

IN THE MATTER OF

KRAFT, INC.

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

Docket 9208. Complaint, June 17, 1987—Final Order, Jan. 30, 1991

This final order prohibits, among other things, a Delaware corporation from misrepresenting the calcium or any other nutrient content of any cheese, substitute cheese, or imitation cheese product in the future, and prohibits any such absolute or comparative nutrient or calcium-content claim that is not substantiated by competent and reliable scientific evidence.

Appearances

For the Commission: *Robert C. Cheek.*

For the respondent: *Hugh Latimer, Pepper, Hamilton & Scheetz,*
Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Kraft, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent is a Delaware corporation, with its office or principal place of business located at Kraft Court, Glenview, Illinois.

PAR. 2. Respondent has advertised, offered for sale, sold and distributed cheese and related cheese products including Kraft Singles American Pasteurized Process Cheese Food ("Kraft Singles").

PAR. 3. Respondent has disseminated or caused to be disseminated advertisements for "Kraft Singles" and various other foods, as "food" is defined in Section 12 of the Federal Trade Commission Act. These advertisements have been disseminated by various means in or affecting commerce, including magazines distributed across state lines, and radio and television broadcasts transmitted across state

lines, for the purpose of inducing purchase of such foods by members of the public.

PAR. 4. The acts and practices of respondent alleged in this complaint have been in or affecting commerce.

PAR. 5. Typical of respondent's advertisements, but not necessarily inclusive thereof, are the advertisements attached hereto as Exhibits A through D. Specifically, the aforesaid advertisements and others contain the following statements and depictions:

a. "How could I shortchange my shortstop? Kraft Singles have five ounces of milk per slice; so I don't have to. Because Kraft Singles give my kids great nutrition like calcium and protein. Sure, I could buy imitation slices. But some use hardly any milk. Could I shortchange my little shortstop? No way." (Exhibit A);

b. "How could I hold back from my quarterback? Kraft Singles are made from five ounces of milk per slice; so I never would. Sure I could buy imitation slices. But some use hardly any milk, Kraft Singles are made from five ounces. Plus, my kids get great nutrition like calcium to help their bones grow up strong. Hold back from my quarterback? No way." (Exhibit B);

c. "Imitation slices hardly use any milk, but Kraft [Singles] has 5 ounces per slice, 5 ounces. So her little bones get calcium they need to grow ... Kraft Singles. More milk makes them ... More milk makes them good." (Exhibit C); and

d. "Imitation slices use hardly any milk. But, Kraft Singles are made from five ounces per slice. So his bones get calcium they need to grow ... Kraft Singles. More milk makes 'em good. Skimp on my superstar? No way." (Exhibit D).

PAR. 6. Through the use of the statements and depictions referred to in paragraph five, and other statements and depictions in advertisements not specifically set forth herein, respondent has materially represented, directly or by implication, that a slice of Kraft Singles contains the same amount of calcium as five ounces of milk.

PAR. 7. In truth and in fact, a slice of Kraft Singles does not contain the same amount of calcium as five ounces of milk. Therefore, the representation as set forth in paragraph six was and is false and misleading.

PAR. 8. Through the use of the statements and depictions referred to in paragraph five (c) and (d), and other statements and depictions in advertisements, respondent has materially represented, directly or by implication, that Kraft Singles contain more calcium than do most imitation cheese slices.

PAR. 9. In truth and in fact, Kraft Singles do not contain more calcium than do most imitation cheese slices. Therefore the representation as set forth in paragraph eight was and is false and misleading.

PAR. 10. Through the use of statements and depictions referred to

in paragraph five, and other statements and depictions not specifically set forth herein, respondent has represented, directly or by implication, that at the time of making the representations set forth in paragraphs six and eight respondent possessed and relied upon a reasonable basis for such representations.

PAR. 11. In truth and in fact, at the time of making the representations set forth in paragraphs six and eight, respondent did not possess and rely upon a reasonable basis for making such representations. Therefore, respondent's representations set forth in paragraph ten were and are false and misleading.

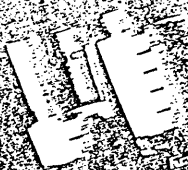
PAR. 12. The acts or practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

KRAFT, INC.
Complaint

EXHIBIT A

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How could I shortchange my shortstop?



Kraft Singles have five ounces of milk per slice, so I don't have to. Because Kraft Singles give my kids great nutrition like calcium and protein. Sure I could buy imitation slices. But some use hardly any milk. Could I shortchange my little shortstop? No way. Kraft Singles. More milk makes 'em good.

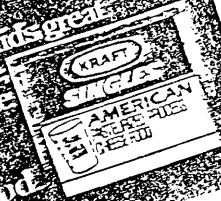
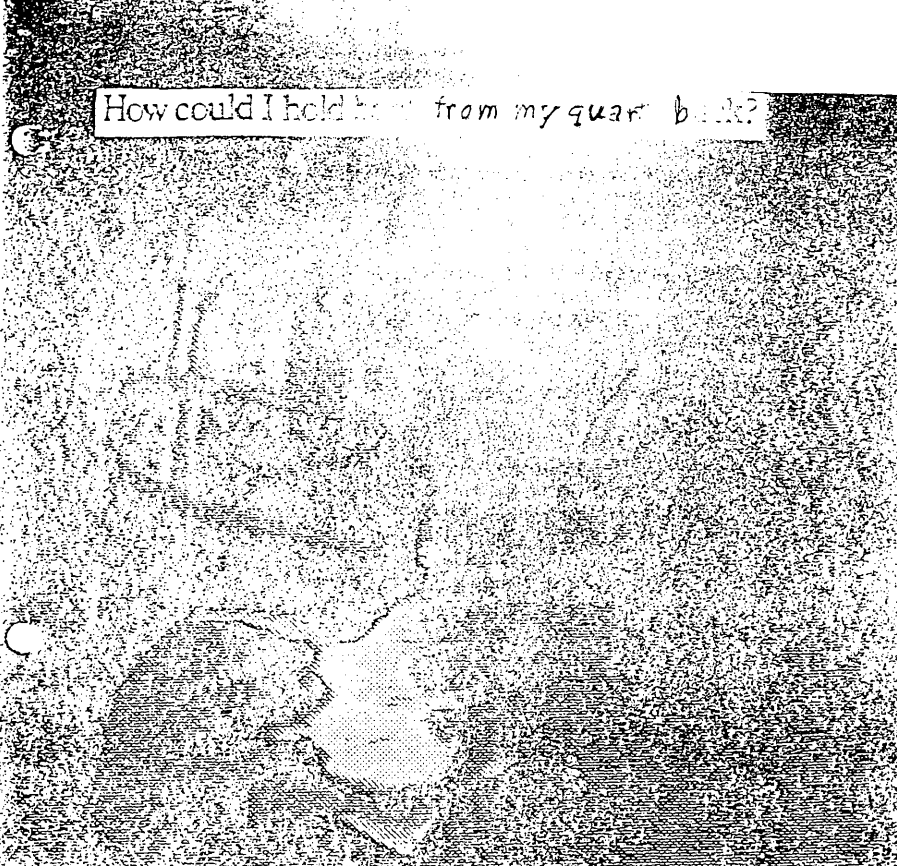
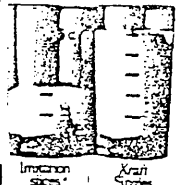


EXHIBIT B

How could I hold back from my quarter back?





Imitation slices
Kraft Singles

Kraft Singles are made from five ounces of milk per slice, so I never would.

Sure I could buy imitation slices. But some use hardly any milk. Kraft Singles are made from five delicious ounces.

Plus, my kids get great nutrition like calcium to help their bones grow up strong. Hold back from my quarterback? No way.

Kraft Singles. More milk makes 'em good.



KRAFT
SINGLES
AMERICAN
CHEDDAR CHEESE
100% MILK

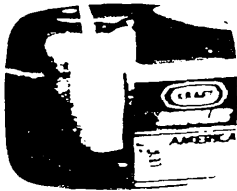
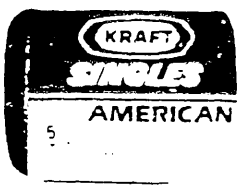
*Milk amounts based on cheese content. Disputed comparison to imitation cheese slices.
For more information on Kraft Singles, call 1-800-323-0758 ext. 0454. © 1988 Kraft Inc.

EXHIBIT C

111 East 42nd Street New York N.Y. 10017
(212) 599-5500

WGBS-TV (NEW YORK)

EXHIBIT C

		
1. (MUSIC) WOMAN'S VOICE: I admit it, I thought of skipping.	2. Could you look in those big blue eyes and skimp on her?	3. So I buy Kraft Singles.
		
4. Imitation slices hardly use any milk.	5. but Kraft has 5 ounces per slice, 5 ounces.	6. So her little bones get calcium.
		
7. they need to grow.	8. No, she doesn't know what that big Kraft means.	9. Good thing I do.
		
10. CHORUS SINGS: Kraft Singles. More milk makes them...	11. more milk makes them good.	12. WOMAN'S VOICES: Skimp on her? No milk. (MUSIC CUE)

ALSO AVAILABLE IN COLOR VIDEO TAPE CASSETTE

While Radio-TV Reporting Inc. endeavors to assure the accuracy of material supplied by it, it cannot be responsible for mistakes or omissions.

-- EXHIBIT C --

Complaint

114 F.T.C.

EXHIBIT D

J. WALTER THOMPSON COMPANY 875 NORTH MICHIGAN AVENUE CHICAGO ILLINOIS 60611		EXHIBIT D	
TELEVISION COMMERCIAL			
CODE NUMBER: KRPS5681 CLIENT: Kraft, Inc. PRODUCT: Process Singles LAL 11/18/85		TITLE: "Major League Material/Rev. I" LENGTH: :30 STATUS: To Be Produced	
<u>VIDEO</u> CU OF KID IN CATCHER'S MASK. KID PULLS KRAFT SINGLE OUT OF PACKAGE. MILK POURS INTO GLASS. POUR STOPS. GLASS IS ONLY PARTIALLY FILLED. <u>SUPER: MILK AMOUNTS BASED ON CHEESE CONTENT.</u> MILK CONTINUES TO POUR. FILLS GLASS UP FURTHER. KID EATS A KRAFT SINGLES. DX OF KRAFT SINGLES LOGO. MILK POURS INTO GLASS. GLASS ANIMATES ONTO SINGLES PACKAGE. KID EATS PIECE OF CHEESE. c 1985 Kraft, Inc.		<u>AUDIO</u> <u>DAD</u> : You're looking at definite major league material. But not if we skimp on what he eats. So when he gets behind the plate, we give him KRAFT Singles. Imitation slices use hardly any milk. But Kraft Singles are made from five ounces per slice. So his bones get calcium they need to grow. He doesn't know what that big KRAFT means. Glad I do. <u>SINGERS</u> : KRAFT Singles. More milk makes 'em good. <u>DAD</u> : Skimp on my superstar? No way.	

002699

INITIAL DECISION BY

LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE

APRIL 3, 1989

I. HISTORY OF THE PROCEEDING

On June 17, 1987, the Commission issued a complaint charging that Kraft, Inc. ("Kraft") had violated Sections 5 and 12 of the Federal Trade Commission Act ("FTC Act"). The complaint alleges that Kraft has advertised and sold cheese and related cheese products including Kraft Singles American Pasteurized Process Cheese Food ("Kraft Singles") and that the advertisements which have been disseminated by various means in or affecting commerce materially represented, directly or by implication (1) that a slice of Kraft Singles contains the same amount of calcium as five ounces of milk (Paragraph 6); and (2) that Kraft Singles contain more calcium than do most imitation cheese slices (Paragraph 8). [2]

The complaint alleges that, in truth and in fact (1) a slice of Kraft Singles does not contain the same amount of calcium as five ounces of milk; and (2) Kraft Singles do not contain more calcium than do most imitation cheese slices.

Since Kraft allegedly stated in its advertisements, either directly or by implication, that it possessed and relied upon a reasonable basis for the challenged representations when in fact it did not, the complaint charges that those representations were and are false and misleading, and constitute unfair or deceptive practices in or affecting commerce in violation of Sections 5 and 12 of the FTC Act.

After extensive pretrial discovery, trial began on July 5, 1988. It ended on November 17, 1988. The record was closed on November 29, 1988. The parties filed their proposed findings of fact and conclusions of law on January 10, 1989. Answers were filed on February 10,

1989. At my request, the Commission granted me an extension of time to April 10, 1989 to file this decision.

This decision is based on the transcript of testimony, the exhibits which I received in evidence, and the proposed findings of fact and answers thereto filed by the parties. I have adopted several proposed findings verbatim. Others have been adopted in substance. All other findings are rejected either because they are not supported by the record or because they are irrelevant.

II. FINDINGS OF FACT

A. *Kraft's Business Activities*

1. Kraft is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its offices and principal place of business located at Kraft Court, Glenview, Illinois (Ans. ¶ 1).¹ [3]

2. Kraft is one of the nation's largest food companies, with sales of \$8.7 billion and a net income of \$413 million in 1986. Besides Kraft Singles, the product involved in this case, Kraft manufactures such food products as Philadelphia Brand Cream Cheese, Velveeta Pasteurized Process Cheese Spread and Cracker Barrel Cheddar Cheese (CX 271, pp. 1, 6).

B. *Interstate Commerce*

3. The acts and practices of Kraft challenged in the complaint have been in or have affected commerce during the time period referred to in this decision (Ans. ¶ 4).

4. Kraft has disseminated, or caused to be disseminated, advertisements for Kraft Singles and various other foods, as "food" is defined in Section 12 of the FTC Act. These advertisements have been disseminated by various means in or affecting commerce, including magazines distributed across state lines, and radio and television broadcasts transmitted across state lines, for the purpose of inducing purchases of these foods by members of the public (Ans. ¶ 3).

¹ Abbreviations used in this decision are:

CX	Commission Exhibit
RX	Respondent's Exhibit
Tr.	Transcript page
CPF	Complaint counsel's proposed findings
RPF	Respondent's proposed findings
Ans.	Respondent's answer to the complaint
F.	Finding number in this decision.

C. Kraft Singles

5. Kraft Singles are individually wrapped slices of pasteurized process cheese food, and are subject to a Food and Drug Administration ("FDA") "standard of identity" requiring a certain level of mandatory ingredients and permitting specified optional ingredients (Tr. 2250).

6. Kraft Singles are made from, among other ingredients, a blend of cheddar or Swiss cheese, whey, skim milk, and whey protein concentrate. A slice of Kraft Singles is approximately 67 to 68% natural cheese and therefore exceeds the percentage of natural cheese required by federal regulation (51%) for a pasteurized process cheese food (21 CFR 133.173(a)(5); CX 329, p. 21; Tr. 607).

7. All of the calcium in Kraft Singles is derived from three dairy sources: natural cheese, whey, and skim milk. The largest percentage of the calcium comes from the natural cheese component (CX 329, pp. 26-27). There are two other products—imitation and substitute cheese slices—which compete with Kraft Singles (CX 342, pp. 97-100; CX 44A-C; CX 166). [4]

8. Unlike Kraft Singles, imitation cheese food slices are not subject to an FDA standard of identity and can be any combination of ingredients which resemble and can be substituted for pasteurized process cheese food. Those presently on the market are made predominantly from a combination of water, vegetable oil, flavoring agents and fortifying ingredients (Tr. 2250-53; RX 125).

9. Imitation cheese food slices are, by FDA definition, "nutritionally inferior" to pasteurized process cheese food slices such as Kraft Singles although they may not, in fact, be so (F. 218). Nutritional inferiority is defined as any reduction in the content of any "essential nutrient," of which calcium is one, that is present in a measurable amount in the food being imitated (21 CFR 101.3(e)(1)(4); Tr. 2251; RX 13A).

10. Substitute cheese food slices are those that resemble and can be substituted for pasteurized process cheese food slices but are not "nutritionally inferior" to those slices and are not required to be labeled as an imitation (21 CFR 101.3(e); Tr. 2251-52; RX 13A).

11. Kraft Singles are sold in both 3/4 ounce and 2/3 ounce slices. Fifty-five to sixty percent of Kraft Singles' sales is 3/4 ounce slices, with the remaining 40 to 45% being 2/3 ounce slices (CX 329, pp. 37-38).

12. By Kraft's own analysis, a 3/4 ounce slice of Kraft Singles

contains 68.2% of the calcium of five ounces of whole milk (CX 100). Since low-fat and skim milk have slightly more calcium than does whole milk, a 3/4 ounce slice of Kraft Singles has less than 68.2% of the calcium of five ounces of low-fat or skim milk (CX-327, pp. 156-57; CX 100). The 2/3 ounce slice contains proportionally less calcium than does the 3/4 ounce slice.

13. Kraft Singles are sold nationally and are the largest selling product in the individually wrapped process slices category, which includes imitation (also referred to as "analog") slices, as well as process cheese food slices like Kraft Singles (CX 44C). Kraft Singles' sales are approximately 200 million pounds annually, or well over \$300 million (CX 44D; Tr. 1723). Approximately half of all American households purchase Kraft Singles (Tr. 1723-24). [5]

D. Kraft's Development Of The "Five Ounces Of Milk" Ads

1. Introduction

14. Most of the challenged ads were part of Kraft's "five ounces of milk" campaign. Prior to the development of these ads, Kraft Singles were losing market share to the increasing number of low cost imitation and substitute cheese food slices appearing on the market (Tr. 1502-03, 1796).

15. Imitations and substitutes were being advertised as both less expensive and more nutritious than dairy slices such as Kraft Singles. Fisher's Sandwich Mates slices, for example, were advertised in 1983 and 1984 as:

Better than American cheese. Tastes like American cheese and melts the same. But Sandwich Mate is more nutritious. More vitamins, more minerals, less fat. Made with wholesome vegetable oil, and it costs less (RX 149A).

16. Most of the Sandwich Mate ads were print ads, none of which mentioned that the product was made with vegetable oil. None of the ads, television or print, stated that Sandwich Mate was a non-dairy product (RX 149B; Tr. 1508-10, 1802-03).

17. Imitations and substitutes are priced significantly lower than Kraft Singles because the dairy ingredients used to make Singles are more expensive than the vegetable oil used to make imitations (Tr. 1727, 1754). These products are virtually identical to Kraft Singles in appearance and are sold next to them in the supermarket (Tr. 1502-03, 1796; CX 320, pp. 35-36).

18. Kraft and its advertising agency, J. Walter Thompson ("JWT"), developed the "five ounces of milk" ads because they were concerned that consumers were unaware that the price differential between Singles and imitation and substitute slices was due to the fact that Singles are a dairy product and imitation and substitute slices are not dairy products. The intent of the ads was to educate consumers about the difference in milk content between Singles and competing analog slices (Tr. 1503-05, 1797; CX 317, p. 86; CX 320, pp. 35-36). [6]

2. "Shopping Dad" and "Tell Me When"

19. The first two "five ounces of milk" television ads were "Shopping Dad" (CX 278Z-49 through Z-52) and "Tell Me When" (CX 278Z-53 through Z-56). Both ads emphasized the difference in dairy ingredients between Singles and imitation and substitute slices. While some slices were made from a small amount of milk, the ads stated, Kraft puts five ounces of milk into every slice.

20. "Shopping Dad" ran from January to April 1984 and in February 1985, and "Tell Me When" ran from April 1984 to the beginning of 1985 (CX 278Z-47; Tr. 1798, 1501). Neither "Shopping Dad" nor "Tell Me When" mentioned calcium, and neither is a challenged ad (CX 278Z-49 through Z-56).

