

FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

LITTON INDUSTRIES, INC.

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

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

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

Appearances

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

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

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Litton Industries, Inc., a corporation (hereafter "Respondent" or "Litton"), has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Litton Industries, Inc. is a corporation, organized, existing and doing business under and by virtue of the laws of the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For the above reasons, representation 6 in Paragraphs Six and

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

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

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

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

PAR. 14. The aforesaid acts and practices of Litton, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair and deceptive acts or practices in or affecting commerce and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

97 F.T.C.

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The Economic Enemy

Israel's economic woes date to the 1972 Yom Kippur war and the Arab oil embargo and would-be stabilization that followed. Not only did its \$7.6-billion-a-year oil bill triple, but inflation sent Israeli prices of all kinds soaring from 1973 to 1975 to 25-60% in each of the next two years. At the same time, the global slump dried up markets for Israel's traditional exports, mainly textiles, processed food and chemicals. Finally, the Israeli military had to make up for the losses it suffered during the Yom

Newweek, November 22, 1976

Litton leads all brands

EXISTING ✓

For permanently separating surface regions, a plasma treatment process was used. In this process, the surface of the polymer is treated with a plasma of oxygen and nitrogen gas. The plasma treatment process is used to remove the surface layer of the polymer, which is then removed by the plasma treatment process. The plasma treatment process is used to remove the surface layer of the polymer, which is then removed by the plasma treatment process. The plasma treatment process is used to remove the surface layer of the polymer, which is then removed by the plasma treatment process.

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

BLITTON
Manufacturing Company

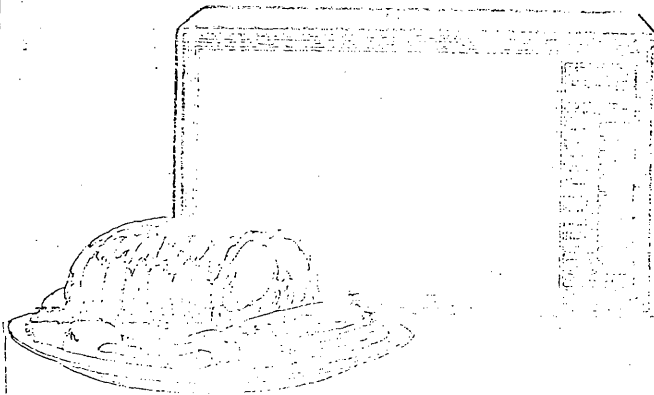
Lition...changing the way America Cools.

Complaint

EXHIBIT B

Quality is No. 1 at Litton!

73% of the microwave oven service technicians surveyed* would recommend Litton.



Among technicians serving Litton and competitive microwave ovens, 73% of those surveyed said they would recommend Litton to a friend. Survey respondents were 234 technicians who work for independent service agencies or have to service Litton microwave ovens and who operate at least one other microwave oven brand.

And 51% of those surveyed preferred Litton brand ovens as the best quality.

That's because Litton ovens are made for dependability to be your very best microwave oven. Having the best microwave oven means doing the best job.

You'll find it in a product that has our full line of advanced counter-top, built-in, over-the-range, double-oven and combination microwave ranges. And in such Litton features as "One Cook" oven control, Van-Temp® automatic temperature control and Menusound™ microwave program cooking. Innovative microwave ovens that make life better.

Need more proof? Ask a technician. Ask for a Litton microwave oven. They'll demonstrate to you!

*Survey conducted by Litton Industries, Inc. in 1977. Surveyed 234 technicians who work for independent service agencies or have to service Litton microwave ovens and who operate at least one other microwave oven brand.

LITTON

Microwave Ovens

Litton leads in survey.

PERCENTAGE OF SERVICE TECHNICIANS RECOMMENDING LITTON AND OTHER BRANDS				
Brand	Top	Second	Third	Fourth
Litton	73%	51%	34%	21%
Other	27%	49%	66%	79%

Litton...changing the way America cooks.

Litton is the best commercial microwave oven buy.

Exhibit C
Dec 15, 1976

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

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

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

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

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

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

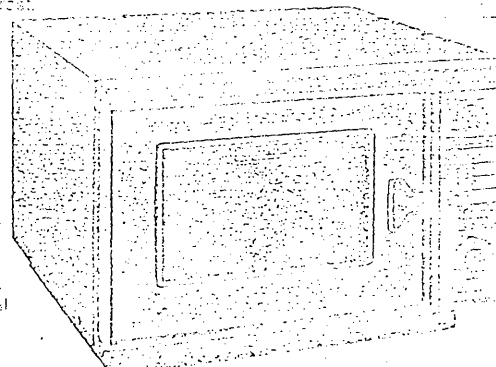
Take the opinion of your independent microwave technician. Litton is the best commercial microwave oven you can buy.

Litton...
changing the way
America Cooks.

EXHIBIT C

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

*Survey conducted by Customer Research Inc. Complete results available on request.
*Based on a survey of 100 independent microwave oven service technicians who were asked to recommend a brand of microwave oven to prospective customers. The results are based on the percentage of technicians who recommended Litton over other brands. The results are based on the percentage of technicians who recommended Litton over other brands. The results are based on the percentage of technicians who recommended Litton over other brands.



Call 800-555-7777 for more information. IFM-71-5

Circle number of interest on card below and mail to:
Litton Microwave Oven Company, Inc., 10000 E. 1st Ave., Suite 100, Denver, CO 80231

☐ Please send me literature on the following:

Name _____

Title _____

Firm _____

Business address _____

City _____ State _____ Zip _____

Telephone _____

Area code _____

Time of call _____

LITTON

INITIAL DECISION BY JOHN J. MATHIAS,
ADMINISTRATIVE LAW JUDGE

JUNE 6, 1980

PRELIMINARY STATEMENT

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

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

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

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

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

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

The principal issues presented for trial were:

- (1) Did LMCP disseminate and cause to be disseminated challenged advertisements in commerce?
- (2) What representations did LMCP in fact make?
- (3) Did LMCP have a reasonable basis for making such claims? [3]
- (4) Were the advertisements false and misleading in any respect?
- (5) Should the parent corporation Litton Industries, Inc. be held responsible for the acts of the LMCP division of its subsidiary Litton Systems, Inc.?
- (6) What is the proper scope of the order, if any, to be issued?

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

This initial decision is based upon the entire record including proposed findings of fact and conclusions of law and supporting memoranda filed by the parties, as well as their replies. I have also taken into account my observation of the witnesses who appeared before me and their demeanor. Proposed findings not herein adopted, either in the form submitted or in substance, are rejected either as not supported by the evidence or as involving immaterial matters.

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

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

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

FINDINGS OF FACT

I. THE RESPONDENTS

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

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

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

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

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

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

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

II. THE ADVERTISEMENTS AND THE REPRESENTATIONS

A. *The Advertisements Were Widely Disseminated.*

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

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

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

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

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

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

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

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

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

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

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

B. The Consumer Oven Advertisements

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. The Commercial Oven Advertisements

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

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

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

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

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

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

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

1. The majority of independent microwave oven service technicians servicing Litton and competitive microwave ovens would recommend Litton to their customers.
2. The majority of such independent microwave oven service technicians are of the opinion that Litton commercial microwave ovens are superior in quality to all other microwave oven brands.
3. The majority of such independent microwave oven service technicians are of the opinion that Litton commercial microwave

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

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

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

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

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

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

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

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

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

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

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

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

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

D. The Local Advertisements

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

E. Representation of Reasonable Basis

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

F. Representation That Surveys Were Independently Conducted

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

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

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

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

III. LACK OF REASONABLE BASIS

A. *The Litton Surveys*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Substantial Defects In The Litton Surveys

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

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

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

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

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

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

interviewees volunteered information showing they were dealers. (See for example, CX 150-Z016-019, 150-Z136-Z139, 150-Z553, 150-Z572-Z575, 150-Z688-Z691, and 185-Z003-Z005). [22]

55. Under the circumstances, the weight of the evidence herein indicates that the admitted servicing-dealers included on the Litton lists, which were from the direct buying areas only, must be illustrative of similar experiences throughout all the marketing areas serviced through Litton's 54 distributors.⁹

56. Thus, the evidence shows that the number of servicing-dealers included on CX 162 and 163 may be quite substantial. The necessary corollary is that a substantial number of the respondents to Litton's surveys may also be servicing-dealers.

57. Respondents' own experts have shown that the answers of a servicing-dealer would tend to be biased in favor of a brand which it sells, and that such agencies should not be included in the survey for that reason (Zeisel, Tr. 4110; Roshwalb, Tr. 3587-88; RX 72W-Z18). In fact, Mr. Roshwalb conceded that he would be concerned if 10 to 15% or more of the Litton survey respondents were actually servicing-dealers (Roshwalb, Tr. 3587-88; *See also*, Miller, Tr. 561-62, 700-01).

58. Under these circumstances the two Litton surveys upon which the advertising herein were based must be considered fatally defective. Once Litton was on notice that their lists of service agencies were not pure; that is, that they contained servicing-dealers as well as service-only agencies, steps should have been taken to determine the extent of that problem. Having failed to do so, the surveys could not be considered a reasonable basis for the claims made in the advertisements.

59. The Litton surveys were also defective in that they did not elicit the opinions of the "100" other agencies which serviced Litton microwave ovens, but were not on the two Litton service agency lists.¹⁰ The universe for the surveys was [23]defined by Litton itself as all independent service agencies servicing two or more brands of microwave ovens (one of them being Litton) (CX 1-4, 6, 152, 178). Moreover, as noted above, respondents intended to make a "census", which necessitated an attempt to contact each and every member of

⁹ Respondents have urged in their Reply Brief that there could be no servicing-dealers in the distributor areas and cite to several areas of the record for support (RRB, pp. 44-45; Proposed Finding 59). I have reviewed the citations given and they do not support respondents' position. Moreover, the record evidence, as cited above, convincingly destroys such position. The fact is that the record shows that some agencies in the distributor areas were servicing-dealers and that there were undoubtedly more that were not identified by name on the record.

¹⁰ It should be noted that respondents claim that a portion of CX 72 which was not received in evidence would have proven the number of such unidentified other agencies to have been slightly less than 100; about 77. However, for reasons set out below, where I discuss respondents' exceptions to several of my rulings, the rejected portion of that exhibit could not have reliably determined the number of such other agencies. The only substantial evidence on this point is the evidence above in Finding 44.

the chosen universe. Yet Litton chose to completely ignore one-sixth of its defined universe from the very inception of these surveys (CX 148B-D).

60. Further, in view of the fact that Litton's service lists contained a substantial number of agencies which were not properly members of the universe, such as, servicing-dealers, agencies which did not service Litton and one other brand and agencies which were no longer in business, the problem is exacerbated (CX 152, 178). In other words, these "100" agencies probably amounted to more than one-sixth of the intended universe.

61. Respondents' primary defense against this obvious defect is that they were unable to identify any of these unlisted agencies and were thus forced to rely solely on their own lists (CX 148B-C). This is not entirely true.

62. Respondents had in their possession, prior to the surveys, service agency lists of two of their competitors. It is claimed that they could not use such lists, however, because they were both several years old (CX 148C).¹¹ While this was [24]true of the Magic Chef list, the Sharp list had only been published in 1975 and was still being packed in ovens sold in 1976 (See Finding 43, *supra*). Moreover, even the 1973 list probably listed a substantial number of service agencies which were still in business, since it was only three years old (even if they may have no longer been authorized Magic Chef repair agencies). Litton cannot now prove that these lists might not have provided an adequate basis for "sampling"¹² the additional "100" agencies, since Litton did not even try to make such a test (CX 148B-D). In the absence of such proof I must assume that it was possible to get some indication of the preferences of the additional "100" agencies by questioning agencies listed on these two lists who were not on the Litton lists.

63. This defect is even more serious when it is realized that the additional "100" servicers who serviced Litton and at least one other brand were not authorized Litton servicers. Although I don't agree with complaint counsel that authorization is a substantial biasing factor in and of itself (see discussion below), it is clear to me that familiarity with a particular brand would influence an agency's

¹¹ In their proposed findings and briefs respondents cite to other alleged defects with these lists, based primarily on other lists of service agencies supposedly serving these two companies which complaint counsel introduced as a basis for their Chilton Survey, discussed below. Since I find the Chilton Survey and its underlying lists defective, as is discussed below, such arguments are not persuasive. Moreover, there is no evidence that Litton was aware of any defects in such lists, with the possible exception of age, at the time they were determining what universe to survey (CX 148B-C).

¹² Sampling can be defined as taking a sample from a universe for the purpose of drawing inferences about that universe. A sample is a subset of the universe drawn from the universe in such a manner that it in some way represents the population (universe) from which it was taken (Miller, Tr. 476, 478-79).

opinion as to the relative quality of various brands. Some of the verbatim comments recorded on certain of the questionnaires from the Litton surveys indicate that where an interviewee's experience with a particular brand is limited, the technician is not likely to select that brand in a preference poll (CX 150-Z196-Z199, 150-Z416-Z419, 150-Z420-Z423, 150-Z544-547, 150-Z640-643, 150-Z752-Z755, 150-Z792-Z795, 150-Z796-Z799, 150-Z820-Z823, 150-Z844-Z847, 150-Z884-887, 185M-O, 185-Z085-Z087, 185-Z223-Z225, 185-Z226-Z228; *see also*, CX 239B). The record reveals that the unauthorized servicers of Litton ovens were not likely to service a great number of Litton ovens (Houserman, Tr. 2844-50). Accordingly, it can be expected that their answers to the preference questions in these surveys might have differed substantially from those on the Litton authorized lists (CX 239B).

64. In the light of these facts, respondents did not have a reasonable basis for advertising that their surveys revealed [25] certain preferences for Litton among independent service agencies which serviced Litton and one or more other brands of microwave ovens, since a substantial portion of such universe was not included in the surveys.

65. This is especially so where, as here, the attempt was to conduct a census, rather than a mere sampling. Respondents' arguments concerning the United States Census and its imperfections (RRB, pp. 99-100) do not detract from this point. It is clear that in the United States Census an attempt is made to contact every person in the universe. Moreover, the United States Census is not used as the basis for advertised claims and users of its results are well aware of its shortcomings.

66. To the extent the Litton surveys were used as the basis for claims of preferences among a universe of microwave oven service "technicians", they were also defective. This is so because the surveys were only made of agencies, not technicians¹³ (Miller, Tr. 526-27). As noted previously, CRI made an attempt to contact one technician at each agency on the Litton lists. It was their practice to speak to either an experienced technician or the manager at each agency contacted (CX 150A, 185A). There was no attempt to obtain the opinion of more than one technician at any one agency (CX 150, 185). Further, there was no effort made to determine if the technicians being interviewed were even representative of the technicians within each agency, let alone whether their views were

¹³ The evidence reveals that some of the agencies on the Litton lists employed as many as ten or eleven technicians (Houserman, Tr. 2924; Seitz, Tr. 2411).

representative of all independent technicians who serviced Litton and one or more other brands (CX 150, 180).

