, Atlanta, Georgia (Dr. Bryan, Tr. 2592), was called by complaint counsel and also testified concerning the Sears' documents, CX 242 through CX 251. Dr. Bryan holds a Ph.D. degree in bacteriology

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from Iowa State University (CX 296A; Dr. Bryan, Tr. 2594-95). Dr. Bryan's qualifications are set forth in Appendix B. Dr. Bryan has authored many publications dealing with foodborne diseases, pathogenic microorganisms and their thermal destruction (Dr. Bryan, Tr. 2629-36).

195. Dr. Bryan reviewed CX 242 through 251 and testified that they did not establish that the Sears' dishwasher "would sterilize or [68]kill all microorganisms" on the surfaces of the dishes, pots and pans (Dr. Bryan, Tr. 2641).

196. One of the Sears' documents, a November 12, 1968 letter from a Ms. Virginia Peart, D&M Home Economics consultant, advised the Sears' Home Economics laboratory that "dishwasher temperature (even if 180° F. is achieved) alone cannot sterilize tableware" (CX 245B). CX 1 states that the "Sani-wash" cycle provides "an extra-hot 155° final rinse." There is evidence, however, that the "Sani-wash" cycle does not actually reach this temperature (Clifford, Tr. 5045-49).

197. During the course of the hearings, Sears' counsel stated that "Sears did not undertake any bacteria, microbiological testing of its dishwashers prior to the submission of the data that we submitted in the post-complaint subpoena." This referred to "actual physical microbiological tests, swabbing and all of that" (Tr. 2090). The "Standard Swab Test" for detecting the presence of bacteria remaining on the surface of dishes, pots and pans after washing and drying in a dishwasher is not difficult or costly, and has been used by microbiologists for many years (CX 243D-E; Dr. Godwin, Tr. 2085-88, 2091; Dr. Bryan, Tr. 2661-63).

198. Mr. Eugene Kramer, Manager of Environmental Engineering at Sears and former Group Manager of Sears' Chemical Laboratory (Kramer, Tr. 5339-41), testified that in 1971 or 1972 he had verbally approved a request from Sears' Legal Department to use the terms, "Sani-wash" and "hygienically clean" in advertising for Sears' dishwashers (Kramer, Tr. 5351-54). Mr. Kramer served as Sears' microbiologist during the period 1972 through 1975 (Kramer, Tr. 5387, 5493). He testified that Sears had seen no need for microbiological testing of the Sears' dishwasher and that, if any had been done, it would have been done in his laboratory (Kramer, Tr. 5389-90). No such microbiological testing was performed (Kramer, Tr. 5388-90, 5392). To Mr. Kramer's knowledge no tests were performed by Sears on the 1972 through 1975 models of Sears' dishwashers to assess the microbiological capabilities of the "Sani-wash" cycle (Tr. 5392).

199. Sears did not possess and rely on a reasonable basis for the presentation found to have been conveyed by the advertising that

the "Sani-wash" cycle destroys all harmful and other bacteria and microorganisms on dishes, pots and pans.

B. Sears' "Sani-wash" Cycle Does Not Destroy All Bacteria and Microorganisms on the Dishes, Pots and Pans

200. The Sears' Lady Kenmore's "Sani-wash" cycle does not destroy all harmful and other bacteria and microorganisms on dishes, pots and pans. In one of the documents submitted by Sears in response to the subpoena issued by the law judge requiring production of all documents relative to the "Sani-wash" statements in CX 1, the following appears (CX 242D): [69]

Apparently many consumers believe that home-type dishwashers "sterilize" the utensils. It is obvious from the results summarized above that this term, which means destruction of *all* microorganisms, cannot be used. It is probable that the word "sanitize" can be used, since a larger percentage of the utensils were acceptable by Public Health Standards.

This statement appeared and was reprinted in an article in *Soap and Chemical Specialities*, by three authors from the Agricultural Research Service, U.S. Department of Agriculture, Beltsville, Maryland.

201. Another document furnished by Sears in response to the subpoena issued by the law judge is entitled "Microbiology and Public Health Aspects of Home Appliances," and is a paper delivered at a meeting of the American Society of Sanitary Engineering in October 1970 (CX 243). According to this study, although mechanical dishwashers did a creditable job of reducing bacterial count below 100 colonies per utensil, all bacteria and microorganisms were not killed (CX 243N).

202. Dr. Glyn J. Godwin testified as an expert witness in this proceeding on the "Sani-wash" issues. Dr. Godwin has a Master's degree in microbiology from Southeastern Louisiana University and has a Ph.D. degree in food science from Louisiana State University. He is a registered food, dairy, industrial, agricultural and sanitation microbiologist (CX 293A; Dr. Godwin, Tr. 2035-36). His qualifications are contained in Appendix B. Dr. Godwin agreed with the statement in CX 245B, the letter from Ms. Peart of D&M to Sears' Home Economics laboratory, referred to in a preceding finding, that even if the temperature of 180° were achieved in a dishwasher all microorganisms would not be killed. Dr. Godwin testified that such a temperature is not "sterilization temperature" and "does not kill spores [which] can easily survive that heat treatment." (Dr. Godwin, Tr. 2060-61).

203. Dr. Bryan testified that domestic household dishwashers are not designed to kill all microorganisms present on cooking and eating dishes placed in them (Dr. Bryan, Tr. 2637). More specifically, Dr.

Bryan testified that the Sears' "Sani-wash" water temperature of 155° for two minutes (even if achieved) would not kill all microorganisms on cooking and eating utensils (Dr. Bryan, Tr. 2664).

204. Mr. Brown testified that dishwashers do not sterilize dishes and that certain types of organisms and spores would survive the temperature and duration of the "Sani-wash" cycle (Brown, Tr. 2851, 2853-57).

205. Dr. Charache, a physician and Director of Microbiology, [70] Johns Hopkins University School of Medicine, testified that various pathogenic microorganisms would survive the "Sani-wash" cycle (Dr. Charache, Tr. 6120). Dr. Charache's qualifications are set forth in Appendix B.

206. Furthermore, Sears' own witnesses, Dr. Ordal and Mr. Kramer, testified that the "Sani-wash" cycle on Sears' dishwashers, with its temperature of 155° F., will not sterilize dishes (Kramer, Tr. 5482; Dr. Ordal, Tr. 5760-61, 5773). Dr. Ordal's qualifications are set forth in Appendix B.

207. Thus, the "Sani-wash" cycle does not kill all harmful and other bacteria and microorganisms on dishes, pots and pans.

C. "Materiality"

208. While he was an assistant professor at the University of Rhode Island, Dr. Godwin was the food science expert for the state (Dr. Godwin, Tr. 2029). He is a member of the Institute of Food Technologists and its Division of Food Microbiology (Dr. Godwin, Tr. 2031-32; CX 293A). Dr. Godwin is particularly familiar with the critical points in food processing and canning (Dr. Godwin, Tr. 2036-37).

209. Dr. Godwin testified on the safety of processing jars that are to be used in home canning in the "Sani-wash" cycle instead of using stronger bactericidal measures. Dr. Godwin testified that spores of clostridium botulinum bacteria may remain on canning jars after being washed in the Sears' dishwasher with the "Sani-wash" cycle and then germinate once food is put in the jars (Dr. Godwin, Tr. 2120). Spores of botulinum bacteria could also be redeposited in the glass canning jars on residue from other dishes and objects in the dishwasher (Dr. Godwin, Tr. 2123). The spores of botulinum organisms are widely found in nature and would commonly be found in the kitchen (Dr. Charache, Tr. 6123-27). Once the spore germinates, the bacteria can grow and multiply within the food, creating botulinum toxin (Dr. Godwin, Tr. 2120). The toxin is dispersed in the food and there may not be any odor to warn that the food is contaminated (Dr. Godwin, Tr. 2120-21). It is common knowledge that botulinum toxin is one of the most dangerous

toxins known to man and even 1.6 billionth of a gram can kill a full grown person (Dr. Godwin, Tr. 2120).

210. If the Sears' advertisements cause purchasers who engage in home canning to believe mistakenly that the "Sani-wash" cycle kills all bacteria and other microorganisms when it does not, there is more than a theoretical possibility of serious harm (Dr. Godwin, Tr. 2119-21) particularly in view of the large number of dishwashers that Sears markets annually.

211. In addition to home canning, there are other significant risks if purchasers mistakenly believe that the Lady Kenmore's "Sani-wash" cycle kills all bacteria and other microorganisms when it does [71]not. Spores of various bacteria will survive the "Sani-wash" cycle (Dr. Godwin, Tr. 2061, 2063-66; Dr. Bryan, Tr. 2664-67; Brown, Tr. 2853-59). Such surviving spores can pose a health risk to human beings (Dr. Godwin, Tr. 2063-64, 2119-22; Dr. Bryan, Tr. 2670-78; Brown, Tr. 2859; Dr. Charache, Tr. 6128).

212. Dr. Bryan testified that if bacillus enteritidis, clostridium botulinum, or clostridium perfringens spores remain on food storage utensils after surviving the "Sani-wash" cycle, they may return to a vegetative, i.e., multiplying, state as a result of food being stored in the utensil and, thereupon, can cause gastroenteritis or botulism (Dr. Bryan, Tr. 2670).

213. Dr. Charache also testified that certain health risks could arise if purchasers of Sears' dishwashers erroneously believed that the "Sani-wash" cycle killed all bacteria and other microorganisms (Dr. Charache, Tr. 6128-31). Spores that survived could return to the vegetative state and produce a toxin that causes disease (Dr. Charache, Tr. 6129-30). If the utensils are mistakenly thought to be sterile, the person who uses them may handle them as though they were sterile and put other products in them which would be contaminated (Dr. Charache, Tr. 6130-31). Susceptible individuals such as infants could be adversely affected (Dr. Charache, Tr. 6128-29).

214. One of Sears' print ads, "Eight Things That Make Lady Kenmore the Best Cleaning Lady in Town" (CX 3) published in *Better Homes and Gardens* and *House & Garden* magazines (CX 71, 72), advertised the "Sani-wash" feature as "especially nice for glasses and baby bottles," as set out earlier. Dr. Charache testified that before recommending washing baby bottles in a dishwasher she would want to be certain of how well the dishwasher removed the milk deposits and residual film of milk because the long, narrow shape of baby bottles makes them difficult to clean (Dr. Charache, Tr. 6135). Based on the representation in this advertisement, however, purchasers of Sears' dishwashers may believe erroneously that all the bacteria and microor-

ganisms on baby bottles are killed after being washed in the "Sani-wash" cycle. As a consequence, they may put milk or some other food into the bottles and use them without first boiling the bottles (Dr. Charache, Tr. 6135-37). If this were done, and all bacteria and microorganisms had not been killed, the infant might receive a heavier than desirable bacterial load and be subject to harm (Dr. Charache, Tr. 6137-38).

215. Dr. Bryan testified that a clostridium botulinum spore on a baby bottle could survive the "Sani-wash" cycle, produce toxins and cause an illness called infant botulism (Dr. Bryan, Tr. 2670-71, 2673-75). Infant botulism differs from botulism in that only the spore need be ingested to cause it. The spore can germinate in the infant's intestine and produce toxin with potentially dangerous consequences (Dr. Bryan, Tr. 2670-71, 2673). Nelson, *Textbook of Pediatrics*, Tenth Edition, 1975, recommends the boiling of baby bottles for 5 to 10 minutes (CX 340D). Dr. Bryan testified [72] that this was a standard procedure which was usually recommended because "[i]nfants are far more susceptible to smaller numbers of microorganisms than adults" (Dr. Bryan, Tr. 2681-83). Dr. Charache agreed that boiling baby bottles was desirable "to reduce the bacterial load . . . so you are not giving the infant large numbers of pathogens with the milk" (Dr. Charache, Tr. 6134). She testified that "if the person using the dishwashers had the impression that the dishwasher made the bottle cleaner than it did, then this would be a danger" (Dr. Charache, Tr. 6135). Although there is some conflict in the record on the question of boiling baby bottles that are to be used to feed newborn infants (see RX 171), the preponderance of the evidence establishes that the practice is desirable to avoid the possibility of disease. The Sears' advertisements for the "Sani-wash" feature have the capacity to induce purchasers to cease using this procedure which could prevent illness in newborn babies under the mistaken impression that the dishwasher's "Sani-wash" cycle kills all bacteria and microorganisms when it does not in actuality, do this. [73]

DISCUSSION

Sears disseminated advertising nationwide which made an affirmative product claim for its dishwashers. It is an unfair practice and a violation of Section 5 of the Act to make such a claim without a reasonable basis. *Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972). It is well established that an affirmative product claim necessarily carries with it a representation that the party making it possesses a reasonable basis for the claim. *National Commission on Egg Nutrition*, 88 F.T.C.

89, 191 (1976), *modified*, 570 F.2d 157 (7th Cir. 1977); *cert. denied*, 99 S. Ct. 86 (1978); *National Dynamics Corp.*, 82 F.T.C. 488, 549-50 (1973), *aff'd*, 492 F.2d 1333 (2nd Cir.), *cert. denied*, 419 U.S. 993; (1974); *Firestone Tire and Rubber Co.*, 81 F.T.C. 398, 451-52 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

It has been found that Sears did not have a reasonable basis for the no scraping, no pre-rinsing claim it disseminated. In determining whether or not Sears possessed and relied upon a reasonable basis, it has been necessary to consider the standard that should be applied. Complaint counsel contend that the standard which should govern in this case is "valid and reliable scientific tests" (CPF 90). According to complaint counsel, valid and reliable scientific tests, which they would require of Sears, should have included a truly representative range of food products, food preparation procedures, and cooking temperatures. Among other things, Sears' tests should have taken into account normal variations in usage of the dishwasher by consumers such as use of detergent and loading technique, and should have controlled the many other variables which affect dishwasher cleaning performance. Complaint counsel contend that procedures, methodologies, conditions and results should have been reported in detail so that the tests could be run again and similar results obtained. A scoring procedure should have been utilized to record the results at the conclusion of the tests, and the tests should have been replicated at least three times to check the validity of the results.

Sears argues against the standard of "valid and reliable scientific tests" (RRB, pp. 8-9). Sears contends that "the technical, laboratory-controlled tests which complaint counsel would require as a reasonable basis for these claims are in fact *not* necessary to their substantiation; and this is particularly true with respect to the claims in issue in this proceeding, which were approved and disseminated during the very time period in which the Commission, in *Pfizer*, held that 'scientific' tests would not invariably be required in order to find a reasonable basis for advertising claims" (RRB, p. 9).

In *Pfizer*, the Commission made it clear that what constitutes a reasonable basis for a claim was a factual issue which would be determined on a case-by-case basis. 81 F.T.C. at 64. The Commission further pronounced that "adequate and well-controlled scientific studies or tests" were not required for every claim. 81 F.T.C. at 68. [74]

In the factual setting of this case, Sears was not limited to "adequate and well-controlled scientific studies or tests" in order to be held to have had a reasonable basis for the no scraping, no pre-rinsing claim. Safety was not involved in the claim, nor was health in any immediate sense, although complaint counsel make an argument to

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this effect. The product was a dishwasher, not a food, drug, or potentially hazardous product. The consequences of the falsity of Sears' representation did not involve possible personal injury or property damage. Sears, therefore, was entitled to rely upon other evidence and information not necessarily rising to the level of "adequate and well-controlled scientific studies or tests," so long as that evidence and information did, in fact, provide a reasonable basis for the claim.

Sears submitted materials in its Special Report (CX 83) in response to the Commission's 6(b) Order (see, e.g., CX 88, 90) which it characterized as "tests" of the cleaning ability of its dishwashers. Although, these tests were not required to be "adequate and well-controlled scientific tests," they certainly were required to be competent and reliable.