3. "Things That Look Alike"

21. "Things That Look Alike" (CX 62V-Y), which is not a challenged ad, was developed from the same creative strategy as "Shopping Dad" and "Tell Me When," but specifically mentioned that analog slices are made from vegetable oil and water rather than milk. This ad was developed as a part of Kraft's competitive response to ads for Fisher's Sandwich Mate, a brand of substitute cheese slices (CX 202C; Tr. 1507-08, 1799-800, 1860, 1946-47). The strategy of the ads was to convey the "benefit/promise" or "reason why" one should purchase Kraft Singles: because they provide great cheese taste and nutrition and are made from five ounces of milk while imitations use less (Tr. 1495-98, 1792-93).

22. Like "Shopping Dad" and "Tell Me When," "Things That Look Alike" compared the milk content of Singles and analog slices but did not mention calcium (CX 62V-Y). "Things That Look Alike" was broadcast in certain markets from December 1984 to May 1985 and from July 1986 to the present (CX 62Z-2 through Z-3).

E. The Challenged Ads

1. "Skimp"

23. The challenged ads were disseminated in a nationwide campaign from early 1985 to mid-1987 (CX 62I; CX 331B, Stip. 4; CX 332G, Stip. 45, 46). The campaign cost over \$16 million in 1985 (CX 44; CX 212). In 1986, Kraft spent almost \$15.5 million for Kraft Singles advertising, and it planned to spend another [7] \$15 million in 1987 (*Id.*). The ads ran on television, radio, and in print (CX 331). The challenged ads fall into two groups: a series of broadcast and print ads called the "Skimp Campaign" and broadcast and print ads entitled "Class Picture/5 Ounce."

24. The ads were first disseminated in February 1985, when the broadcast ads entitled "Skimp/Blue Eyes" (CX 62C, E-H) and "Skimp/Brown Eyes" (CX 62L-P), began running on national and local television networks (CX 62I, T-U; CX 331A-C). These ads were broadcast on national and regional television from February through December 1985. "Skimp Blue Eyes, Rev. I" (Revision I) and "Skimp Brown Eyes, Rev. I" were broadcast on national television from January through March 1986 (CX 331B-C).

25. "Skimp/Brown Eyes" and "Skimp/Blue Eyes" were followed by television ads entitled "Major League Material," "Daredevil," and "Smile." Also beginning in February 1985, Kraft disseminated a series of print ads entitled "Shortstop," "Quarterback," "Bunny," "Halfpint," and "Guard." Kraft referred to these broadcast and print ads, and all of their variations, as the "Skimp Campaign" (Tr. 1501, 1560, 1589, 1792).

26. Although each of these television and print executions was somewhat different, and most were disseminated with a number of variations, the advertising claims challenged in this proceeding are contained primarily in the following illustrative language:

Imitation slices use hardly any milk. But Kraft has five ounces per slice. Five ounces. So her little bones get calcium they need to grow (CX 62C, "Skimp/Blue Eyes").

27. Calcium was mentioned in the ads as an example of the nutrition provided Kraft by Singles because they are a dairy product. Calcium was chosen because of apparent consumer interest in it, and because other advertisers were promoting the calcium content of their products at the time (Tr. 1513-14, 1611, 1806-07; CX 320, p. 42). For

example, Tums antacids, breakfast cereals, orange juice, calcium supplements and individually wrapped cheese slices were all being promoted as good sources of calcium, in both television and print media. Fisher's Sandwich Mate was promoted as having "more calcium" than American cheese, and Borden Lite-line was advertised as having "all the protein and calcium of process cheese" (RX 127D, H; Tr. 1512-13, 1807-08). [8]

28. Two changes were made in the text of the challenged ads during the approximately two-and-one-half years that they were disseminated. In January 1986, the language "Kraft has five ounces per slice" was changed to "Kraft is made from five ounces per slice" (e.g., CX 62Q). Also, in March 1987, near the end of the challenged campaign, the disclosure that "one 3/4 ounce slice has 70% of the calcium of five oz. of milk" was added as a superscript in the television advertisements and as a footnote in the print advertisements (e.g., CX 275J; CX 62Z-55).

29. "Major League Material" (CX 278T) was broadcast on national and regional television from October 1985 to January 1986 (CX 278Y; CX 331C). "Major League Material, Rev. I" (the first revision of that ad) (CX 275H; CX 278W) was broadcast on national, regional and local television from March 1986 through January 1987 (CX 278Y; CX 331C). "Major League Material/Rev. III" (CX 275J) began airing on national television in March 1987 and continued until June 1987 (CX 331G, Stip. 45).

30. "Daredevil" and "Smile" were each aired in both 15 and 30 second versions (CX 62Z-14, Z-16 [Daredevil]; CX 62Z-19, Z-21 ["Smile"]). These ads were broadcast on national and local television from November 1986 through February 1987 (CX 62Z-18, Z-23; CX 331D-E, Stip. 20, 22). "Daredevil, Rev. I" (CX 275K-L) and "Smile, Rev. I" (CX 275M-N) began airing on national television in March 1987 and continued until June 1987 (CX 331G, Stip. 45).

31. The "Skimp" campaign also included five print ads entitled "Shortstop" (CX 62Z-33 through Z-36), "Quarterback" (CX 62Z-38 through Z-39), "Bunny" (CX 62Z-41 through Z-43), "Halfpint" (CX 62Z-45 through Z-46), and "Guard" (CX 62Z-48). These ads used language similar to the Skimp television ads (F. 83, 99; Tr. 122-26).

32. "Shortstop" appeared in major national publications such as *Better Homes & Gardens*, *Good Housekeeping*, *McCalls*, *People*, and *Parents* from February 1985 through March 1987 (CX 62Z-37; CX 331E, Stip. 24).

33. "Quarterback" appeared in major national publications such as *Family Circle*, *Good Housekeeping*, *Parents*, and *People* from September 1985 through February 1987 (CX 62Z-40; CX 331E, Stip. 27).

34. "Bunny" appeared in major national publications such as *Better Homes & Gardens*, *Family Circle*, *Good Housekeeping*, *McCall's*, *Parents*, *People*, and *National Enquirer* from June 1985 through November 1986 (CX 62Z-44; CX 331F, Stip. 30). [9]

35. "Halfpint" appeared in major national publications such as *Better Homes & Gardens*, *Ladies Home Journal*, *Reader's Digest*, *TV Guide* and *Southern Living* from February through April 1987 (CX 62Z-47; CX 331F, Stip. 33).

36. "Guard" appeared in *Woman's Day* in May 1987 (CX 62Z-48 through Z-49; CX 331F, Stip. 37).

37. Kraft also disseminated both broadcast and print versions of an advertisement entitled "Class Picture/5 ounce" or "Class Picture/II" (CX 62Z-10 through Z-11 (television); CX 62Z-55 (print)). These advertisements were not part of the "Skimp" campaign (CX-203Y; Tr. 1589-90).

2. "Class Picture"

38. The "Class Picture" ads were developed from a different creative strategy than the "Skimp" ads: that Kraft Singles are an "excellent source of calcium." The ads were not expressly comparative, stating only that Kraft Singles were "made from five ounces of milk per slice. So they're concentrated with calcium." These ads did not mention imitations or substitutes (Tr. 1519-20, 1847).

39. Kraft developed its calcium strategy from which the "Class Picture" ads were created because of the continued consumer interest in calcium and the increasing number of products, including competitive analog cheese products, being advertised as good sources of calcium. In February 1985 and June 1985 ads, Fisher's Sandwich Mate was promoted as having "more calcium (than American cheese)" and "as much calcium as a 6 2/3 ounce glass of milk." Fisher also introduced a "calcium rich" cheese slice brand, with the claim "more calcium than eight ounces of milk" on the label, just below a picture of a pitcher filled with milk (CX 193B; RX 126A; Tr. 1519-20).

40. The "Class Picture/5 ounce" television ads aired on national television from June 1986 through January 1987 (CX 62Z-13; CX 331D, Stip. 17). The "Class Picture/5 ounce" print ad appeared in *Family Circle* in April 1987 (CX 62Z-55, Z-58; CX 331F, Stip. 35).

41. Kraft also disseminated three radio ads, entitled “Splash” (CX 62Z-24), “Milk Chorus” (CX 62Z-29), and “Moo” (CX 62Z-32), containing language similar to the challenged television and print ads in the “Skimp” campaign (Tr. 149-57).

42. “Splash” aired in Lexington, Louisville, Seattle and Tacoma from March 1985 through October 1985 and in Nashville from December 1986 through May 1987 [10] (CX 62Z-26; CX 331G, Stip. 40). “Milk Chorus” aired in Lexington, Louisville, Seattle and Tacoma from November 1984 through August 1985 (CX 62Z-29; CX 331G, Stip. 42). “Moo” aired in Lexington, Louisville, Seattle and Tacoma from November 1984 through November 1985 (CX 62Z-32; CX 331G, Stip. 44).

F. The Messages Conveyed By The Challenged Ads

1. Interpretation Of The Ads’ Language

43. The complaint alleges that Kraft’s ads represented: (1) that a slice of Kraft Singles contains the same amount of calcium as five ounces of milk (the “milk equivalency claim”); (2) that Kraft Singles contain more calcium than most imitation slices (the “imitation superiority claim”); and (3) that Kraft had a reasonable basis for those claims at the time they were made.

44. The challenged ads do not expressly make the alleged claims, but complaint counsel argue that the following ads—as an example of the challenged ads—can, without extrinsic evidence, be interpreted as conveying those claims:

“Skimp/Brown Eyes”

Audio

Lady (VO): I thought of skimping. I admit it. But could you look in those big brown eyes and skimp on her? So I buy KRAFT Singles. Imitation slices use hardly any milk. But KRAFT has five ounces per slice. Five ounces. So her little bones get calcium they need to grow.

No, she doesn’t know what that big KRAFT means. Good thing I do.

Singers: KRAFT Singles. More milk makes ’em . . . more milk makes ’em good.

Lady (VO): Skimp on her? Not me (CX 62L). [11]

“Shortstop”

How could I shortchange my shortstop?

KRAFT Singles have five ounces of milk per slice, so I don’t have to.

Because Kraft Singles give my kids great nutrition like calcium and protein. Sure, I could buy imitation slices. But some use hardly any milk. Could I short change my little shortstop? No way.

Kraft Singles. More milk makes ’em good.

Copies of these and additional representative ads appear in Appendix 1 of complaint counsel's proposed findings.

45. The "Skimp" ads state that: "Imitation slices use hardly any milk. But Kraft has five ounces per slice. So her little bones get calcium they need to grow." The ads' reference to the precise amount of milk in a Kraft Single, and their reference to milk and calcium can be interpreted as implying that a slice of Kraft Singles contains the same amount of calcium as five ounces of milk, and that—because there is no mention that calcium is lost in the processing of cheese—the ads convey the milk equivalency claim.

46. Mariann Feldmann, a Kraft category manager who is responsible for the marketing of Kraft Singles (Tr. 1483), agreed that one logical conclusion which consumers could make from these ads was that a slice of Kraft Singles contains the same amount of calcium as five ounces of milk (Tr. 1705).

47. The words in the "Skimp" ads, "Imitation slices use hardly any milk. But Kraft has five ounces per slice. So her little bones get calcium they need to grow" can be interpreted, since they refer to calcium and milk, and emphasize the amount of milk in a slice of Kraft Singles, as implying that imitation slices which, they state, use hardly any milk, contain less calcium than Kraft Singles. The ads do not contradict this since they do not indicate that imitation slices may contain calcium from sources other than milk. Again, Ms. Feldmann agreed that the imitation superiority claim was one logical interpretation of the ads (Tr. 1706), as did Dr. Jacoby, one of complaint counsel's expert witnesses (Tr. 3685). [12]

2. Extrinsic Evidence

a. *Complaint Counsel's Experts*

48. Dr. David Stewart, who testified about the Market Opinion Research ("MOR") copy test he designed for the Commission (F. 99), has a Ph.D. in psychology, is a full professor of marketing at the University of California (Tr. 1063), teaches several graduate and undergraduate level marketing and consumer research courses (CX 274A-B), has authored or co-authored four books, three of which deal with consumer behavior (Tr. 1071), has written scores of articles on consumer research in peer-reviewed academic journals (Tr. 1072-73) and has himself served as a peer reviewer for academic journals (Tr. 1069-70). Dr. Stewart was also employed for two years as the

research manager for a major advertising agency where he was personally involved in the design of about 100 consumer surveys (Tr. 1065-66).

49. Dr. John McDonald, who testified for complaint counsel about the execution and analysis of the MOR copy test, is a vice president of that company, a polling research firm which does survey research for a variety of clients (Tr. 765-66, 771).

50. Dr. McDonald has a Ph.D. in business administration and has worked for MOR since 1984. His responsibilities include the design of research studies, questionnaire development, sample selection, overseeing project management, analyzing and interpreting data, and preparing descriptive analyses of these studies (Tr. 766, 770-71).

51. Dr. McDonald is experienced in the design and execution of consumer surveys which use mall intercept interviews and other techniques for eliciting consumer responses. He is responsible for 50 to 70 consumer research projects annually at MOR. Approximately 15 to 20% of these consumer research surveys have involved advertising-related issues (Tr. 771-72).

52. Dr. McDonald also has experience as an academic in the field of marketing and marketing research. He was an assistant professor of marketing at Arizona State University for two years, teaching courses in marketing management and marketing communications. He was also an assistant professor of marketing at Wayne State University for two years, teaching various graduate and undergraduate level courses in marketing, including consumer research, and he has written a number of articles which have been published in peer reviewed academic journals (Tr. 768-70). [13]

53. Dr. Deborah MacInnis, who testified for complaint counsel regarding the claims conveyed by the challenged advertisements, as well as the design of consumer research surveys, is an assistant professor of marketing at the University of Arizona (Tr. 48), teaching courses in consumer behavior and in advertising and promotion management (Tr. 48, 62).

54. Dr. MacInnis has published numerous professional journal articles as well as a book chapter addressing, *inter alia*, various aspects of marketing, advertising and consumer research, and has presented papers at numerous professional conferences. She has written several papers, including her doctoral dissertation, that address the effects of various aspects of advertising on consumer comprehension, and she is currently working on a number of other

projects that are directly related to how consumers process information from advertising. Dr. MacInnis is also experienced in developing questionnaires for consumer research designed to study how consumers process information from advertisements (Tr. 57-61). Her conclusion as to the meaning of the challenged ads is based upon:

[A] considerable body of research which on its own provides valid information about how consumers process information from advertisements that would lead us to quite confidently conclude what kinds of inferences they are going to take away . . . (Tr. 272).

b. *Expert Analysis Of The Challenged Ads*

(1) The Milk Equivalency Claim

(a) *The Television Ads*

55. Dr. MacInnis testified that the passage in the televised Skimp campaign ads which conveys the milk equivalency claim is: "Imitation slices use hardly any milk. But Kraft has five ounces per slice. So her little bones get calcium they need to grow," for if a slice of Kraft Singles contains five ounces of milk, it is reasonable to expect it to contain all of the ingredients, including all of the nutrients, of five ounces of milk, including calcium, which the ad specifically names. Since there is no indication in the ads that nutrients are lost in [14] processing, the ads imply that a slice of Kraft Singles contains as much calcium as the five ounces of milk from which it is made (Tr. 88, 119, 199; CX 62L).

56. Dr. MacInnis pointed to several visual elements in the ads that reinforce the milk equivalency claim. The juxtaposition of the glass containing five ounces of milk with the package of Kraft Singles, at the same time calcium is discussed, leads consumers to equate the cheese with the glass of milk, and all of its nutritional benefits, specifically calcium, the only nutrient mentioned in the ads (Tr. 89).

57. Changes which were made in the challenged ads did not, in Dr. MacInnis' opinion, eliminate the equivalency claim. Around January 1986, the word "has" in the phrase "Kraft has five ounces" was replaced in some of the ads with the words "is made from" (e.g., CX 62Q), but the words "made from" convey the same impression as the word "has" (Tr. 91-92; see also CX 324, pp. 58-59).

58. Around March 1987, a superscript was added to some of the ads stating that "one 3/4 ounce slice has 70% of the calcium of five ounces of milk" (e.g., CX 275J-N), but Dr. MacInnis testified that it did not

correct the milk equivalency implication because, while the superscript was played, there was a good deal of movement in the ad which would distract the viewer from the disclosure, it was not on the screen long enough for consumers to process the information it supposedly conveyed, and its complicated quantitative message would be difficult for consumers to process (Tr. 109-13). Dr. MacInnis also referred to consumer information research which indicates that even when consumers are given adequate time to read an ad, its qualifications are not effective in changing their beliefs (Tr. 109-10).

59. The "Class Picture/5 ounce" television ad states that "Kraft is made from five ounces of milk. So they're concentrated with calcium" (CX 62Z-10 through Z-11). Dr. MacInnis' analysis of the "Skimp" ads and the superscript which was added later applies to the "Class Picture" ads and their superscript (Tr. 119-21).

(b) *The Print And Radio Ads*

60. Dr. MacInnis testified that the challenged print ads ("Short-stop" (CX 62Z-33 through Z-34); "Quarterback" (CX 62Z-32 through Z-39); "Halfpint" (CX 62Z-45 through Z-48); "Bunny" (CX 62Z-41 through Z-42)), which employed the same copy strategy as the "Skimp" ads conveyed the same milk equivalency claim [15] (Tr. 127-34, 141-42), as did the three challenged radio ads ("Splash," "Milk Chorus," and "Moo" (CX 62Z-24, Z-27, Z-30)) because they emphasize the five ounces of milk in Kraft Singles and establish a causal connection between their milk and calcium content (Tr. 152-53, 156-57).

61. In some of the later print ads (CX 62Z-34, Z-45, Z-48), as in the later television ads, Kraft changed the copy from "Kraft Singles have five ounces of milk" to "Kraft Singles are made from five ounces of milk," and added the 70% disclosure in a small print footnote. As with the television ads, Dr. MacInnis stated that these alterations did not affect the communication of the milk equivalency claim (Tr. 130-31, 133-34).

(2) The Imitation Superiority Claim

(a) *The Television Ads*

62. The "Skimp" ads state, *e.g.*, "I admit it. I thought of skimping. But, could you look in those big brown eyes and skimp on her? So I buy Kraft Singles. Imitation slices use hardly any milk. But Kraft has

five ounces per slice. Five ounces. So her little bones get calcium they need to grow” (CX 62L).

63. This language, according to Dr. MacInnis, represents that imitation slices are inferior to Kraft Singles and implies that because they have “hardly any” milk, imitation slices have “hardly any” calcium (Tr. 75-79) because of its “pragmatic implication,” which “automatically causes listeners to hear more than was actually asserted in the ad” (Tr. 78).

64. The “Skimp” ads, as viewed by Dr. MacInnis, contain visual elements which interact with the script and reinforce the imitation superiority claim. During the audio portion of this ad, a glass containing very little milk—representing imitation cheese slices’ milk content—is first shown. Then the glass is filled to the five ounce mark to represent Kraft Singles’ milk content. The filling of the glass corresponds with the audio reference “[s]o her little bones get calcium they need to grow” (Tr. 82-83).