67. A survey conducted by respondents' experts for the purposes of this litigation (RX 72-Z19-Z27) reveals the seriousness of this defect with relationship to advertised claims that the Litton survey was made of technicians. This survey was made to determine the effect of random selection of technicians within each agency.¹⁴ In the course of this [26]latter survey the technician randomly selected was frequently the first and only technician spoken to. However, in 42 instances the survey required eliciting a preference as to best quality from two technicians (See RX 72-Z24-Z27; CX 361). In 22 out of those 42 instances the second technician's preference differed from the first technician's (CX 361). This is substantial evidence that the opinion of a single technician at an agency employing a number of such technicians is not representative of all technicians within that agency and that the procedure followed by Litton in its surveys could not be expected to indicate the preferences of the universe selected therein—independent microwave oven service technicians who serviced two or more brands (one of them Litton).

68. Therefore, Litton did not have a reasonable basis for advertising that its surveys revealed certain preferences among such independent service technicians.

69. The evidence of record also indicates that the surveys failed to establish that the respondents thereto possessed sufficient expertise with the various brands they claimed to service to qualify as respondents for a microwave oven comparative brand survey. The primary evidence of this defect is supplied by verbatim responses of the interviewees entered on the questionnaires. Such information was certainly known by Litton prior to the publication of the advertisements and militate against respondents' arguments that they had a reasonable basis for the claims made in such advertisements.

70. For example, the verbatim comment on CX 150-Z199 indicates this interviewee had insufficient experience with Amana to make a preferential comparison between an Amana oven and a Litton oven. This respondent stated, "I really don't know that much about servicing of Amana" This interviewee listed Amana, Litton and others as the brands serviced, so he would have been included in the preferential chart rating Litton as compared to

¹⁴ This study was made in response to the position of complaint counsel and their experts that the Litton surveys could not even be considered to be a survey of the service agencies, since a random selection basis was not used to select the technician interviewed at each agency. Thus, it was argued that the technician interviewed might not be representative of the entire agency. Statistically speaking, the random selection procedure was posited as giving a better chance that the technician selected for the interview would be representative.

Amana (CX 150-Z197). Under most of the preference questions he listed Litton as the preferred brand (although he did have an Amana in his home). This interviewee's answers are of doubtful validity because he did not have enough [27]experience servicing Amana (Miller, Tr. 532-33; Sudman, Tr. 1697-98).¹⁵

71. On CX 150-Z417, the interviewee again indicated that experience played a great part in his statement of preferences. This respondent had listed Amana, Magic Chef, Panasonic, Sears (Kenmore), Sharp and Wards (Signature), as well as Litton as the brands serviced, so his responses would have been computed as showing preferences between these brands (CX 150-Z417). Yet in connection with the very first preference question, in which he indicated a preference for Amana, he stated, "I'm more familiar with it [Amana]." He went on to select Amana as the brand preferred in each of the preference questions (CX 150-Z417-Z419—he did indicate he had a Magic Chef, as well as an Amana in his home). Again, the comparative experience in servicing the various brands was pointed out as a critical factor in the preferences of the interviewer. Again, a "red flag" was raised for Litton to see that some inquiry should have been made into the experience of the interviewed technician with the various brands being compared. Since familiarity was an important factor with this respondent, it should have been determined whether his experience with the other brands was sufficient to make his ratings meaningful (Miller, Tr. 533-34).

72. CX 150-Z421 also illustrates this problem, when in rating Litton and GE as the "easiest to repair," this respondent volunteered that it "depends on how many of a brand you work on." CX 150-Z544-547, similarly shows the importance of comparative experience. In connection with the various questions asked of this respondent he made such remarks as, "because we served more Litton than any other," "because I can service it" (after answering that he would recommend Litton to a friend), and "Don't have enough experience on other brands besides Litton" (CX 150-Z545-Z547). Other comments indicating experience was a factor which should have been probed further in the Litton surveys are found at CX 150-Z603, Z640, Z755, Z794, [28]Z797, Z845, Z887; CX 185B, E, O, R, V, Z86, Z224, and Z227. Since these were all volunteered remarks, there being no questions in the survey designed to qualify a respondent by experience, I am led to the same conclusion as that

¹⁵ Respondents' argument that this verbatim comment was in response to a question not used in the Litton advertisements (RRB, p. 153) is really beside the point. The fact is this interviewee indicated a lack of experience in repairing Amana ovens. This certainly casts some doubt on his rating of Litton as "easiest to repair," requiring "the fewest repairs," and "best quality", for example. Such an answer should have raised a "red flag" in Litton's mind as to the need for further qualification of the interviewees in the survey questionnaire.

reached by complaint counsel's experts. That is, that the interviewees were not properly qualified as to experience and the survey is, consequently, unreliable (Miller, Tr. 548, 532-47; Sudman, Tr. 1697-1701, 1703-04).¹⁶

73. LMCP was also aware that its surveys were not originally designed for the purpose of advertising. Surveys which are to be the subject of advertisements should be conducted under stricter standards than those which are for internal company use only (Zeisel, Tr. 4257-62). Litton, therefore, should have carefully re-evaluated the surveys and the methodology followed therein, prior to using the results in advertisements. It is clear, in light of the previous findings, that such a critical re-evaluation was not made in this case (See Miller, Tr. 591-92).

74. Moreover, the complaint herein charges and I have so found above (Findings 21, and 29) that the Litton advertisements represented that certain preference claims were proven by the two Litton surveys. [See Complaint, Pars. Six (6) and Seven (7)]. In view of the above findings that Litton lacked a reasonable basis for making such preference claims, it must also be found then that the representation that such claims were proven by the surveys is false and misleading.

C. Rejection of Certain of Complaint Counsel's Criticisms of Surveys

75. In addition to the above defects, which I find to be substantial, complaint counsel urge that there are other defects in Litton's surveys. In the main, I find that these other alleged defects are inconsequential, have not been proven to be consequential, are subsumed in the principal defects noted above, or are simply not defects at all. In view of my basic findings, there is no need to discuss each and every one of these alleged defects. However, I will dispose of a few of the principal ones cited by complaint counsel. [29]

76. Among such alleged defects, complaint counsel take issue with respondents' definition of the universe for this study. They urge that the proper universe includes all independent service agencies, whether they service Litton ovens or not,¹⁷ and including servicing-dealers. Much of their evidence and the testimony of their experts is based on this theory—that servicing-dealers are part of the universe. Such position flies in the face of the evidence of record which shows

¹⁶ This problem is, of course, compounded by the fact that the interviewees in the Litton surveys were all from agencies on Litton's lists of authorized service agencies.

¹⁷ As noted in Finding 19, *supra*, some of the advertisements can be read as implying that the survey results were representative of all independent service technicians. However, for the purpose of these findings, I am conservatively using the universe which Litton apparently intended using in its surveys—independent service technicians who serviced two or more brands (one of them being Litton).

that Litton adopted a narrower universe in its studies and that such narrower universe conformed to industry definitions and logic (See Finding 42, *supra*). Complaint counsel's position is based on two factors: (1) Their reading of the advertisements as implying such to be the fact through use of terminology such as "independent microwave oven service technicians surveyed," and (2) Because the lists which Litton used in its surveys included servicing-dealers. As for the first, it is not so obvious that the public perception of the term "independent service technicians" would include servicing-dealers. The expert testimony of record in this case would indicate that it would not. Dr. Ward testified that the public perception of "independent" would be that such technicians were free from any "biasing influence" (Tr. 3979). It is probable that association with a retail store would be considered a "biasing influence". Technicians so employed would be expected to be loyal to the brands which their employers handled (RX 72W-Z19). Insofar as the inclusion of dealers on the Litton lists is concerned, this is a basic defect with the Litton surveys, as noted above, but it does not warrant broadening the universe to include all such servicing-dealers. This is particularly true where the weight of the evidence indicates the proper universe to be the narrower one, as in this case.

77. A second alleged defect urged by complaint counsel is termed the "bias of non-response."¹⁸ Based primarily on [30]Litton submissions to the Commission during the investigation of this matter, complaint counsel argue that the response rate to the commercial survey was 42% and the response rate to the consumer survey was 47% (CPF 165 et seq.). These response rates were obtained by simply dividing the number of "completed calls" (where a qualified technician was reached who would answer all of the questions) into 500 (the number of agencies on each list). Complaint counsel argue that such admissions by respondents are binding and cannot be rebutted (CPF 167).

78. The latter argument is pure nonsense. If respondents mistakenly admitted black was white in response to a Commission investigative demand it would not make it so. The fact is that the term response rate can be used in a number of different ways. Respondents, in answering complaint counsel's investigative demands obviously thought they were being asked how many technicians responded to the survey who were qualified and willing to

¹⁸ The "bias of non-response" refers to the possibility that the non-respondents to a survey (those who are missed for some reason) might differ in their answers from those who did respond (Miller, Tr. 574-75). Tests to determine the extent of such possible bias become necessary in the opinion of complaint counsel's experts, when there is a low response rate, since the possibility of bias in the survey is then substantial (Miller, Tr. 572-75, 577-78; Sudman, Tr. 1716).

answer the preference questions (CX 308-Z006-Z007). The testimony of two of complaint counsel's own experts indicates that this may not be the proper way to determine response rate if one is trying to determine whether there may be a "bias of non-response". That testimony and the testimony of respondents' experts shows that certain other data must be considered in determining response rate from a statistical point of view (Miller, Tr. 668-90; Fink, Tr. 1440-41, 1452-56, 1465-73; Roshwalb, Tr. 3378-80, 3381-83; Zeisel, Tr. 4139). For example, agencies contacted which were not qualified to answer the questions (did not repair microwave ovens, serviced only one brand of ovens, had not repaired such ovens for at least one year, etc.) were obviously responses, even if they did not properly belong in the universe being surveyed. It is certainly inaccurate to classify such agencies as non-respondents.¹⁹ [31]

79. The only evidence of record which attempted to clarify this confusion in terms, as to actually what was the non-response rate in a statistical sense, was the testimony of respondents' experts. Mr. Roshwalb and Dr. Zeisel computed what they considered to be the proper response rate of the Litton surveys to be 63% for the consumer survey and 65% for the commercial study (Roshwalb, Tr. 3378-80, 3381-83; Zeisel, Tr. 4139). The testimony of complaint counsel's own expert, Dr. Miller on cross-examination, confirms the propriety of their logic (Tr. 668-90).

80. The testimony of Dr. Zeisel further indicates that these latter response rates were within the normal range of responses to surveys of this kind and, therefore, would not raise the spectre of a possible "bias of non-response" (Zeisel, Tr. 4139-40). There being no reliable evidence of record to the contrary, this opinion must be credited. Therefore, the rate of response to the two Litton surveys is found to be not abnormally low and does not present a substantial probability of bias.

81. Complaint counsel also argue that the Litton surveys were biased because they were based solely on LMCP's own lists of authorized service agents. It is their position that such "authorized agents" were likely to be biased in favor of the brands for which they were authorized (CPF 137 et seq.). While there is some validity to this position (See Finding 63, *supra*), the basic problem it poses is subsumed by the defect I found above, that Litton failed to sample in some way the "100" additional agencies that were repairing Litton ovens but were not on the authorized lists. Thus, I do not find this,

¹⁹ For instance, in the commercial survey CRI contacted 93 agencies which serviced only one brand (CX 308B). The interview was completed for this survey's purposes once that fact was established.

the interview of authorized technicians only, to be a separate, substantial defect in the Litton studies.²⁰ [32]

D. *The Chilton Survey*

82. As part of their case-in-chief, complaint counsel introduced a survey designed to show that the universe of independent microwave service agencies was vastly larger than the 600 or 700 agencies claimed by respondents. This survey was conducted for complaint counsel by Chilton Research Services, a survey research firm located in Radnor, Pennsylvania (Fink, Tr. 1345-46, 1352-53).

83. The basic materials for the Chilton survey were provided by the Commission staff, *i.e.*, a list of agencies and the questionnaire. Chilton Research Services (Chilton) then conducted the interviews, tabulated the results and made certain findings (Fink, Tr. 1352-55). A report was then submitted to the Commission staff transmitting those findings (CX 280A-Z180; Fink, Tr. 1352-53).

84. The sampling frame for the Chilton survey consisted of about 3,699 agencies. The list of names, as provided by Commission staff is in evidence as CX 278. Dr. Fink, who was in charge of this survey at Chilton, was informed by Commission staff that this list included agencies which were likely to have repaired appliances, including microwave ovens, in 1976. He also understood that the list might be as much as three years old (Fink, Tr. 1355-56).

85. Chilton then followed a simple random sampling technique in setting up and conducting telephone interviews. It was expected that the sampling would produce about 500 interviews. The purpose was to determine a percentage of agencies which were servicing multiple brands of microwave ovens in 1976, with one of them being Litton. That percentage would then be projected to the universe (the list of 3,699 agencies) to obtain an estimate of the approximate number of those agencies within the total universe (Fink, Tr. 1356-58, 1362-63; CX 280A-Z180).

86. The Chilton survey resulted in liberal and conservative estimates, both of which would indicate that Litton had greatly underestimated the number of independent service agencies which were not on the Litton lists, but which would have been servicing Litton and at least one other brand of microwave oven in 1976 (CX 280A-Z180).

87. The Chilton survey results are not reliable and probative for

²⁰ Moreover, the bias of authorization would be impossible to completely escape in the Litton surveys. To the extent the universe is limited to agencies servicing two or more brands of ovens (one of them Litton), it will of necessity be comprised mainly of agencies authorized to service Litton ovens. Thus, it makes no sense to divide the question of authorization from the basic problem that the unlisted (unauthorized) "100" were not surveyed.

a number of reasons. The principal one is that the list which comprised the universe for the survey was made up in great part of servicing-dealers (Niemasik, Tr. 1312-13; RX 72B-S). As noted in Findings 42 and 76, *supra*, such servicing-dealers are not properly a part of the universe in the Litton surveys. The substantial extent of inclusion of such servicing-dealers in the Chilton survey taints its results and makes its conclusions irrelevant to this proceeding (RX 72B-S). [33]

88. Among other reasons why the Chilton survey is defective is the lack of consistency and reliability in the universe upon which it was based. The exhibits underlying CX 278 (the universe for the study) were vastly different in make-up and the time periods for which they were applicable (Niemasik, Tr. 1244-56; Jadwin, Tr. 837-68, 925-27; Wooden, Tr. 944-50, 991-95, 998-1010; Carmen, Tr. 1142-48). The GE list, for example, was a computer listing of service agencies franchised to service all GE appliances in 1978 (Carmen, Tr. 1158).²¹ From this list Commission staff allegedly eliminated most servicing dealers in preparing CX 278. This was done because of the great number of agencies listed on the GE computer listing (Niemasik, Tr. 1301-03). The Sharp and Magic Chef lists were both prepared by these companies for complaint counsel's use in this case and were not records kept in the ordinary course of business (Jadwin, Tr. 837-45; Wooden, Tr. 944-47). Both included servicing-dealers (Jadwin, Tr. 837-49; Wooden, Tr. 950-51). The Sharp list was made from a computer run listing all Sharp service agents. The computer run was prepared in February 1977 and represented Sharp's service network in December 1976 (Jadwin, Tr. 834-37, 858-60). The Magic Chef list was compiled from that company's service contract file as of June 30, 1976 (Wooden, Tr. 946-47). Both Sharp and Magic Chef had published lists of service agencies which were packed into their microwave ovens when sold to the public. In each instance such published lists varied substantially from the lists prepared for complaint counsel for use in this case (CX 175, 243, 245, 53-54, 56; Wooden, Tr. 1009-10). In addition, it was noted in the cross-examination of Mr. Jadwin that there were very substantial differences between the Sharp published list for 1976 and a later Sharp list published in 1977 (Jadwin, Tr. 910-21). This indicates a substantial change in Sharp's service network was taking place in 1976-1977 (See also, Jadwin, Tr. 928-29). It was also shown that GE's service network was vastly different from those of Sharp and Magic Chef. GE's service network in 1976 was primarily composed of its

²¹ This list was not compiled by GE but by Wahlstrom & Company which handles GE's yellow page advertising for all product services (Carmen, Tr. 1131-42).

own GE factory service operations. At that time it had 115 to 120 factory service locations. Only in the areas outside the boundaries of these locations did it franchise other servicing agencies (Carmen, Tr. 1109-12). These were among the facts I considered when I stated, upon accepting CX 278 (the [34]Chilton universe) into evidence, that this exhibit does not show who was servicing microwave ovens in 1976, nor that the agencies listed might have qualified for the Litton surveys. CX 278 was received solely because it provided the universe for the Chilton survey (Tr. 1339-41), and the Chilton survey is subject to any infirmities that may be inherent in such list.²²

89. Moreover, the cross-examination of Dr. Miller, one of complaint counsel's experts, casts further doubt upon the validity of CX 278 as a proper universe for the Chilton survey. Using a hypothetical approach, Dr. Miller was questioned concerning the disposition totals in a survey entitled "Color Television Services Technician Survey Conducted by ABC Corporation" (RX 75)—the disposition totals therein were virtually identical to those in the Chilton survey (RX 75; CX 280-Z003). Dr. Miller testified that the number of unlisted, wrong numbers and non-working number agencies on RX 75 was much too high and created a "red flag" in his mind suggesting that the underlying list in the survey was defective (Tr. 687-88). He indicated that if you have a good list to begin with the number of non-working or wrong numbers should be quite small. He added that when his company got a bad list, it did not accept it. It went out and got a better frame for the sample (Tr. 688-90). These remarks necessarily reflect on CX 278 as well, since RX 75 and the Chilton survey results are practically identical. This gives additional substance to the problems raised above concerning the three lists underlying CX 278.