Sears' tests, however, were quite inadequate and under no circumstances could they be described as competent and reliable. In fact, whether Sears should be held to the standard of "adequate and well-controlled scientific studies or tests," or to some lesser standard, is an academic point because Sears did not possess and rely upon competent and reliable evidence in any form, tests or otherwise, for its claim. Sears simply did not possess any evidence or substantiation which could be judged to constitute a reasonable basis for the no scraping, no pre-rinsing representation.

The materials submitted to the Commission by Sears in the 6(b) Special Report (CX 79 - 100) have been the subject of detailed findings set out earlier in this decision. As found therein, these materials neither constituted a reasonable basis for Sears' no scraping, no pre-rinsing claim nor showed that Sears' dishwasher would perform as was represented to the public. Sears' tests submitted in response to the 6(b) Order showed in many instances that the washed dishes emerged from the dishwasher still dirty. Clearly, a reasonable basis for Sears' claim cannot be found in test results showing dirty dishes.

Sears contests that conclusion, arguing that the complaint limited the no scraping, no pre-rinsing claim in paragraph 10 to "normal consumer conditions" (RRB, pp. 5-8, 12). According to Sears, this is different from the claim that it was asked to substantiate in the Commission's 6(b) Order to file a Special Report and, therefore, "the documents submitted in response to the Section 6(b) Order reflect the dishwasher's cleaning ability under conditions which are more rigorous than those experienced in the home" (RRB, p. 5). In other words, Sears argues that reports showing still dirty dishes in Sears' "Substantiating" materials do [75]not reflect "normal consumer recipes" and, therefore, neither prove that Sears lacked a reasonable basis for the no

scrapping, no pre-rinsing claim nor show that Sears' dishwasher will not perform as represented. Sears states that the "tests" and documentation submitted in its 6(b) report "show the dishwasher's performance under aggravated circumstances, which is indicative of its *enhanced* performance ability under circumstances normally encountered in the home" (RRB, p. 5).

In further defense against the contention that it lacked a reasonable basis for the no scraping, no pre-rinsing claim, in addition to the 6(b) material, Sears relied in this proceeding on the testimony of Mr. James Clifford, its dishwasher buyer (RPF 8-14, 27), on the testimony of Ms. Barbara Fraser, an employee of D&M (RPF 15-26), on the several instances in CX 90, which was submitted as part of Sears' 6(b) report, in which dishes did come out of the dishwasher clean and where Sears asserts the food soils reflected "normal consumer procedures" (RPF 25), and finally on a memorandum of Ms. Judith Cannon, a former home economist with Sears (RPF 28), which Sears quotes as stating, "There is no need to pre-rinse dishes before washing, but it is necessary to remove large pieces of food from dishes" (CX 141A).

This evidence has been reviewed in detail in the findings and found to be grossly deficient, both as a reasonable basis for Sears' claim and as evidence that Sears' dishwashers eliminated the need for pre-scrapping and pre-rinsing. For example, in citing Ms. Cannon's memorandum, Sears fails to quote her final statement which specifically contradicts Sears' claim where she advised her superiors at Sears, "Baked or burned-on soil (cooking utensils: Casseroles, pans, etc.,) usually requires some additional effort for complete removal in a dishwasher" (CX 141A).

In addition to the preceding evidence, Sears also relied on tests conducted by IIT (Illinois Institute of Technology) for use in this litigation to support the truth of its claim, contending that its dishwashers did, in fact, eliminate the need for pre-treatment of dishes, pots and pans and would perform as represented.

The argument that inclusion in the complaint of the qualifying language, "according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers," materially changed what Sears was called upon to substantiate by the Commission's 6(b) Order is rejected. The language in the complaint merely eliminated any possible interpretation that the Commission was challenging Sears' advertising on the ground that the Lady Kenmore would not remove every totally abnormal and unreasonable food soil occurring on dishes, pots and pans in the kitchen. Food soils that were the result of kitchen disasters or which it was otherwise unreasonable to expect *any* dishwasher to remove were eliminated from the scope of

the representation Sears was found to have made. On occasion people forget that cooking dishes are in the oven or on the stove; as a consequence, extensive burned-on food residue may result [76] which is so severely adhered to the dish, pot or pan that it is extremely difficult to remove even with intensive scraping by hand. This is a common experience. The complaint freed Sears from the contention that its advertising was false because, without pre-treatment, the Lady Kenmore would not completely clean such dishes, pots and pans.

However, the language of the complaint did not limit its challenge to the truth of Sears' no scraping, no pre-rinsing representation only to food soils resulting from carefully followed cookbook recipes. The language of the complaint did not free the no scraping, no pre-rinsing claim from challenge whenever testimony could be elicited from a witness that particular food soils were not "normal" or not prepared in a way "that they would normally be prepared" (Fraser, Tr. 5109). By this standard, an omelet prepared "with milk rather than water" would not constitute a "normal" recipe, a contention made by Sears (RPF 31). Failure of Sears' dishwasher to remove such a food soil from dishes, pots and pans, by the standard Sears would impose in this proceeding, cannot be used either to judge whether or not Sears had a reasonable basis for the no scraping, no pre-rinsing claim or to judge whether that claim was true. Such trivial distinctions by Sears border on frivolous argument and are rejected.

Sears' no scraping, no pre-rinsing representation was unlimited and unqualified, as emphasized. CX 1 is an example; this advertisement was specifically incorporated into the complaint and challenged as false. CX 1 was the advertisement transmitted to Sears in 1975 for substantiation under the 6(b) Order. As stated in the beginning of the findings in this decision, the public cooks in myriad ways. Many individuals do not follow cookbook recipes, improvising their own recipes instead. They also cook the same foods for different amounts of time in different types of cookware under varying degrees of heat. They store food in casseroles, pots, pans and other dishes, to be heated and reheated for later meals. Some individuals may leave dishes, pots and pans unwashed for considerable periods. In sum, the public uses a tremendous variety of cooking techniques, recipes, methods and procedures. All of these fall within the ambit of the complaint and the qualifying language of Paragraph 10 except, in fairness to Sears, disasters or procedures that produce food soils which it would be unreasonable to find that even Sears' unlimited claim represented would be removed by the Lady Kenmore without pre-scraping, pre-rinsing, or other pre-treatment.

Whether Sears possessed a reasonable basis for its claim, and

whether Sears' dishwasher would actually perform as advertised, were not tested against kitchen disasters or unreasonable food soils. As stated above, the tests which Sears submitted in response to the 6(b) Order specifically showed that, in many instances, food soils neither resulting from disasters nor unreasonable cooking procedures remained on dishes after being washed in Sears' dishwasher. [77]

Sears contends, as indicated earlier, that the results should not be considered because the degree of tenacious adherence of the food soils in the "tests" submitted with its 6(b) documentation was "beyond that achieved by following customary in-home cooking procedures" (CX 83U). Therefore, the fact that the food soils were not removed does not show that Sears lacked a reasonable basis for its advertising claim and does not constitute evidence that Sears' dishwashers would not perform as advertised.

This line of argument is rejected. Examination of the food soils and method of cooking in CX 90 reveals neither kitchen disasters nor food soils resulting from unreasonable cooking procedures which it would be unfair and unreasonable to expect Sears' dishwashers to clean without scraping or pre-rinsing. For example, an omelet made with milk rather than with water, referred to earlier, is clearly not an abnormal food soil that would be excluded by the complaint from consideration as a soil to be tested. Nor are the other food soils used in CX 90 abnormal (see Sullivan, Tr. 1475-76, 1478, 1481-82, 1522-23, 1530-38, 1550; Ferguson, Tr. 1697, 1701-05, 1708-12, 1720, 1722-24, 1732-33). The same is true for CX 89, the test protocol used by D&M for the test reported in CX 88 in which dishes were not, in many instances, washed clean by Sears' dishwasher (CX 88Z). Far from substantiating the no scraping, no pre-rinsing claim, the 6(b) documents demonstrate that Sears' dishwashers will not perform in accordance with the promise of Sears' advertisements and therefore, that Sears' representation was false.

The IIT tests also do not establish the truth of Sears' claim. These tests, too, have been the subject of detailed findings. Aside from serious methodological deficiencies, the tests did not, in a number of instances, produce clean dishes, pots and pans. Although Dr. Norman and Ms. Bryant, assisted by counsel for Sears, ran two test loads in May, two in June 1978, and one in July 1978, Sears has rejected all but Load 2 in the June tests and the July load. The basis for this position is Sears' contention that the May Load 1 test and the June Load 1 test did not use the "power wash" cycle. This contention has been considered in the findings. Sears made the no scraping, no pre-rinsing claim for "Kenmore" dishwashers (CX 5, for example), not only the "Lady Kenmore" which is the only Sears' dishwasher that has the

"power wash" cycle. Furthermore, Sears has admitted both that the cleaning ability of the Kenmore and Lady Kenmore dishwasher models are the same and that the "normal wash" cycle on the Kenmore models is the same as the "power wash" cycle on the top-of-the-line Lady Kenmore (RPF 15, 18).

Looking beyond that, however, there is no basis for the contention that the food soils used in May Load 2 were abnormal and that it was unfair to test the performance of Sears' dishwasher with these soils. These food soils were specifically devised by the Association of Home Appliance Manufacturers to "establish a uniform [78]and repeatable procedure or standard method for measuring specified product characteristics of dishwashers" (CX 185). Sears' objection appears to be another example of a pattern to eliminate from consideration all items of evidence showing that Sears' dishwashers will not eliminate the need for scraping, pre-rinsing, or other pre-treatment of firmly adhered food soils.

Sears disseminated throughout the country for between three to four years a blanket, unlimited claim by which it sought to persuade hundreds of thousands of consumers to buy its dishwashers. During this time period, Sears increased its share of the home dishwasher market in the U.S. and derived great economic benefits. It is ironic that Sears, when called to account, now urges a highly restrictive and technical approach to the evidence, including the very tests Sears conducted for use in this proceeding as well as the tests that Sears submitted as substantiation in 1975 in response to the Commission's 6(b) Order (see RRB, pp. 5-37). Nevertheless, even June Load 2 and the July test did not result in all the dishes coming out completely clean (RX 181, 182).

But the two isolated IIT tests (June Load 2 and the July test) would not rebut the burden of proof met by complaint counsel, even if all the dishes were clean. It is fundamental that the unlimited Sears' claim cannot be proven true by merely two test operations of Sears' dishwasher where the food soils used are not truly representative of the tremendous variety of food soils occurring "normally and expectably" in the nation's kitchens. Moreover, there is no truly credible means of ascertaining just how clean the dishes were after they had been removed from the dishwasher. Clearly, the photographs are an inaccurate record of the state of the dishes; photographs do not show all sides of a dish and may often fail to reveal retained or redeposited food soil that would become evident upon visual or tactile inspection. The dishes themselves increasingly lose value as a record of cleaning performance in proportion to the length of time that passes after their removal from the dishwasher. At the time the dishes were examined

for the record in this proceeding, December 1978, approximately six months had elapsed from the IIT test dates; at the writing of this decision, over one year has passed. During that period, the dishes have been handled several times, exposed to air, and shipped to different locations. The dishes, both at time of trial and now cannot be relied on to show that clean results were obtained.

Sears had no reasonable basis to advertise, as it did in CX 1 for instance, that "the dishes on top get as clean as those on the bottom." Sears possessed no tests conducted to determine whether this claim could be made truthfully. The unreliability and self-serving nature of the testimony of Mr. Clifford and Ms. Fraser has been discussed in the findings. Although the truth of this representation has not been challenged, the very materials that Sears submitted in alleged substantiation of its claims constitute evidence that the top rack did not get dishes as clean as those on the bottom [79]rack.

In some of its advertisements, as set out in the findings, Sears used visual depictions of the inside of its dishwasher during the washing cycle to reinforce the impact of the no scraping, no pre-rinsing claim (CX 1, 4). Sears represented that such demonstrations were certified by the "Nationwide Consumer Testing Institute" and proved the no scraping, no pre-rinsing claim. The tests of the "Nationwide Consumer Testing Institute" do not establish the truth of the claim. Indeed, they are close to preposterous as proof of Sears' unlimited and unqualified claim in CX 1, "No scraping. No pre-rinsing. Lady Kenmore has 6 powerful hot water jets for the bottom rack, surging hot water with enough force to scrub every dish, pot and pan *really* clean. Even baked-on food comes off." The demonstrations in the ads plainly do not provide visual proof of Sears' claim, *Colgate-Palmolive Co. v. F.T.C.*, 380 U.S. 374 (1965), and do not reflect the complete inadequacy of the tests of "Nationwide Consumer Testing Institute" to prove the claim, thus misleading the public. *Standard Oil Co. of California*, 84 F.T.C. 1401 (1974), *modified*, 577 F.2d 653 (9th Cir. 1978).

Sears' Owners Manual, which was given to purchasers of Sears' dishwashers, including the Lady Kenmore, instructed users to pre-soak or scour firmly cooked or baked-on foods (CX 99D, 100D). This instruction contradicted the representation contained in Sears' advertisements which were being disseminated at the same time. The instruction to pre-soak or scour firmly cooked-on and baked-on food is clearly a material fact directly relating to the no scraping, no pre-rinsing claim. Sears explains this contradiction by a two-pronged argument. Sears asserts that its dishwashers will perform as advertised and, consequently characterizes the instruction in the Owners Manual as a mistake (RRB, p. 48). In other words, Sears contends that

the advertisements are right and the instruction in the Owners Manual is wrong.

Addressing the first argument, it is clear that Sears' dishwasher will not perform as represented. Sears' dishwasher will not completely remove all firmly cooked-on and baked-on food residue and film from cooking and eating dishes without pre-treatment. The statement in the Owners Manual is correct. The second argument that the instruction to pre-soak or scour firmly cooked-on or baked-on food was retained in the Owners Manual for years through oversight or error is incredible. It is based on the testimony of Mr. Clifford which has been found to be self-serving and unreliable in this respect.

As described earlier, Mr. Clifford, Sears' dishwasher buyer, asserted that his visits to the Home Economics kitchen of Sears, which was located across the street from his office and where he observed, on occasion, the operation of the Lady Kenmore, convinced him that the Owners Manual instruction was in error. According to Mr. Clifford, he then changed the instruction for the 1976 line. However, no other evidence supports Mr. Clifford's assertions. On [80]the contrary, Ms. Cannon, who was a Sears' Home Economist at the time and who worked on the 1976 Owners Manual, did not recall anyone suggesting that the instruction was in error (Cannon, Tr. 2543). She also testified that she believed pre-soaking or scouring was required for some cooking dishes for them to be cleaned (Cannon, Tr. 2543-44). The instruction remained in Sears' Owners Manuals for the years 1972, 1973, 1974 and 1975, until the 1976 line was put into production in 1975. As late as April 29, 1975, Sears' Consumer Services Manager advised a purchaser, who apparently had complained about the dishwasher's cleaning of cooking utensils, that "light - scouring may be necessary" for foods "baked on during the cooking process" (CX 186). Sears' claim that the instruction to pre-soak or scour firmly cooked or baked-on foods was in the Owners Manual by mistake is beyond credibility and is rejected. For Sears to have secured purchasers by promising "no scraping, no prerinsing," and then to have told them the exact opposite in instructional materials, is unfair and deceptive. *Montgomery Ward & Co., Inc.*, 70 F.T.C. 52 (1966), *aff'd*, 379 F.2d 666 (7th Cir. 1967).

Sears disputes the law judge's finding that Sears advertisements represented that the "Sani-wash" cycle destroyed "all harmful and other bacteria and microorganisms on the dishes, pots and pans." It is clear that the representation was made, not only from Sears' advertisements in general, but from CX 3 in particular. That advertisement, disseminated nationally in 1972 (CX 72), states that the "Sani-wash" cycle is the Lady Kenmore dishwasher's way:

... of getting dishes hygienically clean. It gives your dishes a final rinse in 155° water which is especially nice for glasses and baby bottles.