65. The mention of “calcium” at this point in the ad encourages consumers to think about milk in terms of calcium. The interaction of these visual elements and the causal relationship established in the ads between milk and calcium encourages the conclusion that calcium content is directly related to milk content and that imitation slices, in comparison [16] to Kraft Singles, must therefore have less calcium (Tr. 82-83). This analysis applies to all of the challenged “Skimp” television ads (Tr. 91-109, 115-17).

66. According to Dr. MacInnis, the “Class Picture/5 ounce” television ad (CX 62 Z-10 through Z-11) also implies that Kraft Singles have more calcium than all competing cheese slices, including imitation slices, for although the ad is not expressly comparative, the passage “Kraft is made from five ounces of milk per slice. So they’re concentrated with calcium” implies that competitors’ products are not as concentrated with calcium (Tr. 117-19).

67. Dr. MacInnis testified that “Shopping Dad” and “Tell Me When,” which are not challenged ads, and neither of which mentioned calcium, were deceptive because consumers could imply a calcium superiority claim from the milk comparison made in those ads (Tr. 346-49).

(b) *The Print And Radio Ads*

68. Dr. MacInnis applied her analysis of the “Skimp” ads to the challenged print ads that employ the same copy strategy (CX 62Z-33

through Z-34, Z-38 through Z-39, Z-41 through Z-42, Z-48) and concluded that they convey the imitation superiority claim (Tr. 122-34, 141-42) as do the challenged radio ads (CX 62Z-24, Z-27, Z-30) which emphasize that Kraft puts in five ounces of milk per slice, and then establish the causal connection between the amount of milk in Kraft Singles and the “nutrition like calcium and protein” they provide. This is followed by statements about the small amount of milk in imitation slices and the tagline “more milk makes ’em good” (Tr. 151).

69. Dr. MacInnis testified that CX 62Z-55, the print version of the “Class Picture/5 ounce” advertisement, also implies that a slice of Kraft Singles contains more calcium than competing slices through essentially the same elements as the television version of this ad (CX 62Z-10 through Z-11; Tr. 117-20, 148).

70. Dr. MacInnis’ interpretation of the ads assumes that, as to the milk equivalency claim, consumers believe that none of the nutrients, including calcium, in five ounces of milk are lost when it is processed into cheese (Tr. 336). As to the imitation superiority claim, she conceded that her interpretation of consumer beliefs assumes that consumers also believe that imitation cheeses are not fortified with calcium, and that they must therefore have less calcium than Kraft Singles (Tr. 305-06), [17] and she testified that she could not rule out the possibility that consumers know that imitation cheese slices contain calcium by fortification (Tr. 317).

71. Dr. Stewart also analyzed the language of some of the challenged ads and came to the conclusion that they could potentially mislead some subset of consumers (Tr. 1078-85).

G. Kraft’s Knowledge That The Challenged Ads Conveyed The Milk Equivalency And Imitation Superiority Claims

72. Kraft’s legal department reviews all proposed ads prior to their dissemination, and all ads that make nutritional references must also be reviewed and substantiated by scientists in both Kraft’s research and development department and its nutrition advisory board which is staffed by outside nutrition experts (Tr. 1491, 1493-94, 1527-28).

73. Kraft uses two consumer survey organizations, ASI Market Research (“ASI”) and Communication Workshop Incorporated (“CWI”), to copy-test its proposed ads. “Class Picture/5 ounce” was copy-tested by both ASI and CWI; “Skimp” was copy-tested only by ASI (Tr. 1518, 1667-68, 1991; CX 324, pp. 44, 46).

74. ASI is probably the leading supplier of copy testing services in the nation, conducting 1,000 to 1,200 copy tests every year for its advertising clients, which include many of the top 50 national advertisers (Tr. 2162). Although the test performed by ASI is a "recall" test, it is designed both to measure recall of an ad and to determine the messages that consumers take from the ad (Tr. 2167-69, 2203, 2236; CX 324, p. 44; CX 319, pp. 31-32).

75. ASI followed its standard procedure in copy testing the "Skimp" ad: Potential respondents were contacted by telephone and asked a few screening questions to determine if they qualified for the survey. Survey participants were required to be women between the ages of 18 and 65 years old who were connected to the local cable television system, not employed in the market research or advertising industry, and who had not previously participated in an ASI survey (Tr. 2160; RX 139; CX 323, pp. 19-20, 30, 33).

76. Those women who qualified for and agreed to participate were asked to watch a 30 minute program on cable television that evening. Participants were telephoned the following day and asked whether they had actually watched the program. A total of 181 persons qualified for the remainder of [18] the survey by having watched the first 15 minutes of the program, when the "Skimp" ad was broadcast (RX 7L; Tr. 2161; CX 323, pp. 19-21, 26-27, 29).

77. Those respondents who stated that they saw an ad for Singles, either on their own or in response to an aided recall question, were asked four unaided open-ended (F. 102) questions about what they remembered from the ad (RX 7Z-15).

78. The verbatim responses to these questions were coded into categories representing the ad messages being played back by respondents (Tr. 216-68; RX 139; CX 323, pp. 69-70). ASI also calculated a "related recall" score, which is the percentage of the respondents who were determined, based upon their answers, to have meaningfully recalled the "Skimp" ad 24 hours after viewing it. The related recall score for "Skimp" was 29%, which slightly exceeded the average percentage for food product advertising of 28% (Tr. 2167; CX 79J; CX 323, pp. 67-68, CX 324, p. 44).

79. ASI conducts a "refocus" interview for those clients who wish to have additional questions asked after respondents view their ad a second time. Respondents view the ad again by turning on their television set and are immediately asked several questions (RX 55; Tr. 2174-75). The refocus portion of the interview is not designed to

measure the message consumers take away from ads (Tr. 2177-78; RX 5A-B; CX 323, pp. 39-40).

80. The verbatim responses from the “Skimp” copy test were reviewed by Mariann Feldmann, Kraft’s category manager for Singles “before they became an issue,” after CSPI contacted Kraft (F. 88), and “since the FTC issue has arisen.” Mr. Myron Lyskanycz of JWT also reviewed them. Neither one believed, after their reviews, that respondents to the ASI copy test took away the messages alleged in the complaint (Tr. 1514-17, 1526-27, 1809).

81. Ms. Feldmann also testified that she found no evidence of consumers taking away either alleged implication from “Class Picture/5 ounce” when she reviewed the ASI consumer verbatims relating to this ad (Tr. 1525).

82. CWI followed its standard methodology when copy-testing the “Class Picture/5 ounce” ad. It conducted a screening interview by telephone for potential respondents. Those persons who qualified for and agreed to participate in the survey were subsequently brought in CWI’s test facility (CX 58B-G; CX 326, pp. 27-28). Each respondent viewed the ad once in isolation, without additional “clutter” ads (RX 73; CX 326, pp. 28-29, 40). The respondents were then asked five open-ended questions about what they remembered from the ad as well as their thoughts upon viewing it (RX 8J, R-V). According to Kraft’s [19] witnesses these—and not other open-ended, closed-ended (F. 103) and scaled “diagnostic” questions—were the only questions that measured what messages respondents took away from the ad (CX 58H-Z-5; CX 326, pp. 30-31, 54, 71-72, 100-05, 109-10; RX 73; RX 141, pp. 36, 47, 50-51, 57-59; RX 148, pp. 34-35; Tr. 1540, 1544-47, 1681-83, 1767-69, 1906-18, 1990, 1996-98, 2001-04, 2009, 2011-18, 2021-24, 2029, 2047-50, 2105-06, 2121).

83. Eight percent of the responses to the first four questions were coded by CWI as responding “Kraft Singles contain more calcium than other cheeses.” None said “Kraft Singles contain more calcium than [or the same amount of calcium] as milk” (RX 128R).

84. However, Ms. Feldmann testified that her own analysis of the verbatims revealed that none of them mentions imitations or any other competing product, and she assigned one ambiguous verbatim as arguably supporting the milk equivalency claim (Tr. 1761-63).

85. In response to the fifth question about the main idea of the ad, 15% were coded as responding that Kraft Singles contain “more calcium.” None of the respondents was coded as saying “Kraft

Singles contain more calcium than [or the same amount of calcium as] milk" (RX 128Z-2).

86. In 1983, Kraft conducted consumer research to test various advertising concepts, including the concept that Kraft Singles have five ounces of milk, more than some other slices. Although these concepts made no express reference to calcium, the test results showed that they conveyed the belief that Kraft Singles contain "extra calcium" (CX 282Z-93). In 1984, as a result of this concept testing, Kraft ran a national advertising campaign focusing on the theme that Kraft Singles have five ounces of milk, while substitute slices do not. While these ads did not expressly mention calcium and have not been challenged in this proceeding (*e.g.*, CX 278Z-50), Kraft's consumer research on them showed that some people stated that a benefit of having five ounces of milk in an individually wrapped cheese slice was "more calcium" (CX 132Z-5).

87. In February 1985, Kraft began the Skimp campaign, whose ads are challenged here. The "Skimp" campaign was designed to communicate the nutrition benefit of Kraft Singles by referring to calcium as the key nutrition element (Tr. 1881-82, 1886-87; CX 122A; CX 317, pp. 50-51; CX 322, p. 50; CX 44F).

88. In November 1985, the Center for Science in the Public Interest ("CSPI"), a consumer group, informed Kraft that it believed the Skimp ads conveyed the message that a slice of Kraft Singles had the same amount of calcium and other nutrients as five ounces of milk and asked that those ads be changed (CX 63). [20] In January 1986, the FTC initiated an investigation to determine, *inter alia*, if Kraft's ads conveyed the milk equivalency claim (*see* CX 166). In February 1986, the California Attorney General's office notified Kraft that it planned to file suit against Kraft on the grounds, *inter alia*, that Kraft's ads made that same representation (CX 286).

89. In July 1986, in response to these actions, JWT, at Kraft's request, developed several copy alternatives that it believed would not convey the milk equivalency claim (CX 45B-C; CX 322, pp. 45-48). However, Kraft did not adopt any of those copy alternatives at that time (*e.g.*, CX 62).

90. A Kraft document dated March 1986 and entitled "Kraft Singles Calcium Copy ASI/CWI Testing" "Class Picture" stated that while the "Class Picture I 4(X) and Class Picture II" (502) ads were intended to communicate that Kraft Singles are good tasting and a good source of calcium, the latter ad "directly links calcium claim to

five ounces of milk claim of the current national campaign” (CX 54C; *see also* CX 8A).

91. Kraft intended that the Skimp campaign convey a superiority to imitation slices message (CX 4K; CX 120; CX 122A). A JWT proposed copy strategy states that the “copy will convince low-loyal users that Kraft Singles deliver great cheese taste and have a high nutritional value (good source of daily calcium needs), because they are made with ‘5 oz.’s of milk’ per slice (imitation slices use less)” (CX 4S). Although he denied that this copy strategy was used to develop ads which related calcium and imitation slices, the account director of JWT’s Kraft Singles account testified that this proposed copy strategy suggests advertising which compares calcium amounts between Kraft Singles and imitation slices (Tr. 1888-89).

92. In an April 7, 1986 letter to the FTC, Kraft’s senior food and drug counsel stated that “it would be reasonable to assume that consumers would consider a product made from milk to be superior to one labeled as an imitation;” however, he stated that the ASI test of the “Skimp” ad “indicates very little direct comparison with imitation products, and practically no specific mention of calcium” (CX 166J).

93. In January 1985, the ABC television network requested substantiation for the “milk and calcium comparisons for Kraft Singles and imitation slices.” JWT answered that the “commercial makes product comparisons regarding milk content only” and told ABC that Kraft Singles “contain more . . . calcium (120 mg.) per slice than imitation slices” (CX 22A-B). Actually, the imitation slices JWT was comparing to Kraft Singles—Cheez Twin and Sandwich Mate—contain the same amount of, or more, calcium than Kraft Singles (CX 166Z-4 through Z-5; CX 95). [21]

94. ABC still would not clear the ad for broadcast and continued to question whether the “Skimp” ads made an implied comparison between the calcium content of Kraft Singles and imitation cheese slices (CX 24A). In an attempt to convince ABC to broadcast the “Skimp” ads, JWT sent ABC further substantiation regarding the nutritional inferiority of imitation cheese slices (CX 26A), which consisted of two imitation brand labels which showed that those brands had less calcium than Kraft Singles (CX 22A, D). JWT never informed ABC that these two brands were not representative of the imitation brands available to consumers (Tr. 1936). In fact, these two imitation cheese slice brands comprise only a very small portion of the imitation cheese products available to consumers, and most imitation

cheese products have the same amount of calcium as a slice of Kraft Singles (F. 235).

95. A January 29, 1985, "confidential" JWT legal memorandum regarding the "Skimp" ad, written prior to any of the Skimp ads being broadcast, stated that:

It is my feeling that the imitation slice people are going to be rather upset over this spot, and I would not be shocked if Kraft were to receive a challenge on this one.

First, we should find out the facts concerning the precise calcium content in each nationally or regionally distributed imitation slice product. It may be that some have as much or more calcium per slice as Kraft Singles and that other have less. If some others do have less this obviously is helpful (CX 283).

96. The creative strategy for the "Class Picture/5 ounce" ads stated that they were intended to elicit the consumer reaction "that there really is a difference between brands" (CX 203Y). Prior to running the "Class Picture/5 ounce" ads, Kraft had copy test results for these ads showing that consumers took a calcium superiority claim over other individually wrapped cheese slices—which includes imitation slices. The copy test, conducted by Communications Workshop, Inc. ("CWI") for Kraft in early 1986 (F. 82), asked respondents if there was anything "said or shown in the ad that makes you think Kraft Singles is different from other brands of individually wrapped cheese slices." Forty-five percent of respondents answering this [22] closed-ended question said that what differentiated Kraft Singles was that they contain more calcium than other individually wrapped cheese slices (Tr. 1387; CX 57Z-32).

97. In the same copy test, 20% stated that Kraft Singles have more calcium than all other brands of individually wrapped cheese slices, and 48% stated that Kraft Singles have more calcium than most other brands (CX 57Z-39). Thus, after being exposed to the "Class Picture/5 ounce" ad, 68% believed Kraft Singles have more calcium than most other brands of cheese slices, including imitations (Tr. 171, 386-87).

98. The complaint alleges that Kraft's ads misrepresent that Kraft Singles have more calcium than "most" imitation slices (Complaint ¶ 8). The copywriter of the "Skimp" ads, the JWT account director and the Kraft employee chiefly responsible for the advertising and marketing of Kraft Singles all testified that the Skimp ads referred to all imitation slices (CX 321, p. 32; CX 324, pp. 100-02; CX 320, p. 244; Tr. 1934-35).

H. *The MOR Copy Test*

1. Introduction

99. A copy test measures the extent to which messages are conveyed to consumers by an ad (Tr. 773). MOR conducted a copy test, designed by Dr. Stewart, of three of the challenged ads (CX 196; Tr. 1077). The broadcast ads tested were "Major League Material, Revision I" and "Major League Material, Revision III." A print ad entitled "Shortstop" was also tested (CX 196, App. D-E). Two control ads were also tested: a broadcast ad "Taste of Cheese" and a print ad with the headline: "I compare prices. So why do I spend a little more for Kraft Singles." The control ads were chosen by Dr. Stewart because he did not believe that they communicated the challenged claims (Tr. 1097).

2. The Execution of The Copy Test

100. The MOR copy test was executed in four geographically-dispersed shopping malls using the "mall intercept" method (Tr. 777). Shoppers were stopped by professional interviewers in the malls and asked if they would be willing to answer some questions. If they agreed, they were given a screener questionnaire which ensures that the participants ("respondents") met the demographic and other requirements of the test (Tr. 782, 1092-93). [23]

101. If the respondent qualified, she was asked to go to an interviewing room to participate in the test, was shown either a test or a control ad and was then asked the questions on the main questionnaire (CX 196, p. 1; Tr. 783-84). A total of 100 female respondents were shown one of the three test ads or one of the two control ads at four shopping malls (CX 196, p. 2).

102. The main questionnaire contained 14 questions, some having subparts. Questions 1 through 3 were asked to ensure that the respondent recalled seeing the ad in question (Tr. 786-87). Questions 4 and 5 were general open-ended questions, such as "What points does the Kraft ad make about the product?" Open-ended questions are undirected questions which respondents answer in any manner they choose (Tr. 788). Questions 6 through 10 were open-ended questions with some closed-ended aspects, which asked for respondents' perceptions, if any, based on the ad, regarding nutrition, milk and the calcium content of Kraft Singles (Tr. 1102; CX 196, App. B). Respondents' answers to questions 4 through 10 were recorded verbatim (Tr. 795).

103. The ad in question was then shown a second time, followed by a series of closed-ended question (11 through 14). Closed-ended question ask about specific topics and provide the respondent with a finite number of response options, such as “yes” or “no,” or “more,” “same” or “less” (Tr. 1102, 799).

104. Questions 11 and 11A were designed to determine the percentage of consumers who take the milk equivalency claim from Kraft’s ads (Tr. 1111-13). Question 11 was a “filter” or “screener” question. Only if respondents answered question 11 affirmatively were they asked the next question (Tr. 1104-05; CX 196, App. 13). Question 11 asked:

Does this ad say or suggest anything about the amount of calcium in a slice of Kraft Singles compared to the amount of calcium in five ounces of milk? (CX 196, App. B).

105. If respondents answered “yes” to this question they were asked question 11A (Tr. 1111-12):

Based on this ad, do you think that a slice of Kraft Singles has more calcium than five ounces of milk, the same amount of calcium, or less calcium than five ounces of milk? (CX 196, App. B). [24]

106. Questions 12 through 14 were designed to determine the percentage of consumers who take the imitation superiority claim from the ads (Tr. 1119-20). Question 12 asked respondents:

Does this ad compare Kraft Singles to imitation cheese slices? (CX 196, App. B (emphasis in original)).

Like question 11, this question was a “filter” or “screener” question which determined whether respondents saw a comparison in the ad between Kraft Singles and imitation slices before they were asked the next question (Tr. 1116-17; CX 196, App. B).

107. If respondents answered “no” to question 12, they were asked Question 13, a second “filter” or “screener” question:

Does this ad make any direct comparisons between Kraft Singles and other cheese slices? (CX 196, App. B (emphasis in original)).

Question 13 was asked to identify those respondents who saw a comparison to other slices in the ad but did not understand the reference to “imitation slices” (Tr. 1107).

108. Only if respondents answered “yes” to question 12 or 13 were they asked question 14 (Tr. 1119):

Based on this ad, do you think Kraft Singles have more calcium, the same amount of calcium, or less calcium than those cheese slices they are being compared to? (CX 196, App. B).

3. The Validity and Reliability Of The MOR Copy Test

109. Dr. Stewart chose the universe in the MOR copy test to reflect the target market for Kraft Singles—in this case, mothers over the age of 18, with children under the age of 18 living at home, who were the principal food shoppers for their [25] household and who had purchased cheese or cheese products in the last three months (CX 196, App. A; Tr. 1094-97). This was a proper universe for the MOR copy test (CX 324, pp. 50-51).

110. Survey questionnaires generally follow the “funnel approach”—beginning with general open-ended questions and asking successively narrower questions, ending with specific closed-ended questions (Tr. 3369, 3840-41), the process used in the MOR test (Tr. 802, 1102, 3841-42).

111. MOR showed the tested ad a second time to respondents before asking the closed-ended questions, a methodology commonly used in consumer studies of ad communication (Tr. 798, 1103, 1252, 3867, 2212-13, 2216-17; CX 58V-W). The reason that second exposures to ads are given is that they may make respondents more attentive to the ad, and increase the accuracy of the copy test results (Tr. 410, 3191, 3562, 3867-69; CX 416F).