90. In spite of such disparities revealed on the record, complaint counsel have submitted no substantial evidence to support the validity of the universe used in the Chilton survey, that is, to show that CX 278 was of such a character that projections could be made to it based on the results of the Chilton survey. The testimony of complaint counsel's own experts indicates that there should be a certain consistency to [35]a universe or population of a survey, so that the results of that survey might be generalized to the total population (Miller, Tr. 474-75; Sudman, Tr. 1666; Fink, Tr. 1432-36;

²² The statement that CX 278 does not show who was servicing microwave ovens in the Spring of 1976, nor that of any of the listed agencies might have qualified for the Litton surveys applies equally as well, of course, to the underlying lists—CX 243, 245 and the GE computer run. In addition, CX 241 (a list of Amana service agencies) suffers from the same defects—in that it included servicing dealers and it was not proven that the agencies therein serviced microwave ovens in the Spring of 1976, nor that the listed agencies would have qualified for the Litton surveys (Moore, Tr. 1850).

See also, Roshwalb, Tr. 3630-31). Yet, Dr. Fink who conducted the Chilton survey was not able to vouch for the quality of the universe used in that survey. When asked whether he had a list that would give him a universe from which he could get usable responses, Dr. Fink specifically denied any responsibility for the quality of CX 278. In fact he testified:

Well, we merely were charged with the responsibility for taking the list that was given us, regardless of what its source was, and identifying agencies on there that serviced Litton and one other brand . . . professionally we were not asked to comment on the quality of the list or what it represented (Tr. 1432).

Complaint counsel have offered no other expert to testify as to the quality of CX 278, nor the propriety of its use as a universe for the Chilton survey; despite my comments concerning some obvious problems with CX 278 when it was received in evidence (Tr. 1339-41). There is simply no reliable evidence of record that CX 278 was as was represented to Dr. Fink—a list containing the names of agencies that were “likely” to have repaired microwave ovens in 1976 (Fink, Tr. 1356). Without such a showing the Chilton survey could not be given much weight, even if it were not tainted by the inclusion of servicing-dealers.

91. Another problem with the Chilton survey is its failure to establish that all of the interviewees had repaired microwave ovens for at least one year prior to 1976 (CX 280H-J). Since this was one of the qualifying factors in the Litton surveys (Finding 46, *supra*), the omission of this question prevents any determination that all of the tabulated Chilton interviewees would have been eligible for the Litton universe, even if there were no other faults with such survey.

92. Under all of these circumstances the Chilton surveys must be considered irrelevant and lacking in probative value.

IV. CAPACITY TO MISLEAD MEMBERS OF THE CONSUMING PUBLIC

93. The advertisements at issue herein received substantial dissemination to the public (Findings 7-10, *supra*). They were [36]of a type which could be expected to have a substantial impact on consumer buying decisions. They called to the consumer's attention the purported expertise of a class of professionals—independent service technicians—who could be expected to have a peculiar insight into the comparative quality of Litton ovens and the leading competitive ovens. Moreover, such advertisements indicated that the preferences of these experts was established as the result of a survey. While there may be some consumer skepticism regarding surveys conducted for commercial establishments (Sudman, Tr. 4519-20), the

term "survey" strongly implies that the characteristics of the sample taken can be used for drawing inferences about the characteristics of the entire universe (Miller, Tr. 475). In other words, the technicians contacted in the "survey" are representative of a broader base of independent service technicians who service microwave ovens.²³ Even with a certain amount of reader skepticism, such a representation can be expected to have an impact on some readers of the advertisements and to cause them to purchase a substantial quantity of Litton microwave ovens.

V. VIOLATIONS

94. Having found: (1) that respondents made certain representations in advertisements which received substantial dissemination, in commerce (Findings 7 through 33); (2) that Litton's surveys did not provide a reasonable basis for such [37]representations as claimed in such advertisements (Findings 52 through 74); (3) that the further representation in such advertisements to the effect that certain preferential claims were proven by the Litton surveys was false and misleading (Finding 74); (4) that such representations had the capacity and tendency to mislead members of the purchasing public into the purchase of substantial quantities of microwave ovens manufactured by LMCP (Finding 93); and (5) that Litton was and is in substantial competition in commerce with other firms engaged in the sale and distribution of microwave ovens similar to those produced by Litton (Finding 6); it necessarily follows that I find that there have been violations of Section 5 of the Federal Trade Commission Act, as charged in the Complaint.

95. In so finding, it should be noted that two of the substantial defects in Litton's surveys which are found hereinabove were not among the four specified defects set forth in Paragraph Ten of the complaint (Findings 58 and 66-68; Complaint Para. Ten). However, Paragraph Ten clearly is not limited to the specific defects enumerated therein. In fact, it charges that the Litton surveys do not prove certain representations of the Litton ads "for reasons including *but not limited to* the . . ." four specified problems (Emphasis added). Moreover, the issues were broadened during pretrial proceedings to

²³ A careful reading of Dr. Ward's testimony for respondents shows that he carefully avoids stating categorically that consumers do not "project" the results of a "survey" to a larger group (Tr. 3981-86). Rather, the tenor of his overall testimony is that the readership of the Litton advertisements would be an "up-scale" clientele which would be particularly immune to the blandishments of such ads (Tr. 3984-85). It is obvious that Litton did not believe this to be the case or such advertisements never would have been published. Further, I am not able to give full credit to such testimony in view of the nature of the representations in Litton's ads. Even Dr. Ward noted that these advertisements provided far more information about the nature of the study done than is provided in much consumer advertising (Ward, Tr. 3983). Such additional information could be expected to have a greater impact on the reader than a bold assertion that "three out of five doctors . . ." recommend (Ward, Tr. 3983).

spell out a number of additional defects complaint counsel would raise under the broad language of Paragraph Ten (Statement of Issues, filed June 27, 1979).²⁴ The record of the pretrial proceedings and the subsequent trial herein make it evident that the issues of whether servicing-dealers were properly a part of the universe for Litton's surveys and whether the surveys were made of agencies rather than technicians, as represented in the ads, were squarely before me and fully tried.

96. In fact, aside from the Statement of Issues, the question of the inclusion of servicing-dealers in the Litton surveys was raised in pretrial in complaint counsel's Request [38] for Admissions and Interrogatories of respondents (Response to Request for Admissions, filed July 5, 1979, pp. 33-34; Answers to Interrogatories, filed Sep. 10, 1979, No. 59), and a substantial portion of respondents' evidence in the case-in-defense was directed to the question of whether servicing-dealers were properly a part of the universe for the studies (e.g., Seitz, Tr. 2335-37; Omstead, Tr. 2519-20; Winters, Tr. 2660; Houserman, Tr. 2787, 2790-91, 2930-34; Roshwalb, Tr. 3587-88; Zeisel, Tr. 4110; RX 72A-Z18).²⁵

97. Respondents also successfully blocked complaint counsel's attempts to ascertain the exact number of dealers included on Litton's authorized service agency lists. Complaint counsel's application for subpoenas *duces tecum* directed to Litton's 54 distributors was denied on the ground that complaint counsel had already carried their burden of showing that respondents' lists may have included a substantial number of dealers (thus indicating that respondents did not have a reasonable basis in their surveys for the advertisement claims). (Application for 54 subpoenas, dated November 28, 1979; Order Ruling on Respondents' Opposition . . . , Dec. 6, 1979.) In view of the pretrial notice that the purity of the Litton lists was being questioned and the fact that respondents blocked the one attempt to establish the exact number of dealers on those lists, it is clear that respondents chose to leave the record in the state it is now found. Therefore, my findings of these defects and a consequent violation based partly thereon are within the framework of the complaint, the notice to respondents and in conformance with the evidence of record.

²⁴ The Statement of Issues questioned the propriety of Litton's "sample of independent technicians," and urged that if a proper sample had been drawn the results would have been different (Issue II.A.f. p. 5). It also questioned Litton's failure to sample properly from within the "universe of independent technicians," as opposed to Litton's simply contacting each agency (Issue II.A.d. p. 5; see also Ward, Tr. 3787).

²⁵ Respondents proved quite effectively that servicing-dealers did not belong in the universe, knowing full well that their own lists contained servicing-dealers. They can't have it both ways—the Chilton Survey can't be wrong because it includes servicing-dealers and the Litton surveys still be right.

VI. RESPONDENTS' EXCEPTIONS TO THREE OF MY RULINGS

98. Respondents allege there was substantial error on my part in three of my rulings concerning discovery and the admissibility of evidence. First, respondents allege that I erroneously denied them discovery of certain coding information in connection with two surveys which complaint counsel then intended offering in evidence, the Chilton Survey and the Bee [39]Angell Survey (not offered), thus denying them of substantial evidence crucial to their case on defense (RPF, pp. 76 et seq., n.9). Secondly, it is stated that I erroneously rejected RX 86, on the ground that it had not been noticed as a respondent exhibit, even though it had previously been noted as one of complaint counsel's proposed exhibits and despite the fact it was to be used in cross-examination of a witness called by complaint counsel (RPF, p. 41, n.4). Finally, respondents take exception to my exclusion of Wave 1 of RX 72 on the ground that complaint counsel had not been provided with underlying documentation in violation of pretrial orders. In the latter argument it is urged that I was inconsistent in that I did not exclude several of complaint counsel's exhibits despite the fact respondents did not get access to underlying documentation. None of these exceptions have any merit.

99. The denial of access to the codes for the Chilton and Bee Angell surveys was based on a balancing of the public interest in preserving the reliability of survey data through the protection against disclosure of confidential survey data, as compared to the needs of respondents. (Order of June 19, 1979, p. 9.) Subsequent events at the hearing herein proved such ruling correct. Respondents had no trouble proving that the interviewees in the Chilton Survey included a substantial number of servicing-dealers (Finding 87, *supra*). In fact, complaint counsel readily admit to that fact. Nor, did respondents have any difficulty proving other substantial defects in the Chilton study (Findings 88 through 91, *supra*).²⁶ The Bee Angell study was not even offered in evidence, so there could be no prejudice in this regard. [40]

100. Respondents also imply, however, that the denial of such

²⁶ Moreover, respondents fail to note the wealth of underlying data they did have in connection with the Chilton study, which enabled them to make such an effective attack on that survey. They were provided with the following: The survey reports plus any errata or clarification sheets; all tabulations; all questionnaires, fully intact except for the code numbers which would identify the name of the interviewee in each instance; lists containing the names and addresses of all agencies in the universe; the sample drawn by Chilton, with identification of all agencies who were actually interviewed; the names of the telephone interviewers and supervisors for the survey; the identity, background and training of the responsible researchers of Chilton; and all documents which Dr. Fink stated were underlying materials for the survey. (Order of June 19, 1979, pp. 2-3.) In the case of the last items, it was discovered on cross-examination that there might have been some additional hand-written notes and papers in Chilton's files which Dr. Fink had not considered backup papers and which he did not turn over to complaint counsel for disclosure to respondents. Dr. Fink was ordered to search his files and turn over any such materials to respondents (Tr. 1538-42).

code for the Chilton survey in some way prevented them from proving the exact size of the group of unauthorized agencies who would have qualified for the Litton survey, but were not on the Litton lists (the missing "100") (RPF, n.9, p. 77). However, in view of the problems found herein with the universe for the Chilton survey, all of which defects have been strenuously urged by respondents, I find that such study could not have provided a basis for a more exact determination of the size of the additional group of agencies which were not included in the Litton surveys. In fact, aside from the defects found in the Chilton survey and its underlying lists of service agencies, it must be noted that such survey was not based on service lists from all of Litton's competitors. It is to be assumed that if service agencies authorized for all of the numerous other competitive brands were available, there would be additional agencies revealed which might belong in the Litton universe.

101. The exception to my rejection of RX 86 is equally as erroneous. Respondents' argument in footnote 4 of page 41 of their Proposed Findings omits certain salient facts, including the main basis for my ruling. The witness being questioned in this instance was Mr. William Wallace George, the president of LMCP at the time the challenged advertisements were run (Tr. 1941). He was called as complaint counsel's witness, but his questioning on direct was quite limited in scope—dealing with the involvement of Litton industries, Inc., in the day-to-day affairs of LMCP (Tr. 1941-2021). On "cross-examination" respondents' counsel went well beyond the scope of the direct questions; over complaint counsel's objections. I overruled complaint counsel's objections and permitted such questioning with the express notice to respondent's counsel that, where he did so, he was making the witness his own (Tr. 2024-25). Mr. Adair at the point of questioning involved in respondents' present exception, was clearly exercising his permission to put in some of his defense during complaint counsel's case and was, in fact, engaged in the direct examination of Mr. George [41](Tr. 2085-88)—who had also been noted as one of respondents' witnesses on its defense (Respondents' Witness List.) The document in question was an internal communication between Litton officials concerning the then on-going dealings with the Federal Trade Commission staff. It contained a number of obviously self-serving statements and was not a document noted by respondents on their proposed exhibit lists (Tr. 2085-88). It was rejected primarily because it was a self-serving statement with no substantial probative value and, secondarily, because it was being offered on the direct examination of one of respondents' noticed witnesses, without having been noted on the exhibit list in accordance

with the pretrial orders controlling the conduct of this hearing (Tr. 2088). Such ruling was correct and proper.