It is a legitimate question to ask why Sears chose to make a specific reference to "baby bottles." This can not be attributed to accident; on the contrary, in the view of the law judge, the reference had an obvious purpose.

It is everyday knowledge that boiling bottles that are used to feed babies only a few weeks old has been a commonplace practice among the American public for many years. The practice is grounded on the assumption that boiling baby bottles kills all the microorganisms on them and "sterilizes" the bottles. Whether or not this is true, the public has the impression that it is true. Sears' advertising exploited that belief by equating the performance of the "Sani-wash" cycle with the boiling of baby bottles. Sears' "Sani-wash" cycle does not sterilize baby bottles or dishes, pots and pans by killing all microorganisms, and Sears had no reasonable basis for making this representation.

As already determined, even if the term "hygienically clean" has [81]a meaning to the scientific community, or to a portion of that community, and this is sharply in dispute (see Dr. Ordal, Tr. 5641, 5848-62; Dr. Charache, Tr. 6081-88), the message that is conveyed to the public is what counts. The public plainly may not understand the technical meaning of the term "hygienically clean," but rather may conclude from that term and from the net impression conveyed by Sears' advertisements that the "Sani-wash" cycle sterilizes dishes, pots and pans. See *Murray Space Shoe Corp. v. F.T.C.*, 304 F.2d 270, 272 (2d Cir. 1962); *Carter Products, Inc. v. F.T.C.*, 323 F.2d 523, 528 (5th Cir. 1963); *Sun Oil Co.*, 84 F.T.C. 247, 270 (1974).

Sears' contentions that the "Sani-wash" cycle gets dishes "hygienically clean," and that it "sanitizes" dishes, rendering them safe to use, are irrelevant. Complaint counsel question these contentions and argue that Sears did not prove that the "Sani-wash" cycle raised the surface temperature of dishes, pots and pans to 155° or that the "Sani-wash" cycle "sanitized" dishes (see CPF 215-17; CB, pp. 29-30). Since Sears' representation that the "Saniwash" cycle kills all harmful and other bacteria and microorganisms on dishes, pots and pans is false, Sears' argument that the dishwasher does render the dishes safe from a public health standpoint is beside the point.

It is elemental that the public is entitled to get what is represented to it. *Waltham Watch Co. v. F.T.C.*, 1692, 1724 (1962), *aff'd*, 318 F.2d 28 (7th Cir.), *cert. denied*, 375 U.S. 944 (1963); *Manco Watch Strap Co.*, 60 F.T.C. 495 (1962). Consumers paid substantially more for Sears' dishwashers which had the "Sani-wash" cycle. Sears' advertisements had the capacity to cause prospective purchasers to pay substantially

more for such dishwashers on the erroneous belief that the cycle killed all microorganisms on the dishes, pots and pans, including baby bottles. If Sears' dishwashers did not do this, then the additional purchase price was paid by the public for performance it did not obtain. Moreover, there is more than a purely theoretical possibility of actual harm from Sears' representation. There is substantial evidence, set out in the findings, that a mistaken belief on the part of the public that dishes, pots and pans, including canning jars and baby bottles, have had all bacteria and microorganisms on them killed has the capacity to cause actual injury.

REMEDY

The representations contained in Sears' advertisements which are the subject of this proceeding were disseminated in all media, television, radio, newspapers, magazines, catalogues and point of sale, were directed to both national and local audiences, and were disseminated from the latter part of 1971 through much of 1975, a three to four year period (CX 62-77). Relatively large amounts of money were expended in this advertising campaign, *i.e.*, over one and one-half million dollars in 1971, and around two million dollars in each of the years 1972 through 1974. [82]

Although intent is not an element of a false advertising charge, intent can bear on the quality of the violation, the likelihood of repetition, the need for an order and the scope of its provisions. *F.T.C. v. National Lead Co.*, 352 U.S. 419, 428-31 (1957); *United States v. United States Gypsum Co.*, 340 U.S. 76, 88-90 (1950). Even if the dubious nature of the Sears' claim is put aside from the time it was first disseminated in 1971, the record shows from internal Sears' documents (*e.g.*, CX 125) widely circulated in the company (CX 272) that Sears had to know by June 1973 that its broad no scraping, no pre-rinsing claim was false. Market research of a highly reliable nature (Dr. Kassarian, Tr. 1814-17, 1844-46) conducted by questioning a large number of recent purchasers of Sears' Lady Kenmore dishwashers revealed that a substantial proportion disagreed completely with the question, "Does not require prerinsing." Over half of recent Lady Kenmore purchasers surveyed, having used the machine in their homes, refused to register complete agreement with this statement (CX 125Z029). Over 70% of those surveyed refused to agree completely with the statement, "Washes pots and pans thoroughly" (CX 125Z030).

Notwithstanding this information obtained through market research from a large percentage of purchasers of the Lady Kenmore indicating that they had found the no scraping, no pre-rinsing claim untrue, Sears

continued to disseminate the representation nationwide over all media. Sears did not even conduct an inquiry to evaluate the propriety of the claim in view of the results of its survey, but continued to disseminate the claim through 1975 (CX 64E, F, 67, 69, 75).

But there is more to the situation than the foregoing. Sears conducted extensive market research in 1972 to find out what it was that members of the public most desired in a dishwasher (CX 136, 180, 205). This research showed that a large segment of the public wanted a dishwasher which eliminated the need for pre-scraping and pre-rinsing, and was willing to pay more for this feature (CX 136Z008 - Z009, 155H; Dr. Kassarian, Tr. 1858-63). The ability of a dishwasher to clean dishes on the upper rack as thoroughly as those on the bottom rack was also an important factor to the public (CX 140D, 180Z029 - Z033; Dr. Kassarian, Tr. 1911-17), as was the ability of a dishwasher to clean pots and pans (CX 140D, 180Z029-Z033; Dr. Kassarian, Tr. 1900-02, 1911-17, 1924-25).

Armed with the knowledge that the consumer wanted a dishwasher that would not require pre-scraping or pre-rinsing of dishes, including cooking and baking dishes, Sears and J. Walter Thompson Company, its advertising agency, planned and conducted the advertising campaign for Sears' dishwashers (see CX 142A, Y, Z028-029, 143E-M and O, 148-49, 151A, I, N and O, 165A-C). As an example, in a presentation to Sears and its advertising agency on the Lady Kenmore, dated February 18, 1972, the "Creative Objectives" of two commercials, one of which was "Birthday Cake" (CX 4), were stated (CX 193C):

To present the superiority of the Lady [83]Kenmore for its ability to eliminate scraping and pre-rinsing of dishes.

The campaign was effective. A "Mail Panel Awareness Tracking Study" (CX 130) conducted in two "waves" for Sears in December 1973 and July 1974 (CX 130D) revealed that 28% and 23% of persons contacted in waves 1 and 2, respectively, associated the no scraping, no pre-rinsing attribute with Sears' dishwashers, 23% and 21%, respectively, associated the attribute "clean pots and pans" with Sears' dishwashers, and 21% and 19%, respectively, associated "jets for scouring dishes" with Sears' dishwashers (CX 130J, Z002).

With no proof that the no scraping, no pre-rinsing representation for its dishwashers was true, and with actual evidence early in the advertising campaign in its possession and available that the claim was false (CX 88, 90, 125), Sears nonetheless disseminated the claim through all media nationwide.

Not only did Sears disseminate false advertising, exploiting what it had found the public wished for in a dishwasher, but Sears apparently

realized a commercial advantage in so doing. Sears increased its share of the dishwasher market from 26% in 1971 to 29% through August 1973 (CX 151C). Sears increased the sales of its top-of-the-line Lady Kenmore model from 35,029 units in 1971, when that model accounted for 10% of line sales, to 105,570 units in 1973, when that model accounted for 23% of line sales (CX 151E). Sears' market position was even higher as of the date of this proceeding, at which time Sears was the leading marketer of dishwashers to consumers with about one-third of the transcript in an *in camera* status).

The attribution of Sears' enhanced market position in the sale of dishwashers, in whole or in part, to the representations at issue in this proceeding admittedly requires that a causal relation be found between Sears' advertising and its increased market share. Such a causal relation is probably impossible of absolute proof, but is an appropriate subject of inference. Such an inference is reasonable based on this record. In the opinion of the law judge, deceptive and untrue advertising claims challenged in the complaint in this proceeding, extended to the growth of Sears' market share.

Sears is not a stranger to Commission proceedings. Only two years ago a cease and desist order was consented to by Sears settling a formal adjudication proceeding charging the use of misleading and deceptive "bait and switch" practices in the advertising and sale of "sewing machines, washers and dryers, and other major home appliances." *Sears, Roebuck and Co.*, 89 F.T.C. 229, 230 (1977). In a separate statement in that decision, then Chairman Engman and Commissioner Hanford characterized Sears' conduct as "a blatant bait-and-switch advertising scheme." 89 F.T.C. at 233. Prior violations are proper for consideration in determining the entry of a cease and desist order and the scope of its provisions. *Porter & Dietsch v. [84]F.T.C.*, 90 F.T.C. 770, 880-81 (1977), *modified*, Nos. 78-1324 and 78-1497 (7th Cir. August 8, 1979).

A cease and desist order must be entered. A broad order is essential not only to remedy the specific violation disclosed by the record, but to prevent future violations by Sears in the promotion of kindred appliances falling into the category of "major home appliances." Under the circumstances, "fencing in" is required. *Federal Trade Commission v. National Lead Company*, 352 U.S. 419, 451 (1957). The term "major home appliance" is not an arbitrary category but is a recognized industry term which has been defined by the Association of Home Appliance Manufacturers in its bylaws as follows (CX 288):

The term *major home appliance* means large, energy-operated appliances used in the

home and includes such products as room air conditioners, dishwashers, disposers, compactors, home laundry equipment, refrigerators and freezers, dehumidifiers, ranges and microwave ovens.

Sears' Motion to Dismiss

Sears prefaced its Proposed Findings of Fact and Conclusions of Law with a Motion to Dismiss the Complaint. The motion to dismiss is denied.

Sears' Affirmative Defenses

In its answer to the Commission's complaint, Sears raised four affirmative defenses, as noted in the Preliminary Statement to this decision. These affirmative defenses were first addressed in the pre-trial Order of March 10, 1978, in which Sears' second and fourth affirmative defenses were ruled as raising issues irrelevant to this proceeding. Sears' findings (RPF 198-202) and argument (RB, pp. 56-63) on these affirmative defenses fails to show that they have any validity. They are without merit and are rejected (see also CRB, pp. 28-36, 38).

Conclusions

1. The Federal Trade Commission has jurisdiction over Sears, Roebuck and Co. and over its acts and practices in the advertising, promotion, marketing and sale of dishwashers.
2. Sears, Roebuck and Co. at all times relevant hereto has been engaged in commerce as defined in the Federal Trade Commission Act and has been and now is in substantial competition in commerce with corporations, firms, and individuals in the sale of dishwashers.
3. Sears, Roebuck and Co. has disseminated false, unfair, misleading and deceptive advertisements in the promotion, marketing and sale of dishwashers. [85]
4. Sears, Roebuck and Co. has engaged in unfair and deceptive acts and practices, and unfair methods of competition, by disseminating advertisements making material representations and affirmative product claims without having a reasonable basis, and without having substantiation for such representations and claims.
5. The dissemination by Sears, Roebuck and Co. of false, misleading and deceptive advertisements has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said advertisements were and are true and into the purchase of substantial numbers of Sears' dishwashers by reason of said erroneous and mistaken belief.

6. The dissemination by Sears, Roebuck and Co. of false, misleading and deceptive advertisements, and the making of material representations and affirmative product claims without a reasonable basis and without having substantiation, were and are all to the prejudice and injury of the public and of Sears, Roebuck and Co.'s competitors, and constituted and now constitute unfair and deceptive acts and practices in or affecting commerce, and unfair methods of competition in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

7. This proceeding is in the public interest.

ORDER

I.

It is ordered, That Sears, Roebuck and Co., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of dishwashers, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any Sears dishwasher will completely remove, without prior rinsing or scraping, all residue and film from all dishes, and from pots and pans used in cooking and baking, according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers. [86]

2. Representing, directly or by implication, that dishes in the top rack of any Sears dishwasher will get as clean as those on the bottom rack without prior rinsing or scraping.

3. Representing, directly or by implication, that any Sears dishwasher destroys all harmful and other bacteria and microorganisms on dishes, pots and pans.

It shall be an affirmative defense to a compliance action brought under the preceding paragraphs for Sears, Roebuck and Co. to establish that the representation is truthful.

II.

It is further ordered, That Sears, Roebuck and Co., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or

other device, in connection with the advertising, offering for sale, sale or distribution of "major home appliances," in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. (a) Making any statements or representations, directly or by implication, concerning the performance of such products unless such statements or representations are true and unless, at the time the statements or representations are made, Sears, Roebuck and Co. possesses and relies on a reasonable basis for such statements or representations, which shall consist of competent and reliable tests, as defined in the next paragraph, or other competent and reliable evidence which substantiates such statements or representations. [87]

(b) For purposes of this order, a competent and reliable test is one in which persons with skill and expert knowledge in the field conduct the test and evaluate its results in an objective manner using testing procedures which insure accurate and reliable results. Such tests must be truly and fully representative of expectable consumer usage.

2. Misrepresenting in connection with the advertisement of any such products or in any other manner, directly or by implication, the purpose, content or conclusion of any test, experiment, demonstration, study, survey, report, or research.

3. Making any statements or representations, directly or by implication, in connection with the advertisement of any such products which are inconsistent in any material respect with any statements or representations contained directly or by implication in post purchase material(s) supplied to the purchasers of such products.

4. For purposes of this order, the term "major home appliance" includes air conditioning units (room or built-in), clothes washers, clothes dryers, disposers, dishwashers, trash compactors, refrigerators, refrigerator/freezers, freezers, ranges, microwave ovens, humidifiers, dehumidifiers, and any other product that falls into the category of major home appliances.

III.

It is further ordered, That Sears, Roebuck and Co., a corporation, its successors and assigns, and its officers, [88]representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of dishwashers or other "major home appliances," in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall maintain written records:

(a) Of all materials which were relied upon in making any claim or representation in advertising, sales materials, promotional materials, or post purchase materials, concerning the performance characteristics of any of Sears, Roebuck and Co.'s dishwashers or other major home appliances;

(b) Of all matter in their possession which contradicts, qualifies or calls into question any claim or representation in advertising, sales materials, promotional materials, or post purchase materials disseminated by Sears, Roebuck and Co., or by any advertising agency on behalf of Sears, Roebuck and Co., concerning the performance characteristics of any of Sears, Roebuck and Co.'s dishwashers or other major home appliances.

Such records shall be retained by Sears, Roebuck and Co. for a period of three years from the date such advertising, sales materials, promotional materials, or post purchase materials were last disseminated. Such records may be inspected by the staff of the Commission upon reasonable notice.

IV.

It is further ordered, That Sears, Roebuck and Co. shall notify the Commission at least 30 days prior to the effective date of any proposed change in it as a corporate respondent such as dissolution, assignment or sale resulting in the emergence of a [89]successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That Sears, Roebuck and Co. shall forthwith distribute a copy of this order to each of its operating divisions, and to each of its officers, agents, representatives and employees, engaged in or connected with the preparation and placement of advertisements for dishwashers or other major home appliances.