112. The MOR copy test was pre-tested and, as a result, a few minor procedural and questionnaire changes were made; a second, briefer pre-test was also made which Dr. Stewart observed (Tr. 822-24).

113. MOR conducted personal briefings of each field service supervisor and interviewer to ensure that everyone understood the testing procedure. A standard written briefing guide was used so that each of the four field services received the same briefing (Tr. 778-80). The MOR briefer stayed at each field service the first day and observed that day's interviews to ensure that the questionnaire was executed properly (Tr. 778-81). Dr. McDonald testified that the in-person briefing was specifically “designed to increase the quality and reduce error possibilities on the part of the field services” (Tr. 781).

114. MOR's coding department prepared coding categories, that is, categories in which similar responses were grouped together, for the responses to the open-ended questions. These categories were reviewed by Dr. McDonald. The verbatim responses from all 500 questionnaires were then placed in the appropriate coding categories by MOR's coding department (CX 196, p. 7). All of these coding decisions were reviewed independently by Dr. McDonald and his senior analyst for accuracy (CX 196, pp. 7-8). Additionally, three of the four field services which executed the MOR copy test called 10% of the respondents to verify that they had been interviewed. All had been. Finally, MOR did keypunch verification of the results of the closed-ended questions (Tr. 830-32). [26]

4. MOR's Use of Closed-Ended Questions

115. Kraft attacks the MOR test primarily because of what it sees is the uncontrollable bias caused by questions 11A (which tests the milk equivalency claim) and 14 (which tests the imitation superiority claim) and the closed-ended questions leading up to them.²

116. The use of closed-ended questions in copy tests is common: all of the copy test research Dr. McDonald has designed for MOR uses such questions (Tr. 1026-27; *see also* Tr. 814, 1026, 1106, 3540, 3543-45). Dr. MacDonald also testified that one of Kraft's expert witness, Dr. Jacoby, has relied on closed-ended questions similar to those in the MOR copy test (Tr. 1180-81). Respondents' initial attention level, their processing of the ad when they see it and their inability to articulate a complete response are some reasons why responses to open-ended questions do not necessarily reveal implied claims (Tr. 1247, 3962).

117. Dr. Stewart testified:

[T]here is a substantial amount of literature, substantial number of studies which show very clearly that open-ended questions are not useful for getting at very specific, brand-based beliefs, whether created by an ad or on some other basis.

The only way to get that in—the literature is very explicit about this—the only way to get it is to use closed-ended questions (Tr. 3962-63; *see also* Tr. 3165, 2435-36, 2536-37).

118. A well-recognized problem with closed-ended questions is the

² Kraft also argues that MOR excluded respondents from its sample pool who should have been counted as not receiving the alleged implications (RPF 71), but I agree with Dr. MacDonald's conclusion that the number of such respondents was not large enough to affect the results of the copy test (Tr. 79, 859-61, 904-07).

“yea-saying” bias, the tendency of some people to respond to such questions affirmatively (Tr. 807, 3850). [27]

119. Despite this problem, Dr. Stewart concluded that the closed-ended questions (11-14) “are reliable, they are valid . . . the results adequately controlled for any systematic response biases . . . the net difference between the test respondents and the respondents exposed to the control . . . ads gives us a very good reading of the level of miscomprehension and the creation of decept[ive] beliefs, misleading beliefs on the basis of exposure to the ad” (Tr. 3894-95; *see* Tr. 776, 1077).

120. While complaint counsel argues that the MOR closed-ended questions did not create a yea-saying bias and were not leading (CPF’s 177-78), Dr. Stewart exposed several MOR respondents to one of the two controls ads—which do not make the challenged claims—to measure the bias which may have been caused by the questions or consumers’ prior exposure to the tested ad.

121. Consumer research workers accept that, regardless of the design of a study, some consumers will respond to a particular question in a manner unrelated to the ad they have just seen. For example, respondents may have formed an opinion based on previous exposure to the ad, or despite one’s best efforts, some of the questions in a copy test might contain or prompt some form of bias, such as the yea-saying response (Tr. 803-04, 3855).

122. In either case, those phenomena will be present in equal proportion in both the test ad and the control ad respondents, because they were randomly assigned to the two groups, and any biases would be present in equal percentages in both groups. A control ad therefore allows the researcher to eliminate the effects of such biases, whether they are biases the respondent brings to the copy test or biases that result from the questions (Tr. 803-04, 1260-61, 1284-85, 3931).

123. The number of responses in the control ad group for a particular question are subtracted from the number of responses in the test ad group to eliminate bias that might be responsible for some of the responses to the closed-ended questions (Tr. 1105-06, 1111-13, 3855, 3873). For example, if 60% of the respondents saw the alleged claim in the test ad and 20% saw it in the control ad (in which the claim was not made), the percentage who received the claim from the test ad is considered to be 40%.

124. Dr. Stewart suggested that this approach is conservative because it assumes that all positive responses (i.e., responses

indicating that the alleged claim was communicated) in the control group are the result of some bias (Tr. 1285, 3855, 3873). In reality, he stated, after an ad campaign of the duration and wide dissemination of the Skimp campaign, it is reasonable to conclude that some of the positive [28] control group responses were based on prior exposure to the challenged ads, and thus are attributable to those ads. Because this is not an absolute certainty, all positive control group responses are subtracted from the positive test ad responses (Tr. 1183-85).

125. Once this subtraction is completed, the remainder is the "minimum [number] of individuals who would take that particular claim away from the ad" (Tr. 819-20, 1113). Any biases, such as the yea-saying bias, the bias which may result from leading questions, the bias which theoretically may result from the fact that all closed-ended questions provide the respondent with some information, as well as the fact that a respondent may answer the questions on the basis of prior exposure to the test ads, will be controlled for and eliminated from the results (Tr. 808-09, 1111-14).

5. The Appropriateness Of The Control Ads

126. Dr. Stewart testified that the control ads used in the MOR copy test were appropriate because they were actual ads for the same brand and product that had been disseminated and were thus designed with a persuasive intent. In addition, the control ads did not contain the elements believed likely to cause the alleged claims communicated by the test ad (Tr. 1099, 3874-75). The broadcast control ad used by MOR, "Taste of Cheese," was the same ad used by Kraft in its ORC copy test (F. 175) as its control ad although Dr. Heisler, who designed the copy test, did not use the information from the control ad in his analysis of the test results (CX 244C; CX 196, App. D; Tr. 2489-90).

6. The Results Of The MOR Copy Test

(a) "*Major League Material, Rev. I*"

127. Dr. Stewart analyzed the copy test results individually for each ad and found that the percentage of respondents in the MOR copy test who, after subtracting the positive control ad responses from the test ad responses, agreed that the ads made the challenged claims ranged from 23 to 53%, depending upon the ad and claim that were tested (Tr. 1078).

128. Of the 100 respondents who saw "*Major League Material, Rev. I*," 52 said, in response to question 11, that it made a comparison

between the amount of calcium in five ounces [29] of milk and the amount of calcium in a slice of Kraft Singles. Of those 52, 49 responding to question 11A said the ad represented that Kraft Singles had the same amount as, or more calcium than five ounces of milk. Of the seven of 100 respondents who said such a comparison was made in the control ad, four said Kraft Singles had the same amount of calcium as five ounces of milk (CX 196, p. 30). Thus, 49% of the test ad sample saw the milk equivalency claim and only 4% did for the control ad. When the positive control ad responses are subtracted from the test ad responses, the difference is 45% (Tr. 1112-13).

129. As to question 14, 62 of the 100 respondents who viewed “Major League Material, Rev. I” said the ad communicates that Kraft Singles have more calcium than the cheese slices they were compared to. Twenty-seven of the 100 respondents who viewed the control ad gave that response (CX 196, p. 33). The difference, after subtracting, is 35% (Tr. 1119).

130. Subtracting control group responses from test group responses to question 12A, which asked: “Based on this ad, how many brands of imitation cheese slices do you think Kraft Singles are being compared to?” reveals that 37% of the respondents believed that the comparison in the ad was to all or most brands of imitation slices (CX 196, p. 32; Tr. 1117-18).

131. The following data, presented in chart form, show the percentage of respondents who saw the claims alleged in the complaint in these test ads as compared to the control ads:

	Milk Equivalency Q 11A	Comparison Is To Most Imitations Q 12A	Imitation Superiority Q 14
MLM, Rev. III	57	74	66
Control Ad	4	29	27
<u>Net Percentage</u> <u>taking claim</u>	<u>53%</u>	<u>45%</u>	<u>39%</u>
QB	47	55	53
Control Ad	0	22	30
<u>Net Percentage</u> <u>taking claim</u>	<u>47%</u>	<u>33%</u>	<u>23%</u>

(See CX 196, pp. 48, 50-51, 81, 83-84; Tr. 1120-27). [30]

132. In Dr. Stewart's opinion, the results of the MOR closed-ended questions, which are statistically significant, represent the minimum number of persons who interpret the ads as making the challenged claims, and they can be generalized to the population which shares the demographic traits of the MOR sample (Tr. 1113, 1118-28, 1368).

(b) *The Effect Of The Superscript*

133. In March 1987, Kraft added a printed superscript to "Major League Material, Rev. III" which stated, in part, that "one 3/4 oz. slice has 70% of the calcium of five ounces of milk" (CX 331C, G, Stipulation 45). "Major League Material, Rev. I" did not contain the superscript. The MOR test reveals that, after subtracting control ad responses, 45% of the respondents saw the milk equivalency claim in "Major League Material, Rev. I" while 53% saw it in "Major League Material, Rev. III," establishing that the superscript did not prevent respondents from seeing the equivalency claim in the latter ad (see CX 196, pp. 55-67; Tr. 1166).

(c) *Application Of The MOR Test Results
To The Rest Of The Challenged Ads*

134. Because each of the ads in the Skimp campaign share similar wording and visual elements, Dr. Stewart concluded that all of them communicated the two alleged claims to the same number of respondents as did the ads tested in the MOR study (Tr. 1147, 1154-55); and, since the broadcast and print versions of the "Class Picture/5 ounce" ads (CX 62Z-10 through Z-11, Z-55) have copy similar to that of the test ads, he concluded that the "Class Picture/5 ounce" ads conveyed the milk equivalency claim to the same extent as did the tested ads (Tr. 1156).

7. Kraft's Challenges To The MOR Copy Test

(a) *Introduction*

135. Kraft challenges the MOR copy test for several reasons: [31]

- a. MOR excluded qualified respondents from its sample pool (RPF 71-72).
- b. Dr. Stewart did not show that the responses to the questions were not biased by extraneous factors (RPF 73-85).
- c. The control procedures did not rule out the possibility that responses to questions 11-14 were due to extraneous factors (RPF 86-108).
- d. Assuming that the control procedures ruled out the possibility of bias, the

responses to the test ad do not show that a significant number of respondents saw the alleged implications in the challenged ads (RPF 109-120).

136. The first complaint about the MOR copy test was discussed and rejected above (F. 115).

(b) *Bias*

137. Both complaint counsel's and Kraft's expert witnesses confirmed that the so-called "yea-saying" bias affects responses to closed-ended questions (Tr. 2418, 3371-72, 3850), and it is probably impossible to design questions which eliminate this bias.

138. Kraft argues, however, that the bias could have been moderated by removing from questions 11 through 14 suggestions that they should be answered affirmatively. Thus, Kraft argues that the wording of question 11 ("Does this ad say or suggest anything about the amount of calcium in a slice of Kraft Singles compared to the amount of calcium in five ounces of milk?") suggests that the answer should be "yes," and Dr. Jacoby, Kraft's expert, argued that this question should explicitly offer respondents an opportunity to say no by asking "Does or doesn't this ad say or suggest . . . or don't you know?" (Tr. 3388).

139. Kraft claims that the bias in question 11 is demonstrated by the large percentage of test group respondents who answered "no" or "don't know" to question 10 (73) which asked whether the ad said or suggested "anything about the calcium in Kraft Singles" but then answered yes to [32] question 11 (39, or 53%). The same inconsistency appears in the comparison between those who answered "no" or "don't know" to question 10 but answered "more calcium" when asked question 14 (RPF, Appendix A).

140. The biases in questions 12, 13, and 14 are demonstrated, says Kraft, by the answers of the respondents in the control groups, for although the control ad "Taste of Cheese" did not mention calcium, imitations, or any other cheese slices, and made no comparisons to any products, 91 (or 45%) of the 200 respondents in the control groups answered "yes" to questions 12 or 13 (CX 196, data tables 24-25; Tr. 2091-92), while 57 of the 91 persons in the control group (63%) who were asked question 14 said "more calcium" (CX 196, data table 25).³

³ Question 12: "Does this ad compare Kraft Singles to *imitation* cheese slices?"

Question 13: "Does this ad make any direct comparisons between Kraft Singles and *other* cheese slices?"

Question 14: Based on this ad, do you think Kraft Singles have more calcium, the same amount of calcium, or less calcium than those cheese slices they are being compared to?" (CX 196, App. B).

141. Kraft also argues that the biases in questions 11 through 14 are evident because Dr. Stewart considered, and rejected, variations or lead-in questions which would have alleviated those biases (Tr. 1194-96, 1202-03, 1259-60, 1263). With respect to question 14, Drs. Stewart and MacDonald agreed that it assumed that the comparison seen in the ad was a calcium comparison (Tr. 925-26, 3961-62), and Dr. Stewart considered but rejected asking a question which would ask what kind of comparison they gave (Tr. 1194).

142. Finally, Kraft suggests that respondents may have answered “more” or “same amount” of calcium to question 11A and “more calcium” in response to question 14 because of the “halo effect,” *i.e.*, the inclination, because of their good opinion of Kraft in general and the negative connotation of the word “imitation,” to agree with any positive statement about a Kraft product in a test question regardless of the actual content of the ad (Tr. 2006-07, 2077, 2080, 2248, 2418, 2455, 3398, 3392, 3971, 1539-40; RX 146, pp. 151, 325; RX 141, pp. 157-59). [33]

143. There is no doubt that different questions, or additional lead-in questions could have been posed in the MOR test, but it seems to me that the disputes between its author, Dr. Stewart and its principal critic, Dr. Jacoby, are typical of disputes between highly regarded and well-qualified experts—a tendency to be minutely critical of the options chosen by their opposite number.

144. For example, while Dr. Jacoby criticized questions 11 through 14 of the MOR test for not using the phrase “Does or doesn’t the ad say or suggest . . . or don’t you know,” which, he said, would have eliminated or lessened the yea-saying bias, Dr. Heisler, who also testified for Kraft, agreed that question 11 did not suggest either a yes or no answer (Tr. 2582-83). In fact, the “Does or doesn’t . . . or don’t you know” form of question is infrequent in copy testing because it is cumbersome (Tr. 812-23, 1169, 2591, 3845, 3852). Dr. Jacoby admitted he did not always use the format in surveys he has conducted (Tr. 3528, 3547), and he did not use this form of question in his “materiality” survey (F. 194).

145. Dr. Stewart testified that the yea-saying bias only exists where respondents are unfamiliar with the product, where they have to rely on long term memory or where the question asks them for their opinion or an attitude. Factual questions, as in the MOR survey, do not create a yea-saying bias, according to the literature (Tr. 3846-50). Furthermore, the “yes” responses to questions 11-14 were no more

frequent in lesser-educated respondents, as would have been expected had the bias existed (Tr. 3849-50, 3950).

146. Nevertheless, the answers of viewers of the control ads to some of the questions suggest that some bias is inherent in those questions. Indeed, this is the reason why Dr. Stewart used a control ad in the MOR copy test (Tr. 803-04, 3855).

(c) *The Control Ads*

147. Kraft charges that Dr. Stewart's use of the "Taste of Cheese" control ad violated a basic principle: that the number of variables controlled for at a given time should be as few as possible. A control ad adhering to this principle should contain as few differences from the test ad as possible (RX 70, p. 176; Tr. 565-67, 2085, 2460, 3424-25). Other Kraft Singles ads are claimed to be better potential controls than the one chosen by Dr. Stewart because their use would have reduced the number of differences between the test ads and the control ad (CX 278Z-49 through Z-56; CX 26V-Y, Z-4 through Z-7).
[34]

148. Another criticism of the "Taste of Cheese" ad is that it does not control for the "halo effect" or the fact that respondents, because of negative impressions of imitations, would agree with any negative statement about them. The method used to control for these biases—a "non-exposure" control group which is not shown the test ad—could have been used in the MOR study. (Tr. 283, 3408-09, 3428-30, 3570; RX 141, p. 145).

149. Despite these criticisms, I find that Dr. Stewart's rejection of the control techniques advocated by Kraft did not substantially affect the validity of the MOR copy test, since a non-exposure control would not be practical in view of the limited number of consumers in the universe who had not been previously exposed to the challenged ads (Tr. 1212-13, 1393-99), for in 1985 alone, the Kraft Singles campaign potentially reached 95% of the United States population nine times (CX 34C).

150. As to a purged control ad—which is created by removing a small copy element (an element believed to be responsible for conveying the message at issue)—given the test ads' extensive prior dissemination, respondents seeing a purged ad would answer on the basis of their memory of the prior ad, defeating the purpose of the control (Tr. 1219-23, 1231-32, 3874; *see also* Tr. 805-06). Moreover, because of the multiple elements of the challenged ads that contribute

to the communication of the alleged claims, the purged control ad procedure would require a minimum of 1800 respondents to test one broadcast and one print ad, an impractical procedure which is not used in market research (Tr. 3588, 3878-79, 3881).

(d) *Kraft's Analysis Of The MOR Results*

151. Accepting, for the sake of argument, the validity of the MOR copy test, Kraft's analysis of the responses to the closed-ended questions presents a radically different picture than does Dr. Stewart.

152. Kraft's analysis begins with the argument that since questions 11A and 14 pose the questions that are in issue, only the responses to those questions should be considered, and Kraft combines the responses to the three test ads and compares them with the results of the two control ads; thus, Kraft limits its analysis to 165 test group respondents and nine control group respondents who were asked question 11A, and its analysis of question 14 is limited to the 246 test group respondents and 91 control group respondents who were asked that question (Tr. 2661-66, 3410-11, 3416-17, 3420-21, 3496-98; RX 154, 155). The responses of persons in the control group who were not asked [35] questions 11A and 14 are not considered in this analysis (Tr. 2090, 2661-66, 3410-12, 3416-17, 3420-21, 3496-98; RX's 154-55).

153. The result of this analysis of those respondents who were asked questions 11A and 14 (which adds the responses of all those persons in the test groups) is:

Question 11A

a. One hundred fifty-three (or 93%) of the 165 persons in all of the test groups agreed with the "more calcium" or "same amount of calcium" options (CX 196, data table 23).

b. Four (or 44%) of the nine persons in the control groups agreed with the "more calcium" or "same amount of calcium" options (CX 196, data table 23).

c. Since the sample size in the control group (9) is so small, there is a possible margin or error of ± 35 -40%. With a margin of error of this magnitude, the maximum percentage of "more calcium" and "same amount of calcium" responses in a control group of sufficient size would be 84%. Subtracting this figure from the 93% "more" or "same" responses of the test groups, the conclusion is that only 9% of the test group responses are attributable to the control ad (RPF 118a-c).