102. The third ruling in issue similarly involved a direct and deliberate violation of a legitimate pretrial order and was correct and proper. It is important to notice that respondents do not deny violating pretrial orders to disclose underlying records and documentation for Wave 1 of RX 72. Rather, it is their contention that my ruling was erroneous because it was inconsistent, in that I allegedly had allowed in other exhibits offered by complaint counsel without requiring the underlying documents to be turned over to respondents (RPF 96-98; RRB, pp. 127-28). The latter allegation is simply false. Respondents refer to the records underlying CX 241, 243 and 245—lists of service agencies (including servicing-dealers) allegedly authorized to service Amana, Magic Chef and Sharp ovens, respectively. In the first place, to the extent any such underlying documents existed they were in the hands of third parties, *i.e.*, Amana, Magic Chef and Sharp, rather than complaint counsel. Therefore, the question was not one of holding respondent to a higher standard of conduct under pretrial orders than was applied to complaint counsel. And secondly, all of such underlying documents were either available to respondents through pretrial discovery, or non-existent. In the case of CX 241, the document itself was an original business record, but there were notations made on such document based on other records. Those notations had not been placed on CX 241 for purposes of this litigation, but for Amana's own purposes, some years prior to the hearing herein. The records on which such notations were based were destroyed prior to the date respondents' subpoena *duces tecum* was served upon Amana in this proceeding (Moore, Tr. 1844-51). There were no longer any underlying documents to be discovered. CX 241 was, therefore, allowed into evidence noting this fact, among others, as detracting from the weight that could be given to such exhibit (Tr. 1850-51). In the case of CX 243 and 245, respondents were granted subpoenas *duces tecum* which contained specifications directed toward obtaining documentation underlying these two [42] exhibits; both of which had been prepared by competitors of Litton at complaint counsel's request for use in this litigation (Specifications 3 and 4 of Magic Chef subpoena; Specifications 3-5 of the Sharp subpoena). If respondents did not obtain access to such documents under these subpoenas I must assume it was their own fault. No application was made to me seeking enforcement of these provisions of the subpoenas.

103. Accordingly, respondents' argument that I was inconsistent in this regard in requiring respondents to adhere to pretrial orders

requiring disclosure while not requiring similar disclosure to respondents, is simply false. Moreover, respondents' failure to comply with such legitimate order was particularly egregious. Respondents' witness, Mr. Houserman had compiled a summary list of certain data from LMCP's records between the date of his deposition by complaint counsel and his testimony at trial. The underlying records were not available in the courtroom and complaint counsel had not been made aware of the summary or the documents from which it was compiled. Complaint counsel then were given no access to the underlying records and were not in a position to cross-examine concerning such summary data (Tr. 2874-96). When Wave 1 of RX 72 was later offered in evidence based on such summary data (the Houserman summary was not itself offered in evidence) I had no choice but to enforce the pretrial orders of Judge Howder (my predecessor in this case) and myself. There is certainly no similarity between this action and my receipt in evidence of CX 241, 243 and 245 under the circumstances outlined above.

VII. DISCUSSION

A. Proof in Ad Substantiation Cases

This is a fairly standard "ad substantiation" case. As such, there is a well-established body of case law governing the burdens of proof and elements of a violation herein. As the Commission stated in *Pfizer, Inc.*, 81 F.T.C. 23, 62 (1972), "it is an unfair practice in violation of the Federal Trade Commission Act to make an affirmative product claim without a reasonable basis for making that claim" (Emphasis added). This same conduct has also been found by the Commission to be a deceptive practice within the meaning of Section 5 in later cases such as, *National Dynamics Corporation*, 82 F.T.C. 488, 549-50 (1973), *affirmed*, 492 F.2d 1333 (2d Cir., 1974), *cert. denied*, 419 U.S. 993 (1974). *See also*, *Firestone Tire and Rubber Co.*, 81 F.T.C. 398, 449, 452 (1972) and *Crown Central Petroleum Corp.*, 84 F.T.C. 1493 (1974). [43]

The burden of proof and the issues involved in such cases are best spelled out in the *National Dynamics* case, *supra*. There the Commission stated, "We have held that the test applied to determine the adequacy of substantiation is whether or not it [the substantiation for the advertised claims] provides respondents with a reasonable basis for believing their claims are true. The issues thus raised under this test appropriately involved a consideration of the reasonableness of the advertiser's action and his good faith" (at 553). As to the type of substantiation required under the "reasonable

basis" issue, the Commission has stated that "... the type of substantiation required to satisfy the reasonable basis standard would depend on the facts of each case." *Crown Central Petroleum Corp., supra*, at 1548.

In light of these basic principles it was complaint counsel's burden to prove that at the time Litton caused the advertisements in question to be published, it knew or should have known that its substantiation was defective and did not provide a reasonable basis for such advertisements.²⁷ My findings above show that complaint counsel met that burden. In fact, the experience in marketing and market research of LMCP's marketing staff (George, Tr. 2030-31; Wilkie, Tr. 3722-27) which was responsible for the formulation of the Litton surveys (CX 145B, 248, 305A, and 308E-J) emphasizes this fact.

These experienced personnel knew or should have known that the substantiation for their advertisement claims was defective where:

1. They intended to survey technicians who were free of any biasing influence through relationship to a manufacturer or a dealer, but they were on notice that the lists used as a [44]universe for their surveys were tainted by the inclusion of servicing-dealers;

2. They knew that one-sixth, or more, of their defined universe was not included in the survey and that this group of authorized agencies might differ in preferences from Litton's authorized agencies;²⁸

3. They knew they had surveyed agencies, not technicians, but their advertisements referred to a survey of technicians; and

4. They knew that a number of the technicians interviewed had volunteered remarks indicating they did not have adequate experience, with some brands mentioned, in order to allow them to make preferential comparisons; and that such remarks might be symptomatic of a much broader group of the interviewees, since the surveys asked no questions which would qualify respondents as to their relative familiarity with different brands mentioned (See n.28).

Each of these facts should have been sufficient to cause grave

²⁷ In this regard, respondents have introduced in evidence studies prepared by its experts for use in this litigation and other data which were not in their possession at the time the ads were published (e.g. RX 10 and 72). It is complaint counsel's position that such data, to the extent they attempt to prove the validity of the Litton surveys, are irrelevant because such information could not have provided a reasonable basis for Litton's claims at the time of publication (CRB, pp. 21 et seq.). The case law cited above would appear to support this position. However, in the event such data had proven that the Litton studies were error-free and valid, it certainly would have had a bearing on the public interest in bringing this proceeding and the issuance of an order herein.

²⁸ LMCP personnel were well aware that familiarity with a particular brand would weigh heavily on the preferences of the individual technicians polled. In an internal Litton memorandum, one LMCP official noted, "... the assumption being that if a technician services a particular brand he is most likely to prefer it ..." (CX 239B)

doubts in the minds of LMCP's officials as to the reasonableness of their basis for the advertising claims. Furthermore, such doubts should have been reinforced by the fact that the surveys were not originally intended or designed to serve as the basis for advertisements. They were initially intended only for internal use at LMCP. With this fact in mind, the Litton officials should have taken a very careful look at the surveys and their results before putting them to a use for which they were not intended. This fact alone would put Litton on notice of the defects in their studies; if the obvious defects listed above did not come to their attention previously.

Such facts specifically negate both the "reasonableness of the advertiser's action" and its "good faith". Therefore, the burden of proof spelled out in *National Dynamics* has been met. [45]

B. The Meaning of the Advertisements

My findings above, concerning the representations made in the Litton advertisements, are essentially the same as the representations set forth in Paragraphs Six through Nine of the complaint.²⁹ My support therefor is the plain wording of the advertisements and the fact that such interpretation is a reasonable one. Such interpretation is one which a substantial number of readers, whether sophisticated or not, were likely to have made when they read the Litton advertisements. The law is quite clear that under such circumstances there was no need for any further empirical evidence as to what the ads represented to the public, *Giant Foods, Inc.*, 61 F.T.C. 326, 347, n.2 (1962). The appropriate test is whether the interpretation of the ads set forth in the complaint and found herein is a reasonable one, *National Dynamics Corporation, supra*, 82 F.T.C. at 548, and that test has been met.

Respondents' expert, Dr. Ward, characterized the audience for the Litton advertisements as "sophisticated", "upscale", "well-educated" and "wealthy" (Ward, Tr. 3972-73, 3988-90). Respondents have offered no proof that the readers of *Better Homes and Gardens*, *Newsweek*, *Sunset* and *Time* magazines and the major newspapers published in the cities named in Finding 8 fit such description. Moreover, even a "sophisticated" reader would not be so well versed in electronics that he would place no value on the preferences of a body of experts (service technicians) in making a purchase decision

²⁹ The only differences between my findings and the charges of the complaint are that I did not find that respondents misrepresented the surveys as being "independently" conducted by Custom Research, Inc. (Findings 35-37) and I did not agree with complaint counsel's definition of "independent microwave oven service technicians." In connection with this latter difference, I further limited the representations to independent microwave oven service technicians who serviced Litton and competitive microwave ovens; although, in doing so, I noted that some of the local advertisements made a broader representation (Findings 21, 29, 18 and 19).

on such a complex appliance as a microwave oven. Dr. Ward's testimony concerning reader interpretation of the ads was not based on empirical evidence of consumer perception, but only on his own generalized experience as an academic working in the field of marketing behavior (Ward, Tr. 3959-70). Under the circumstances, it is of little probative value in the face of the plain wording of the advertisements. *Crown Central Petroleum*, 84 F.T.C. 1493, [46]1524, 1540 (1974); *Firestone Tire and Rubber Co.*, 81 F.T.C. 398, 454 (1972).

Furthermore, a sophisticated readership, as posited by Dr. Ward, would be more likely to be appreciative of survey methodology. Such readership would be even more aware that the results of a survey can be generalized to a broader universe of service technicians than the group actually questioned in the survey. See *Bristol-Myers Co.*, 46 F.T.C. 162, 173 (1949). They are likely, therefore, to be more affected by the representations of the advertisements than a less knowledgeable readership.

However, it must also be noted that respondents' advertising was not limited to the readership of the magazines mentioned above, the *Wall Street Journal*, a few trade publications and a number of leading newspapers in major cities (Findings 8 and 9). As noted in Finding 10, above, advertisements containing all, or part, of the textual material disseminated by Litton to its distributors and dealers appeared in at least 109 local advertisements (106 print and 3 radio) in 26 states across the country. This was in addition to Litton's own national advertising campaign. Litton assisted in the payment of all or part of the cost of at least 41 of such advertisements (the cooperative advertising program), including many which did not contain the full text of the Litton "slicks" and which were, therefore, even more deceptive than the national advertisements (Findings 18 and 19, *supra*). But, whether Litton cooperated in the payment for such advertisements or not, it certainly provided the instrumentality to each of these advertisers through which misrepresentations were made to the public (Findings 10 through 13, *supra*).³⁰ It is well established that one who puts into the hands of others the means by which such others may deceive the public is equally as responsible for [47]the resulting deception. *Federal Trade Commission v. Winstead Hosiery*, 258 U.S. 483, 494 (1922); *Regina Corp. v. Federal Trade Commission*, 322 F.2d 765-768 (3rd Cir., 1963); *Waltham Watch Co. v.*

³⁰ Respondents have misstated my rulings concerning the admission of such advertisements (RRB, pp. 14 et seq.). My rulings at Tr. 358 and 378-79 make it quite clear that I was receiving advertisements not paid for by Litton and which only contained a part of the materials supplied by Litton in its "slicks", on the basis that Litton "created the instrumentality which was the basis for the various advertisements and in this way participated in the dissemination of such information through news media, the various news media indicated on those particular exhibits" (Tr. 358). Consistent with this, I rejected some advertisements which contained no data concerning the Litton surveys (Tr. 362-64).

Federal Trade Commission, 318 F.2d 28, 32 (7th Cir., 1963), *cert. denied*, 375 U.S. 944 (1963); *C. Howard Hunt Pen Co. v. Federal Trade Commission*, 197 F.2d 273, 281 (3rd Cir., 1944). Litton is, therefore, responsible for the representations made in all of the local advertisements, as well as those in its own national advertising program. It can hardly claim any special, "upscale" readership for such local publications.

Under such circumstances the representations alleged in the complaint and found herein, and Litton's responsibility therefore, have been established by the weight of the evidence.

VIII. THE ORDER

A. *Necessity for an Order*

Having found a violation it is necessary to consider whether an order should issue and, if so, what its provisions should be. Although respondents showed a certain amount of cooperation with Commission staff in halting the advertisements and revising the copy thereof, their cooperation was far from perfect. The first advertisement was placed in October 1976 and complaint counsel contacted respondents shortly thereafter, in November 1976 (Tr. 3945). Respondents started curtailing their advertising in December of 1976, but published an additional commercial oven advertisement in January 1977 and an additional consumer microwave oven ad in February 1977. A revised consumer ad (CX 3) was placed in August 1977 and revised commercial oven ads (CX 6) were published during the period August through October 1977 (Tr. 3946).³¹ In the meantime, local advertisements placed by Litton oven dealers were being run during the period September 1976 through February 1978 and Litton continued to cooperate in the cost and dissemination of many of these ads (Finding 10).

Litton's violations herein were certainly not inadvertent. My findings hereinabove show that its misrepresentations were [48] made despite clear indications that it did not have a reasonable basis to make such claims (Findings 52 through 74). Through the rulings in cases such as *National Dynamics*, *Pfizer*, and *Crown Central Petroleum*, *supra*, it was on notice that it must have such a reasonable basis if it were to make advertising claims of this sort. Further, it only ceased running such advertisements after being contacted by the Commission staff and, even then, its cooperation was somewhat less than perfect. Under the circumstances, it is clear

³¹ Although there was some improvement in the revised advertisements, they continued to include a number of misleading representations (Findings 22 and 30).

that an appropriate order should be issued in this case. *Coro, Inc., et al.*, 63 F.T.C. 1164, 1201 (1963).

The only questions remaining are: what provisions should be included in the order; should Litton Industries be included in the order; and what products should the order cover?

B. *The Provisions of the Order*

Complaint counsel propose an order which is very particularized and far-reaching in its requirements. It, among other things, would require respondents to have in their possession "competent and reliable scientific surveys or tests and/or other competent and reliable evidence" before making representations such as those in the advertisements involved herein. (Par. 1 of Proposed Order, CPF, p. 95.) Other provisions of the proposed order go into great detail in the manner in which future tests or surveys must be conducted and the qualifications of those who may conduct them (CPF, pp. 95-97). Complaint counsel have offered no expert testimony or other evidence as to the necessity for, or propriety of, such provisions, despite the fact that respondents' expert, Dr. William K. Wilkie, has offered some formidable testimony in opposition to most of these requirements.

Dr. Wilkie has pointed out a great number of ambiguities and problems with the order as proposed by complaint counsel. His testimony indicates that many of the provisions of such order would likely inhibit a great deal of legitimate comparison advertising (Tr. 3714-20, 3721-23, 3728, 3734, 3737-38, 3740, 3743). Complaint counsel have not adequately rebutted such testimony.

Most of complaint counsel's order provisions appear to be based on the theory that there are clearly defined and generally accepted procedures and practices in the market research field, which must be followed if a market survey is to have any validity. The evidence, however, does not support this position. Respondents' experts have testified that there is no single, unified body of generally accepted procedures in the [49]market research field (e.g., Wilkie, Tr. 3728-29). Complaint counsel's experts have not contradicted this position. In fact, Dr. Sudman indicated that he was not familiar with the general practices in a large segment of market research—that done for private organizations (Tr. 4517-18).