It is further ordered, That Sears, Roebuck and Co. shall within sixty (60) days after service upon it of this order, and at such other times as the Commission may require, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

APPENDIX A

The following charts contain the results of the D&M Center tests on the Sears dishwasher, which are recorded in CX 83Z007 - CX 83Z012:

WASHING RESULTS OF D&M CENTER TESTS

CX - 83Z007

Date	Food	Pot	Oven or Stove	Cooking Method		Wash Cycle	Washing Results (% Clean)
				Temp.	Time		
9/1/72	Eggs	SSS	Stove	#6	4 Min.	Normal	"retained soil"
	Eggs	SSS	Stove	#6	3 Min.	Normal	"retained soil"
	Eggs	AS	Stove	#7	4 Min.	Normal	100%
	Eggs	AS	Stove	#7	3 Min.	Normal	100%
	Cake	Cake Dish	Oven	325°	35 Min.	Normal	"clean"
9/5/72	Pork & Beans	Cass. Dish	Oven	400°	40 Min.	Normal	"clean"
	Eggs	AS	Stove	#8	2 Min.	Normal	"clean"
	Eggs	AS	Stove	#8	2 Min.	Normal	"clean"
	Eggs	SSS	Stove	#6	4 Min.	Normal	"retained soil"
	Eggs	SSS	Stove	#6	3 Min.	Normal	"retained soil"
9/6/72	Pork & Beans ¹	Cass. Dish	Oven	325°	40 Min.	Normal	"clean"
	Eggs	AS	Stove	#4	4½ Min.	Normal	50-75%
	Eggs	AS	Stove	#4	4½ Min.	(in upper rack) Normal	75%
	Eggs	SSS	Stove	#4	4½ Min.	(in lower rack) Normal	25-50%
	Eggs	SSS	Stove	#3	7 Min.	(in upper rack) Normal	25%
9/7/72	Pork & Beans	Cass. Dish	Oven	325°	55 Min.	(in lower rack) Normal	95%
	Eggs	AS	Stove	#4	7 Min.	Normal	95%
	Eggs	AS	Stove	#7	1 Min.	(in lower rack) Normal	25-50%
	Eggs	SSS	Stove	#4	N.R.	(in upper rack) Normal	75%
	Eggs	SSS	Stove	#3	12 Min.	Normal	50-75%
	Potatoes	Cass. Dish	Oven	350°	45 Min.	Normal	"clean"
	Macaroni	Cass. Dish	Oven	350°	35 Min.	Normal	"clean"
	Macaroni	Cass. Dish	Oven	350°	60 Min.	Normal	Film on Bottom
	Eggs	AS	Stove	#4	3 Min.	Normal	99%
	Eggs	AS	Stove	#4	2 Min.	Normal	100%
	Eggs	SSS	Stove	#3	2 Min.	Normal	75%
	Eggs	SSS	Stove	#3	2 Min.	Normal	85%
	Pork & Beans ²	Cass. Dish	Oven	325°	45 Min.	Normal	only burned on soil retained
	Cake	Cake Dish	Oven	325°	45 Min.	Normal	25-50%
	Cake	Cake Dish	Oven	325°	35 Min.	(in upper rack) Normal	"mark" retained
9/8/72	Eggs	AS	Stove	#4	4 Min.	(in lower rack) Normal	85%
	Eggs	AS	Stove	#4	N.R.	(in lower rack) Normal	100%
	Eggs	SSS	Stove	#4	4 Min.	(in upper rack) Normal	75%
	Eggs	SSS	Stove	#4	10 Min.	(in lower rack) Normal	50%
	Pork & Beans	Cass. Dish	Oven	350°	2 Hrs. 20 Min.	(in upper rack) Normal	"clean"

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WASHING RESULTS OF D&M CENTER TESTS

CX - 832008

Date	Food	Pot	Oven or Stove	Cooking Method		Wash Cycle	Washing Results (% Clean)
				Temp.	Time		
9/11/72	Eggs	AS	Stove	#4	7 Min.	Normal (in upper rack)	retained on upper edge
	Eggs	AS	Stove	#4	7 Min.	Normal (in lower rack)	very little retained
	Eggs	SSS	Stove	#4	7 Min.	Normal (in upper rack)	50%
	Eggs	SSS	Stove	#3	3½ Min.	Normal (in lower rack)	25%
	Cake	Cass. Dish	Oven	325°	35 Min.	Normal (in upper rack)	25%
	Cake	Cass. Dish	Oven	325°	35 Min.	Normal (in lower rack)	60-75%
	Macaroni	Cass. Dish	Oven	325°	60 Min.	Normal (in upper rack)	starch particles retained
	Macaroni	Cass. Dish	Oven	325°	60 Min.	Normal (in lower rack)	"almost clean"
	Cream of Rice	AS	Oven	350°	10 Min.	Normal	clean except
	Cream of Rice	AS	Oven	350°	10 Min.	Normal	for film
9/12/72	Cream of Rice	Cass. Dish	Oven	350°	10 Min.	Normal	clean except
	Cream of Rice	Cass. Dish	Oven	350°	10 Min.	Normal	for film
	Cheese Sauce	Skillet	Stove	#4	6 Min.	Normal (one wash)	"almost clean"
	Cheese Sauce	Cass. Dish	Stove	#4	6 Min.	Normal (one wash)	"almost clean"
	Macaroni	Cass. Dish	Oven	N.R.	30 Min.	Normal	some starch retained
	Eggs	AS	not cooked in pot			Normal	clean
	Eggs	SSS	not cooked in pot			Normal (in upper rack)	4 particles retained
	Eggs	SSS	Not cooked in pot			Normal (in lower rack)	2 particles retained
	Macaroni	N.R.	N.R.	N.R.	N.R.	Normal	4 particles retained
	Macaroni	N.R.	N.R.	N.R.	N.R.	Normal	17 particles retained
9/14/72	Oatmeal	Cass. Dish	N.R.	N.R.	N.R.	Normal	film over 75%
	Macaroni ³	Cass. Dish	Oven	350°	45 Min.	Normal (3 washes)	"clean"
	Macaroni ³	Cass. Dish	Oven	350°	40 Min.	Normal 3 washes: 4 washes:	75% 90%

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WASHING RESULTS OF D&M CENTER TESTS

CX - 83Z009

<u>Date</u>	<u>Food</u>	<u>Pot</u>	<u>Oven or Stove</u>	<u>Cooking Method</u>		<u>Wash Cycle</u>	<u>Washing Results (% Clean)</u>
				<u>Temp.</u>	<u>Time</u>		
9/15/72	Eggs	AS	Stove	#4	6 Min.	Normal	clean
	Eggs	SSS	Stove	#4	8 Min.	Normal	residue on sides
	Eggs	AS	Stove	#4	10 Min.	Normal	90%
	Eggs	SSS	Stove	#4	10 Min.	Normal	60%
	Cake	Cake Dish	Oven	350°	10 Min.	Normal	85%
	Cake	Cake Dish	Oven	350°	10 Min.	(in lower rack) Normal	75%
9/18/72	Eggs	AS	Stove	#4	6 Min.	(in upper rack) Normal	95%
	Eggs ⁴	As	Stove	#4	6 Min.	(1 wash) Normal	95%
	Eggs	SSS	Stove	#4	8 Min.	(1 wash) Normal	70%
	Eggs ⁴	SSS	Stove	#4	8 Min.	(1 wash) Normal	60%
	Macaroni	Cass. Dish	Oven	350°	45 Min.	(1 wash) Normal	80%
	Macaroni ⁴	Cass. Dish	Oven	350°	45 Min.	(1 wash) Normal	60%
	Cake	Cake Dish	Oven	350°	10 Min.	(1 wash) Normal	75%
	Cake ⁴	Cake Dish	Oven	350°	10 Min.	(1 wash) Normal	80%
	Eggs	AS	Stove	#4	6 Min.	(1 wash) Normal	100%
	Eggs ⁴	AS	Stove	#4	6 Min.	(2 washes) Normal	100%
	Eggs	SSS	Stove	#4	8 Min.	(2 washes) Normal	mostly clean
	Eggs ⁴	SSS	Stove	#4	8 Min.	(2 washes) Normal	N.R.
	Macaroni	Cass. Dish	Oven	350°	45 Min.	(2 washes) Normal	99%
	Macaroni ⁴	Cass. Dish	Oven	350°	45 Min.	(2 washes) Normal	75%
	Cake	Cake Dish	Oven	350°	10 Min.	(2 washes) Normal	85%
	Cake ⁴	Cake Dish	Oven	350°	10 Min.	(2 washes) Normal	N.R.
	Oatmeal	Aluminum Sauce Pan	Stove	N.R.	30 Min.	(2 washes) Normal	50%
	Rice	Cass. Dish	N.R.	N.R.	N.R.	(1 cycle) Normal	70%
	Eggs	N.R.	N.R.	N.R.	N.R.	(1 cycle) Normal	95%
	Rice	Skillet	N.R.	N.R.	N.R.	(1 cycle) Normal	90%

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WASHING RESULTS OF D&M CENTER TESTS

CX - 83Z010

Date	Food	Pot	Oven or Stove	Cooking Method		Wash Cycle	Washing Results (% Clean)
				Temp.	Time		
8/4/73	Macaroni ⁵	Cass. Dish	Oven	Lowest Setting	Until Dry	For each test: 5 Min. Wash) 2 Min. Rinse)	100%
	Macaroni ⁵	Cass. Dish	Oven	Lowest Setting	Until Dry	20 Min. Wash) 2 Min. Rinse)	100%
	Beefaroni ⁵	Cass. Dish	Oven	Lowest Setting	Until Dry	2 Min. Rinse)	100%
8/9/73	Macaroni ⁵	Cass. Dish	Oven	350°	45 Min.	20 Min. Wash)	film retained
	Beefaroni ⁵	Cass. Dish	Oven	350°	45 Min.	20 Min. Wash)	100%
9/26/73	Macaroni	Cass. Dish	Oven	350°	50 Min.	20 Min. Wash	100%
	Macaroni	Cass. Dish	Oven	350°	40 Min.	20 Min. Wash	100%
	Macaroni	Cass. Dish	Oven	350°	50 Min.	20 Min. Wash	100%

Abbreviations

AS - Aluminum Skillet
 SSS - Stainless Steel Skillet
 N.R. - Not Recorded

Cass. Dish - Pyrex Casserole Dish
 Temp. - Cooking Temperature;
 # refers to stove setting from
 #1 (low) to #8 (high)

Footnotes: All tests allowed pots to stand for two hours after baking and before placing in dishwasher, except those footnoted:

1. Casserole dish with pork and beans allowed to stand one hour and 20 minutes after baking and before placing in dishwasher.
2. Casserole dish with pork and beans allowed to stand 24 hours after baking and before placing in dishwasher.
3. Casserole dishes with macaroni and cheese allowed to stand 24 hours before placing in dishwasher.
4. Each of these tests involved allowing the pots to stand for 24 hours before placing in dishwasher.
5. Each of these tests involved allowing the casserole dishes to stand for 36 hours before placing in dishwasher.

From October 6, 1972, to October 25, 1972, tests run at D&M Center involved the following food having been prepared as follows:

Cake - In cake dish; in oven; at 325°; 40 minutes.

Macaroni - In casserole dish; in oven; at 350°; 40 minutes.

Oatmeal - In aluminum sauce pan; on stove; at #8 setting for 2 minutes, then #4 setting for 20 minutes.

Egg Omelet - In aluminum skillet; on stove; at #4 setting; 10 minutes.

The results of these tests are as follows:

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WASHING RESULTS OF D&M CENTER TESTS

CX - 83Z011

<u>Date</u>	<u>Wash Cycle</u>	<u>Cake</u>	<u>Wash Results (% Clean)</u>		
			<u>Macaroni</u>	<u>Oatmeal</u>	<u>Omelet</u>
10/6/72	5 Min.	15%	10%	2%	90%
	10 Min.	30%	25%	15%	95%
	15 Min.	35%	30%	20%	95%
	20 Min.	40%	55%	30%	95%
	25 Min.	45%	65%	45%	95%
	30 Min.	50%	70%	50%	95%
	35 Min.	60%	70%	70%	95%
	3 Min.	75%	80%	80%	N.R.
	5 Min.	75%	80%	80%	95%
	10 Min.	85%	80%	85%	95%
	15 Min.	90%	85%	90%	95%
	20 Min.	90%	85%	90%	95%
	25 Min.	90%	85%	90%	95%
10/9/72	35 Min. Wash	50%	75%	50%	15%
	3 Min. Rinse	55%	80%	60%	20%
	3 Min. Rinse	60%	85%	65%	25%
	25 Min. Wash	95%	95%	95%	40%
10/10/72	20 Min.	Film	65%	30%	90%
10/11/72	30 Min.	35%	70%	95%	99%
	10 Min.	15%	25%	30%	80%
10/12/72	15 Min.	50%	50%	35%	80%
	20 Min.	Not Tested	65%	Not Tested	90%
10/13/72	25 Min.	90%	55%	35%	85%
10/16/72	20 Min. Wash)				
	3 Min. Rinse)				
	3 Min. Rinse)				
	20 Min. Wash)	75%	65%	98%	100%
	3 Min. Rinse)				
10/17/72	3 Min. Rinse)				
	20 Min. Wash)				
	3 Min. Rinse)	90%	75%	98%	90%
	3 Min. Rinse)				
	3 Min. Rinse)				
	Normal Cycle	80%	70%	98%	95%
10/18/72	Normal Cycle	80%	50%	80%	98%
10/19/72	20 Min. Wash)				
	3 Min. Rinse)				
	3 Min. Rinse)				
	20 Min. Wash)	85%	85%	90%	95%
	3 Min. Rinse)				
	3 Min. Rinse)				
	Normal Cycle	40%	40%	65%	80%

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WASHING RESULTS OF D&M CENTER TESTS

CX - 832012

<u>Date</u>	<u>Wash Cycle</u>	<u>Cake</u>	<u>Wash Results (% Clean)</u>		
			<u>Macaroni</u>	<u>Oatmeal</u>	<u>Omelet</u>
10/20/72	Normal Cycle	Not Tested	75%	Not Tested	Not Tested
10/23/72	Normal Cycle	Not Tested	65%	Not Tested	Not Tested
10/24/72	Normal Cycle	Not Tested	75%	Not Tested	Not Tested
10/25/72	20 Min. Wash)	Not Tested	65%	Not Tested	Not Tested
	3½ Min. Rinse)				
	3½ Min. Rinse)				
	8 Min. Wash)				
	4 Min. Rinse)				
10/27/72	5 Min. Rinse)	Not Tested	"No Retained Soil"	Not Tested	Not Tested
	8 Min. Wash)				
	3½ Min. Rinse)				
	3½ Min. Rinse)				
	20 Min. Wash)				
	4 Min. Rinse)				
	5 Min. Rinse)				

APPENDIX B

QUALIFICATIONS OF WITNESSES

Patty J. Annis

Patty J. Annis is an Assistant Professor of Household Equipment in the Department of Family Economics at Kansas State University, where she is responsible for all of the household equipment courses taught in the Department of Family Economics (Annis, Tr. 2246, 2248; CX 289A). She is currently in charge of the Home Management Program at Kansas State (Annis, Tr. 2249-50). She has a B.S. degree in Home Economics from Mississippi State College for Women and an M.S. degree from the University of Tennessee (CX 289A; Annis, Tr. 2248). Her field specialization is inside air contamination control (Annis, Tr. 2250-52; CX 289A). Professor Annis has experience in the use, testing and analysis procedures with regard to basic household equipment including dishwashers and their performance vis-a-vis different types of food soils (Annis, Tr. 2254-56, 2260-63, 2265-67). She has taught courses and done work in areas dealing with industry standards for appliances such as dishwashers (Annis, 2256-57). Professor Annis is a member of College Educators in Home Equipment, the ASTM Committee on Vacuum Cleaners and the American Home Economics Association (CX 289A; Annis, 2253-54).