Question 14

a. One hundred eighty-one (or 74%) of the 246 persons in all of the test groups agreed with the "more calcium" response option (CX 196, data table 25).

b. Fifty-seven (or 63%) of the 91 persons in the control groups agreed with the “more calcium” [36] response option (CX 196, data table 25).

c. The test group responses, adjusted for the responses by the control groups (74%-63%) lead to the conclusion that only 11% of the “more calcium” responses are due to the test ads (RPF 119a-c).

154. When it considers the total number of respondents in the test groups (300), Kraft concludes that only 5% of respondents answered “more” or “same amount of calcium” to question 11A, and only 8%⁴ agreed with the “more calcium” option in question 14 (RPF 120).

155. Kraft’s analysis of the MOR copy test, while statistically ingenious, does not use the typical method of dealing with so-called “contingent questions.” Questions 11A and 14—which test whether the challenged claims are conveyed—are examples of such questions: those which are only asked of respondents who give an answer to a prior screening question that demonstrates a basis for asking the follow-up question (Tr. 1387, 3883).

156. Dr. Stewart testified that the responses to a contingent question must be interpreted in light of the questions which led to those responses and measured against the entire base of the people exposed to the ad (Tr. 1146), and that “that is the standard practice in the research literature. There is [a] long literature on contingent response questions and that is exactly the way it is done” (Tr. 3980). Therefore, he analyzed the results of the MOR test by comparing the number of positive responses to questions 11A and 14 with the total number of respondents exposed to the ads (100 respondents per ad) (Tr. 1130-33, 1286-87, 3979-80).

157. The research companies that Kraft uses analyze their data in the same way (Tr. 1387-88, 1407, 2215; CX 58Z-3; CX 57Z-32), and Dr. Heisler, one of Kraft’s expert witnesses, testified that:

If the issue that we are addressing is, of all of the people that saw this ad, how many felt, took away such and such an impression, [37] and we had to filter people to get to that point, then typically the appropriate population against which that percentage should be applied is everybody that saw the ad as opposed to the number of people that were asked the question (Heisler Tr. 2599-600).

158. Also, using the contingent question method, complaint counsel demonstrates that Kraft’s analysis is faulty (Only the analysis of the

⁴ Claimed in Kraft’s proposed findings as 9% but, upon further analysis, reduced to 8% in Kraft’s reply to complaint counsel’s proposed findings.

responses to question 11A is explained here; analysis of the responses to question 14 yields similar results).

159. To determine the percentage of respondents who received the alleged claims (for both control and test groups), Dr. Stewart accounted for those respondents who did not see the relevant comparison at all. For example, of the 300 respondents shown the test ads, 165 said, in response to question 11, that they saw the calcium comparison. Of that 165, 153 said in response to question 11A that Kraft Singles has as much calcium as five ounces of milk. Thus, 153 of the 300 respondents who viewed the ads (51%) received the milk equivalency claim. Of the 200 respondents shown the control ads, only nine saw the calcium comparison. Of those nine, four said Kraft Singles had as much calcium as five ounces of milk. Accordingly, four of the 200 respondents who viewed the control ad (2%) received the milk equivalency claim. Subtracting the control ad percentage from the test ad percentage yields a net of 49% who received this claim from the test ads.

160. Kraft's approach assumes that the communication of the milk equivalency claim (to both the test and control groups) must be calculated from the base of only those respondents who reported seeing the calcium comparison in response to question 11 and were therefore asked question 11A, rather than the base of all of the respondents who viewed the ads; therefore, the number of control group respondents who received the claim is four of nine (44%), rather than four of 200 (2%).

161. This analysis is faulty because it ignores those respondents who never saw any comparison in the first place and were therefore not asked to quantify it, yet respondents who never saw a calcium comparison between five ounces of milk and Kraft Singles should be counted as not having received the milk equivalency claim, for that is the purpose of the screened questions.

162. Since I conclude that Kraft's control group response percentage (44%) is incorrect (the actual response is 2%), I do not accept its analysis using that figure (*see also* Complaint Counsel's Reply to Kraft's proposed findings at pp. 59-62). [38]

163. For the above reasons, I reject Kraft's analysis of the MOR copy test and agree with Dr. Stewart that the appropriate way to analyze its results is to compare the number of positive responses to questions 11A and 14 with the total number of respondents exposed to each test ad (100 respondents per ad).

(e) Conclusion

164. After analyzing the conflicting expert testimony, I find that while the closed-ended questions in the MOR copy test may have lead to some biased responses, any bias was revealed by the control ads which were appropriate since they were actual ads which did not contain the elements believed likely to cause the challenged claims communicated by the test ads.

165. The results of the MOR copy test, which is a valid measure of consumer attitudes in the universe represented by the test groups, reveal that the test ads, as well as the other challenged ads which contain the same elements as the test ads (F. 134) conveyed the deceptive messages alleged in the complaint.

8. Verbatim Responses To The Copy Tests

(a) Introduction

166. Since Kraft and other major national advertisers use only unaided open-ended questions to discover the message consumers take away from their ads (Tr. 1548, 1564-65, 1986-87), Kraft believes that the most reliable evidence of the messages which the challenged ads contain is found in respondents' answers to the open-ended questions in the copy tests conducted by ASI, CWI, and ORC at Kraft's request, because such questions do not introduce the bias and suggestiveness inherent in closed-ended questions (Tr. 1536-37, 1673, 1985, 1991, 2069, 2100-01, 2171-72, 2415-16, 2419-21, 3187-88; RX 156; RX 146, pp. 121, 170, 172, 174-75; RX 141, p. 60).

167. Complaint counsel does not agree that open-ended questions provide a more reliable indication of consumer belief, but they claim that the verbatim responses to the MOR open-ended question do identify what issues consumers found important in the test ads (Tr. 1138). [39]

(b) The MOR Copy Test

168. Dr. Stewart testified that responses to MOR's open-ended questions disclose that calcium was one of the two or three most salient points in the ads, confirming the reliability of the closed-ended questions. Specifically, 28, 20, and 26% of the respondents who viewed "Major League Material, Rev. I," Major League Material, Rev. III," and "Quarterback" stated that those ads said something about "more calcium," while only 2% made that statement about the control ads (Tr. 1140-41; CX 196, Data Summary Table).

169. Dr. Leon Kaplan, a Ph.D. in consumer industrial psychology from Purdue Community, and the founder of the Princeton Research and Consulting Center (Tr. 3151, 3154) and Dr. James Heisler, who earned a Ph.D. in psychology from Illinois Institute of Technology and is a vice president of Opinion Research Corporation (Tr. 2411), analyzed the results of the MOR verbatims and came to different conclusions about their implications.

170. Dr. Heisler's analysis of the MOR verbatims rejects such statements as "more calcium" and "more milk, more calcium" as ambiguous and not supporting the complaint allegations (Tr. 2469-74), and he found that, applying his coding standard, only 5%, 2%, and 1% of the responses in the three test groups supported paragraph six of the complaint (milk equivalency) and only 3%, 6%, and 5% of the responses supported paragraph eight (imitation superiority) (Tr. 2466-68).

171. Dr. Kaplan coded the MOR verbatims independent of Dr. Heisler and found that only 4%, 2%, and 3% of the respondents in the three test groups saw the milk equivalency claim and that only 4%, 6%, and 4% saw the imitation superiority claim in the test ads (RX 85B; Tr. 3153-54, 3158-59).

(c) The ASI And CWI Copy Tests

172. "Class Picture/5 ounce" was copy-tested by ASI and CWI; ASI also copy-tested "Skimp." The ASI test of "Skimp" was analyzed by Mariann Feldmann of Kraft, and she testified that the number of verbatims even arguably supporting the complaint allegations were so low that correcting technical faults with the survey would make no significant difference in supporting responses (Tr. 1760-61). Her analysis rejects, as not supporting the complaint allegations, such verbatim responses as "more milk, so more calcium" because their meaning is ambiguous (Tr. 1638-39). [40]

173. Ms. Feldmann, and other witness called by Kraft, testified that the verbatim responses to the CWI "Class Picture" open-ended questions revealed all of the messages conveyed by the test ads (Tr. 1537, 1673, 1985, 1991, 2069, 2100-01, 2171-72, 2415-16, 2419-21, 3187-88; RX 146, pp. 121, 170, 174-75; RX 141, p. 60).

174. Although CWI coded the 8% of responses to the first four questions as responding "Kraft Singles contain more calcium than other cheese" (RX 128R), Ms. Feldmann analyzed the responses at trial and testified that none of them actually made that statement (Tr.

1761-63; RX 128Z-179, Z-133 through Z-237). None of the respondents in the CWI test said that Kraft Singles contain more calcium or the same amount of calcium as milk (RX 128R).

(d) *The ORC Copy Test*

175. Prior to the filing of the complaint, Dr. Heisler of ORC was retained by Kraft to conduct a consumer survey to determine what messages consumers took away from the challenged ads (RX 47; Tr. 2422).

176. ORC tested three of the ads challenged in the complaint: "Major League Material," "Major League Material/Rev. I," and "Major League Material, Rev. III." "Taste of Cheese," referred to by Dr. Heisler as a "control" ad because it was not a challenged ad, was also tested, but Dr. Heisler did not review or analyze the verbatim responses to this ad (Tr. 2428-29).

177. ORC conducted personal interviews with 400 consumers who fell within the target market for Kraft Singles (RX 47B-C), and interviews were conducted in four cities (RX 47B-D).

178. The 400 women who qualified for and agreed to participate in the survey were shown one of the four ads; each of the four ads was shown to 100 respondents. The respondents were shown the ad in isolation, without additional "clutter" ads (RX 47C; Tr. 2423). After viewing the ad, respondents were asked the following six questions:

1. What is the subject of this advertisement? (PROBE: What is being advertised?)
 2. What ideas do you think this advertisement is trying to get across? (PROBE: What else? CONTINUE PROBING UNTIL RESPONDENT SAYS NOTHING ELSE.)
- [41]
3. (IF NUTRITION NOT MENTIONED ABOVE) Does this advertisement say anything about the nutritional content of Kraft Singles?
 4. (IF NUTRITION MENTIONED IN 1 OR 2 OR "YES" IN 3) What does this advertisement say about the nutritional content of Kraft Singles?
 5. Does this advertisement make any comparisons with other products?
 6. (IF "YES" ABOVE) What comparisons are made in the advertisement?
- (RX 47P-Q).

179. At the insistence of respondent's attorneys, Dr. Heisler went beyond the unaided recall questions he typically asks to determine consumer impressions of ad messages and asked Questions 3 through 6, which were biased against respondent and towards obtaining responses supporting the implications raised by complaint counsel (RX 47E-F). Questions 3 through 6 were leading because they suggested

that the ad might have said something about the nutritional content of Singles or made a comparison with another product, which respondents might not have taken away themselves. Dr. Heisler used the more general terms of "nutrition" and "products," rather than the more specific "calcium" and "cheese products," to lessen the bias of these questions (Tr. 2445-46, 2581, 2171-72, 2005, 1617-18; RX 147, pp. 285-86; RX 141, pp. 45-46, 144).

180. After reviewing the verbatim responses to all of the questions for each respondent, Dr. Heisler categorized each of the 400 respondents into one of the following five groups:

- Group #1—Mentioned that Kraft Singles contain as much calcium as milk.
- Group #2—Mentioned that Kraft Singles contain more calcium than imitation slices/other cheese slices.
- Group #3—Mentioned only that Kraft Singles are as nutritious as milk/5 ounces of milk.
- Group #4—Mentioned only that Kraft Singles are more nutritious than other cheese products. [42]
- Group #5—Made other mentions, none pertaining to calcium content versus milk/other cheeses nor nutritional equivalence versus milk/other cheeses (RX 47D-E).

181. The results of Dr. Heisler's analysis are summarized below:

	"Major League Material"	"Major League Material/Rev. I"	"Major League Material/Rev. III"
Group 1	3	4	2
Group 2	7	3	9
Group 3	5	5	4
Group 4	3	4	13
Group 5	<u>82</u>	<u>85</u>	<u>72</u>
TOTAL	100	100	100

(RX 47E; 49A). According to these data, only 3%, 4%, and 2%—an average of only 3%—of the survey respondents took away from the three challenged ads the implication that Singles contain as much calcium as five ounces of milk. Only 7%, 3%, and 9%—an average of only 6.3%—took away from these ads the implication that Singles contain more calcium than imitation slices (RX 47E; RX 49A; Tr. 2427-30).

182. Dr. Heisler testified that only those respondents placed in Groups 1 and 2 gave verbatim answers supportive of the allegations in paragraphs 6 and 8, respectively, of the complaint; the verbatims of

those respondents in Groups 3 and 4 do not support the complaint allegations because their responses about “nutrition” provide no basis for inferring a message about “calcium” (Tr. 2425-26, 2672-74; RX 47F-G).

183. Complaint counsel charges that the ORC copy test was flawed because it never asked a question about the specific claims at issue in this proceeding (Tr. 208, 334, 417, 1089-91), it did not properly screen respondents (Tr. 1093), and because Dr. Heisler read the verbatims in a narrow and arbitrary way.

184. Dr. MacInnis recoded the ORC copy test relying upon the “totality” of the answers to arrive at her coding determinations (Tr. 214-15; CX 285). Using this approach, she found that 11% of the viewers of “Major League Material,” 10% of [43] the viewers of “Major League Material, Rev. I,” and 13% of the viewers of “Major League Material, Rev. III” were able to articulate that the ads made the claim that a slice of Kraft Singles has more calcium than other cheese slices (CX 285A-B).

185. Complaint counsel also criticizes the ASI and CWI copy tests for methodological faults, especially the failure to probe respondents to ensure that all of the messages conveyed by the ads had been articulated (CPF 265-82).

(e) *Conclusion*

186. Complaint counsel’s criticisms of Kraft’s copy tests and Kraft’s similar criticism of complaint counsel’s reflects the problem with open-ended questions: the results depend upon the way the responses are coded. A generous interpretation of verbatims, such as Dr. Stewart’s of the MOR test, or Dr. MacInnis of the CWI test leads to the conclusion that several respondents saw the challenged claim in the test ads while a narrower, less generous approach, such as Kraft’s experts took, leads to the conclusion that only an insignificant number of respondents saw those claims.

187. Given the wide disparity of interpretation of the same verbatim responses, the only conclusion that can be drawn from these tests and their interpretations is that they do not provide valid information about the number of respondents who saw the alleged claims in the challenged ads. The situation with respect to the responses to the closed-ended questions in the MOR survey is different. These responses provide a valid indication of the impressions conveyed by the challenged ads.

I. The Materiality Of The Claims Made By The Challenged Ads

1. The Presumption of Materiality

188. The challenged ads present calcium as desirable for good nutrition, bone growth or healthy teeth and therefore make a significant health claim (*e.g.*, CX 62C: “So her little bones get calcium they need to grow;” *see also* CX 62Z-10 relating to calcium deficiency).

189. Kraft saw calcium as important to consumers when the calcium claims in the Kraft Singles ads were made (Tr. 1840, 1844, 1882-84, 1574; CX’s 41C; CX 137F; CX 320, pp. 103, 212), and the calcium claims were intended to induce consumers to [44] purchase Kraft Singles (Tr. 1519, 1709, 1728). For example, a 1985 “creative presentation” noted that the difference between Kraft Singles and imitation brands is not clear to consumers, and stated that “[o]ur current advertising addresses this situation by seeking to convince consumers that Kraft Singles is worth its premium price because of the superior nutritional value in its “5-oz. of milk in every slice” (CX 32B). Since calcium was the only nutritional reference in the Skimp ads airing at this time, the advertising intended to capitalize on the calcium content of Kraft Singles.

190. Evidence of the importance of calcium to consumers is also revealed in Kraft’s materiality survey (Tr. 1172-74). Question 3 of the survey asked respondents to rate the importance of nine factors, including “a source of calcium,” in their decision to buy Kraft Singles (RX 82, p. 20). Respondents were read response categories ranging from “extremely important” to “not at all important” (*Id.*). In response to this question, over 71% rated “a source of calcium” as an “extremely” or “very important” factor in their purchase decision.

191. Another indication that the claims in the challenged ads are material is Kraft’s often-expressed belief that the challenged ads induced consumers to purchase Kraft Singles (CX 6B; CX 35A; CX 320, pp. 214-15). When the ads were challenged by CSPI, Ms. Feldmann stated that one reason why the ads should not be changed was that “Singles business is growing for the first time in four years due in large part to the copy” (CX 63B). In 1985, JWT placed a full page ad in *Advertising Age* stating:

For Kraft, it [the Skimp campaign] was good news too. Because a 15% jump in

advertising awareness translated into dramatic increases in sales and market share (CX 337).

192. The fact that imitation slices cost about 40% less than Kraft Singles also suggests that the ads convinced consumers that Kraft Singles were superior to imitations (CX 324, p. 141).

193. Kraft argues that those who were involved in the advertising of Kraft Singles would naturally exaggerate the importance of their contribution to that product's success, but even taking this phenomenon into account, I conclude that the challenged ads contributed to the success of Kraft Singles during the time they were disseminated and that the claims that they made were material to consumers. [45]

2. Kraft's Materiality Survey

194. Despite the common-sense conclusion that ads which make nutrition claims, which are disseminated over an extensive period of time, and which help to increase sales, make claims which are material to consumers, Kraft commissioned a materiality survey which was conducted by Dr. Jacob Jacoby. Dr. Jacoby is a professor of marketing and consumer behavior at New York University (Tr. 3338), has been hired as a consumer research consultant by major corporations (Tr. 3341-42), and has written numerous peer-reviewed articles and two books on consumer perceptions of advertising (Tr. 3344-45, 3351-54).

195. The survey was designed to determine the materiality of the milk equivalency claim, that is, whether:

a. in general, calcium was claimed to be important by consumers in their decision to purchase Kraft Singles slices, or;

b. whether the difference between 70% and 100% of the calcium in five ounces of milk was material to consumers in that it would affect either their purchasing behavior and/or the way in which they used Kraft Singles slices (RX 82D; Tr. 3464-68).

196. Complaint counsel criticizes the study for not showing consumers the challenged ads or telling them that Kraft had represented that a slice of Kraft Singles contains the same amount of calcium as five ounces of milk (CPF 308), but Dr. Jacoby testified that the purpose of the study was not to determine the messages received from the ads but to discover whether the difference between the amount of calcium that Singles actually provide and the amount the challenged ads convey that Singles have is so significant to consumers

that they would act differently if they knew that Singles actually provide only 70% of the calcium in five ounces of milk (Tr. 3463-68, 3474-75, 3610, 3706, 3708-09).

197. The universe used in this survey was defined as individuals 18 years of age or older who were the primary food shoppers in their households, who had bought individually wrapped cheese slices in the previous three months, had bought Singles in the previous year, and watched at least one hour of television per week (RX 82H; Tr. 3464). Although this universe [46] was not identical to the target market for the challenged ads, 78.2% of the survey's respondents reported having seen a Singles ad during the previous year (RX 82Z-135). Because respondents were required to have actually purchased Singles, the survey focused on those people for whom the difference between Singles' actual calcium content and the calcium in five ounces of milk would be meaningful in terms of purchase or usage behavior (Tr. 3658-59, 3468-70).

198. The consumers who participated in the survey were contacted through the use of a random digit telephone dialing procedure. Those who satisfied all of the criteria of the universe became part of the survey sample and were asked the questions on the main questionnaire; those who did not meet the screening criteria were terminated (RX 82I). The main questionnaire was administered to 200 people. As a result of validation procedures conducted after the interviews, seven people were removed from the sample. Consequently, the results of the survey were based on a sample of 193 people (RX 82M, O).