In short, I find no record support for the many innovative order provisions proposed by complaint counsel. Where a proposed order goes so far afield of prior orders in adjudicated cases, some evidence, expert testimony or other, should be offered to support the need and

propriety of such provisions, but this was not done in this case. I am left with a record which does not reveal a need for order provisions other than the customary order to cease and desist from the practices found to be violative of the act. Moreover, there is some evidence that the other provisions proposed by complaint counsel may be anti-competitive, in that they may inhibit legitimate comparison advertising. Consequently, the order attached hereto does not contain such provisions.

I do find, however, that written records, especially written interviewer instructions in connection with any future market surveys, would be very helpful in compliance procedures relating to the order entered below. Having been found in violation of Section 5 of the Federal Trade Commission Act, it is incumbent upon Litton to be prepared to demonstrate the reliability of any product comparison claims which it might make in future advertisements. Such record keeping need not be as broad, however, as that proposed by complaint counsel in Paragraph Six of their proposed order (CPF, p. 97). The expense of making comparison shopping claims should not be made so great that even legitimate advertising of this type is squelched. The order provision below is, therefore, modified accordingly.

C. Litton Industries

Complaint counsel propose that the order herein be directed to Litton Industries, Inc., as well as against Litton Systems, Inc., of which Litton Microwave Cooking Products is a division. Complaint counsel argue that in reality Litton Systems is no more than a paper entity, that there is ". . . such complete control of the subsidiary by the parent that the subsidiary is a mere tool and its corporate identity a mere fiction." (CPFM at 47, quoting *Beneficial Corporation*, 86 F.T.C. 119 (1975), *aff'd in part and rev'd in part on other grounds*, 542 F.2d 611 (3rd Cir., 1976) *cert. denied*, 430 U.S. 983 (1977)). Complaint counsel then offer an elaborate factual foundation for their contention: interlocking directorates; Litton Industries supervision and control over Litton Systems budget, officers, [50]management services, and product development; Litton Systems use of Litton Industries' name, reputation and goodwill; and Litton Industries actual participation in the practices here at issue (CPF 221-52).

The record shows that LMCP was largely an autonomous operation (George, Tr. 2011-21, 2048-51, 2062-75, 2078-84; Craver, Tr. 4305-06). However, Litton Industries does play an important, and direct, oversight role in connection with LMCP (George, Tr. 1942,

2020). Additionally, Litton Industries did provide legal advice in connection with the advertising at issue herein (George, Tr. 2051).

More important, however, is the corporate structure of respondents. LMCP is merely a division and has no corporate identity of its own (Finding 1, above). Therefore, the order herein must be directed to an actual legal entity—Litton Systems, Litton Industries, or both. Litton Systems is largely a paper entity (George, Tr. 1942–96). Although it may have been created for corporate organizational purposes and not for the purpose of evading responsibility for the actions of LMCP, or other divisions of Litton Systems, it has no obvious separate identity from Litton Industries.

Despite the fact that he was a vice-president of Litton Systems from 1973 until 1978 (George, Tr. 1942), William George was “not familiar with the business of Litton Systems” (Tr. 1943) or with the products marketed by it (Tr. 1977). He did not even know where the corporate headquarters of Litton Systems was located (Tr. 1956, 1993), despite the fact that during his nine and one-half years with Litton he visited the corporate headquarters of Litton Industries (which has the exact same address as the corporate headquarters of Litton Systems—Finding 1) approximately three times per year (Tr. 1994). Mr. George did not know how many employees Litton Systems had in 1976 and 1977 (Tr. 1993). Nor did he know how the officers of Litton Systems were chosen (Tr. 1995), or even how he was chosen as an officer of Litton Systems (Tr. 1996). All of this indicates that in actual practice LMCP was a division of Litton Industries and that Litton Systems was a mere paper corporation set up for corporate organizational purposes.

It is highly questionable under these circumstances whether an order herein can be effective without including Litton Industries. One of the basic legal principles involved in determining whether to include a parent corporation in a Commission order directed toward the operations of a subsidiary, is that liability of a parent corporation may be found where necessary to effectively enforce an order (See RPF 183). Due to the intercorporate relationships in this instance, such appears [51]to be the case here. Since LMCP is not a legal entity in and of itself, but merely a division of Litton Systems, the corporation, not the division must be covered by the order. However, for the purposes of this case Litton Systems is nothing more than a legal fiction; no matter what its justification for existence may be within the corporate structure of Litton Industries. Litton Systems is simply the alter-ego of Litton Industries with relationship to LMCP. Under the circumstances, failure to include Litton Industries could vitiate the order herein, if there were any change in the structure of

Litton Industries which would eliminate Litton Systems. Therefore, Litton Industries, Inc., should be included in the coverage of the order. *Beneficial Corporation et al.*, 86 F.T.C. 119, 158-162 (1975); *Zale Corp. v. Federal Trade Commission*, 473 F.2d 1317, 1322 (5th Cir., 1973); *P. F. Collier & Sons Corp. v. Federal Trade Commission*, 427 F.2d 261, 267 (6th Cir., 1970).

D. Product Coverage

Complaint counsel's proposed order would apply to "the advertising, offering for sale, sale or distribution of any commercial microwave oven, any consumer microwave oven, or any other consumer product. . . ." (emphasis added) (CPF, p. 95). Respondents allege on the other hand that the order, if any, should be limited to microwave ovens and microwave oven accessory products (RRB, p. 182).

It is respondents' position that an "all consumer products" order would not bear a reasonable relationship to the unlawful practice found in this matter (RPF 195-197). Further, they point out that microwave ovens and accessories for such ovens are the only products produced and sold by LMCP and that the latter organization is a largely autonomous division (RPF 183-189, 205). It is also argued that microwave ovens and the accessories thereto are one of the very few consumer products produced and/or sold by any subsidiary or division of Litton Industries and that the latter corporation is not oriented toward consumer products (RPF 205-206).

While the Commission has broad discretion in determining the type of order which should be entered in a particular case, it is well established that a cease and desist order must bear a reasonable relationship to the practices found to be violative of the Federal Trade Commission Act in each case. *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *Jay Norris, Inc. v. Federal Trade Commission*, 598 F.2d 1244, 1249 (2d Cir., 1979); *Chrysler Corp. v. Federal Trade Commission*, 561 F.2d 357, 364 (D.C. Cir., 1977); *ITT Continental Baking Co. v. Federal Trade Commission*, 532 F.2d 207, 220-21 (2d Cir., 1976). [52]

The practices involved in this case related solely to microwave ovens and Litton has not been shown to have engaged in similar practices in connection with any other product (RPF 201). Microwave ovens and accessory products therefor are the only products manufactured or distributed by LMCP, the division directly involved in this proceeding (George, Tr. 1944). Moreover, the evidence reveals

that, considering all subsidiaries of Litton Industries, respondents are not heavily involved in, or oriented toward, the manufacture or distribution of consumer products (Craver, Tr. 4309-11).

Complaint counsel introduced in evidence Litton Industries product directories for 1977 (CX 164) and 1979 (CX 392). Such listings, in and of themselves, do not indicate that a particular product is a "consumer product;" one normally sold to the general public for their personal or household use.³² Mr. Craver, an official of Litton Industries, described in detail the items on such lists and only a very few fit into the "consumer product category" (Craver, Tr. 4316-55, 4367-68, 4389-92; See also, RRB, pp. 212-13). None of the consumer products which were identified fell into the appliance category to which microwave ovens belong.

In short, complaint counsel have demonstrated no reason why the order herein should go beyond microwave ovens. Certainly, the fact that Litton is a large conglomerate which frequently buys and sells businesses and, thus, might at some time in the future acquire a company which sells consumer products (CPF 264), is not ground for a broader product coverage.

Therefore, I must find that the proper order coverage in this case, as far as product is concerned, is limited to microwave ovens. In this regard, I am mindful that LMCP also sells a line of accessories for its microwave cooking products, but these do not appear to be of a nature which would make them the subject of similar advertising practices (George, Tr. 1976, 1978-79; Craver, Tr. 4361-64, 4368-70). Consequently, it would make no sense to include them in the order. [53]

IX. RESPONDENTS' REQUESTS FOR OFFICIAL NOTICE

At page 170 of their reply brief, respondents' request that official notice be taken of a study of non-response in telephone surveys by two professors at Northeastern University, Professors Wiseman and McDonald. They contend that such study only came to their attention recently, since it was reported in *Marketing News* long after the close of the record herein. They allege further that such study is competent, reliable evidence of facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. I disagree. In view of the fact that several experts, all with impressive qualifications, have testified to such opposite effect on this very topic in this case, as well as to the criteria

³² I find Mr. Craver's definition of a "consumer product" (Tr. 4313-14) to be far more realistic than that of complaint counsel (See CPF 260). Office quality, commercial filing cabinets, for instance, are different from those normally sold for home use and should not be considered a "consumer product" (Craver, Tr. 4347-48).

to be applied in judging the efficacy of a survey or study, it can hardly be stated that still another study "cannot reasonably be questioned" as to accuracy. This simply is not the type of evidence of which I can take official notice. Furthermore, the entire point is mooted, since I ruled on the "bias of non-response" issue in respondents' favor in any event (Findings 77 through 80).

X. CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and over the respondents.
2. The complaint herein states a cause of action and the proceeding is in the public interest.
3. The aforesaid acts and practices of the respondents as found in the foregoing Findings of Fact were and are to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Litton Industries, Inc., a corporation, Litton Systems, Inc., a corporation, and their successors, assigns, officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising for sale, sale or distribution of microwave ovens (either for commercial or consumer use), in or affecting commerce, as [54]"commerce" is defined in the Federal Trade Commission Act, do cease and desist from representing, directly or by implication, that any commercial microwave oven or consumer microwave oven;

(a) is able to perform in any respect, or has any characteristic, feature, attribute, or benefit; or

(b) is superior in any respect to any or all competing products; or

(c) is recommended, used, chosen, or otherwise preferred in any respect more often than any or all competing products,

unless and only to the extent that respondents possess and rely upon a reasonable basis for such representation at the time of its initial and each subsequent dissemination.

It is further ordered, That respondents, in connection with any future comparison advertising, wherein the attributes or quality of Litton microwave ovens are compared with those of other brands,

maintain accurate records, which may be inspected by Commission staff members upon reasonable notice, and:

(a) which contain documentation in support or contradiction of any such claim included in advertising or sales promotional material disseminated or caused to be disseminated by respondents, including all documentation prepared by or for survey organizations or advertising agencies employed by respondents (such documentation shall include written instructions for the supervisors and interviewers in connection with any future market surveys of service technicians or other persons which tend to show that Litton microwave ovens are superior in any way or preferred over any other brands);

(b) which provided or contradicted the basis upon which respondents relied at the time of the initial and each subsequent dissemination of the claim; and

(c) which shall be maintained by respondents for a period of three years from the date such advertising or sales promotional material was last disseminated by respondents or any subsidiary or division of respondents.

It is further ordered, That the respondents shall, within [55]sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

It is further ordered, That the respondents shall forthwith distribute a copy of this order to the Litton Microwave Cooking Products division.

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

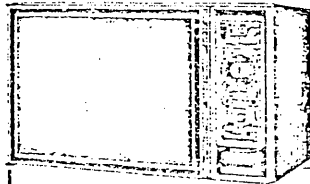
1

Initial Decision

Quality is No. 1 at Litton!

CX-1

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



Litton Model 119
microwave oven.

Litton leads all brands.

Brand To Brand	PREFERENCE FOR SPECIFIC BRANDS AMONG TECHNICIANS SERVICING THOSE BRANDS			AVERAGE PREFERENCE FOR LITTON VS. ALL COMPETITORS (Sampled Average)
	Litton vs. G.E.	Litton vs. Amana	Litton vs. Magic Chef	
Which Microwave Oven Brand would you recommend to a friend?	59% vs. 23%	56% vs. 18%	81% vs. 1%	76% vs. 8%
Which Microwave Oven Brand is easiest to repair?	68% vs. 5%	65% vs. 8%	71% vs. 0%	72% vs. 4%
Which Microwave Oven Brand is the best quality?	48% vs. 16%	50% vs. 25%	67% vs. 1%	63% vs. 9%
Which Microwave Oven Brand requires fewest repairs?	38% vs. 22%	42% vs. 24%	54% vs. 3%	50% vs. 12%
Which Microwave Oven Brand do you have in your home?	46% vs. 19%	50% vs. 18%	70% vs. 5%	67% vs. 10%

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

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

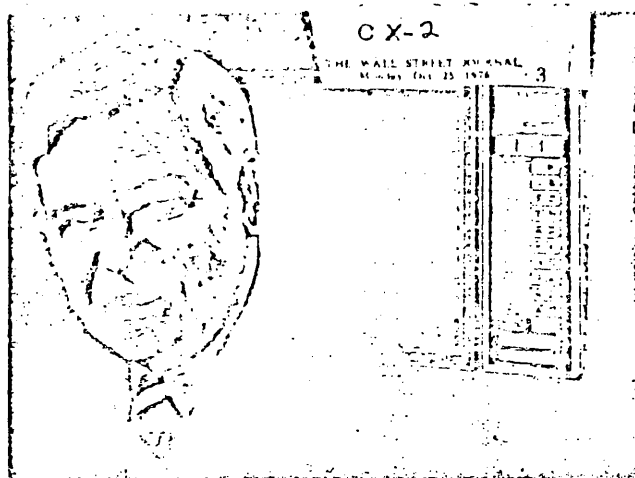
For more information, contact Litton Industries, Inc., 10000 West 10th Avenue, Denver, CO 80231. Litton is a registered trademark of Litton Industries, Inc. © 1988 Litton Industries, Inc. All rights reserved.

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

Need any more reasons to buy Litton? Ask your Litton dealer for a microwave or long demonstration. For his name and number, call us right now, toll free 800-324-7777.

LITTON
Microwave Ovens

Litton...changing the way you cook.



Quality is No. 1 at Litton!

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

Dan R. Cavalier, President
Marketing and Sales Division.

Among independent technicians servicing Litton and competitive microwave ovens, an average of 76% of those surveyed said they would recommend Litton to a friend. The Litton brand was an overwhelming preference over the competition.

We think you'll prefer Litton quality, too.

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

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

You see, at Litton, quality is a lot more than our warranty. It's our assurance you're buying the best microwave cooking product available.

One that's been developed through high standards of cooking performance in our test kitchens, more useful cooking applications at a greater energy savings, and the highest level of quality assurance practical.

That's why Litton is the brand most recommended by people who know. Take their advice. For additional information, call us toll-free 800-326-7777.

*Conducted for Litton by Consumer Research, Inc., 1976.
Complete details available upon written request.

PREFERENCE FOR SPECIFIC BRANDS AMONG TECHNICIANS SERVICING THOSE BRANDS

Brand	Litton vs. GE	Litton vs. Amana	Litton vs. Maytag Chef	Average Preference for Litton vs. all Competitors (Surveyed average)
Which Microwave Oven Brand would you recommend to a friend?	59% vs. 23%	66% vs. 18%	81% vs. 1%	76% vs. 8%
Which Microwave Oven Brand is easiest to repair?	68% vs. 5%	65% vs. 8%	71% vs. 0%	72% vs. 4%
Which Microwave Oven Brand is the best quality?	49% vs. 16%	50% vs. 26%	59% vs. 1%	62% vs. 9%
Which Microwave Oven Brand requires fewest repairs?	38% vs. 22%	42% vs. 24%	59% vs. 3%	53% vs. 12%
Which Microwave Oven Brand do you have in your home?	42% vs. 19%	59% vs. 18%	70% vs. 5%	67% vs. 10%

Respondents represent independent microwave oven service agencies who service at least two brands of microwave ovens (one of them Litton) and do not represent a factory owned service agency.