James L. Brown

Mr. Brown is currently Managing Director of Customer Services of the National Sanitation Foundation ("NSF") in Ann Arbor, Michigan (Brown, Tr. 2814, 2817; CX 290A). The National Sanitation Foundation is a non-profit organization which works with industry, user groups and regulatory agencies in the development of standards for food service equipment, including commercial spray-type dishwashers, and in the evaluation of that equipment (CX 302-305, 319; Brown, Tr. 2814-16). Mr. Brown's Customer Services group evaluates and tests dishwashers in manufacturers' plants, participates in coordinating tests for dishwashers in the NSF laboratory, and works in developing test procedures for such testing (Brown, Tr. 2819). Mr. Brown is also Resident

Lecturer on Environmental Health at the University of Michigan School of Public Health, covering sanitization and commercial dishwashers in the graduate courses he teaches (Brown, Tr. 2842-44; CX 290A). Mr. Brown holds a B.S. degree from the University of Toledo and a Masters of Public Health degree from the University of Michigan; his coursework included identifying the numbers and kinds of microorganisms on surfaces, thermal destruction of microorganisms and proper laboratory procedure (Brown, Tr. 2826-27). In his experience as a field sanitarian and supervisor, Mr. Brown has evaluated dishwashers for their ability to sanitize dishes; while at NSF, he has evaluated commercial dishwashers which are very similar in their design to home-type dishwashers (Brown, Tr. 2827-30). He has been involved with setting standards for commercial dishwashing machines since 1964 and did much of the laboratory work for the 1964 NSF study (CX 300) on commercial dishwashers (Brown, Tr. 2831-32; CX 290B). Mr. Brown has authored several publications including one entitled, "Mechanical Dishwashing" (CX 309), which is used to train sanitarians in the field evaluation of dishwashers (Brown, Tr. 2841-42; CX 290B). He is a member of several professional organizations including the Intersociety Academy for the Certification of Sanitarians and the American Public Health Association (Brown, Tr. 2844-46; CX 290A).

Dr. Frank L. Bryan

Dr. Bryan is currently the Chief of Foodborne Disease, Bureau of Training, at the Center for Disease Control in Atlanta, Georgia (Dr. Bryan, Tr. 2692; CX 296A). The Center for Disease Control, an agency of the U.S. Department of Health, Education and Welfare, has primary responsibility for disease surveillance throughout the country, laboratory support to the states, and demonstration and training of disease control (Dr. Bryan, Tr. 2592). Dr. Bryan received his B.S. degree from Indiana University, majoring in Public Health, and his Masters of Public Health degree from the University of Michigan (CX 296H). He obtained his Ph.D. degree at Iowa State University, majoring in Bacteriology with a minor in Food Technology (CX 296G). Since working at the Center for Disease Control, Dr. Bryan has conducted a major study on the evaluation of home-type dishwashers for use in small institutions (Dr. Bryan, Tr. 2598-2606; CX 296E). This study was published in 1975 (CX 307). He has held training sessions in which he dealt with dishwashers (Dr. Bryan, Tr. 2626). Dr. Bryan has also done work involving the thermal destruction of microorganisms and has had to assess the presence, numbers and kinds of microorganisms on foods and surfaces (Dr. Bryan, Tr. 2596-97, 2626-27). Dr. Bryan is one of five representatives from the United States who sit on the 21 member International Commission on Microbiological Specifications for Foods (Dr. Bryan, Tr. 2628-29; CX 296K). He is a member of, and frequently has served as an officer on, numerous other professional organizations and committees, including the American Society for Microbiology, Institute of Food Technologists, International Association of Milk, Food and Environmental Sanitarians, American Public Health Association, New York Academy of Sciences, Sigma Xi-Scientific Research Society of North America, and the National Association of Environmental Health (CX 296 J-K). Dr. Bryan has authored numerous publications dealing with foodborne diseases, pathogenic microorganisms, and their thermal destruction (Dr. Bryan, Tr. 2629-2636; CX 296 B-F).

Shari Bryant

Ms. Bryant is a free-lance home economist specializing in consumer affairs; her clients have included corporations, advertising agencies, financial institutions and public relations firms (RX 128, p. 2; Bryant, Tr. 4028, 4030). Her previous positions were as the Director of Household Finance Corporation's Money Management Institute, Manager of Wilson Food Company's Home Service Department, food lecturer and cooking school director for Rural Gravure Publications, and staff home economist with Smith Bucklin Trade Association Management Firm (RX 128, p. 2; Bryant, Tr. 4010-27). Ms. Bryant has a B.S. degree in Home Economics from Northern Illinois University (RX 128, p. 2; Bryant, Tr. 4004). She has been a member of various professional societies, including the American Home Economics Association, Grocery Manufacturers of America, and Chicago Better Business Bureau (RX 128, pp. 2-3; Bryant, Tr. 4038-43). Ms. Bryant has general experience in food preparation procedures, consumer use of dishwashers, and normal kitchen practices (RX 128, p. 2; Bryant, Tr. 4005-09, 4012-14, 4016-19, 4022, 4033, 4037-38).

Dr. Patricia Charache

Dr. Charache holds numerous current appointments at Johns Hopkins University School of Medicine and Johns Hopkins Hospital, including the following positions among others: Associate Professor of Laboratory Medicine and Director of the Microbiology Division of the Departments of Pathology; Associate Professor of Medicine, Member of the Infectious Disease Division; Director of the Microbiology Laboratories; and Chairperson of the Committee on Infection Control (CX 365A). Dr. Charache is extensively involved in the areas of medical microbiology, disease prevention and identification, infection control, and patient care in her multiple capacities as teacher, researcher, staff and laboratory supervisor, hospital physician, and member or head of various medical school and hospital committees and departments (Dr. Charache, Tr. 6047-53). As Director of the Microbiology Division of the Department of Pathology, she has 55 full-time people under her supervision (Dr. Charache, Tr. 6047-48). Prior to her present position, Dr. Charache was a Research Associate at Harvard Medical School and Children's Hospital in Boston, where she studied immunology responses and infection control in patients; she has also served as Assistant Chief of Medicine for the Baltimore City Hospitals (CX 365B; Dr. Charache, Tr. 6054-55). Her areas of specialty are in infectious disease, medical microbiology, and epidemiology as it pertains to infection control, epidemiology, smoking, etc. (Dr. Charache, Tr. 6055). Dr. Charache graduated from New York University School of Medicine, where she received various honors and awards for academic excellence (Dr. Charache, Tr. 6055-57). She also has received other honors, awards and fellowships which demonstrate her achievement in the medical profession (CX 365B, C; Dr. Charache, Tr. 6057-61, 6072). Dr. Charache is a member of numerous honorary and professional societies, such as the American Society for Microbiology, American Association for the Advancement of Science, American College for Clinical Pharmacology, and Infectious Diseases Society of America, among others (CX 365C; Dr. Charache, Tr. 6061-67). She has served as a consultant to NIH's Board of Scientific Counselors for the National Institute for Allergy and Infectious Diseases (CX 365C; Dr. Charache, Tr. 6067-68). She presently serves as a consultant to the U.S. Department of Defense's Ad Hoc Study Group on Bacterial and Mycotic Diseases, as well as to other organizations (CX 365C; Dr. Charache, Tr. 6068-70). Dr. Charache has had numerous editorial appointments and has written many published articles and books (CX 365C-H; Dr. Charache, Tr. 6070-73). Finally, Dr. Charache has done work involving sterilization procedures, thermal destruction of microorganisms, bacterial spores,

botulism, sanitization procedures, and the susceptibility of infants to various diseases (Dr. Charache, Tr. 6075-78).

Anthony Eberwein

Mr. Eberwein is presently president of Installations by Anthony, Inc., in southern Florida, a company which installs home appliances and provides consulting services to consumers and builders (Eberwein, Tr. 950). Previously, he worked for Canadian General Electric Co. ("CGE" from 1954-1964), holding several successive positions as a Field Service Technician, District Product Service Trainer, and National Service Trainer. In this last capacity, he assisted in writing the service manuals for CGE personnel and servicing dealers, the installation instructions for major appliances, and the customer user books for the products manufactured in Canada (Eberwein, Tr. 954, 956-57; CX 318A). From 1964 to 1975, he worked for General Electric Co. in the United States, holding successive positions as a Field Service Technician, Engineering Laboratory Technician and Dishwasher Performance Specialist (Eberwein, Tr. 957-63; CX 318A-B). Throughout his career, Mr. Eberwein has spent extensive amounts of time working with and testing dishwashers (Eberwein, Tr. 952-55; 959-63; CX 318A-B). He has also contributed towards establishing wash performance standards in the dishwasher industry (Eberwein, Tr. 963). Mr. Eberwein works with and is familiar with the mechanical design and operation of Sears' dishwashers, including the Lady Kenmore model (Eberwein, Tr. 952-53).

Virginia B. Ferguson

Virginia Ferguson is a Research Consultant in the Food and Agribusiness Section of Arthur D. Little in Cambridge, Massachusetts (Ferguson, Tr. 1654; CX 292A). Arthur D. Little is an independent research organization (Sullivan, Tr. 1403-04). Prior to that position, she worked as a Food Chemist at the Foods Research Laboratory, Inc. (CX 292A; Ferguson, Tr. 1657). Ms. Ferguson received her B.S. degree in Education, majoring in Foods and Nutrition, from Framingham State College, and her M.S. degree in Foods and Nutrition from Cornell University (CX 292A; Ferguson, Tr. 1658-59). Her experience is in the areas of analytical testing and evaluation of food products, flavor evaluation, product development, development of test designs and procedures for the evaluation of food products and as substantiation for food advertising claims, and adhered food soils (Ferguson, Tr. 1657-58, 1660-61, 1669-70; CX 292A). Ms. Ferguson is a member of the Institute of Food Technologists and a former Secretary for the Northeast Section. She is also a member of the Institute's Sensory Evaluation Division and the Massachusetts Home Economics Association (CX 292A; Ferguson, Tr. 1655-56).

Barbara J. Fraser

Ms. Fraser has been employed by Design and Manufacturing Corporation ("D&M"), the maker of Sears' dishwashers, since 1969, initially starting out as a laboratory technician doing some work in chemistry and gradually assuming duties as a technician in the engineering field (Fraser, Tr. 5080). Since 1976, she has been employed in D&M's Engineering Department as an engineer (Fraser, Tr. 5080). Ms. Fraser has a B.S. degree in Electrical Engineering from Purdue University (Fraser, Tr. 5081). At D&M, her functions and duties have included testing Sears' and competitors' dishwashers, designing tests, doing research on wash systems and in other areas, and designing cycles for dishwashers (Fraser, Tr. 5080-82). At one point, while still a technician, she was put in charge of a dishwasher testing group at D&M (Fraser, Tr. 5084).

Dr. Glyn J. Godwin

Dr. Godwin received his B.S. and M.S. degrees in Microbiology from Southeastern Louisiana University, and has a Ph.D. degree in Food Science from Louisiana State University (CX 293A). In the past, he was Assistant Professor of Food Microbiology and Toxicology at the University of Rhode Island, during which time he also served as food science expert for the State of Rhode Island (CX 293A; Dr. Godwin, Tr. 2029-30). He is a Registered Food, Dairy, Industrial, Agricultural and Sanitation Microbiologist (CX 293A; Dr. Godwin, Tr. 2035-36). During the course of his work, Dr. Godwin focused on food processing and food microbiological problems for the food processing industry within Rhode Island (Dr. Godwin, Tr. 2029-31), and designed and conducted scientific experiments associated with foods (Dr. Godwin, Tr. 2039). He has authored articles on food processing, canning and food safety and has taught university courses on the same subjects (CX 293B). Dr. Godwin is a member of the Institute of Food Technologists belonging to its Division of Quality Assurance and Division of Food Microbiology. He is also a member of the American Society for Microbiology as well as a member of various honorary societies (CX 293A-B; Dr. Godwin, Tr. 2031-34).

Dr. Harold H. Kassaijian

Dr. Kassaijian has been a Professor at the Graduate School of Management at UCLA since 1961, and has taught courses in consumer behavior, marketing, mass communications, statistics, advertising, market research and research methodology (CX 294A, Dr. Kassaijian, Tr. 1798-99). Dr. Kassaijian has also conducted numerous research studies for individuals, government and industry on topics such as politics, product testing, attitude and opinion research, media research, and many aspects of marketing and consumer behavior (Dr. Kassaijian, Tr. 1799-1800; CX 294A). He has served as a consultant to local, state and federal government, industry, and groups such as the National Science Foundation and the Public Broadcasting Service (CX 294A-B; Dr. Kassaijian, Tr. 1802-04). Dr. Kassaijian received his B.A., M.A. and Ph.D. degrees in psychology from UCLA, and is a licensed California psychologist (CX 294A). He has been President of the Pacific Chapter of the American Association for Public Opinion Research from 1969-1970 and a member of their Standards and Ethics Committee on the national level in 1975. He served as President in 1977 of the Association for Consumer Research. Dr. Kassaijian is also a member of the American Psychological Association, American Marketing Association and American Statistical Association (CX 294B; Dr. Kassaijian, Tr. 1800-01). In 1972, he was elected as a Fellow of the American Psychological Association and, in a 1975 opinion poll of marketing educators throughout the country, Dr. Kassaijian was selected as among the top 12 leaders in marketing (Dr. Kassaijian, Tr. 1808-09; CX 294C). Dr. Kassaijian serves as an Academic Editor for West Publishing Company, where he appraises the quality of marketing and consumer research manuscripts submitted for publication (CX 294B; Dr. Kassaijian, Tr. 1806). He has also been, or still is, a member of the editorial board or reviewer for the Journal of Marketing (1970-1976), Journal of Consumer Affairs (1971-1974), Journal of Advertising (1975-present), Journal of Applied Psychology (1976), Journal of Business Research (1976-present), and the Journal of Consumer Research (1973-present); consequently Dr. Kassaijian has reviewed and made recommendations on hundreds of consumer research articles (CX 294B; Dr. Kassaijian, Tr. 1804-06). Dr. Kassaijian has also authored numerous books and articles in the field of consumer research (CX 294C-I; Dr. Kassaijian, Tr. 1809-13).

Dr. Renny S. Norman

Dr. Norman is Engineering Advisor in the Engineering Division of Illinois Institute of Technology Research Institute ("IIT") in Chicago (RX 127, p. 3; Dr. Norman, Tr. 3154). The Research Institute is a not-for-profit research organization associated with the Illinois Institute of Technology and performs contract research and development programs for government and industry (Dr. Norman, Tr. 3180-81). He has been employed by IIT since 1966, except for the period September 1969 to September 1972, during which he was a full time graduate student (RX 127, p. 2; Dr. Norman, Tr. 3177-79). Prior to 1966, he was employed for five years as a propulsion research engineer at NASA's Lewis Research Center in Cleveland (RX 127, p. 2; Dr. Norman, Tr. 3175-77). Dr. Norman has a B.S. degree in Mechanical Engineering from Stanford University, an M.S. degree in Aeronautical Engineering from Purdue University, and a Ph.D. degree in Mechanical Engineering from IIT (RX 127, p. 2; Dr. Norman, Tr. 3166-67, 3169, 3173). He also studied experimental aerodynamics for one year in Belgium at a school sponsored by NATO (RX 127, p. 2; Dr. Norman, Tr. 3171-73). Upon joining IIT, Dr. Norman's initial responsibilities as an associate engineer included projects on aerodynamics and fluid mechanics (RX 127, p. 2; Dr. Norman, Tr. 3177-78). Subsequently, he has held successive positions at IIT as a Research Engineer, Senior Research Engineer, Manager of the Acoustics and Fluid Mechanics Section of the Engineering Mechanics Division and, presently, Engineering Advisor (RX 127, pp. 2-3; Dr. Norman, Tr. 3178-79). Since 1974, Dr. Norman has supervised a group of seven engineers in the areas of acoustics, fluid mechanics, product design, experimental measurements, and instrumentation design, in addition to his current supervisory duties as Engineering Advisor (RX 127, pp. 2-3; Dr. Norman, Tr. 3179-80). During his career, Dr. Norman has been extensively involved in designing test procedures, conducting tests, preparing test reports, and designing instrumentation (Dr. Norman, Tr. 3174, 3176-79, 3182-88).