199. In response to question 1a—"people buy cheese for a number of different reasons. What are the reasons that you buy cheese? . . . (Probe:) Why else?"—only 4.7% of the respondents mentioned calcium (RX 82Q, Z-64, Z-90). In response to question 1b—"What are the reasons for your buying individually wrapped cheese food slices?"—not a single respondent mentioned calcium (RX 82R, Z-64, Z-102). In response to question 1c—"Now, I'd like you to think only about *Kraft* Singles cheese food slices. Please tell me all the reasons that you can think of as to why you buy Kraft Singles individually wrapped cheese food slices? Any other reasons?"—only 1.6% of the respondents mentioned calcium (RX 82T, Z-64, Z-112).

200. In response to question 2, which asked "if Kraft Singles do contain, do not contain, or you don't know if they contain" calcium and six other nutrients, 24 respondents (12.4%) indicated that they did not know if Kraft Singles contain calcium and one respondent (0.5%) indicated that Singles do not contain calcium (RX 82Z-64, Z-117).

201. The 168 respondents to question 2 who said that Kraft Singles do contain calcium were then read a list of nine characteristics of cheese (*inter alia*, taste, price, consistent quality, a trustworthy manufacturer, calcium, Vitamin C) and asked whether each characteristic was “extremely important,” “very important,” “somewhat important,” or “not at all important” in their decision to purchase Kraft Singles. For the 168 people who knew that Singles have calcium, calcium was rated near the bottom of the list in importance; only Vitamin C scored worse in both the “top box” and “top two box” analyses (RX 82V, W, Z-65, Z-127, Z-128; Tr. 3475). Although most of the [47] respondents did say that calcium was important to them, they ranked virtually all of the other attributes more highly, thereby showing, according to Dr. Jacoby, that calcium is, in fact, relatively unimportant to their purchase of Singles (Tr. 3475). I reject his conclusion (F. 190).

202. Seventeen of the 192 respondents indicated that calcium was “not at all important” in their decision to purchase Singles (RX 82Z, Z-123). When the remaining 159 respondents were asked if they had “any idea as to how much calcium is contained in one slice of Kraft Singles,” 151 (95%) replied that they had no idea (RX 82Z-65, Z-129).

203. Question 5a explicitly informed respondents that “although each slice of Kraft Singles is made from 5 ounces of whole milk, it does not contain as much calcium as 5 ounces of milk. One slice of Kraft Singles actually contains 70% of the calcium in 5 ounces of milk” (Tr. 3477, 3708; RX 82Z-66). Respondents were then asked whether the difference in the amount of calcium provided by Singles and the amount provided by five ounces of milk mattered to them. Specifically, they were asked whether they would “[c]ontinue buying Kraft Singles slices even though each slice contains 70% of the calcium in 5 ounces of milk” or would “stop buying Kraft Singles slices because each slice doesn’t contain the same amount of calcium as 5 ounces of milk.” To avoid order bias, these two response options were reversed on half of the questionnaire (RX 82Z-66; Tr. 3478).

204. The 17 respondents who had indicated that calcium was “not at all important” in their purchase of Singles and the one person who said that Singles did not contain calcium were not asked question 5a. Of the remaining 175 respondents, 168 (96.0%) replied that they would continue to buy Singles while three persons (1.7%) indicated that they would stop buying Singles, and four persons (2.3%) gave other answers (RX 82Z, Z-130; Tr. 3474, 3476, 3479).

205. The 172 respondents who indicated that they would not discontinue their purchase of Singles were then asked if that difference in the amount of calcium would affect their use of this product, and, if so, how it would affect the way they use it. Only three people (1.7%) indicated that the fact that Singles have 70%, not 100%, of the calcium in five ounces of milk would affect their use of the product (RX 82Z-1, Z-66, Z-131; Tr. 3480-81).

206. The results of the materiality survey are virtually identical for respondents with children and respondents without children (RX 82Z-130 through Z-131). [48]

207. There are significant faults in Dr. Jacoby's materiality survey. First, the challenged ads promised (to consumers who saw the milk equivalency claim) that Kraft Singles contained 100% of the calcium of whole milk, but Dr. Jacoby's test does not mention that the ads made that claim, and therefore it did not provide a basis for a conclusion as to the impact of the claim on consumer behavior (Tr. 3896, 3907-08).

208. The second problem with the test is that question 5a did not provide respondents with all possible and reasonable response categories—for example, that they would buy less Kraft Singles (Tr. 1175-76, 3911). Those who might have responded in this way were not given that choice, and consequently might choose the alternative response "continue to buy" which would not reflect their actual response (Tr. 1176, 3911-12).

209. Furthermore, question 5a did not account for all of the ways in which the milk equivalency claim could have been material. Consumers might have chosen to eat the same amount of Kraft Singles but drink more milk, or to substitute, but not completely, competing slices that are less expensive or contain more calcium than Kraft Singles.

210. Dr. Jacoby testified that any alterations of consumer behavior caused by the challenged claims other than the decision to stop purchasing Kraft Singles, *i.e.*, the decision to reduce purchases, would be captured in the verbatims or the responses to questions 5b and 5c (Tr. 3483-84, 3709-10), but this is only a hypothesis. Since question 5a of Dr. Jacoby's materiality survey does not measure all possible consumer responses, this question does not accurately reflect the materiality of the milk equivalency claim to consumers. I find, therefore, that the milk equivalency and calcium superiority claims were material to consumers.

J. *The Truth Or Falsity Of The Claims*

1. The Milk Equivalency Claim

211. Kraft sells its Singles in slices of two sizes: 3/4 ounce (55-60% of sales) and 2/3 ounce (40-45% of sales). Kraft has admitted that a 3/4 ounce slice of Kraft Singles has approximately 70% (68.2%) of the calcium of five ounces of whole milk (Ans. ¶ 7; CX 100). Since the calcium content of low-fat and skim milk is greater than that of whole milk, a 3/4 ounce slice of Kraft Singles has less than 68.2% of the calcium of five ounces of low-fat or skim milk (CX 327, pp. 156-57). [49]

212. Because it is smaller, the 2/3 ounce slice contains less calcium than the 3/4 ounce slice and 60% of the calcium of five ounces of whole milk and less than 60% of the calcium of low-fat or skim milk.

213. Thus, the claim that a slice of Kraft Singles contains the same amount of calcium as five ounces of milk is false. This claim is an objective product claim and carries with it a representation that Kraft possessed and relied upon a reasonable basis for that claim (Conclusion of Law, *infra*). Kraft knew when it disseminated the challenged ads that its Kraft Singles slices do not contain as much calcium as five ounces of milk (CX 100), and it introduced no substantiation to support the milk equivalency claim. In fact, the head of Kraft's research department admitted that the claim, if made in the advertising, is unsubstantiated (CX 327, pp. 92-93).

2. The Imitation Superiority Claim

(a) *The Meaning Of "Imitation" Slices*

214. The challenged ads compare Kraft Singles to "imitation slices" and paragraph 8 of the complaint states that Kraft has represented in those ads that "Kraft Singles contain more calcium than do most imitation cheese slices."

215. Under FDA regulations, imitation slices are distinguished from substitutes. For example, imitation slices are "nutritionally inferior" to the products for which they substitute, while "substitute" slices are not. Imitation slices must be labeled "imitation," while substitutes are not required to be labeled "imitation" or "substitute" (Tr. 2251-53; RX 13; 21 CFR 101.3(c)(1), (4); RX 125).

216. FDA regulations do not define "imitation slices," but contain a rather complicated definition of foods that must be labeled as imitation: a food which resembles a natural counterpart but has less of

at least one of several essential nutrients specified in the regulations (21 CFR 101.3(e); Tr. 608); however while FDA regulations define imitations as nutritionally inferior, since they can contain more of other essential nutrients than their natural counterparts, they are not necessarily less nutritious or healthful than a natural food (Tr. 2269-70).

217. The term "substitute food" is not defined in the FDA regulations. However, in effect, a substitute food is one that imitates its natural counterpart but need not be labeled an [50] imitation because it does not have less of any of the specified essential nutrients than its natural counterpart (21 CFR 101.3(e)(2); Tr. 608-09). A substitute food is nutritionally equal to its natural counterpart.

218. A food may be labeled as imitation even if it is not nutritionally inferior to its natural counterpart (Tr. 2275), so a slice that is labeled as imitation may actually satisfy the definition of a substitute slice. The deposition testimony of witnesses employed by other cheese manufacturers established that several slices that are labeled as imitation are, in fact, nutritionally equal to their natural counterparts and could have been labeled as substitutes (CX 311, pp. 50, 53; CX 312, pp. 121, 122).

219. Although the complaint refers only to "imitation slices," and despite the FDA's distinction between imitation and substitute, this phrase should be interpreted as referring to all non-dairy slices, for Kraft intended that its ads compare Kraft Singles to all non-dairy slices.

220. For example, a letter from Kraft to the FTC prior to the issuance of the complaint explaining that the Skimp ad campaign was developed in response to competition from non-dairy slices referred to these non-dairy slices as "sandwich slices," "imitation pasteurized process cheese food," and "pasteurized cheese food substitutes" (CX 166).

221. Furthermore, Kraft claimed in the letter that consumers group all slices into one category, and that the Skimp ads were intended to compare Kraft Singles to the entire category of non-dairy slices:

The development of the "five ounce" Singles commercials must be reviewed in light of a competitive product category consisting of standardized process cheese products which have been marketed for approximately forty years and the relatively new, far less expensive cheese substitute products . . .

Kraft marketing determined it was necessary to educate the consumer as to the

basic difference between Singles and substitutes, that difference being that Singles is a dairy product while substitutes are not

The five ounce campaign represents the second attempt to convey the dairy message (CX 166D-E). [51]

222. The confusion which exists as to the difference between imitation and substitute is evident, for Kraft, responding to a request from complaint counsel for an estimate of the market share of imitation slices, listed Borden's Cheez-Twin and Fisher's Sandwich Mate, which under FDA regulations are substitutes rather than imitations (CX 160A). In correspondence providing substantiation data to television networks, Kraft and JWT often referred to these substitute slices as imitation slices (*e.g.*, CX 17B; CX 22A-C; CX 89B; CX 121B, D). It is not surprising, then, that consumers are not aware of the difference between the two kinds of non-dairy slices and that "imitation slice" is interpreted by them as referring to all non-dairy slices (*see* CX 324, p. 100; CX 79; CX 89A, CX 166G; Tr. 2812-23, 1502-03, 1796).

223. In conclusion, I find that Kraft did not intend its reference to "imitation slices" in the challenged ads to be limited only to those slices that are true imitations under FDA regulations, but to include all non-dairy slices, both imitation and substitute.

(b) *The Calcium Content of Kraft Singles v.
Most Imitation Slices*

224. According to the package label, Kraft Singles contain 15% of the United States RDA (Recommended Daily Allowance) of calcium per ounce (CX 95). This 15% figure is confirmed by other Kraft documents (*see, e.g.*, CX 96D-E). The United States RDA of calcium is 1000 mg.; therefore, Kraft Singles contain approximately 150 mg. of calcium per ounce. (21 CFR 101.9(c)(7)(iv); Tr. 598).

225. Tests of some Kraft Singles showed that they contained an average of 165 mg. calcium per ounce, or 16.5% U.S. RDA (CX 97A-H). However, since the calcium content of products such as Kraft Singles is variable (CX 327, pp. 26-27; Tr. 739-40, 2268-69), Dr. Bursey, the head of Kraft's research department, testified that there is no difference in calcium content even though test results might show that one cheese slice has 165 mg. of calcium whereas another has 140 mg.:

Q: I take it, though, that you are not disturbed by the FDA regulations that . . . would

indicate that both those amounts . . . could be rounded to 15% U.S. RDA or 150 milligrams per ounce? [52]

A: I'm not disturbed—no, I'm not disturbed by it. I mean methodology—I mean there are a lot of variables built into those numbers, the absolute numbers, a lot of variables; so no, I'm not disturbed by it (CX 327, p. 51).

226. Thus, even if all Kraft Singles contained 16.5% U.S. RDA of calcium—as in the test referred to above—the variability of calcium in cheese slices would not allow a conclusion that the difference between that figure and the U.S. RDA of calcium in imitation slices is significant.

227. Gary Willett, director of marketing for Borden, Inc., estimated the market shares of the three largest manufacturers of imitation slices. He testified that in 1985 Fisher had about 50-55% of this market, Borden had 20% and Schreiber had 10%. In 1986, Fisher again dominated with 55-60% of the market, while Borden accounted for 20%, and Schreiber nearly 10%. Fisher was acquired by Borden in late 1986. In 1987, Borden, including Fisher, had about 70% of this market, and Schreiber had 7-10% (CX 311, pp. 43-49). Thus, for the years relevant to this litigation, Fisher, Borden, and Schreiber together sold a large majority—80 to 90%—of the imitation or non-dairy slices.

228. During each of the relevant years 1985-1987, all of the non-dairy slices sold by these companies contained at least 15% U.S. RDA of calcium, the amount contained in Kraft Singles (CX 312, pp. 1-2; CX 310, pp. 1-2).

229. From January 1, 1985, until the end of 1986, all imitation slices sold by Fisher contained approximately either 20% or 25% of the U.S. RDA of calcium per ounce. From the beginning of 1987 to date, after Fisher was acquired by Borden, all imitation slices sold by Fisher have contained 15% of the U.S. RDA of calcium (CX 310, pp. 1-2).

230. From January 1, 1985, to date, all Borden non-dairy slices have contained 15% of the U.S. RDA of calcium per ounce (CX 310, p. 2). All of the 21 non-dairy slice labels Borden produced under subpoena in this proceeding indicated a 15% or greater calcium content (CX 171Z-84 through Z-109).

231. From January 1, 1985, to date, all of Schreiber Food's non-dairy slices have contained 22.5% of the U.S. RDA of calcium per ounce (CX 312, pp. 1-2). Every one of the over 80 non-dairy labels submitted by Schreiber under subpoena (including those from other

companies) indicated a calcium content of 15% of the U.S. RDA or more (CX 173M-Z-75). [53]

232. The Kroger Company also manufactures non-dairy slices, all of which contain at least 15% of the U.S. RDA of calcium per ounce (CX 313A-B). All of the non-dairy slice labels provided by Kroger pursuant to subpoena indicated a calcium content of at least 15% of the U.S. RDA per ounce (CX 169F-Z-6).

233. Kraft also manufactures non-dairy slices, all of which contain at least 15% United States RDA of calcium per ounce. According to their labels, all slices Kraft refers to as "imitation" contain 20% of the United States RDA of calcium per ounce. (Kraft asserts their calcium content is 18.8% of the United States RDA per ounce, which Kraft rounds upward to 20%) (CX 80Z-3). According to their labels, all slices Kraft refers to as "substitute" contain 15% of the United States RDA of calcium per ounce. (Kraft asserts that their actual calcium content is 18.6% of the United States RDA per ounce) (CX 80Z-10).

234. Labels of non-dairy slices which Kraft supplied for the record support the conclusion that most non-dairy slices contain 15% or more of the U.S. RDA of calcium (CX 166B, D-F, L-Z-6). Of the 20 labels that do not appear to be duplicates in this exhibit, only one lists a calcium content less than 15% of the U.S. RDA per ounce, while seven contain more than 15% (CX 166T). CX 80 includes 20 non-duplicate legible labels. Of these, only six labels, CX 80T, U, V, W, Z, and Z-2, show a calcium content less than 15% of the U.S. RDA per ounce. CX 81 includes over 50 non-duplicate labels. Of these, only one, CX 81Z-27, indicates a calcium content less than 15% of the U.S. RDA per ounce. RX 125 is a group of 14 labels for imitation slices, none of which shows a calcium content less than 15% of the U.S. RDA per ounce, while five show a greater calcium content (RX 125; Tr. 2280).

235. In conclusion, the companies that manufacture the vast majority of the imitation slices sold in this country do not sell slices that contain less than 15% of the United States RDA of calcium per ounce and some contain more than this amount. Thus, the claim that Kraft Singles contain more calcium than most imitation slices is false.

236. As with the milk equivalency claim, the challenged ads represent that Kraft had a reasonable basis for its imitation superiority claim. This representation is false. Kraft possessed no substantiation for the imitation superiority claim at the time the ads were first disseminated (CX 283) and offered none at trial. [54]

K. The Bioavailability Of Calcium

1. Introduction

237. Although Kraft has not substantiated the claim that Kraft Singles contain more calcium than most imitations, it presented evidence which, it says, establishes that the dairy calcium in Kraft Singles is more beneficial to the body because it is more bioavailable than the non-dairy calcium in imitation slices.

238. Witnesses testifying on this issue were, for complaint counsel, Dr. Robert Recker, professor of medicine at Creighton University, who has been involved for the past 20 years in research into calcium metabolism, calcium nutrition, bone disease, and bone physiology (Tr. 581-82, 3731; CX 162A). Dr. Recker, who is chief of the clinical section of endocrinology, director of the metabolic research unit, and head of the center for hard tissue research at Creighton, has conducted extensive research on calcium bioavailability, and has been involved in more than one thousand measurements in humans of the bioavailability of calcium from various sources (Tr. 582-83, 3732; CX 162A).

239. Testifying for Kraft were:

a. Dr. Robert G. Bursey, a Ph.D. in human nutrition (Tr. 2286-87), and the associate director of Kraft's nutrition, and toxicology and health laboratory (Tr. 2290-91). Research efforts of the laboratory include inquiry into the metabolism of calcium (Tr. 2301).

b. Dr. George Briggs, a Ph.D., professor of nutrition, emeritus, University of California (Tr. 2707), co-author of the most widely-used textbook on nutrition in the country (Tr. 2708). Dr. Briggs has done extensive research on calcium and dairy products (Tr. 2711).

c. Dr. David McCarron, head of the division of nephrology and hypertension, Oregon Health Sciences University, Portland, Oregon (Tr. 2839), a subdivision of which is the National Dairy Board Institute for Nutrition and Cardiovascular Research ("Institute"). This institute investigates the relationship between dietary factors and the control of blood pressure, and is particularly interested in studying the protective action of dietary calcium against heart disease and blood pressure (Tr. 2843). [55]

2. Absorption v. Utilization

240. While Dr. Recker defined bioavailability as the amount of calcium that is absorbed from the gastrointestinal tract into the

bloodstream (Tr. 611-12), Kraft's witnesses testified that absorption of a nutrient into the gastrointestinal tract is the first step in a complex process which leads ultimately to the utilization of the nutrient to the body (Tr. 2854, 2302; CX 327, p. 116), and Dr. Robert Heary, Dr. Recker's colleague at Creighton University has concluded that calcium bioavailability "involves more than just absorbability, and assessment of only absorbability can be misleading" (RX 15B). Since there is no evidence that calcium, once it is absorbed into the bloodstream, is used any differently by the body depending upon its source, there is no practical difference between these views on bioavailability (Tr. 619).

3. The Expert Testimony

241. Two of Kraft's experts conceded that there are no studies testing the relative bioavailability of the calcium in Kraft Singles and imitation slices (Tr. 2772-73, 2940), but they argued that no single test could ever establish that Kraft Singles are a better source of calcium than imitation or substitute slices, and suggested, instead, that the results of epidemiological studies and animal and human tests, together with the use of deductive reasoning, establish that such is the case (Tr. 2330, 2336-37, 2378-79, 2397-98, 2729, 2753, 2857-58, 2940-41, 2944-45).