Percentages add to less than 100% due to other responses (other brands and no preference).

LITTON
Microwave Cooking

Litton...changing the way America Cooks.

Initial Decision

$$c: X \rightarrow \mathbb{R}$$

Need any more reasons to buy Liton? Ask for a Liton in-store cooking demonstration today!

The purpose of this study was to determine the effect of a 12-week training program on the physical and psychological health of young adults. The study was conducted in a laboratory setting and involved 20 participants. The participants were divided into two groups: a control group and an experimental group. The control group received no training, while the experimental group received a 12-week training program. The training program consisted of three sessions per week, each lasting 45 minutes. The sessions included cardiovascular exercise, strength training, and flexibility exercises. The participants were monitored throughout the study to ensure their safety and to collect data on their physical and psychological health. The results of the study showed that the experimental group experienced significant improvements in physical and psychological health compared to the control group.

ELITTON
Marine Coating

Litton...changing the way America Cooks.

E. 1977: 100 S. 827-828. In

LITTON LEADS IN SURVEY.				
PREFERENCE FOR SPECIFIC BRANDS AMONG TECHNICIANS SERVING LITTON AND OTHER BRANDS.				
Brand Preference	Litton as % of Total	Litton as % of Total	Litton as % of Total	PREFERENCE FOR LITTON VS. ALL OTHER BRANDS AS KNOWN TO TECHNICIANS
1. All types of Lawn Mowers	66	81	59	73
2. All types of Tractor-motors	78	78	72	78
3. All types of Tractor-motors (with PTO's)	78	78	72	78
4. All types of Lawn Tractors	65	71	68	67
5. All types of Tractor-motors (with PTO's)	78	78	72	78
6. All types of Tractor-motors	50	69	48	41
7. All types of Tractor-motors (with PTO's)	78	78	72	78
8. All types of Lawn Tractors	47	59	38	51
9. All types of Tractor-motors (with PTO's)	78	78	72	78
10. All types of Lawn Tractors	39	70	48	69
11. All types of Tractor-motors (with PTO's)	78	78	72	78

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

Take the advice of your independent microwave serviceman. Litron is the best commercial microwave oven you can buy.

	Union vs Air® Brands Combined	Union vs Amana	Union vs Sharp
Best quality	72% vs 14%	77% vs 12%	80% vs 6%
Easiest to repair on location	77% vs 9%	77% vs 8%	83% vs 4%
Requires fewest repairs	75% vs 14%	70% vs 9%	70% vs 11%
Least costly to maintain in operation over time	69% vs 20%	65% vs 15%	61% vs 12%

A black and white photograph of a large, rectangular, textured object, possibly a piece of equipment or a container, with a prominent rectangular panel on its front face. The object has a rough, mottled texture and is shown from a slightly elevated, angled perspective. The lighting is somewhat uneven, with the right side appearing brighter. The overall appearance is that of a vintage or industrial item.

Call 1-800-328-7277 toll free. PRICING 11
Or write LITTON Microwave Cooking Products, 1405 28th Avenue,
Cane Run, Minneapolis, MN 55440.
Tell me more about what makes LITTON a better microwave
oven buy.
☐ Have a LITTON representative call.

Name _____
Title _____
Firm _____
Business Address _____
City _____ State _____ Zip _____
Telephone _____
Area Code _____ **LITTON**
© 1976 LITTON Systems, Inc. *LITTON Cooking*

APPENDIX D

79% of microwave service CX-6 technicians surveyed say Litton is the best quality commercial microwave oven.

80% would recommend Litton to their customers.

And the technicians servicing Litton and competitive commercial microwave ovens, 80% of those surveyed* said they would recommend Litton to prospective customers. A strong preference over other competitive brands mentioned in the survey such as Amera and Sharp. Survey respondents were 211 technicians who work for independent service agencies authorized to service Litton commercial microwave ovens and who service at least one other brand.

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

Litton offers a full line of the most advanced microwave oven systems. From 600 to 2500 watts. With Litton's exclusive features as new Var-Power™ control, push-button digital timers, automatic defrost, intrusion-proof doors, advanced probe and seal plate design, bus-locked interlocks for added safety. And dependable Litton's Advance Power Supply System.

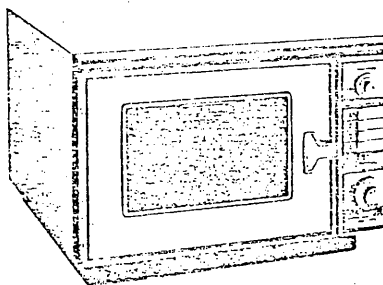
And each oven comes with the total support of the Litton System Masters' Engineers, Food Applications, Drafts, Sales and service representatives who can help increase profits and maximize efficiency.

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

*Survey conducted by Litton Research, Inc., Minneapolis, MN. April, 1978. Complete survey results available upon request.

Survey Question	Preference as Expressed by Among Technicians Servicing Litton and Other Brands*		Preference for Litton vs. 80% Other Brands mentioned
	Litton vs. Amera	Litton vs. Sharp	
Which brand of commercial microwave oven has the best quality?	77% vs. 12%	82% vs. 6%	79% vs. 14%
Which brand of commercial microwave oven is the easiest to repair or maintain?	77% vs. 6%	82% vs. 4%	77% vs. 9%
Which brand of commercial microwave oven requires fewest repairs?	70% vs. 9%	70% vs. 11%	75% vs. 14%
Which brand of commercial microwave oven is least costly to maintain or repair over time?	65% vs. 15%	65% vs. 11%	59% vs. 20%
Which brand would you recommend to a prospective customer?	75% vs. 14%	82% vs. 7%	80% vs. 16%

*Among 211 technicians in the survey, respondents were divided by servicing most brands as follows: 40% Litton, 30% Amera, 10% Sharp, 10% other brands. Respondents who service other brands are listed as "Other Brands mentioned".



Litton...
changing the way
America Cooks.



Call 800-328-7777 for free information. In Minnesota call 612-653-2354.
Or write Litton Microwave Cooking Products,
8601 Science Center Drive, Minneapolis, MN 55440.

Tell me more about what makes Litton a better microwave oven.

☐ Have a Litton representative call.

NRN 8-7

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

LITTON
Microwave Cooking

[illegible]

[illegible]

CX- 39

DIX H

1

Initial Decision

12 - Wednesday, Dec. 8, 1976 - Front, Main

Quality is No. 1
at Litton!

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



litro de all bienda

	Domestic Production	Domestic Consumption	Domestic Exports	Domestic Imports
Domestic Production	100%	100%	100%	100%
Domestic Consumption	100%	100%	100%	100%
Domestic Exports	100%	100%	100%	100%
Domestic Imports	100%	100%	100%	100%

[illegible]

And in such cases treated as victims of a proven totalitarian Soviet economic temperature control and new temperature "treatment" and gradualizing a new wave to fight a new large battle.

ELITTON
SISTEMI INTEGRATI

Litton...changing the way America Cooks.

FREE Turkey, Cookbook and Browner
with every oven purchased
thru December 24th

* * OPEN EVERY NIGHT TILL 9:00 * *
Saturday 9:30-5:30 Sunday 1:00-5:00
* Tili Christmas *

WE FEATURE: Linn Microwave Ovens-Ranges-Accessories

WE OFFER • Delivery & Installation
• Free Cooking Classes Every Sat.
11 a.m. - 3 p.m. til Christmas

Call For An In Home Demonstration

Sa. Minn. Microwave and Appl. Inc.
411 So. State St. - Next to Duling Optical
Farmington, Mn. Phone 523-42

Garrison, Mr.

Phone 723-4241

Initial Decision

97 F.T.C.

CX-126

CONTINUITY



ROGERS, ARKANSAS

Advertiser: LINKWAY
Address: ROGERS
Begin: End:
Prepared by: CR:sf

(MUSIC INTRO.)

ARE YOU STILL SKEPTICAL ABOUT BUYING A MICROWAVE OVEN? OR
MAYBE YOU'RE JUST UNCONVINCED ABOUT WHICH BRAND TO BUY? WELL,
WHEN IT COMES TO MICROWAVE OVENS, ONE NAME IS LEADING ALL THE
REST. THAT'S RIGHT! IT'S LITTON. 73% OF THE TECHNICIANS
WHO SERVICE MICROWAVE OVENS RECOMMEND LITTON OVENS OVER ALL
OTHER MICROWAVE OVENS. IT'S NOT HARD TO GUESS WHY, BECAUSE
QUALITY IS #1 AT LITTON, AND AT LINKWAY AT 8TH AND WALNUT
IN ROGERS...I'M LHEISA BROWN, COME IN AND LET ME SHOW YOU THE
NEW LITTON LINE, WITH GREAT FEATURES LIKE MEMORYMATIC,
VARICOOK, AND VARI-TEMP, AND AUTOMATIC TEMPERATURE SENSING.
DO YOU REALLY NEED ANY MORE REASONS TO BUY A LITTON?

8 x 4 9 2

LITTON INDUSTRIES, INC., ET AL.

01

1

Initial Decision

CONTINUITY
X-FAY

SPONSOR: LINKWAY CX-54
PROGRAM: WEBER
COPY STARTS: 2-1-78 STOPS: 2-12-78 TIME 30 sec.
DATE _____
OTHER INSTRUCTIONS: _____

LITTON

ARE YOU STILL SKEPTICAL ABOUT BUYING A MICROWAVE OVEN? OR MAYBE YOU'RE JUST UNCONVINCED ABOUT WHICH BRAND TO BUY? WELL, WHEN IT COMES TO MICROWAVE OVENS, ONE NAME IS LEADING ALL THE REST. THAT'S RIGHT! IT'S LITTON! 73 PERCENT OF THE TECHNICIANS WHO SERVICE MICROWAVE OVENS RECOMMEND LITTON OVENS OVER ALL OTHER MICROWAVE OVENS. IT'S NOT HARD TO GUESS WHY, BECAUSE QUALITY IS NUMBER ONE AT LITTON, AND AT LINKWAY, 1535 N. COLLEGE IN FAYETTEVILLE. COME IN AND LET US SHOW YOU THE FULL LITTON LINE. ALL AT LINKWAY, YOUR FULL SERVICE LITTON STORE.

LINKWAY HAS LINKED UP WITH LITTON! LITTON, THE ULTIMATE IN MICROWAVES. LIKE THE LITTON COMBINATION MICROWAVE RANGE. IT WORKS LIKE A CONVENTIONAL OVEN AND A MICROWAVE, ALL IN ONE! WITH A BEAUTIFUL SMOOTH TOP COOKING SURFACE. ROAST A MOIST TURKEY IN JUST ONE HOUR. COOK A WHOLE MEAL IN JUST A FRACTION OF THE USUAL TIME. EVEN COOK WITH METAL, AND IT'S SELF-CLEANING. COME IN AND SEE US AT LINKWAY, 1535 N. COLLEGE IN FAYETTEVILLE, AND DISCOVER THE ULTIMATE IN COOKING FROM LITTON!

MAR 21 1978

FEDERAL TRADE COMMISSION
Docket No. 9123 Complaint No. 54
Date Instituted 9/17/79
Date Received _____
Date Rejected _____
In the matter of LITTON INDUSTRIES
Witness _____
Reported by Dinkel D. J. F.

APPENDIX K

OPINION OF THE COMMISSION

BY DIXON, *Commissioner*

The principal question in this case, as it reaches the Commission, is what form of order should issue to prevent recurrence of deceptive advertising in which respondents have engaged. The complaint was issued on February 1, 1979, and charged Litton Industries, Inc. with violating Section 5 of the FTC Act, 15 U.S.C. 45, by disseminating misleading advertisements for microwave cooking ovens produced by Litton Microwave Cooking Products Division. (LMCP)¹

The essence of the charge against respondents was that they and their dealers had published advertisements stating that independent microwave oven service technicians preferred Litton ovens in various respects. These preferences were said to be demonstrated by surveys conducted to determine the opinions of such independent technicians. The complaint [2]alleged, however, that the advertisements were deceptive because the underlying surveys provided no "reasonable basis" for the claims based upon them.

Trial of the case was held before administrative law judge (ALJ) John J. Mathias, who concluded that Litton's surveys were defective in several respects, and could not support the claims that were based on them. The ALJ recommended entry of an order that would prohibit respondents from representing without a reasonable basis (1) the performance or other characteristics of microwave ovens; (2) the superiority of microwave ovens; and (3) that Litton microwave ovens are recommended, used, chosen, or otherwise preferred in any respect more often than competing brands. (I.D. p. 54)²

Respondents have not appealed from the initial decision, but complaint counsel have, arguing basically that (1) ALJ Mathias identified only some of the inadequacies in Litton's surveys; (2) the order should include paragraphs addressing the specific deceptive practices challenged in this case—misuse of survey results or use of inadequate surveys and (3) whatever order is entered should apply to all "consumer products" and not only "microwave ovens" as

¹ The complaint was amended on April 16, 1979 to name Litton Systems, Inc. (a wholly owned subsidiary of Litton Industries, Inc.) as co-respondent. Litton Microwave Cooking Products Division was, during the time covered by the complaint, a direct division of Litton Systems, Inc. rather than Litton Industries, Inc.

² The following abbreviations are used in this opinion:

- I.D. - Initial Decision, Finding No.
- I.D. p. - Initial Decision, Page No.
- CX - Complaint Counsel's Exhibit No.
- RX - Respondent's Exhibit No.
- Tr. - Transcript of Testimony, Page No.
- CB - Complaint Counsel's Appeal Brief before the Commission
- RB - Respondent's Answer Brief before the Commission

proposed by Judge Mathias. Our review of each of these assignments of error follows.