Dr. Zakarias J. Ordal

Dr. Ordal is a Professor in the Department of Food Science and the Department of Microbiology at the University of Illinois, where he has been since 1949 (Dr. Ordal, Tr. 5579, 5585). Previously, he was on the staff of the University of Illinois College of Medicine and also worked in industry for a few years (Dr. Ordal, Tr. 5585, 5593). Since 1940, the positions that Dr. Ordal has held have always been in the fields of bacteriology and microbiology (Dr. Ordal, Tr. 5593-94). Dr. Ordal received his Ph.D. degree in Bacteriology from the University of Minnesota (Dr. Ordal, Tr. 5592-93). During his teaching career, he has supervised graduate students and taught courses dealing with food and industrial microbiology, the destruction or reduction of bacterial populations through physical stresses such as heat, commercial canning, spores and organisms such as botulism, and the principles of sanitation in the food processing industry (Dr. Ordal, Tr. 5585-90). The areas in which Dr. Ordal has research interests include the following: bacterial spore activation, germination and outgrowth (breaking the dormancy or resistant state of the spore); injury and recovery of bacterial cells; sporulation (the process through which a vegetative cell is converted to a spore); physiology of bacterial spores; and bacterial swab testing (Dr. Ordal, Tr. 5580-85, 5591). His memberships in professional organizations include the American Academy for Microbiology, Institute of Food Technologists, and Association of Milk, Food and Dairy Sanitarians (Dr. Ordal, Tr. 5594-95). He has been involved in activities under the aegis of the National Research Council of the National Academy of Sciences, Department of Defense, Department of Health, Education and Welfare, and Food and Drug Administration (Dr. Ordal, Tr. 5595-

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96). Dr. Ordal is the author of many scientific publications and has written several papers on the effects of physical stresses on bacterial cells (Dr. Ordal, Tr. 5580-85).

Frederick Sullivan

Frederick Sullivan is currently Senior Research Chemist and Project Director in the Food and Agribusiness Section of Arthur D. Little in Cambridge, Massachusetts, a company he has been with for 31 years. Arthur D. Little is an independent research organization (Sullivan, Tr. 1403-04; CX 295A). Mr. Sullivan has extensive experience in the scientific testing and evaluation of household products, dishwasher and commercial detergents, household appliances such as refrigerators and air conditioners, and food soils (CX 295A-B). He has participated in dishwasher experiments using commercial detergents (CX 295A). Mr. Sullivan has written several publications involving the testing of chemical substances (CX 295D-E). He is a member of the American Chemical Association, the Institute of Food Technologists, and the New England Council of the American Society for Testing Materials. He is past Chairman of the American Society for Testing and Materials Committee E-18 on Sensory Evaluation of Materials and Products (CX 295C).

OPINION OF THE COMMISSION

By DIXON, *Commissioner*:

This case involves a challenge to the advertising of various performance characteristics of home dishwashers. Complaint in the matter was issued on November 20, 1977, and charged Sears, Roebuck and Co. ("Sears"), and its advertising agency, J. Walter Thompson, with disseminating deceptive and unfair advertisements in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as part of a campaign to promote sales of the Lady Kenmore dishwasher. In particular, the complaint alleged that Sears and J. Walter Thompson had made the following claims, for which they lacked any reasonable basis:

1. the Lady Kenmore dishwasher will completely remove, without prior rinsing or scraping, all residue and film from dishes, pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers; [2]
2. dishes in the top rack of the Lady Kenmore dishwasher will get as clean as those in the bottom rack without prior rinsing or scraping;
3. the Lady Kenmore "Sani-Wash" cycle, by giving dishes an "extra-hot 155 degree final rinse," destroys all harmful and other bacteria and microorganisms on the dishes and pots and pans.

The complaint also alleged that the first and third of the foregoing claims were false, as well as unsubstantiated, and that Sears had further violated Section 5 of the FTC Act by disseminating advertise-

ments depicting a demonstration that was misrepresented as proving the truth of the claim that the Lady Kenmore eliminated the need for pre-rinsing and scraping of pots, pans, and dishes. Finally, the complaint charged that respondents had violated Section 5 of the FTC Act by disseminating a claim in their advertisements (that the Lady Kenmore eliminated the need for pre-rinsing and scraping) that was contradicted by instructions in the Lady Kenmore Owner's Manual. (I.D. p. 2)¹

Following pre-trial proceedings, respondent J. Walter Thompson signed a consent agreement, and was removed from the adjudication. Hearings on the charges against respondent Sears were then held before Administrative Law Judge (ALJ) Daniel Hanscom, who entered an initial decision sustaining all allegations of the complaint, and recommended entry of an order prohibiting various misrepresentations and requiring that Sears maintain substantiation in the future for all advertisements of "major home appliances."

This matter is before the Commission upon an appeal by Sears from one of Judge Hanscom's findings of liability, and from several provisions of the order that he entered. Sears does not challenge the ALJ's finding that it misrepresented that the Lady Kenmore would eliminate the need for pre-rinsing or scraping of dishes, pots, and pans. Nor does Sears challenge the finding that it lacked substantiation for this claim, or [3]for the claim that dishes on the top rack would be cleaned as well as those on the bottom rack of the Lady Kenmore. (TROA 3) Sears does, however, contest the ALJ's finding that it misrepresented that the Lady Kenmore would sterilize dishes, and the ALJ's recommendation that Sears be required to maintain substantiation for all future advertisements of "major home appliances" as defined in the order. Our review of Sears' appeal follows.

I. Sani-Wash Issue

The Sears Lady Kenmore dishwasher comes equipped with a "Sani-Wash" cycle, that is designed to provide dishes with a 2 minute wash in water that has been heated to 155 degrees fahrenheit. The benefits of this feature were described by Sears in its advertising as follows:

¹ The following abbreviations will be used in this opinion:

I.D.	- Initial Decision, Finding No.
I.D. p.	- Initial Decision, Page No.
Tr.	- Transcript of Testimony, Page No.
CX	- Complaint Counsel's Exhibit No.
RX	- Respondent's Exhibit No.
TROA	- Transcript of Oral Argument Before the Commission, Page No.

"SANI-WASH is her way of getting dishes hygienically clean. It gives your dishes a final rinse in 155° water. Which is especially nice for glasses and baby bottles. CX-3

The complaint alleged that messages of the foregoing sort implied to consumers that the Sani-Wash cycle would "sterilize" dishes in the clinical sense, that is, rid them of all living microorganisms and bacteria, harmful or otherwise.

Sears acknowledges that the Sani-Wash cycle will not "sterilize" dishes,² but it denies strenuously that its advertising implied that the Sani-Wash cycle would do this. It argues, rather, that the term "hygienically clean" means simply a state in which bacterial populations are reduced to levels that are universally recognized as safe from a public health perspective.

In rejecting this contention, Judge Hanscom focused upon the reference to "baby bottles" in Sears' advertising, observing that many consumers are likely to associate the sanitization of baby bottles with the process of boiling, [4]which consumers may assume results in sterilizing the bottles. (I.D. pp. 80-81) Sears' reply is that boiling baby bottles does not sterilize them, and that the Sani-Wash cycle is likely to do as much to reduce the bacterial population on a baby bottle as is boiling. (TROA 16)

A threshold question in this dispute is what message is conveyed by the claim that the Sani-Wash cycle will get dishes "hygienically clean." Judge Hanscom, upon review of the advertisements, concluded that the complaint had correctly alleged that such advertising represented that the Sani-Wash cycle would kill *all* microorganisms. Sears objects to this finding, and upon our own review, we agree with its objections.

It is well established that the Commission may rely upon the text of an advertisement itself to interpret the advertisement's meaning. *Carter Products, Inc. v. FTC*, 323 F.2d 523, 528 (5th Cir. 1963); *J.B. Williams Co., Inc. v. FTC*, 381 F.2d 884, 889 (6th Cir. 1967). Accordingly, Judge Hanscom did not err in turning to the text of the advertisements to discern what they represented. Unfortunately, the term "hygienically clean" appears rarely in common parlance. Sears observes that the term has been used by both the General Services Administration and the United States Department of Agriculture to refer to levels of sanitization short of complete sterilization. (RX 114-5; CX 248-B, E; Tr. 5427). Obviously, however, use of the term in publications not designed for general circulation can be at best of limited value in determining the message that such a term would

² Sears' Appeal Brief, p. 10n. - While acknowledging that the time-temperature combination achieved by the Sani-Wash cycle will not guarantee sterilization in all cases, Sears suggests that it may achieve sterilization in some, depending upon the nature of the bacterial colonies present. The Sani-Wash cycle will not kill certain thermophiles and bacterial spores. (Tr. 2054-2058)

convey when disseminated in mass advertising, especially when coupled with other references, such as those to baby bottles.

In response to this point, Sears observes that only a small number of the Sani-Wash advertisements referred to "baby bottles" and that even these spoke of Sani-Wash being especially nice for "*glasses* and baby bottles", thereby diluting the implied analogy to boiling.

It is hornbook law that where an advertisement is subject to two or more possible interpretations, an advertiser will be liable for the truth of each such possible meaning. *Rhodes Pharmacal Co., Inc. v. FTC*, 208 F.2d 382, 387 (7th Cir. 1953), *aff'd*, 348 U.S. 940 (1955). Before this principle may come into play, however, it must first be determined that an advertisement is reasonably subject to some interpretation that is false. In this respect we find the inferences urged by either side to be roughly equal in merit, or lack thereof, and that being so, Sears must prevail. [5]

The foregoing is not to say, however, that we find Sears' advertising of the Sani-Wash cycle to have been "hygienically clean" from a legal point of view. Sears' advertising was obviously designed to convey *some* health-related message to consumers. Sears contends that its ads represented simply that Sani-Wash would sanitize dishes to a degree deemed satisfactory from a public health perspective. (Gets dishes so clean you can eat off them!) There is no doubt that Sears' advertisements did convey *at least* this much, but the further clear inference to be drawn from the advertisements, we believe, is that the Sani-Wash cycle would provide a sanitation benefit significantly in excess of that afforded by the regular cycles of a dishwasher. This message is clearly conveyed by references to the Sani-cycle's "*extra-hot*" 155 degree rinse that leaves dishes "hygienically clean." The reference to a special feature, the extra-hot rinse, combined with use of an uncommon term "hygienically clean" to describe the result, would be likely to lead an average reader to conclude that the Sani-Wash cycle does, indeed, provide a health benefit that a dishwasher without an extra-hot sanitization cycle does not.

As to whether the foregoing representation is or is not true, or substantiated, the record is unclear, in part, no doubt, because this representation was not pleaded in the complaint as having been made by Sears, nor was the case tried on this basis. There is evidence to suggest that the regular wash cycle of a dishwasher will sanitize dishes to levels that are deemed satisfactory from a public health perspective, and that are practically indistinguishable from the level of sanitization achieved by Sani-Wash. (Tr. 2222-3) On the other hand, Sears contends that the Sani-Wash cycle *ensures* that sanitization will occur, by guaranteeing water temperatures at 155 degrees, while a dishwasher

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without a sanitization cycle could not in every case be *relied upon* to achieve a time-temperature combination sufficient to effect the requisite level of germ destruction. (TROA 9)³

To resolve this conflict, we might well, ordinarily, remand the case for receipt of further evidence, or at least further findings by the ALJ. Because Judge Hanscom construed Sears' advertising to promise sterilization, he did not evaluate the extensive testimony regarding the precise extent of sanitization benefits provided by the Lady Kenmore. Moreover, it is likely that the trial did not give Sears fair notice that it should defend the issue of the comparative benefits of the Sani-Wash cycle. (See, e.g., I.D. 189; Tr. 5653, 5657, 5662) In this case, however, a remand would be inappropriate, because [6] the challenged claim has been halted and, more importantly, because Sears does not dispute that other evidence of record justifies entry of an order prohibiting at least false performance claims for dishwashers. Such an order would cover future representations regarding the sanitizing capabilities of the Lady Kenmore, if they are resumed.

II. Scope of the Order

A. Introduction

While we are unable to conclude that Sears misrepresented that its Lady Kenmore would sterilize dishes, the record leaves no doubt, and indeed, Sears does not contest, (TROA 3) that it did misrepresent the capabilities of the Lady Kenmore in two other highly significant respects. First, Sears claimed that the Lady Kenmore would eliminate the need for scraping or pre-rinsing all dishes, pots, and pans dirtied under circumstances normally encountered in the kitchen, and second, Sears represented that dishes on the top rack of the Lady Kenmore could be cleaned as thoroughly as those on the bottom. Both claims were unsubstantiated, and the first is shown by the record in this case to be false.

The claims in question were made as part of an effort by Sears, as described by its advertising agency, to

transform the consumer image [of the Lady Kenmore] from a 'price' brand to a superior product at a reasonable price. Eventually, the brand should move from market leadership to market dominance as the market share increases. [CX 142Z028, emphasis in original]

The strategy chosen to achieve this repositioning of the Lady Kenmore was to merchandise it as the "Freedom Maker," a dishwasher

³ Of course, if this is the principal added health benefit of Sani-Wash, it might have been far more accurately conveyed in Sears' advertising than it was.

that would actually wash dishes, rather than simply rinse, remove trace elements of dirt from, and dry dishes that had already been scraped and pre-rinsed by a homemaker with better things to do. It hardly requires elaborate survey evidence (although the record is replete with it) to realize that a dishwasher that eliminates the need for pre-rinsing and scraping of dishes, pots, and pans, is likely to command the interest of large numbers of consumers, who will be willing to pay more for it because of that feature.⁴ [7]Sears' advertising agency outlined the following rationale for its ad campaign:

Among the leading dishwasher brands, there is a general level of product parity, with most brands claiming or implying a straight cleaning consumer benefit.