242. The application of deductive reasoning (the process of deducing from something known or assumed; inference by reasoning from generals to particulars) to existing scientific data in order to reach conclusions concerning complex associations and relationships on which specific data are not available is well accepted. The Surgeon General's recent report on nutrition and health states that "research on the relationship of dietary excesses and imbalances to chronic disease yields results that rarely provide . . . direct proof of causality," so that "[s]cientists must often draw inferences about the relationships between dietary factors and disease from laboratory animal studies or human metabolic and population studies that approach the issues indirectly." *The Surgeon General's Report on Nutrition and Health, Summary and Recommendations* (1988) at 6-7. I agree, however, with Dr. Recker that such inferences are unnecessary and undesirable when it is possible, as it is here, to conduct a direct test of the proposition at issue (Tr. 3798-3801, 624-25). [56]

243. Kraft's nutrition experts testified that existing data provide evidence that Kraft Singles are a better source of calcium than

imitation slices. This data includes epidemiological studies, animal studies, molecular studies, and human intervention studies conducted by Dr. McCarron and his colleagues at the Institute (Tr. 2913-14, 2915, 2928, 3142, 2315, 2396-97; RX 145; CX 328, pp. 258-62, 275-76).

244. Dr. Bursey's conclusion that the dairy calcium in Kraft Singles is better for the body than the calcium in imitations is based on his study and research in the field of nutrition, and the research of others that he is aware of through his familiarity with nutrition literature, particularly the research and the data generated by Dr. McCarron and his colleagues at the Institute showing the superiority of dairy calcium over non-dairy calcium in its effects on blood pressure (Tr. 2328-29, 2930-31).

245. Dr. George Briggs, one of the nation's pre-eminent nutritionists, testified that on the basis of his decades of study in the field of nutrition, his own research in that field, and the research of others, he believes that a real dairy product is superior to an imitation product as a source of calcium (Tr. 2723-24, 2729, 2737, 2772, 2830-32).

246. Dr. McCarron concluded, based on the data available in 1984-1985, that dairy calcium was superior to non-dairy calcium in its effects on blood pressure, and more recent data developed by him and his colleagues in studies by the Institute convinces him that his conclusion is correct (Tr. 2860-71). These studies include:

247. RX 27, "The Calcium Deficiency Hypothesis of Hypertension," in which Dr. McCarron and his colleagues at the Institute examined epidemiologic data, as well as findings from clinical studies, controlled interventions and laboratory investigations, and verified that a dietary deficiency of calcium exposed humans to increased risks of hypertension (Tr. 2885-86).

248. RX 25, "Dietary Calcium in Human Hypertension," an epidemiological study of normotensives (people with normal blood pressure) and hypertensives in which both groups consumed approximately equal amounts of calcium from milk and from non-dairy sources, but the hypertensives reported much lower consumption of cheese, yogurt and ice cream (Tr. 2862-65; RX 25C).

249. RX 24, "Blood Pressure and Nutrient Intake in the United States," a study by the Institute which showed an inverse relationship between dietary calcium intake and blood pressure (Tr. 2859-62). This study used data compiled by the United [57] States government in the early 1970's ("HANES" data) and is considered by Dr. McCarron as

reliable, not for one person, but for the large sample size actually used in that survey (RX 24D; Tr. 2985-86).

250. Dr. McCarron also bases his conclusion on the results of the following studies by other investigators (Tr. 2866, 2871):

251. Six out of seven studies of the HANES data which observed the same inverse relationship between calcium and blood pressure (Tr. 2966-67, 2973-74, 2981; RX 27A; RX 153A-B). Other sources of calcium have been examined in epidemiological studies but have not demonstrated a correlation with blood pressure comparable to that shown for dairy calcium (Tr. 3070-71).

252. RX 122, an epidemiological study by Dr. Dwayne Reed and his colleagues in 1984 ("Diet, Blood Pressure and Multicollinearity") using data concerning 6,496 Hawaiian men compiled by the National Institutes of Health which showed dairy calcium consumption inversely associated with blood pressure. Non-dairy calcium did not show this correlation (Rx 122B, E; Tr. 2867, 3012).

253. RX 121 "Dietary Calcium and Magnesium and Hypertension: a Prospective Study" an epidemiological survey of nearly 60,000 nurses which identified calcium (which Dr. McCarron believes must be dairy calcium) and magnesium intake as the nutritional factors that most accurately predicted future development of hypertension over a four year period (RX 121; Tr. 2872-74, 3017).

254. Epidemiological data showing the relationship between dietary calcium and blood pressure, which is described by Dr. Harlan of the NIH as the most consistent relationship ever identified between diet and some form of heart disease (Tr. 3017-18).

255. Animal studies, which provide information that would not be obtained from human clinical studies also suggest, according to Kraft's experts, the superiority of dairy over non-dairy calcium (Tr. 2338, 2727, 2881-82). These studies include:

256. RX 26 "Blood Pressure Development of the Spontaneously Hypertensive Rat," an Institute study showing calcium's protective effect on blood pressure to be dependent on at least one nutrient—sodium—that naturally tracks with it in the human diet (RX 145, pp. 43-44; *see also* RX 23D).

257. Animal studies which indicate that in addition to their effect on blood pressure, dietary calcium and sodium also interact to affect other biological endpoints that track with [58] hypertension, and support the inverse relationship observed in the HANES data between dietary calcium intake and body weight (Tr. 2889-91; RX 24C, RX 30B-C; RX 31C).

258. Data from subcellular research and animal studies of dietary fat (Tr. 2319-20, 2321, 2394, 2731-32, 2856-57, 2919-22, 2946, 3037, 3104; RX 29).

259. RX 38 "Comparison of Dietary Fats and Calcium Levels on Blood Pressure in the SHR," in which spontaneously hypertensive rats were fed fish oil, butter fat or corn oil and two different amounts of calcium. Blood pressure levels were lowest with fish oil and highest with corn oil for both levels of calcium consumption. Blood pressure levels for the rats given butter fat were lower for those given corn oil with comparable amounts of calcium (Tr. 3039-40, 3108, 3112).

260. Dr. McCarron also relies on clinical data developed by him and his colleagues in human intervention studies at the Institute (RX 37) which he believes shows that dairy calcium is better than non-dairy sources of calcium for lowering blood pressure or preventing the development of hypertension because it is effective for both men and women, and does not cause adverse hormonal effects in either sex (Tr. 2911-12, 2942). This study has, however, not been peer reviewed (Tr. 2912-13, 3071).

261. Dr. McCarron testified that the conclusion reached by Drs. Recker and Heaney in their 1985 calcium-bone remodeling study (RX 21, "The Effect of Milk Supplements on Calcium Metabolism, Bone Metabolism and Calcium Balance") is consistent with the data reported in RX 37 (Tr. 2906-08, 3143-44).

262. According to Dr. Bursey, a calcium balance study conducted by Dr. Herta Spencer and her colleagues (RX 123, "Calcium Bioavailability Studies in Man") using both dairy and non-dairy sources of calcium also showed the superiority of the dairy sources; subjects showed positive calcium balances for whole and skim milk but a negative balance for calcium gluconate, even though a greater amount of that non-dairy source of calcium had been consumed (RX 123; Tr. 2403). Dr. Bursey also testified that research conducted at the University of Iowa Dental School suggests that the consumption of Kraft Singles, as compared to consumption of imitations, reduces the amount of calcium lost from tooth enamel after consumption of sugar, and also allows more calcium to be deposited back into the enamel during remineralization (Tr. 2324-26).

263. Kraft's experts also rely on the fact that dairy products have a unique nutrient mix for their conclusion that dairy calcium is superior to non-dairy calcium. Drs. McCarron and Briggs testified that fabricated foods do not replicate real [59] foods and do not contain the

complex mix of nutrients which dairy products contain and which contribute to calcium utilization (RX 19B; Tr. 2721-23, 3082).

264. Dr. Recker did not agree with the conclusion of Kraft's experts and testified that at a recent workshop involving 15 or 16 investigators who discussed bioavailability issues, the consensus was that the data is not present which would show that dairy products were more available than any other food source (Tr. 3735-36). This consensus is reflected in the regulatory policy of the FDA. Under FDA regulations, the 150 mg. of calcium in Kraft Singles is considered the same as 150 mg. of calcium in imitation slices (Tr. 2267). This is because the nutritional experts responsible for these regulations consider the data too incomplete and unspecific to make conclusions regarding any potential differences in the bioavailability of nutrients, including calcium, from different foods (Tr. 2267).

265. According to Dr. Recker, the deductions of Kraft's experts of superior bioavailability is based upon a small number of studies published in peer-reviewed journals, an assortment of abstracts, drafts of studies, and lay and semi-scientific studies none of which demonstrate or even test that claim (Tr. 3937-40); his studies, which are the only ones in evidence testing the bioavailability of calcium in any specific foods, show that the bioavailability of calcium in most foods tested is approximately the same (Tr. 612-14, 3742-43). RX 16, a study of his which tested the bioavailability of calcium in various foods, including dairy products, found no statistically significant difference (Tr. 628-30, 3773).

266. To Dr. Recker, the relevance of the epidemiological studies to the relative bioavailability of the calcium in Kraft Singles and in imitation cheese slices is not readily apparent. These studies do not address the issue of calcium bioavailability, much less the relative bioavailability of calcium from Kraft Singles and from imitation cheese slices (Tr. 670-71). Rather, they relate only to associations between calcium and other nutrients and blood pressure. Blood pressure is not an appropriate measure of bioavailability (Tr. 3755-56).

267. Furthermore, the specific studies introduced by Kraft are flawed. RX 24 is unreliable because the authors' analysis of the data and their conclusions regarding both calcium and sodium are extremely controversial (*see* Tr. 2993), and have been criticized by numerous members of the scientific community (Tr. 2967-68, 2970-71, 2975-76, 2978-79, 2984; CX 342L; CX 343A-B; CX 345A-B, G; CX 344D, G). [60]

268. As to the rat studies, Dr. Recker believes that they do not serve as a good model to test calcium bioavailability in humans (Tr. 643-44). Furthermore, none of these studies compare the products at issue in this case, or test the calcium from either Kraft Singles or imitation cheese slices. With the exception of RX 28 and RX 33, none of these studies compared different sources of calcium at all, and those that involved feeding the animals calcium used only calcium carbonate (Tr. 3032, 3033-34, 3035, 3038, 3110).

269. RX 28 compared dairy sources with calcium carbonate, but there is no evidence that Kraft Singles or imitation cheese slices derive their calcium from calcium carbonate. In addition, Dr. Recker found that the observed differences in bone weight in RX 28 were not statistically significant (Tr. 675), and he concluded that RX 33 does not support Kraft's defense because it is a study of nutritional equivalency, not bioavailability (Tr. 643).

270. Dr. Recker's criticism of the other tests are well-founded: RX 29 and RX 38 are abstracts, not completed and published study reports, and therefore do not constitute adequate or reliable scientific evidence (Tr. 592, 632-33, 753-54, 3757-58). Blood pressure is not an appropriate measure of calcium bioavailability because the relationship between blood pressure and calcium intake is an unproven and controversial hypothesis (Tr. 3755-56). Thus, RX 23 and RX 26 do not prove anything about calcium bioavailability. As to RX 38, no evidence was introduced to show that imitation cheese slices contain corn oil. To the contrary, labels for imitation slices show that the products' fat source is soybean or cottonseed oil (RX 125; CX 166L-Z-6; CX 80; CX 81; CX 169, CX 171; CX 173). Dr. McCarron testified that all vegetable oils are not the same, and that tests of specific vegetable oils would be necessary to determine their blood pressure effects (Tr. 3113-14).

271. The human intervention studies offered by Kraft were criticized by Dr. Recker because they did not address the relative bioavailability of calcium in the products at issue in this case.

272. RX 123, an abstract "Calcium Bioavailability in Man," tested the calcium and phosphorous balance of subjects fed various dairy and non-dairy natural foods containing calcium and two calcium salts: calcium carbonate and calcium gluconate. Since no significant differences in calcium balance during the subjects' intake of the various calcium sources were found, this study does not support Kraft's hypothesis (Tr. 629).

273. RX 37 and CX 314 present data from Dr. McCarron's incomplete human intervention study which are irrelevant because they do not test the products at issue in this case, and because [61] blood pressure is not an appropriate measure of calcium bioavailability (Tr. 3755-56). Finally, the study is an unfinished, ongoing project, is not peer reviewed, and presents only interim results which may change (Tr. 2912, 3040-42, 3071, 3055-56, 3753-54).

274. Kraft also introduced three human studies by Dr. Recker, but he testified that they do not support Kraft's bioavailability defense:

275. RX 16, entitled "Calcium Absorbability From Milk Products, an Imitation Milk, and Calcium Carbonate," compared the bioavailability of the calcium in several different products, including a cheese, milk, imitation milk, and calcium carbonate. Although it did not test either Kraft Singles or imitation cheese slices, it is the only study introduced by either party comparing the bioavailability of calcium from dairy products and an imitation dairy product, and is therefore the most relevant to the bioavailability issue in this case (Tr. 3773). Dr. Recker found no significant difference in the bioavailability of the calcium in the tested products (Tr. 629-31, 3771-72). Most importantly, the calcium in the dairy products was not more bioavailable than the calcium in the imitation dairy product (Tr. 3772), and Dr. Recker believes it provides an affirmative indication that there is no difference in the bioavailability of the calcium from Kraft Singles and imitation slices (Tr. 660-61, 3771-72).

276. In RX 11, Dr. Recker compared the bioavailability of calcium in two natural foods—milk and spinach—and found the calcium in spinach to be much less bioavailable than that in milk, but since RX 11 did not test Kraft Singles or imitation cheese slices, it provides no information regarding the relative bioavailability of the calcium from those foods (Tr. 657-58, 3743).

277. In RX 21, Dr. Recker and his colleague studied the improvement in the calcium balance in a group of women when their calcium intake was increased, primarily through milk consumption. Dr. Recker concluded from this study, and from prior research, that calcium from dairy products and from calcium supplements provides the same advantages (Tr. 646-47).

278. Kraft also introduced several documents reviewing existing data on nutrition and calcium but since they do not present data from scientific studies, they do not constitute reliable scientific evidence of Kraft's claim (see Tr. 3027, 674, 661, 653, 644-45, 639-41, 659). [62]

4. Conclusion

279. After analyzing all of the evidence offered by Kraft on the issue of bioavailability, Dr. Recker concluded that none of the studies, abstracts or articles support the claim that the calcium in Kraft Singles is more bioavailable than the calcium in imitation cheeses (Tr. 693-94) and, after reviewing his analysis of those documents, I conclude that he is correct: none of the documents relied on by Kraft provide convincing evidence in support of its bioavailability defense.⁵ Furthermore, none of the documents submitted by Kraft as substantiation prior to issuance of the complaint provide substantiation for the superiority claim (Tr. 638-40, 653-54).

280. In any event, since Kraft's ads claimed that its Singles contained more calcium than most imitation slices, and not that the calcium in Singles was more bioavailable than the calcium in imitations, the evidence which Kraft offered on this issue is not relevant to the imitation superiority claim.

III. CONCLUSIONS OF LAW

A. Kraft Disseminated The Challenged Advertisements And The Advertisements Made False Claims

1. Introduction

Under Section 5 of the FTC Act, an advertisement is deceptive if it contains a material representation or omission of fact that is likely to mislead consumers acting reasonably under the circumstances. *Cliffdale Associates, Inc.*, 103 FTC 110, 164-65 (1984), *appeal dismissed sub nom.*, *Koven v. FTC*, No. 84-5337 (11th Cir. Oct. 10, 1984).

The advertisements challenged in this proceeding, which were disseminated in and affected commerce (F. 4), were developed by Kraft in response to the success of non-dairy imitation and substitute cheese slices, and were not intended to convey express deceptive claims about Kraft Singles to consumers [63] (F. 18); thus the issue here is whether, despite Kraft's intent, *see Chrysler Corp. v. FTC*, 561 F.2d 357, 363 n. 5 (D.C. Cir. 1977), the advertisements conveyed to consumers, by implication, the representations alleged in the

⁵ RX 27, a 1987 summary of available data conceded the tentative and unproven nature of Dr. McCarron's blood pressure/calcium hypothesis when it stated that "[t]he consistency of these data must be considered in deciding if the relationship between dietary calcium intake and blood pressure is worth pursuing" (RX 27A; *see also* RX 24F).

complaint. *Thompson Medical Co.*, 104 FTC 648, 788 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 1289 (1987).

Whether implied claims—"any claims that are not express," *Thompson Medical*, 104 FTC at 788—are deceptive may be determined by the Commission relying on its own expertise. *Carter Products, Inc. v. FTC*, 323 F.2d 523, 528 (5th Cir. 1963); *Thompson Medical*, 104 FTC at 789; *Kroger Co.*, 98 FTC 639, 728 (1981); *Litton Industries, Inc.*, 97 FTC 1, 15-20 (1981), *aff'd as modified*, 676 F.2d 364 (9th Cir. 1982); *Sears, Roebuck & Co.*, 95 FTC 406, 510 (1980); *Ford Motor Co.*, 87 FTC 756, 794-95 (1976); *Removatron*, FTC Docket No. 9200 (Slip. op., pp. 5-8).

Because the Commission wants to ensure that advertisers will not be deterred from conveying useful, accurate information to consumers, it will only "deem an advertisement to convey a claim if consumers acting reasonably under the circumstances would interpret the advertisement to contain that message." *Thompson Medical*, 104 FTC at 788.

If the Commission is confident that the language of an ad contains an implied claim, it will rely upon its own interpretation, and it has often done so; otherwise, it looks to extrinsic evidence to confirm that its reading of the ad is reasonable, and it prefers to use, and it gives great weight to, methodologically sound survey evidence which reveals what consumers actually thought upon reading or viewing the ad in question; alternative or confirming extrinsic evidence which "supplements rather than supplants the Commission's expertise," *Crown Central Petroleum Corp.*, 84 FTC 1493, 1540 (1974), *aff'd mem.*, 530 F.2d 1093 (D.C. Cir. 1976), includes adequately supported conclusions as to consumer responses to advertising by marketing experts. *Thompson Medical*, 104 FTC at 789-90, 794.

2. Analysis Of The Challenged Advertisements' Language

The challenged ads state that Kraft Singles "have" or are "made from" five ounces of milk, followed by: "So her little bones get calcium they need to grow" (F. 44, 57), and it is a justifiable inference that reasonable consumers would take away the net impression of milk equivalency from language which states, not just that Kraft Singles are made from milk, but from a precise amount of milk, and which relates calcium to the milk content of Kraft Singles. [64]

Most of the ads did not try to dispel the impression of milk equivalency, and the few that attempted to could not have because of

the confusing and inconspicuous nature of the disclaimer: "Milk amounts based on cheese content. One $\frac{3}{4}$ ounce slice has 70% of the calcium of five ounces of milk" (F. 58). See *Giant Food*, 61 FTC 326, 348 (1962); *Policy Statement on Deceptive Acts and Practices* ("Deception Statement"), 103 FTC 180 (1984).