(1) BACKGROUND

In 1976, two surveys were conducted for LMCP by Custom Research, Inc., a market research firm, to determine which brand of microwave oven was preferred by certain independent microwave oven service agencies. (I.D. 38) The first survey was aimed at agencies servicing microwave ovens used for commercial purposes, and the second at agencies that serviced microwave ovens used by consumers in their homes. (I.D. 39-40)

The survey results were originally intended only for internal use, but because of their highly favorable results they were made the centerpiece of two ad campaigns. (I.D. 41) The first campaign, run from October, 1976 through February, 1977, was consumer-oriented, and consisted of advertisements placed in national periodicals and metropolitan daily newspapers. [3](I.D. 8) The second campaign comprised six advertisements run in trade journals between August and October, 1977. (I.D. 10) Litton also sent copies of its advertisements to Litton dealers, which they, in turn, placed in local newspapers or caused to be aired on radio. At least 109 of these dealer-placed ads were run between 1976 and 1978, some paid for in part by Litton. (I.D. 10)

A typical advertisement for consumer microwave ovens began with the headline: "Quality is No. 1 at Litton." The sub-head states "76% of the independent microwave oven service technicians surveyed³ recommend Litton." In the body of the advertisement, under a caption claiming that "Litton leads all brands" appears a chart in which Litton is ranked against G.E., Amana, Magic Chef, and then all competitors combined, on each of five criteria. In all 20 comparisons Litton comes out ahead. The text of the ad highlights two of the survey findings:

Among independent technicians servicing Litton and competitive microwave ovens, an average of 76% of those surveyed said they would recommend Litton to a friend. And an average of 63% identified Litton brand ovens as having the best quality. CX-1

The ALJ concluded that the foregoing advertisement and others like it represented that the majority of independent microwave oven service technicians servicing Litton and competitive microwave ovens (1) would recommend Litton to a friend; (2) believe that Litton microwave ovens are the easiest to repair of all microwave oven

³ The footnote stated "Survey conducted by Custom Research, Inc. Complete survey results available on request."

brands; (3) believe that Litton microwave ovens are superior in quality to all other microwave oven brands; (4) believe that Litton microwave ovens require the fewest repairs of any oven brand; and (5) have Litton microwave ovens in their homes. (I.D. 21) The Litton advertisements also represented that support for the foregoing five claims could be found in the survey conducted by Custom Research, Inc. and that this survey constituted a reasonable basis for the claims made. (I.D. 21, 34)⁴ Similar findings were made by Judge Mathias regarding the representations contained in advertisements for Litton commercial ovens. (I.D. 29, 34) [4]

(II) DEFECTS IN LITTON SURVEYS

The ALJ found the Litton surveys wanting in several substantial respects that made them unsuitable support for the advertisements that were based upon them. (I.D. 38-74) These findings have not been appealed by respondents, and our own review yields no reason to disturb them.

The challenged advertisements represented that a survey had been made of the opinions of independent microwave oven service technicians who had serviced Litton and one other brand of microwave oven.⁵ In fact, however, survey respondents were drawn only from a list of "Litton-authorized microwave oven service agencies." The ALJ found that there were at least 100 agencies that serviced both Litton and competing products but that were not designated as "Litton-authorized" service agencies. (I.D. 59) Many of these agencies were authorized by competing manufacturers.

Complaint counsel contend that there were far more than 100 such agencies (CB 11ff.), but Judge Mathias found complaint counsel's evidence insufficient to warrant any estimate beyond 100. We do not find it necessary on this appeal to determine whether complaint counsel are correct in their objection to Judge Mathias' finding. Their evidence does suggest that there were more agencies disre-

⁴ The ALJ also found that these ads represented implicitly that Litton microwave ovens are superior in quality to all other microwave oven brands, and are the easiest to repair and require the fewest repairs of all microwave oven brands. (I.D. 23-25)

⁵ Complaint counsel argue that Litton's ads could reasonably have been read to represent that *all* independent service technicians (not just those who had serviced Litton and one other brand) had been surveyed, because the "Litton and one other brand" qualification was stated in very fine print far removed from the reference to service technicians (and in a few ads not at all). We agree that fine print qualifications are often not sufficient to eliminate the deceptive potential of large print headlines. In this case, however, we believe that the use of a fine print qualification was reasonable. To begin with, many consumers would not be deceived by the bold print headline, because they would assume that only the views of technicians having experience with Litton and competing brands would be solicited. Beyond that, if some consumers were to assume that Litton had surveyed all technicians, it is not clear that this false assumption would necessarily prove material to their assessment of the ads. Under these circumstances, deception, if any, was minimal, and fine print was a reasonable medium for disclosing a qualification of only limited relevance. By contrast, compare *fn. 6 infra*.

garded by Litton than the 100 estimated by ALJ Mathias, but it is difficult to determine from this evidence how many more agencies might have been involved. [5]

What is clear, whether one accepts Judge Mathias' estimate or complaint counsel's, is that it was misleading for Litton to take an attempted census of the opinions of "Litton-authorized" service agencies and pass it off as being a survey of the opinion of *all* service technicians. Litton should have endeavored to include within its attempted census *all* service agencies (including those authorized by its competitors) that serviced Litton and a competitor. Alternatively, if Litton found it too difficult or expensive to take a census or a representative sample of all service agencies that serviced Litton and another brand, Litton should have made clear in its advertisements that it had surveyed only "Litton-authorized" entities. Such a disclosure would at once have eliminated any misrepresentation of the survey population, while permitting consumers to draw their own conclusions about the proper weight to be accorded the survey findings.⁶

A second significant deficiency in the Litton surveys was that the list from which survey respondents were drawn included at least 52 agencies (I.D. 52), and quite probably a great many more (I.D. 53-56), that sold as well as serviced microwave oven products. As Litton's own witnesses recognized, the inclusion of such agencies in any survey could bias the results significantly, because servicing dealers tend to prefer the brand that they sell. (I.D. 57) In recognition of this fact, Litton's surveys were intended to exclude servicing dealers, but failed of their purpose because of the way in which respondents were selected.⁷ [6]

A third defect in the Litton surveys found by the ALJ was that they measured the opinion of only one technician from each service agency. The ALJ determined that this did not provide a reasonable basis for advertising claims that a "survey of technicians" had been taken. The term "survey" is likely to imply projectibility to the

⁶ After being contacted by FTC staff, Litton began to disclose in very fine print the fact that its surveys included only "Litton-authorized" agencies. We do not believe that such fine print disclosures were adequate to remedy the significantly deceptive characterization of the survey population contained in the headline. *Giant Food, Inc.* 61 F.T.C. 326, 344-46, 348-49 (1962), *aff'd*, 322 F.2d 977 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 967 (1964); *Standard Oil Co. of California*, 84 F.T.C. 1401, 1470-71 (1974), *aff'd as modified*, 577 F.2d 653 (9th Cir. 1978).

⁷ Complaint counsel allege as a further defect in the surveys (not found by Judge Mathias), that they did not measure the views of all servicing dealers not owned by a microwave oven manufacturer. We agree that the term "independent microwave oven service agency" might reasonably be construed by some consumers to mean an agency that is not owned or controlled by an oven manufacturer, even if the agency happens to sell, as well as service, some brand(s) of microwave oven. It is not clear to us, however, that this alleged misrepresentation would necessarily be material. To be sure, the surveys should either have excluded all servicing dealers, or included all servicing dealers not owned by a manufacturer, but had the former been accomplished, we cannot find on this record that there would be any reason to quarrel with the surveys' definition of an independent microwave oven service agency.

entire population sampled. According to the ALJ, inasmuch as some service agencies employed 10 or 11 technicians, whose opinions frequently differed, a sample of only one technician per agency was insufficient to justify representations about any universe of independent service technicians. (I.D. 66-67)⁸ Of greater significance, the ALJ also found that the surveys failed to establish that those technicians who did respond had sufficient expertise with Litton and competing brands to make any judgment about them. Verbatim comments from many of those interviewed indicated that they disavowed having sufficient experience to make any sort of informed judgment, but their tentative statements of preference were nevertheless counted along with those of technicians who were qualified to give judgment. (I.D. 69-72)

(III) ORDER PROVISIONS

A. General Observations

Complaint counsel have objected both to the substantive provisions of the order and to the limited product coverage. Respondents argue, generally, that no broader order than that [7]entered by the ALJ is warranted by the record. Respondents contend that the violations found by the ALJ are insubstantial, and that the lack of expert agreement about the proper way to conduct survey research precludes entry of the order recommended by complaint counsel.⁹ In respondents' view, entry of such an order might chill the use of survey research for advertising purposes.

The Commission is sensitive to respondents' concern that advertisers not be unreasonably restrained in their use of survey research in advertising. There is plainly much potential for improving the information value of advertising through the use of survey research, and this is certainly to be encouraged. On the other hand, references in advertisements to "surveys", "tests", and the like also have considerable potential to mislead. The existence of a "survey" as support for a claim of product superiority may well imply to many

⁸ In light of the unrebutted observations made by respondents at RB 39n.40, we find the ALJ's reasoning on this point somewhat thin. Selection of only one technician per agency may have been insufficient to qualify Litton's survey as a reliable census of service agencies, for the reasons noted by ALJ Mathias, but this does not necessarily demonstrate that the choice of technicians was insufficient to qualify as a random sample of all technicians, for the reasons noted by respondents at RB 39n.40. Given the other deficiencies in the Litton surveys noted herein, however, a resolution of this point is not necessary to our disposition of the appeal.

⁹ Respondents have not appealed from the order recommended by the ALJ, although they suggest in their Answer Brief to Complaint Counsel's appeal that only a "narrowed" version of the ALJ's recommended order is appropriate. (RB 54) We believe that the ALJ's recommended order, so far as it goes, is appropriate. We do note, that as with any substantiation order, the claims covered are only those that would be capable of objective verification, and the type of substantiation required is only such as is appropriate to the type of claim being made. *See Fedders Corp. v. FTC*, 529 F.2d 1398, 1403-04, (2d Cir.), cert. denied 429 U.S. 818 (1976).

consumers a measure of precision and accuracy that they would be less willing to attribute to the same claim made without reference to any statistical support. We assume this is why advertisers wish to use surveys; it is also, however, a reason why those surveys must be suitable to demonstrate whatever they are used to show.

Witnesses for both sides appear to agree that the quality of survey research used for marketing purposes leaves much to be desired (e.g., Tr. 4166), at least when judged by the standards of an expert. Most of this research, however, does not become the basis for advertising claims directed at consumers. When used for internal consumption by marketing personnel, such research may serve its intended purpose quite well, because those individuals making use of it are equipped by training, experience, and proximity to assess for themselves the quality of the research and to act with awareness of any defects in it.

A consumer reading a brief summary of a survey in an advertisement, by contrast, is not as well situated to assess its insufficiencies. For this reason, as ALJ Mathias recognized (I.D. 73), surveys that are used as the basis for advertising claims must be held to higher standards than may prevail among surveys [8]intended only for internal corporate use. The surveys used by Litton in this case were deficient in several significant respects enumerated by the ALJ. We do not believe that these can be regarded as trivial, or defended by reference to the poor quality of other research that is not made the basis of advertising claims. On the other hand, the Commission does recognize that a proper balance must be struck in this area, because standards that are too stringent may discourage the use of surveys that convey to consumers a basically accurate message. With the foregoing considerations in mind, we shall assess the specific changes proposed by complaint counsel in the ALJ's recommended order.

B. *Practices Covered*

The principal operative order paragraph recommended by the ALJ would forbid Litton to represent that any commercial or consumer microwave oven

(a) is able to perform in any respect, or has any characteristic, feature, attribute, or benefit; or

(b) is superior in any respect to any or all competing products; or

(c) is recommended, used, chosen, or otherwise preferred in any respect more often than any or all competing products

unless and only to the extent that respondents possess and rely upon a reasonable basis for such representation at the time of its initial and each subsequent dissemination.

Respondents have not objected to this paragraph. Complaint counsel argue that its scope should be expanded to apply to all "consumer products" manufactured by Litton (a point to be discussed *infra.*) and that the term "reasonable basis" should be defined in the order to mean "competent and reliable surveys, tests, or other evidence which substantiates the representation", with "competent and reliable" in turn defined.

A formulation nearly identical to that recommended by complaint counsel was recently applied by the Commission in *Sears, Roebuck & Co.*, Docket No. 9104 (1980), *appeal pending*, No. 80-7368 (9th Cir.) although it was there not subject to dispute by the respondent. It does not appear to us from [9]respondents' brief that they dispute that "competent and reliable" is a proper characterization for the type of substantiating material that an advertiser should possess before making a claim. (RB 29) Indeed, it is hard to see how evidence of any description could constitute adequate substantiation for a claim were it not competent and reliable. Respondents argue that these terms are subject to a variety of possible interpretations depending upon the type of substantiating evidence on which the advertiser chooses to rely. This point is certainly well taken. However, absolute precision in this area is not possible, and we note that respondents themselves have not objected to the ALJ's proposed order, which requires only a "reasonable basis" and is, therefore, even less precise than the order that complaint counsel would impose.

The same observations are applicable to complaint counsel's proposal to define a "competent and reliable survey or test" as

one in which persons with skill and expert knowledge, in the field of survey research or testing, conduct the survey or test and evaluate its results in an objective manner, using procedures that insure accurate and reliable results.

There may be room for doubt about the application of this standard in particular cases, but it adds at least some measure of specificity to the ALJ's order.

Respondents object further to the above-quoted provision that it may set too high a standard for survey research by requiring that it be conducted by "experts". In respondents' view, if the order is read in light of the facts of this case, it would appear implicitly to condemn as insufficiently expert those personnel who conducted the Litton surveys. Such a standard, in turn, would make the execution of survey research for use in advertising more difficult and expensive. (RB 30)

We share fully respondents' concern, but we cannot accept their

premise as to the meaning or effect of complaint counsel's proposed order. The proposed order language is designed merely to give greater specificity to the term "reasonable basis", and not to cast doubt upon the qualifications of those who conducted the Litton surveys in this case. To eliminate any room for doubt on this score, however, we shall amend the term "persons with skill and expert knowledge in the field of survey research or testing" to read "persons qualified to do so." This change reflects the fact that the degree of experience and [10]expertise required of those who design and conduct a survey or test must inevitably depend upon the circumstances and the nature of the survey or test itself. Certain expertly designed surveys can obviously be conducted by lay personnel, with no survey expertise. In such a case, those lay personnel would be "qualified" to conduct the survey. Indeed, it is possible that some types of surveys might be so simple that relatively little or no specialized training would be necessary even to design them. Most often, however, surveys or tests, to be competent and reliable, will require at least some expert input at the design stage. The order entered herein is intended to reflect that general point, without discouraging in any way the proper use of survey-based advertising. (Paragraph I(1) of Commission's Final Order).

Paragraphs 2 through 5 in complaint counsel's proposed order are designed to address the specific abuses in this case—misuse of survey results. In a sense they provide a gloss on the meaning of "reasonable basis" in paragraph 1 as it relates to tests or surveys. Our review of these proposed order paragraphs follows.

Complaint counsel's proposed paragraph 5 would prohibit respondents from

Misrepresenting in any manner, directly or by implication, the purpose, sample, content, validity, reliability, results or conclusions of any survey and/or test.

Respondents' expert, Dr. Wilkie, endorsed the general concept of a prohibition on misrepresentations of survey or test results as a remedy for any violations that might be found (Tr. 3883, 3885ff.) and argued that it would obviate the need for certain other paragraphs proposed by complaint counsel. We agree that this paragraph is central to the violations found by the ALJ in this case, and should be adopted.¹⁰ We have deleted the word "validity" as unnecessary. (Paragraph II(1) of Commission's Final Order). [11]

¹⁰ Respondents cite in opposition to this paragraph *Chrysler Corp. v. FTC*, 561 F.2d 357 (D.C. Cir. 1977), wherein a prohibition on "misrepresenting in any manner, directly or by implication, the purpose, content, or conclusion of any test, report, study, research, demonstration or analysis" was struck down. 561 F.2d at 364. The court in *Chrysler*, however, did sustain a prohibition on false or deceptive representations of test results with respect to fuel economy. 561 F.2d at 364. The *Chrysler* court was concerned with the potentially limitless scope of

Paragraphs 2, 3, and 4 proposed by complaint counsel are in large part elaborations on proposed paragraph 5. We believe that proposed paragraphs 2 and 3 provide useful elaboration and should be adopted, but that proposed paragraph 4 should be rejected.

Paragraph 2 proposed by complaint counsel would forbid respondents from

Advertising the results of a survey unless the respondents in such survey are a census or a representative sample of the population referred to in the advertisement, directly or by implication. A representative sample need not be a probability sample so long as when the ad is first disseminated respondents have a reasonable basis to expect the sampling method used would not produce biased results.