The Sears Lady Kenmore Dishwasher positioning is *unique* because it is the only brand strongly claiming convenience with effective cleaning. It gains additional strength because it is based on two of the most important product features: no scraping, no pre-rinsing. [CX 142Z029, emphasis in original]

In order to establish Lady Kenmore as the convenience dishwasher, the "Freedom Maker," Sears disseminated such messages as the following:

SEARS LADY KENMORE. THE DO-IT-ITSELF DISHWASHER. No scraping. No pre-rinsing. Lady Kenmore has 6 powerful hot water jets for the bottom rack, surging hot water with enough force to scrub every dish, pot and pan *really* clean. Even baked-on food comes off. And the dishes on top get as clean as those on the bottom. [CX-1, emphasis in original]

Another commercial depicted a hopelessly unliberated husband, his wife away from home, awash in a sea of dirty dishes. To the rescue, Lady Kenmore:

Now's the time to really clean up during Sears gigantic dishwasher sale. With a Kenmore you'll never have to scrape or rinse again. Even dishes *crusty* with leftover food. Kenmore's 14 powerful hot water jets scour every dish clean. . . with no scraping or rinsing. Make your dish happy. . . . [CX-5, emphasis in original]

The theme that Sears Lady Kenmore would eliminate the need for pre-rinsing and scraping was maintained in Sears advertising on a widespread basis for three to four years, from sometime in 1971 to sometime in 1975 (CX 62-77), with roughly \$8 million spent on this promotional effort, in both national and local markets, in print and broadcast media. Altogether, the record contains more than 50 distinct advertisements in which this theme was repeated. (CX 1-CX 54) The

⁴ In fact, this commonsense proposition is borne out by surveys conducted for Sears in 1972. In one survey, for example, 41% of all women respondents, and 32% of male respondents identified a "no pre-rinse" feature as "very desirable" and a feature for which the respondents would pay extra. Only "extra large capacity" outranked "no pre-rinse" in this survey in terms of desirability and consumer willingness to pay more to obtain it. (CX 136Z008)

record also reveals that Sears' efforts to distinguish the Lady Kenmore as the dishwasher that would eliminate the need for pre-rinsing or pre-scraping coincided with a dramatic rise in the good Lady's market share. [8]Sears increased its share of the dishwasher market from 26% in 1971 to 29% through August 1973 (CX 151C), and sales of the Lady Kenmore increased from 35,029 units in 1971 (10.4% of all Sears' dishwasher sales) to 105,570 units in 1973 (23.8% of all Sears' dishwasher sales). (CX 151E)

The record reveals, however, that even at the time that the no scrape, pre-rinse claim was first disseminated, Sears lacked substantiation, or a reasonable basis for making it. (I.D. 99) Indeed, if anything, the tests purportedly relied upon by Sears at the time that it made its claim demonstrated precisely the reverse—that the Lady Kenmore could not ensure that the consumer would “never have to scrape or rinse again.” (I.D. 100) And Sears' advertising message was further belied by the Owner's Manual furnished to all purchasers of Lady Kenmore, which advised them to pre-soak or “lightly” scour firmly cooked or baked-on foods before loading dishes in the dishwasher for washing. (I.D. 111; CX 99D, 100D)

Further evidence of the falsity of this advertising message appeared midway through its dissemination. Market research conducted in 1973 revealed that more than half of all recent purchasers of the Lady Kenmore either disagreed, or would not “completely agree” with the proposition that the Lady Kenmore “does not require pre-rinsing.”⁵ Notwithstanding the results of this survey, Sears continued to disseminate widely its claim that Lady Kenmore eliminated the need for pre-rinsing or scraping until at least 1975, and, in more isolated instances until at least 1977. Sears disseminated at the same time the claim that dishes on the top rack of the Lady Kenmore would be cleaned as thoroughly as those on the bottom, also a matter of considerable importance to the purchasing choices of consumers. (CX 180Z031) [9]

Extensive findings by Judge Hanscom reveal that neither the no pre-rinse claim, nor the equally clean on both racks claim could be substantiated by Sears, either at the time it began the advertisements,

⁵ 373 respondents were asked to indicate, on a scale of 1 to 7, with 1 being “disagree completely” and 7 being “agree completely” their response to the assertion that Lady Kenmore “Does Not Require Pre-Rinsing of Dishes.” Only 49% of the respondents indicated that they agreed completely with this statement, 11% disagreed completely, 2% did not answer, and the remaining 38% indicated levels of agreement or disagreement somewhere between the extremes. (CX 125Z029) Presumably, however, anything less than complete agreement with the “no pre-rinse” claim would signify that in at least some cases the responder had encountered dirty dishes after use of the Lady Kenmore.

With the statement “Washes pots and pans thoroughly” the same survey revealed that over 70% of all respondents did not register complete agreement. (CX 125Z030) See also Tr. 1814-1848.

or now. (I.D. 33-98; 172-80) The record also demonstrates that the no pre-rinse claim is not true. (I.D. 101-69)⁶

B. Product Coverage

To remedy the foregoing unfair and deceptive practices, complaint counsel proposed, and the ALJ adopted, an order prohibiting Sears from disseminating any untruthful or unsubstantiated performance claims for "major home appliances" as defined in the order. Sears contends on appeal that the order should extend only to prohibiting untruthful performance claims for dishwashers.⁷

[10]It is well established that in order to prevent recurrence of violations of law, the Commission may proscribe acts "like and related" to the one condemned. *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 393 (1959). Courts have recognized that various types of deceptive advertising are readily transferrable to a wide range of products. Therefore, to ensure protection of the public against a repetition of deceptive advertising once it is found to have occurred, courts have sustained Commission orders that applied to "all products" of a company, or a wide range of products, on the basis of findings of deceptive advertising of only one or a small number of products. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-5 (1965) (use of deceptive mock-ups of "all products" prohibited based upon use of deceptive mock-up of one product); *ITT Continental Baking Co., Inc. v. FTC*, 532 F.2d 207 (2d Cir. 1976) (order against misrepresenting growth properties of all food products sustained based upon misrepresentations of growth properties of one bread product); *Jay Norris v. FTC*, *supra*, 598 F.2d at 1250 (order against unsubstantiated performance or safety claims for all products of a mail order merchandiser sustained on the basis of misrepresentations of attributes of 6 products); *Niresk Industries, Inc. v. FTC*, 278 F.2d 337, 342-3 (7th Cir.), *cert. denied*, 364 U.S. 883 (1960) (order against deceptive pricing claims for all products of a mail order

⁶ The truth of the "equally clean" claim was not placed in issue, but, as Judge Hanscom observed, tests submitted by Sears itself demonstrated that the lower rack achieved a higher level of cleaning than the upper rack. (I.D. 178, 180)

⁷ In its reply brief, Sears has also objected to the term "performance" to describe the types of claims that may not be made without substantiation. This objection was not raised, however, in Sears' appeal brief, the practical effect being that complaint counsel have been given no opportunity to answer. Section 3.52(b) of the Commission's Rules of Practice, 16 CFR 3.52(b), requires that a party contesting an initial decision shall specify in its appeal brief "the questions intended to be urged" and "the points of fact and law relied upon in support of the position taken on each question. . .". The reason for such a requirement is to permit the timely and orderly consideration of points in issue. If a party withholds objections to a specific part of an ALJ's order until the filing of its reply brief, to which the opposing party can make no response, the purpose of the rules is defeated. For this reason, we believe that Sears has waived its right to object to the term "performance" in the ALJ's order, although were the issue properly raised we would find it to be without merit. This precise term has been deemed proper by reviewing courts in the past, *Jay Norris v. FTC*, 598 F.2d 1244, 1250, 1253 (2d Cir.) *cert. denied*, 100 S. Ct. 481 (1979); *National Dynamics Corp. v. FTC*, 492 F.2d 1333, 1336 (2d Cir. 1973), *cert. denied*, 419 U.S. 933 (1974), and where, as here, two major performance characteristics have been misrepresented, an order covering all performance claims is appropriate.

merchandiser sustained on the basis of findings of deceptive pricing claims for one product).

The technique employed here, misrepresenting the performance characteristics of a dishwasher in a highly material respect, in order to distinguish it from the competition and gain added market share, is readily generalizable to a wide range of products, and this proceeding would be a pointless exercise indeed if it left Sears able to repeat with respect to refrigerators, stoves, washing machines, or other home appliances, the same deceptive technique that it used to merchandise the Lady Kenmore.

Sears correctly observes that in some cases reviewing courts have narrowed the product coverage of Commission orders, *e.g.*, *Chrysler Corp. v. FTC*, 561 F.2d 357 (D.C. Cir. 1977); *Standard Oil Co. of California v. FTC*, 577 F.2d 653 (9th Cir. 1978). The striking difference in facts between those cases and this one, however, serves only to emphasize the propriety of multi-product order coverage here. [11]

The appropriate scope of an order necessarily depends upon a rough evaluation of the extent to which a practice is likely to be repeated. Needless to say, no one can predict future events with precision, and so such an evaluation must inevitably be at best a rough guess. But within those constraints, the Commission and courts have looked to a variety of factors to judge the extent to which a respondent may be in need of restraint, and among them have been the nature of the violation itself (its magnitude and duration), the state of mind of the perpetrator (wilful, reckless, negligent, or unintentioning) and the prior history of violations by the respondent.

In at least two of the three foregoing respects, Sears' conduct is strikingly deficient, and warrants concern that its deceptive practices may be repeated with respect to other products if not restrained. The record here suggests a conscious, deliberate effort by Sears to mislead the consuming public as to the capabilities of the Lady Kenmore dishwasher, nationwide, over a period of three to four years, by numerous different advertisements. The advertisements that Sears ran were unequivocal in their meaning, and Sears should surely have known that that unequivocal message was without credible support—and untrue. If this was not manifest when the advertisements were first run (and we believe it was) it should certainly have become so to Sears by 1973 when consumer surveys revealed widespread disagreement with the "no-rinse" claim by Lady Kenmore users. Nevertheless, widespread dissemination of the "no-rinse" claim continued until 1975.

These facts of record are in stark contrast to those of *Standard Oil of California v. FTC*, *supra*, in which the sum of the deceptive

advertising consisted of three advertisements, run for a period of five months. As the Ninth Circuit noted:

Publication of the three advertisements in question was not a blatant disregard of the law. Petitioners' error was to miscalculate the effect which the televised commercials would have on the public. . . 577 F.2d at 663.⁸

[12]No such "miscalculation" can be claimed in this case. The meaning likely to be conveyed by "No scraping. No pre-rinsing." is not subject to reasonable doubt.⁹

A similar comparison with *Chrysler Corp. v. FTC*, *supra*, highlights the propriety of a multi-product order in this case. In *Chrysler*, the D.C. Circuit Court of Appeals, after characterizing the Commission's case on the merits as "somewhat thin", 561 F.2d at 363, struck order provisions that extended to "automotive products" based on Chrysler's misrepresentations of automobile characteristics.

The Court observed that in 12 out of 14 advertisements dealing with the same theme, Chrysler had endeavored to qualify the challenged representations so as to render them truthful, and concluded that

Given [the Commission's] concession that the violations were unintentional, are not continuing, and were confined to two out of a campaign of fourteen advertisements, we fail to see any rational justification for these sweeping prohibitions. 561 F.2d at 364.

A final factor considered by courts has been the violator's past history of abuses. On this score, the record is less damning to Sears, but it hardly justifies ignoring the inferences to be drawn from the nature of the violation itself. Sears argues that the record shows it has compiled a good record with respect to maintaining substantiation for other product claims for which the Commission has requested substantiation. Complaint counsel argue that no inference may properly be drawn from cases in which the Commission took no action after soliciting substantiation from Sears, and cite instead, prior consent orders signed by Sears as evidence of its propensity to violate the law. Sears argues that these past orders are quite as irrelevant as complaint counsel believe Sears' unchallenged substantiation of non-dishwasher advertising to be.

On balance, we find these contentions of the parties as to the relevance of prior violations to be something of a wash. We have no

⁸ The court in *Standard Oil* was also troubled by the "exceptionably burdensome. . . breadth and generality" of an order that applied to a wide range of products that "number in the thousands." 577 F.2d at 661. Here, by contrast, the Commission's order would apply only to a category of products, major home appliances, that is closely related to the product that was deceptively advertised.

⁹ Of course, it is not necessary to a finding of Section 5 violation that the misrepresentation be shown to have been intentional, *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963), and a company that deceives consumers through reckless or even simply negligent disregard of the truth may do just as much harm as one that deceives consumers knowingly.

doubt that with respect to the advertising of some other products, on some other occasions, Sears has adhered fully, and perhaps on some occasions, in an exemplary manner, to the requirements of the law. It would be shocking to discover that a retailer of its size and stature had not. But this hardly gives reason to disregard the blatant [13]violations of law that occurred and persisted in this case.¹⁰

We must also reject other arguments made by Sears that in its view mitigate the need for an order, or one such as that proposed by complaint counsel. Citing dictum from an initial decision of an administrative law judge in another case, Sears suggests that its store-wide policy of "satisfaction guaranteed" obviates the need for an order, because any consumer whose own experience with a Sears appliance belies the advertising claims made for it can obtain a full refund of the purchase price. (Appeal Brief, p. 21)

A money-back guarantee is no defense to a charge of deceptive advertising. *Montgomery Ward & Co. v. FTC*, 379 F.2d 666, 671 (7th Cir. 1967). Nor, as a practical matter, is a money-back guarantee in any way a satisfactory substitute for a requirement that an advertiser not engage in false and [14]unsubstantiated performance claims for its products. A money-back guarantee does not compensate the consumer for the often considerable time and expense incident to returning a major-ticket item and obtaining a replacement. Because of this, there are many circumstances in which consumers who have been materially misled by deceptive advertising may, upon discovering the deception, be unable to obtain any effective redress whatsoever through the money-back guarantee.

A consumer who purchases a major ticket item is likely to spend

¹⁰ A further consideration tending to neutralize Sears' claim of good conduct is the entry of a consent order in 1977 prohibiting Sears from engaging in "bait and switch" tactics in the sale of major home appliances. *Sears, Roebuck and Co.*, 89 F.T.C. 229 (1977). . . . Bait and switch is, like the practices challenged in this case, a form of deceptive advertising. In bait and switch, the advertiser holds itself out as being prepared to sell the consumer a low-cost model of a product, but then disparages this "bait" item in favor of more expensive models when the consumer comes to the place of sale.

Complaint counsel argue that the consent order should be taken as evidence of Sears' recidivist tendencies, and cite two recent decisions in which consent orders have been considered in determining the proper scope of a later order. *Jay Norris v. FTC*, *supra*, 598 F.2d at 1246, n.3; *Standard Oil of California v. FTC*, *supra*, 577 F.2d at 663. Sears rejoins that such consideration is improper given that its consent order states that it "does not constitute an admission by respondent that the law has been violated."

We agree that the consent order cannot be taken as evidence of prior law violations by Sears. It is, however, evidence that in the recent past the Commission has had "reason to believe" (the statutory standard for issuing a complaint) that Sears engaged in deceptive advertising of home appliances. This is relevant to the limited extent that it tends to undermine Sears' contention that Commission inaction with respect to certain Sears advertisements for which the Commission demanded substantiation demonstrates affirmatively that Sears' advertising, save for the advertising challenged in this case, has been unimpeachable.

Of course, even absent prior orders against a particular respondent, the Commission's failure to challenge some advertising of a respondent does not undermine the inferences to be drawn from advertising that is challenged. In this case, we base our conclusion that a multi-product order is warranted upon the rather egregious circumstances surrounding the violations of law that have been found. To the extent that respondent's conduct in running other advertisements is considered, we find that on balance the evidence introduced neither strengthens nor weakens our conclusion as to the appropriate scope of the order.

hours doing so, including the time taken to select the item at the store, and, in many cases, time taken to supervise or be present at home when the item is delivered and installed. If the consumer subsequently discovers that the appliance is not as represented in some respect, it may, nevertheless, not be worth the consumer's while to utilize the money back guarantee, because the amount that the consumer would stand to save by returning the product may not exceed the value of the consumer's time required to purchase and install a proper substitute.

The foregoing phenomenon is especially likely to be operative where the deceptive advertising is designed simply to distinguish one workable product from another, rather than to merchandise a wholly worthless product. There is no suggestion in the record here that the Sears Lady Kenmore is not a good dishwasher, comparable in quality to those of competing manufacturers. The record simply suggests that the Lady Kenmore may not be superior to its competitors with respect to its cleaning capabilities, because like its competitors, it does not eliminate the need for pre-rinsing or scraping of dishes. A consumer who might pay \$20, \$30, or \$40 extra for a Lady Kenmore, rather than purchase a model without the alleged capacity to eliminate the need for pre-rinsing, would quickly discover the misrepresentation upon use of the machine. The consumer's ability to return the machine to Sears, however, would in no way compensate him or her for the several additional hours necessary to supervise return of the product, purchase a substitute, and supervise its delivery and installation. Given that the Lady Kenmore might well perform no worse than a truthfully advertised substitute, the consumer would be faced with the choice of expending several additional hours of time in order to save a few dollars on an equivalent product. That many consumers would simply write the experience off to bad luck and retain the misrepresented appliance in these circumstances is clear. [15]

If Sears "satisfaction guaranteed" policy included a provision whereby Sears offered to adjust the price of its products to compensate consumers for the extra money they paid in reliance upon its false advertising, and if Sears' "satisfaction guaranteed" policy included a provision whereby Sears would fully compensate consumers for consequential damages including the loss in time entailed by the need to return a major home appliance and purchase a replacement, it might be viewed as an adequate substitute for the relief ordered here, although it would still not justify deceptive, unsubstantiated advertising. As the policy stands, however, it is likely to be virtually useless as a remedy for misleading advertising of the sort involved here.