This paragraph is tailored to the deceptive practices found in this case, and we shall adopt it. There can be no argument with the proposition that if an advertisement claims, directly or by implication, that the views of a given population have been surveyed, the survey should have elicited either the views of every member of the population (as in a census), or else the views of a representative sample of the population.¹¹ A survey that did not take either a census or a representative sample of a given population could not be used to represent the views of that population. This was the fault of the Litton surveys. They were advertised as demonstrating the views of all independent microwave oven service technicians who had serviced Litton and at least one other brand. In fact, however, as the ALJ found, the surveys were neither censuses (as intended), nor representative samples from which Litton could reasonably project the views of the entire population described in its advertisements. Litton could have cured the defect by use of a representative sample, or by accurately and conspicuously disclosing the identity of the population that was actually surveyed. [12]

Litton's principal objection to complaint counsel's paragraph 2 appears to be that Litton construes "representative sample" in the first sentence to mean "probability sample" in the strict statistical sense.¹² The necessity to conduct a "probability sample", it argues,

the stricken order provision in light of what it characterized as a "somewhat thin" Commission case on the merits. In this case, the proposed order provision is considerably narrower than the provision deleted in *Chrysler*, both because it is limited to "tests or surveys" and because it is limited to products comprising a tiny fraction of Litton's sales, while the order in *Chrysler* was applicable to the company's entire production.

¹¹ A representative sample of a population is a sample that "has been selected in a manner which permits projection of results from the sample to the universe from which it is drawn." Tr. 4254; see also Tr. 3882. An attempt to perform a census which fails because some fraction of the census population cannot be contacted, may nevertheless yield a representative sample so long as there is reason to believe that those members of the population actually surveyed are representative of the entire population. In this sense it is not fruitful to quarrel over whether Litton succeeded in conducting a "census" or merely took a sample. In either case the relevant question for the consuming public is whether the results of the survey are projectible to the entire population whose views the survey is represented as reflecting.

¹² Litton also objects to the term "by implication" in the proposed order, fearing liability where it unwittingly misrepresents, by implication, that a survey accurately reflects the views of some population. It is well-established

(Continued)

imposes too great a burden on research-based advertising. To meet this objection of Litton and its expert witness Dr. Wilkie (Tr. 3735), complaint counsel have offered the second sentence of their proposed paragraph 2, making clear that a representative sample need not be a probability sample, so long as Litton has a reasonable basis to suppose that whatever sample it does select will not yield biased results. This would permit Litton to employ, for example, a properly selected "judgment sample" or "convenience sample." (Tr. 4166) Similarly, if Litton wished to attempt a census, but failed to contact all members of the surveyed population, it might still treat the results as a representative sample so long as it had a reasonable basis to suppose that those population members not responding to the survey would not bias its results by virtue of their non-response.

To an extent we agree with Dr. Wilkie, respondents' expert, that proposed paragraph 2 overlaps with proposed paragraph 5. In essence, to represent the characteristics of a given population based upon a survey of an unrepresentative sample amounts to a misrepresentation of the "purpose" or "results" or "conclusions" of the survey, because the survey cannot properly be used to conclude anything about a population of which its sample is not representative. We shall include proposed paragraph 2 in our order, however (along with proposed paragraph 5) because it defines with specificity one particular practice that inevitably leads to the misrepresentation of survey results. (Paragraph II(1) of Commission's Final Order). [13]

Complaint counsel's proposed paragraph 3 requires that respondents not represent that

experts were surveyed unless reasonable care was taken to insure that the survey respondents possessed sufficient expertise to qualify as respondents for the survey and to answer the survey questions. For purposes of this order, an 'expert' is an individual, group or institution held out as possessing, as a result of experience, study or training, knowledge of a particular subject, which knowledge is superior to that generally acquired by ordinary individuals.

While this paragraph, too, might be subsumed within the general prohibition on misrepresentation of survey results, it too describes with specificity one of the violations that occurred in this case, and we shall incorporate it in the order. ALJ Mathias found that many of

principle of advertising law, however, and critical to any attempt to prevent deceptive advertising, that advertisers be held responsible for implied, as well as express, misrepresentations in their advertisements. "Deception may result from the use of statements not technically false or which may be literally true." *United States v. 95 Barrels of Vinegar*, 265 U.S. 438, 443 (1943). "The important criterion is the net impression which the advertisement is likely to make upon the general populace." *Charles of the Ritz Dist. Corp. v. FTC*, 143 F.2d 676, 679-80 (2d Cir. 1944).

the technicians surveyed by Litton were unqualified to offer an expert view on the comparative merits of Litton and its competitors because they lacked experience with one or the other of the brands they were being asked to compare. (I.D. 69-72) It was plainly misleading to tabulate their opinions and pass them off as those of technicians familiar with competing brands, and proposed paragraph 3 is warranted to prevent similar occurrences. (Paragraph II(3) of Commission's Final Order).

Proposed paragraph 4 would prohibit advertising references to surveys or tests unless

- (a) such survey and/or test is designed, executed and analyzed in a competent and reliable manner; and
- (b) the survey and/or test results are accurately reflected in the advertisement; and
- (c) the survey and/or test supports or proves the claim represented in the advertisement.

Proposed paragraph 4(a) is largely subsumed by modified paragraph 1, and is, therefore unnecessary. Proposed paragraph 4(b) adds nothing to proposed paragraph 5, and the useful content of proposed paragraph 4(c) is similarly captured by proposed paragraph 5. Therefore proposed order paragraph 4 is unnecessary. [14]

Proposed paragraph 6 of complaint counsel's order corresponds to the first "*It is further ordered*" paragraph of the initial decision. As reworded by ALJ Mathias it would cover only advertising claims that compare Litton with competing brands. We believe that this paragraph should, instead, be made coextensive with the substantive coverage of paragraph 1 (requiring substantiation for various claims) and have so changed it. We have also modified the language to correspond to our recent order in *Sears, Roebuck & Co., supra*. (Paragraph I(2) of Commission's Final Order.)

C. Product Coverage

The order recommended by ALJ Mathias would apply only to future advertising for "microwave ovens". Respondents agree that this is the proper scope of any order that may enter, while complaint counsel propose that the order be broadened to cover advertising for all "consumer products".

Court and Commission precedent yields no magic formula by which the product coverage of a given order may be divined. The purpose of any order is to prevent the repetition of violations of the law, by creating stringent monetary incentives (in the form of civil penalties) for its observance. The rationale for entry of a multi-product order based upon violations in the advertising of only one or

a few products is that many kinds of deceptive advertising are readily transferrable to a variety of products, and it would serve the public poorly to halt the use of a deceptive tactic in the advertising of one product if the respondent remained free to repeat the deceptive practice in another guise, with no threat of sanction save for another order to cease and desist. *FTC v. Colgate Palmolive Co.*, 380 U.S. 374, 394-5 (1965); *Sears, Roebuck & Co.*, *supra*, slip op. at 10.

Relevant to any determination of the proper scope of an order is some assessment of the likelihood of repetition of the violation in the future. As we observed in our recent decision in *Sears, Roebuck & Co.*, such a judgment entails a necessarily imprecise prediction of the future. In making it, the Commission and courts have looked to a variety of factors, including the "nature of the violation itself (its magnitude and duration), the state of mind of the perpetrator (wilful, reckless, negligent, or unintending) and the prior history of violations by the respondents". *Sears, supra*, slip op. at 11. [15]

An additional factor to be considered, and one that is implicit in *Sears* and the court decisions that it cites, is the burden imposed by an order viewed in light of the gravity of the offense that gives rise to it. In theory, this might seem to be an irrelevant consideration. If a heinous offense can be remedied, and related offenses fenced in, by a narrow order, no greater order can be entered. Conversely, if a less serious violation of law requires a broader order to remedy it, the mild nature of the offense should not preclude the imposition of necessary relief.

As a practical matter, however, the fashioning of many orders does not lend itself to mathematical precision. A variety of orders, reasonably related to the offense, are often possible to imagine, and this means that within certain parameters the Commission must exercise its discretion to determine the scope of the order that it actually issues. *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611-13 (1946); *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 392 (1959). A reading of the court decisions leaves little doubt that this discretion should be exercised with some regard to the gravity of the violation that is being redressed, e.g., *Chrysler Corp. v. FTC*, 561 F.2d 357, 364 (1977); *Standard Oil Co. of California v. FTC*, 577 F.2d 653 (9th Cir. 1978).

Applying these considerations in this case, we believe that limitation of the first paragraph of the order to "microwave ovens" alone, as recommended by Judge Mathias, is appropriate, while those paragraphs added by the Commission on this appeal should apply to all "consumer products", as defined by respondents, I.D. p. 52, Tr. 4313-14.

We reject Litton's suggestion that the violation in this case was not

a serious one. As the law judge found, Litton's violation was not inadvertent; it made claims for its microwave ovens despite clear indication that it lacked a reasonable basis to make them. (I.D. pp. 47-8). Moreover, while dissemination of the offending advertisements was short-lived (perhaps because of the relatively rapid intervention by Commission staff) it was national in scope, and continued even after deficiencies in the ads were pointed out by FTC staff. To Litton's credit it did make some attempts to modify its advertisements when apprised of their shortcomings. (I.D. p. 48)

We do not believe that the violations in this case rise to the seriousness of those in *Sears*, as complaint counsel suggest, but they are more significant than respondents would acknowledge. Misuse of survey results, as noted before, has considerable potential to deceive, and is a technique that may be applied to a variety of products. [16]

Paragraph I(1) of the Commission's final order (ALJ's recommended paragraph 1, as modified) defines the violations in this case in relatively broad fashion and is, therefore, appropriately confined to microwave ovens as the ALJ recommended and as respondents urge. Similarly, the recordkeeping provision (Paragraph I(2)) will be limited to cover only claims governed by Paragraph I(1).

Those order paragraphs added by the Commission at complaint counsel's request [Final Order Paragraphs II(1), II(2), and II(3)] are narrower in focus, relating solely to the misuse and improper conduct of surveys and tests. Moreover, no recordkeeping requirements attach to these paragraphs. Under the circumstances, application of these paragraphs to a broader product line is reasonable and warranted to prevent recurrence of the same deceptive practices in a different guise.

In *Sears* the Commission imposed an order covering 14 specified categories of "major home appliances" based on misrepresentations of the characteristics of dishwashers. Litton does not produce home appliances other than microwave ovens. However, Litton has from time to time produced other "consumer products"¹³ the advertising of which might lend itself to the misuse of test results. While the term "consumer products" is in theory broader than "major home appliances", given the reality of Litton's operations that term is even narrower than the product coverage in *Sears*, because Litton manufactures relatively few consumer products. We conclude, therefore, that the order as described above is suitable to remedy the violations found in this case.

¹³ At trial, Theodore Craver, a Litton official, defined "consumer product" to mean "one normally sold to the general public for their personal or household use." (I.D. p. 52) Under the circumstances of this case, we believe that defines an appropriate scope for Paragraph II of the Commission's order.

Final Order

The order described is appended.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of counsel supporting the complaint, 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 1-53, and appendices, be adopted as the Findings of Fact and Conclusions of Law of the Commission, 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 respondents Litton Industries, Inc., a corporation, Litton Systems, Inc., a corporation, and their successors, assigns, officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising for sale, sale, or distribution of microwave ovens (either for commercial or consumer use), in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do cease and desist from:

1. Representing, directly or by implication, that any commercial microwave oven or consumer microwave oven

(a) is able to perform in any respect, or has any characteristic, feature, attribute, or benefit; or

(b) is superior in any respect to any or all competing products; or

(c) is recommended, used, chosen, or otherwise preferred in any respect more often than any or all competing products,

unless and only to the extent that respondents possess and rely upon a reasonable basis for such representation at the time of its initial and each subsequent dissemination. Such reasonable basis shall consist of competent and reliable surveys or tests and/or other competent and reliable evidence which substantiates the representation. A competent and reliable survey or test means one in which persons qualified to do so conduct the survey or test and evaluate its

results in an objective manner, using procedures that insure accurate and reliable results.

2. Failing to maintain accurate records

(a) Of all materials that were relied upon in disseminating any representation covered by paragraph I(1) of this order, insofar as the text of such representation is prepared, authorized, or approved by any person who is an officer or employee of respondents, or of any division, subdivision or subsidiary of respondents, or by any advertising agency engaged for such purposes by respondents, or by any of its divisions or subsidiaries; [3]

(b) of all test reports, studies, surveys, or demonstrations that contradict any representation made by respondents that is covered by paragraph I(1) of this order.

Such records shall be retained by respondents for three years from the date that the representations to which they pertain are last disseminated, and may be inspected by the staff of the Commission upon reasonable notice.

II

It is further ordered. That respondents Litton Industries, Inc., a corporation, Litton Systems, Inc., a corporation, and their successors, assigns, officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising for sale, sale, or distribution of microwave ovens (either for commercial or consumer use) and any other product normally sold to members of the general public for their personal or household use in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do cease and desist from:

1. Misrepresenting in any manner, directly or by implication, the purpose, sample, content, reliability, results, or conclusions of any survey or test.

2. Advertising the results of a survey unless the respondents in such survey are a census or a representative sample of the population referred to in the advertisement, directly or by implication. A representative sample need not be a probability sample so long as when the ad is first disseminated respondents have a reasonable basis to expect the sampling method used would not produce biased results.

3. Representing, directly or by implication, that experts were

surveyed, unless reasonable care was taken to insure that the survey respondents possessed sufficient expertise to qualify as respondents for the survey and to answer the survey questions. For purposes of this order, an "expert" is an individual, group or institution held out as possessing, as a result of experience, study or training, knowledge of a particular subject, which knowledge is superior to that generally acquired by ordinary individuals.

It is further ordered, That the respondents shall, within sixty (60) days after service upon them of this order, file [4]with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

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

It is further ordered, That the respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents 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.

Commissioner Bailey did not participate.

IN THE MATTER OF
CONTROL DATA CORPORATION, ET AL.

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

Docket 8940. Complaint, Oct. 3, 1973—Decision, Jan. 9, 1981

This consent order requires, among other things, two Bloomington, Minn. sellers of training courses to cease misrepresenting the purpose, significance or results of entrance examinations or aptitude tests; the qualifications or prerequisites necessary to obtain employment in the computer field or in any other field; and the cost and effectiveness of their job-placement services. Respondents are required to give prorated refunds to students who fail to complete their courses, or to compute the amount of money owed to them by students on a prorated basis. Students having unresolved complaints against the companies must be provided, on a shared-cost basis, with an impartial arbitration service empowered to order payment of refunds to those eligible. Additionally, the order requires that individuals selling training courses display nameplates identifying them as "Sales Representatives"; and that the companies institute a surveillance program designed to detect those parties who fail to comply with the terms of the order.

Appearances

For the Commission: *Steven D. Newburg-Rinn, Sharon S. Feather, Robert D. Friedman, Peter Greene and Edward Steinman.*

For the respondent: *Charles Price, Oppenheimer, Wolff, Foster, Shepard & Donnelly, St. Paul, Minn., and James H. Hogg, in-house counsel.*

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 Control Data Corporation, a corporation, and Automation Institute of America, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Control Data Corporation (hereinafter sometimes referred to as CDC) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at