Similarly unpersuasive is Sears' contention that no order is needed because it discontinued the offending advertising in April 1975, prior to

initiation of the Commission's investigation in July, 1975. (Sears' Appeal Brief, p. 33). While it does appear that the bulk of Sears' nationwide deceptive advertising campaign ended in 1975, references to the "no pre-rinse" capacity of the Lady Kenmore appeared in catalogue material in 1976 (CX 257) and 1977 (CX 259).

Most importantly, however, discontinuance of a massive campaign of deceptive advertising after it has run for between three and four years can hardly be grounds not to fear resumption of such advertising in the future. Courts have recognized that discontinuance of an offending practice is neither a defense to liability, nor grounds for omission of an order. *Fedders Corp. v. FTC*, 529 F.2d 1398, 1403 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976); *Coro, Inc. v. FTC*, 338 F.2d 149, 151-3 (1st Cir.), *cert. denied*, 380 U.S. 954 (1964); *Sears, Roebuck & Co. v. FTC*, 258 F.2d 307, 309-10 (7th Cir. 1919). One may imagine circumstances in which discontinuance of a deceptive practice would provide reason for confidence that it would not resume—for example, where an overzealous subordinate authorizes a false advertisement that is quickly squelched upon discovery by higher-ups. A three to four year campaign of misrepresentation, however, hardly falls into this category, and that, like most advertising campaigns, it eventually came to an end, provides no reassurance at all that similar practices will not be employed in the future.

Another argument raised by Sears is that the order of Judge Hanscom offends the First Amendment, by requiring Sears to maintain prior substantiation for performance claims made for major home appliances. Sears suggests that the order offends the First Amendment because it is overbroad, and because it would penalize an unsubstantiated claim even if that claim happened to be true. [16]

The foregoing contentions have been addressed with relation to the First Amendment in a recent case, *Jay Norris v. FTC*, *supra*, and emphatically rejected by the reviewing court. 598 F.2d at 1251-2. The Commission's order in this case does no more than prohibit in related form, the precise deceptive practices found to exist in this case. Under any reading of the Supreme Court's recent commercial speech cases, prohibitions upon deceptive commercial speech are not forbidden. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977).

While the Commission has previously held that unsubstantiated advertising is unfair within the meaning of Section 5, *Pfizer, Inc.*, 81 F.T.C. 23 (1972), we have also recognized that such speech is deceptive as well. As we have observed:

Many consumers are likely to assume that when a product claim is advanced which is in

theory subject to objective verification, the party making it possesses a reasonable basis for so doing, and that the assertion does not constitute mere surmise or wishful thinking on the advertiser's part. As a result, the rendition of a claim based upon inadequate or nonexistent substantiation violates Section 5 for failure to state a highly material fact, whose omission is deceptive. *National Commission on Egg Nutrition*, 88 F.T.C. 84, 191 (1976); *aff'd. and ordered enforced as modified*, 570 F.2d 157 (7th Cir. 1977), *cert. denied* 439 U.S. 821 (1978).

A consumer who is told by Sears that the Lady Kenmore will eliminate the need for pre-rinsing and scraping of dishes is likely to assume that Sears has based that assertion on more than wishful thinking and a desire to outsell the competition. Consumers properly assume that an advertiser, which is in the best position to evaluate the efficacy of its product, has, indeed, verified the claims that it makes before it makes them. If consumers assumed otherwise, and could not depend on the reliability of advertising, advertising would lose much of its persuasive force, for no consumer would have any reason to believe in it.

Sears argues that the order entered herein would penalize it for the dissemination of a claim for which it lacked substantiation, but which might turn out to be truthful. (App. Br. 30-31). It cannot be denied that if an advertiser goes about spreading claims for its products [17] without regard for their accuracy (that is, without possessing prior substantiation), then the law of averages alone probably guarantees that some of these claims will be true, even though the profit motive probably guarantees that more will be false. In this peculiar sense it may be technically correct to say that the requirement of substantiation "burdens" the chance occurrence of truthful speech. This tiny "burden", however, is surely one that the First Amendment must allow, because it is vital to ensuring a far greater quantity of truthful speech by advertisers. *Jay Norris v. FTC*, *supra*, 598 F.2d at 1252.

For the foregoing reasons, we believe that entry of a multi-product order is entirely appropriate and necessary in this case. The record reveals an extensive campaign of wilfully or at best, recklessly negligent deceptive advertising for one major home appliance product. The issue is simply whether, in light of this record, the Commission may now attempt to protect the public from being subjected to the same sort of advertising campaign with regard to a related category of products in the future. The possibility of bringing a *de novo* Section 5 proceeding each time a given product is misrepresented is obviously a wholly inadequate deterrent, if only because the sanction for violating the law (an order with prospective application only) pales in comparison with the financial incentives for bending the truth. The purpose of an order is to create financial incentives to tell the truth, to counter-balance those that may have led a violator to engage in deception. We

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believe that it is appropriate in this case that those incentives be extended to Sears' major home appliances.

C. Definition of "Major Home Appliances"

In addition to disputing the extension of the order to products other than dishwashers, Sears objects to the term "major home appliances", which is defined in the order proposed by Judge Hanscom as:

air conditioning units (room or built-in), clothes washers, clothes dryers, disposers, dishwashers, trash compactors, refrigerators, refrigerator/freezers, freezers, ranges, microwave ovens, humidifiers, dehumidifiers, and any other product that falls into the category of major home appliances. (I.D. p. 87, emphasis added)

[18] Sears contests the underlined language on grounds that it leaves Sears in doubt as to the precise scope of the order's coverage, and cites as examples of products the coverage of which is left unclear "stoves, stereophonic consoles. . . television receivers, floor polishers, vacuum cleaners and sweepers." (Appeal Brief, p. 23)

Although we do not believe that the use of a broad catch-all term such as "major home appliances" is necessarily inappropriate¹¹, in this case in order to provide maximum specificity we shall omit the catch-all language from our definition of major home appliances. Sears' obligations will, therefore, be limited to the products specified in the order.¹²

D. Record Keeping Provision

Sears has also objected to Par. III(b) of the ALJ's order, which requires that it maintain

all matter in [Sears] possession which contradicts, qualifies or calls into question any claim or representation in advertising. . . concerning the performance characteristics of any of Sears, Roebuck and Co.'s dishwashers or other major home appliances. [emphasis added]

Sears objects to the underlined language as being vague and overbroad, and suggests that it be changed to read "all test reports or demonstrations prepared by or for Sears." (Appeal Brief, p. 20) We agree that in this context the term "all matter" is excessive, and will amend the order to require retention only of applicable "test reports, studies, surveys and demonstrations. . ." [19]

¹¹ As complaint counsel point out, Sears itself, in 1977, agreed to a consent order in which it was prohibited from using bait and switch tactics in the sale of "major home appliances". The definition in the consent order specified certain categories of appliances, but also noted that the term was "not limited to" those terms, *Sears, Roebuck and Co.*, 89 F.T.C. 223, 235 (1977).

¹² We have, however, added "stoves" and "ovens" to "ranges" in Judge Hanscom's order, because Sears' brief reflects its view that the term "stoves" is not comprehended by the term "ranges". (Appeal Brief, p. 23) It is not apparent that Judge Hanscom intended any such distinction, and, in any event, we can see no warrant for any.

E. Summary of Order Changes

Paragraph I of the Commission's Order contains definitions collected from various parts of Judge Hanscom's Order. Paragraph I(1) defines "major home appliances" [ALJ's Paragraph II(4) as modified] and Paragraph I(2) defines a "competent and reliable test." [ALJ's Paragraph II(1)(a)]

Paragraph II of the Commission's Order corresponds to Paragraph I of Judge Hanscom's order, minus subparagraph (3) of the ALJ's order, which referred specifically to the Sani-Wash cycle. Sears does not object to the remaining provisions of this paragraph.

Paragraph III of the Commission's Order corresponds to Paragraph II of Judge Hanscom's order, minus the definitional paragraphs. Subparagraph (1) concerns the prior substantiation requirements discussed earlier. Subparagraph (2) governs misrepresentations of the significance of tests or demonstrations and subparagraph (3) prohibits advertising statements that are contrary to or inconsistent with statements made in post-purchase materials (such as owners' manuals) supplied to purchasers. Sears has not objected to either of these latter two subparagraphs except insofar as they extend to "major home appliances" instead of "dishwashers." Our discussion of the appropriate scope of the substantiation requirement is equally applicable to the scope of subparagraphs II(2) and II(3).

Paragraph IV of the Commission's Order corresponds to Paragraph III of Judge Hanscom's order, with the change in the recordkeeping provision of the second subparagraph discussed above.

Paragraph V of the Commission's Order corresponds to Paragraph IV of Judge Hanscom's order, and contains routine compliance reporting requirements.

We have also added, at complaint counsel's suggestion, a synopsis of determinations, to facilitate application of some of the holdings in this case to other cases [pursuant to Section 5(m)(1)(B) of the FTC Act, 15 U.S.C. 45(m)(1)(B)] should others engage in the same practices as have occurred here.

An appropriate order is appended.

SYNOPSIS OF DETERMINATIONS FOR 15 U.S.C. 45(m)(1)(B) SEARS, ROEBUCK AND CO., DOCKET NO. 9104

It is unfair and deceptive, and unlawful under Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) for a party to engage in the following practices:

1. Making an advertising representation, directly or by implication,

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that a dishwasher can completely clean dishes, pots and pans without prior scraping or rinsing, without possessing and relying upon a reasonable basis for the representation at the time that it is first disseminated. A reasonable basis for such a claim shall consist of competent and reliable tests or other competent and reliable evidence which substantiates such representation. Competent and reliable tests are those in which persons with skill and expert knowledge in the field conduct the test and evaluate its results in an objective manner using testing procedures which ensure accurate and reliable results.

2. Making an advertising representation for a product, directly or by implication, that is materially inconsistent with statements or representations contained in owners manuals or other post purchase materials disseminated to purchasers of the product.

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This matter has been heard by the Commission upon the appeal of counsel for respondent, and upon briefs and oral argument in support of and in opposition to the appeal. The Commission, for the reasons stated in the accompanying Opinion, has granted the appeal in part, and denied the appeal in part. Therefore,

It is ordered, That the initial decision of the administrative law judge, pages 1-85, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except for Findings 24-25; last sentence of Finding 26; all of page 80 beginning with the first full paragraph thereon; page 81 except for final paragraph; and except as is otherwise inconsistent with the attached opinion.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following order to cease and desist be entered: [2]

ORDER

I.

It is ordered, That for purposes of this order the following definitions shall apply:

1. "Major home appliance" means air conditioning units (room or built-in), clothes washers, clothes dryers, disposers, dishwashers, trash compactors, refrigerators, refrigerator/freezers, ranges, stoves, ovens (including microwave ovens), and humidifiers.

2. "Competent and reliable test" means a test in which persons

with skill and expert knowledge in the field to which the test pertains conduct the test and evaluate its results in an objective manner, using test procedures that insure accurate and reliable results. Such tests must be truly and fully representative of expectable consumer usage.

II.

It is further ordered, That Sears, Roebuck and Co., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of dishwashers, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any Sears dishwasher will completely remove, without prior rinsing or scraping, all residue and film from all dishes, and from pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers.

2. Representing, directly or by implication, that dishes in the top rack of any Sears dishwasher will get as clean as those on the bottom rack without prior rinsing or scraping.

It shall be an affirmative defense to a compliance action brought under the preceding paragraphs for Sears, Roebuck and Co. to establish that the representation is truthful. [3]

III.

It is further ordered, That Sears, Roebuck and Co., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, or sale or distribution of "major home appliances," in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making any statements or representations, directly or by implication, concerning the performance of such products unless such statements or representations are true and unless, at the time the statements or representations are made, Sears, Roebuck and Co possesses and relies on a reasonable basis for such statements or representations, which shall consist of competent and reliable tests, o

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other competent and reliable evidence which substantiates such statements or representations.

2. Misrepresenting in connection with the advertisement of any such products or in any other manner, directly or by implication, the purpose, content or conclusion of any test, experiment, demonstration, study, survey, report, or research.

3. Making any statements or representations, directly or by implication, in connection with the advertisement of any such products which are inconsistent in any material respect with any statements or representations contained directly or by implication in post purchase material(s) supplied to the purchasers of such products.

IV.

It is further ordered, That Sears, Roebuck and Co., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of dishwashers or other "major home appliances," in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall maintain written records: [4]

1. Of all materials that were relied upon in making any claim or representation in advertising, sales materials, promotional materials, or post purchase materials, concerning the performance characteristics of any of Sears, Roebuck and Co.'s dishwashers or other major home appliances;

2. Of all test reports, studies, surveys, or demonstrations in their possession that contradict, qualify, or call into question any claim or representation in advertising, sales materials, promotional materials, or post purchase materials disseminated by Sears, Roebuck and Co., or by any advertising agency on behalf of Sears, Roebuck and Co., concerning the performance characteristics of any of Sears, Roebuck and Co.'s dishwashers or other major home appliances.

Such records shall be retained by Sears, Roebuck and Co. for a period of three years from the date such advertising, sales materials, promotional materials, or post purchase materials were last disseminated. Such records may be inspected by the staff of the Commission upon reasonable notice.

V.

It is further ordered, That Sears, Roebuck and Co. shall notify the

Commission at least 30 days prior to the effective date of any proposed change in it as a 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 this order.

It is further ordered, That Sears, Roebuck and Co. shall forthwith distribute a copy of this order to each of its operating divisions, and to each of its officers, agents, representatives and employees engaged in or connected with the preparation and placement of advertisements for dishwashers or other major home appliances.

It is further ordered, That Sears, Roebuck and Co. shall within sixty (60) days after service upon it of this order, and at such other times as the Commission may require, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

Complaint

95 F.T.C.

IN THE MATTER OF

AHC PHARMACAL, INC., ET AL.

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

Docket C-3017. Complaint, April 28, 1980 — Decision, April 28, 1980

This consent order requires, among other things, a Miami, Fla. firm and its corporate president, engaged in the marketing and advertising of health related products, to cease disseminating advertisements which represent that the use of AHC Gel or any similar preparation, alone or as part of an acne control regimen, cures acne and results in a blemish-free skin; or that any such preparation is superior to other over-the-counter acne products. Respondents are required to have a reasonable basis for advertising representations relating to product performance, efficacy and results and prohibited from misrepresenting the extent or results of product testing. Respondents are further prohibited from disseminating advertisements for acne products without first disseminating prescribed corrective advertising as specified in the order. Additionally, ad substantiation must be maintained for a period of three years.

Appearances

For the Commission: *Steven Newborn.*

For the respondents: *Pro se.*

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 AHC Pharmacal, Inc. (hereinafter "AHC Pharmacal"), a corporation, and James E. Fulton, M.D. (hereinafter "Fulton"), as an individual and corporate officer, hereinafter at times referred to as respondents, having 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. "AHC Pharmacal" is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida with its office and principal place of business located at 1609 N.W. 14th St., Miami, Florida.

PAR. 2. "Fulton" is an individual and corporate president of "AHC Pharmacal." He formulates, directs and controls the acts and practices "AHC Pharmacal," including the acts and practices described