The language: "Imitation slices use hardly any milk. But Kraft has five ounces per slice. Five ounces. So her little bones get calcium they need to grow" (F. 44) together with the visual which shows a nearly empty glass of milk on the screen when imitation slices are discussed, and which is then filled to the five ounce mark when Kraft Singles and their calcium content are discussed, suggests that reasonable consumers would take away the impression that Kraft Singles are superior to imitation slices because they have five ounces of milk and the equivalent amount of calcium whereas imitation slices, which use hardly any milk, have less calcium, and I find that the interaction of the various elements in the challenged ads just discussed, and ads containing the same elements, are likely to give reasonable consumers the net impression of milk equivalency and imitation superiority as charged in the complaint. *Thompson Medical*, 104 FTC at 789, 793.

Dr. MacInnis' linguistic analysis of the ads and Dr. Stewart's expert opinion support my conclusion that one reasonable interpretation of the advertisements is that they convey the milk equivalency and calcium superiority claims (F. 55-71), as does the testimony of Ms. Feldmann with respect to both claims and Dr. Jacoby with respect to the imitation superiority claim, both of whom agreed that these claims were reasonable interpretations of the advertisement (F. 46-47).

I do not agree with complaint counsel that ABC's problems with the advertisements or the concerns of CSPI or the California Attorney General's office provide support for the argument that the challenged claims were made. See *Thompson Medical*, 104 FTC at 797, n. 20 with respect to the adequacy of disclaimers:

The ALJ's initial opinion also cites the views of CBS and the National Association of Broadcasters (NAB) that the disclosures were inadequate as evidence that the disclosures were so We agree with the ALJ's view at trial that this evidence cannot be relied on to establish in the first instance whether or not the video supers were adequate. As was argued by Thompson (Tr. 633-36), the [65] record does not show the qualifications of the individuals at CBS and NAB who reached the conclusion . . . the facts that were before these individuals, or the standards they applied to the facts

Kraft argues that complaint counsel cannot rely on the advertising

copy or expert analysis of it because any conclusion as to meaning is speculative. It is true that Dr. Stewart characterized his opinion as to the messages conveyed by the advertisements as “an educated guess” and Dr. MacInnis stated that testing was the only way one could find out what an ad means (RPF 53), but Dr. MacInnis was much more confident about her conclusion that Kraft claims (F. 54), and her opinion and Dr. Stewart’s are, by virtue of their extensive experience in consumer research, entitled to substantial respect.

Kraft also points out that the experts’ opinions are based upon the assumption that consumers are not aware that the calcium in five ounces of milk is reduced or lost during its processing and that they are not aware that imitation cheese slices may be fortified with calcium (F. 70).

Some knowledgeable consumers may be aware of these facts but Commission deceptive advertising policy takes into account the range of consumers who may be deceived by an ad,⁶ and it is reasonable to conclude that a significant number are not as knowledgeable as Kraft assumes. Furthermore, Kraft’s assumption is not supported by any convincing evidence.

In any event, other valid extrinsic evidence in addition to expert analysis of the ads’ language establishes that the challenged messages which I and complaint counsel’s experts find in the challenged ads were actually conveyed to consumers. [66]

3. The MOR Copy Test

Copy tests reveal which messages respondents saw in the advertisements tested; however, the results can be relied upon only if they are methodologically sound,⁷ and it is not surprising that the parties criticize their opponent’s tests and argue that, because of the way they are structured, their results are invalid and unreliable.

All of the tests the parties rely upon were designed by persons who have had extensive experience in the development and administration of copy tests and who have definite opinions as to the proper way to design them. My analysis of the record reveals, however, that the differences of opinion, in most cases, are about matters which do not significantly alter the results of the tests.

⁶ *Thompson Medical*, 104 FTC at 789, n. 7:

Advertisements do not necessarily convey one message to all persons. One subset of consumers reading an ad may interpret it to contain a different message. Each interpretation is reasonable as long as the subset making it is representative of the group of persons to whom the ad is addressed.

⁷ That is, if they draw valid samples from the appropriate population, ask appropriate questions which minimize bias, and their results are correctly analyzed. *Thompson Medical*, 104 FTC at 790.

The significant issue which separates the parties is not the methodological soundness of the tests, but the dispute as to whether copy tests using open-ended questions and analyzing their verbatim responses are better measures of what messages respondents took from the challenged ads than are copy tests using closed-ended questions. Kraft chooses the former; complaint counsel the latter.

While consumer-oriented businesses may rely on tests using open-ended questions to determine what messages customers take away from their ads (F. 166), the Commission has been skeptical about the validity of such tests in litigation. *ITT Continental Baking Co.*, 83 FTC 865, 977 (1973), *modified*, 532 F.2d 207 (2d Cir. 1976) (open-ended questions such as: "What is the most important thing the commercial told you about Wonder Bread?" . . . "were not designed and would not be likely to elicit consumers' perception of the latent or implied messages contained in the advertising")

Judge Hyun in *Thompson Medical* was even more critical of open-ended questions:

[T]here is no way to test whether a consumer does or does not take a certain meaning from an ad other than putting that direct question to the consumer and asking the consumer to affirm or deny that the claim was made. 104 FTC at 697.

See also Sun Oil Co., 84 FTC 247, 259-60 (1974); *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272, 275-76 (2d Cir. 1961); *McNeilab, Inc. v. American Home Prods. Corp.*, 501 F. Supp. 517, 525-28 (S.D.N.Y. 1980); *Tyco Indus. Inc. v. Lego Systems, Inc.*, 5 U.S.P.Q.2d 1023, 1028 (D.N.J. 1987), *aff'd*, 853 F.2d 921 (3d Cir.), *cert. denied*, 109 S. Ct. 392 (1988).

The Commission's endorsement of the results of closed-ended questions⁸ conforms with the practice in the field of marketing research, where these questions are widely used to determine the response to ads (F. 116).

Closed-ended questions have one potential drawback: they may lead a respondent to answer them on the basis of their language rather than his perception of the tested ads. Kraft claims that this is the case here, but while the questions in the MOR copy test might have been worded differently and were suggestive in some cases, they were not

⁸ Commission staff has relied on the results of open-ended questions in the past, *see e.g.*, *California Milk Producers Advisory Board*, 94 FTC 429, 461 (1979), but recent cases such as *Thompson Medical*, where the Commission rejected the results of such tests, reflects the relative utility of open-ended versus closed-ended questions in the Commission's mind.

leading because they did not force respondents to answer in a particular way (F. 144).

The MOR closed-ended questions are similar to those in copy tests relied on by the Commission in *Thompson Medical*, 104 FTC at 804:

Q2: Based on the commercial you just saw, does the product in the commercial contain aspirin?

Compare question 2 in *Thompson Medical* with MOR question 11:

Does this ad say or suggest anything about the amount of calcium in a slice of Kraft Singles compared to the amount of calcium in five ounces of milk? (F. 104). [68]

Although this question and other questions in the MOR survey can be answered yes or no, they do not suggest the answer which should be given. See *Thompson Medical*, 104 FTC at 696 (I.D.) and *Sun Oil*, 84 FTC at 260, in which consumers were asked if the challenged advertisement made any of the following statements:

(6) When your gasoline is blended with the action of Sunoco 260 you will get all the benefits of using the highest octane gasoline at any station anywhere.

(8) Gasolines blended with the action of Sunoco 260 are unusual because they provide more power than you would get with other gasolines.

Kraft argues that MOR questions 11 and 12 which use the word “compare” would lead respondents to agree that the advertisement compared the amount of calcium in a slice of Kraft Singles to the amount in five ounces of milk, or that they compared Kraft Singles to imitation cheese slices, but similar questions were used and relied on in *McNeilab*, 501 F. Supp. at 525:

From what you have seen or heard in the commercial, do you think that they were attempting to compare Maximum Strength Anacin to the brand of pain reliever you, yourself use most often?

The following question in *McNeilab* is comparable to question 14 of the MOR copy test (F. 108):

Based only on what the commercial said, would Maximum Strength Anacin contain more pain reliever, the same amount of pain reliever, or less pain reliever than the brand you, yourself, currently use most often?

Considering the acceptance of closed-ended questions in Commis-

sion and court cases and in market research, and comparing the closed-ended questions used in the MOR test with those which [69] were relied upon in other litigated matters, I reject Kraft's argument that the MOR results cannot be relied upon to determine the messages which consumers took from the challenged advertisements.

Kraft also complains that the MOR test results are invalid because the control advertisement used by Dr. Stewart did not account for and eliminate external sources of bias, such as pre-existing beliefs about Kraft Singles' calcium content. Dr. Stewart testified that the control ad which he chose was appropriate. I accept his opinion on this issue and note that while it was not relied upon, ORC used the same advertisement as a control in its copy test (F. 126). The Commission recognizes that because of pre-existing bias, control advertisements should be used in copy tests, but it has not required the use of non-exposure control groups or purged test advertisements, as Kraft urges. *Thompson Medical*, 104 FTC at 806 n. 31, 807-08, suggests that a copy test may use various kinds of controls ("there are many ways of reducing the yea-saying bias"). While Dr. Jacoby preferred a different approach to the control of bias (F. 148), I find that Dr. Stewart's control was appropriate, and that the MOR test was methodologically sound (F. 149-50).

After taking into account the responses of those who were exposed to the control ad, the MOR closed-ended question reveals that the challenged ads communicated deceptive claims to a significant number of reasonable consumers (F. 127-31). *Compare Thompson Medical*, 104 FTC at 805.

The ORC and ASI copy test results relied on by Kraft used open-ended questions (F. 172, 178) and although the CWI test used some closed-ended questions, Kraft relies only on the open-ended questions in that test (F. 173). For the reasons discussed above, I find that none of these tests provide a valid measure of the messages which consumers took away from the challenged advertisements, and that only the results of the MOR copy test are probative. *See Thompson Medical*, 104 FTC at 805, where the Commission found that while the answers to unaided recall questions supported respondent: "The results from the aided recall questions . . . tell an entirely different story."

B. Kraft's Claims Were False And Unsubstantiated

Kraft's claims as to milk equivalency and calcium superiority were

objective product claims and carried with them the representation that it possessed and relied upon a reasonable basis for those claims. *Deception Statement*, 103 FTC at 175, n. 5. (“... most ads making objective claims imply, and many expressly state, that an advertiser has certain [70] specific grounds for the claim.”) The milk equivalency and calcium superiority claims were false and Kraft offered no convincing evidence supporting those claims (F. 211-13, 235-36).

C. Kraft's False Claims Were Material To Consumers

A challenged representation must be material for deception to occur. A material misrepresentation is one which is likely to affect a consumer's choice of or conduct regarding a product. *Thompson Medical*, 104 FTC at 816; *Deception Statement*, 103 FTC at 182.

All express claims are presumptively material, and where there is evidence that an advertiser intended to make an implied claim, the Commission will infer materiality. *Deception Statement*, 103 FTC at 182. The challenged claims were not express, and Kraft did not intend to convey the milk equivalency or imitation superiority claims, but materiality may be presumed if the challenged ads made implied claims concerning the “central characteristics of a product . . . such as those relating to its purpose . . . [or] efficacy,” as well as those which significantly involve health. *Thompson Medical*, 104 FTC at 816-17; *Deception Statement*, 103 FTC at 182; *Firestone Tire & Rubber Co.*, 81 FTC 398, 456 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

The implied claims in the challenged ads were created because calcium was considered of importance to consumers and Kraft spent about \$15 million a year disseminating this message over a long period of time (F. 23, 87, 90-91, 189).

Since the calcium claims in the challenged advertisements made health claims of importance to consumers (F. 188), those claims were material. The importance of these claims to consumers is further reflected in the success of the advertising campaign, which contributed—even though to an unknown degree—to the increased sales of Kraft Singles (F. 190). The conclusion that the ads successfully convinced consumers of the importance of calcium is reasonable (F. 191). See *Thompson Medical*, 104 FTC at 816.

A claim is material if it was a factor in the decision to buy the product or if it affected the consumers' conduct regarding the product. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 386, 391-92 (1965);

Deception Statement, 103 FTC at 182. Kraft's materiality survey limited respondents' choices to "continue" or "stop" buying and did not test other ways in which consumer conduct might be affected by the milk equivalency claim, that is, consumers might buy fewer Kraft Singles, or they might [71] decrease their milk consumption in reliance on the claim that Kraft Singles provide an equivalent amount of calcium. See *Leonard Porter*, 88 FTC 546, 628 (1974), in which the Commission criticized the ALJ's assumption that "the consumer has only two behavioral options, to buy respondents' products or to buy the more expensive native products."

In conclusion, I find that the challenged ads made material representations to consumers, and I reject Kraft's arguments that the implied claims did not materially affect consumers' behavior toward Kraft Singles (F. 210).

D. *The Proposed Order Is Too Broad*

Complaint counsel argues that the deceptive claims in the challenged ads were serious violations of Section 5 of the FTC Act, and were deliberate, justifying an order which requires Kraft to avoid making false or unsubstantiated claims about the nutrient content of any of its cheese and cheese-type products.

Kraft's misrepresentations were not an isolated occurrence, *Litton Industries, Inc. v. FTC*, 676 F.2d 364, 372 (9th Cir. 1982); *Thompson Medical*, 104 FTC at 834, but, while they were material, Kraft did not intend to make them; whether Kraft should have known that the milk equivalency and imitation superiority claim could be inferred from the language of the challenged ads is debatable, for while Kraft might have suspected that the imitation superiority claim would be conveyed to some subset of reasonable consumers (F. 96-97), the verbatim results of Kraft's copy tests—which the Commission itself has relied on in the past, *California Milk Producers*, 94 FTC at 429 (1979)—gave Kraft arguable support for its pre-complaint position that the ads were not deceptive (F. 80, 175, 181). Even as coded by Dr. MacInnis, the ORC copy test showed a borderline number of respondents taking away the challenged claims from the ads (F. 184).

Absent the order sought by complaint counsel, Kraft could make false and unsubstantiated nutrient content claims about its other cheese products but the question is whether it will do so. I do not believe it will, for the challenged claims were an unintentionally deceptive response to significant competitive pressures and although

they were ineffective, Kraft did respond to criticism of the ads by adding a superscript to some of them (F. 28, 133). Furthermore, the record does not reveal that Kraft has, in the past, been involved in the deceptive advertising of its products. *Removatron*, Slip op. at 25. Thus, I do not find here, as the Commission did in *Thompson Medical*, [72] 104 FTC at 833, a persistent, long-term pattern of deceptive advertising which evinces a "massive, long-standing effort" to persuade consumers.

Caution about the broad product order sought by complaint counsel is also dictated by provisions in the proposed order which prohibit Kraft from, *e.g.*, "Misrepresenting in any manner, directly or by implication, the calcium content or amount, or the content or amount of any other nutrient" While this, and similar provisions are appropriate in this case and do not violate the Constitutional rights of Kraft because they prohibit only deceptive advertising, *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 562 n. 5 (1980); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.*, 425 U.S. 748, 772 (1976); *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 399 (9th Cir. 1982); *Jay Norris, Inc. v. FTC*, 598 F.2d 1244, 1251-52 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979); *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 162-63 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); *Warner-Lambert Co. v. FTC*, 562 F.2d at 758, realism suggests that Kraft could be liable, in the future, for implied claims which it never intended to make, and could not have predicted it could be found to have made. For example, Dr. MacInnis testified that "Shopping Dad" and "Tell Me When," neither of which mentioned calcium nor were challenged by the Commission, were deceptive because consumers could imply a calcium superiority claim in these ads (F. 20, 67). Apparently, some would (F. 86) but many others would not. Kraft is, therefore, justifiably concerned that unpredictable interpretations of its ads might be made if its compliance with the order is challenged in future proceedings, and I see no reason to burden Kraft unnecessarily by including products unrelated to the issues in this case in the order which I enter.

Under the circumstances, I find that an order limited to false or misleading claims about the amount or comparative amount of calcium or any other nutrient in individually wrapped slices of pasteurized process, imitation or substitute cheese products is appropriate.

IV. SUMMARY

1. The Commission has jurisdiction over the acts and practices of Kraft, Inc. which are challenged in the complaint under Sections 5 and 12 of the FTC Act.

2. Kraft, Inc.'s use of the false, misleading and deceptive statements and representations set forth in my findings of fact and conclusions of law were likely to mislead reasonable consumers into believing that such statements and [73] representations were true and to induce them to purchase Kraft Singles by reason of those mistaken beliefs.

3. The acts and practices of Kraft, Inc. set forth in my findings of fact and conclusions of law were all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in or affecting commerce in violation of Sections 5 and 12 of the FTC Act.

4. The following order is justified:

V. ORDER

I.

It is ordered, That respondent Kraft, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of any individually wrapped slices of pasteurized process, imitation or substitute cheese products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting in any manner, directly or by implication, the calcium content or amount, or the content or amount of any other nutrient of any such product.

B. Misrepresenting in any manner, directly or by implication, the comparative calcium content or amount, or the comparative content or amount of any other nutrient of any such product.

C. Representing in any manner, directly or by implication, the calcium content or amount, or the content or amount of any other nutrient of any such product, unless at the time of making such representation respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. "Competent and reliable scientific evidence" shall mean for purposes of this order those tests, analyses, research, studies or other evidence

conducted and evaluated in an [74] objective manner by persons qualified to do so, using procedures generally accepted by others in the profession or science to yield accurate and reliable results.

D. Representing in any manner, directly or by implication, the comparative calcium content or amount, or the comparative content or amount of any other nutrient of any such product, unless at the time of making such representation respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. "*Competent and reliable scientific evidence*" shall mean for purposes of this order those tests, analyses, research, studies or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession or science to yield accurate and reliable results.

II.

It is further ordered, That for three (3) years after the last date of dissemination of the representation, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying copies of:

1. All materials that were relied upon by respondent in disseminating any representation covered by this order; and
2. All test reports, studies, surveys, demonstrations or other evidence in its possession or control that contradict, qualify, or call into question any representation that is covered by this order.

III.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale [75] 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.

IV.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions and to all

distributors of products manufactured or marketed by respondent which are subject to this order.

V.

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

OPINION OF THE COMMISSION

BY OWEN, *Commissioner*:

I. INTRODUCTION

Respondent Kraft, Inc. ("Kraft") is one of the largest food products companies in the United States. Kraft produces and markets a broad line of cheese and dairy products under various brand names. One such product is Kraft Singles American Pasteurized Process Cheese Food ("Kraft Singles"), which consists of individual cellophane-wrapped slices of pasteurized process cheese food sold in various count packages. Kraft is charged with violating Sections 5 and 12 of the Federal Trade Commission Act by materially misrepresenting the calcium content and relative calcium benefit of Kraft Singles in a series of nationally disseminated broadcast and print advertisements that ran from early 1985 through mid-1987.¹

The challenged advertisements are known as the "Skimp" and the "Class Picture/5 ounce" (or "Class Picture/II") ads, which were developed as part of Kraft's overall "Five Ounces of Milk" advertising campaign. The "Five Ounces of Milk" strategy was developed in 1983 by Kraft and its advertising agency, J. Walter Thompson, to respond to Kraft Singles' market share loss to the increasing number of lower cost non-dairy imitation and substitute slices that were appearing on

¹ References to the record are abbreviated as follows:

IDF —initial decision finding
ID —initial decision
Tr. —transcript of testimony
CX —complaint counsel's exhibit
RX —respondent's exhibit
RAB —respondent's appeal brief
CAB —complaint counsel's answering and cross-appeal brief
RRAB —respondent's reply and answering brief
CRB —complaint counsel's reply brief

the market. The latter were advertised as being both less expensive and more nutritious [2] than dairy slices such as Kraft Singles.² IDF 14-18; CX 3, CX 44F. Most advertisements in the “Five Ounces of Milk” campaign focused on the theme that a slice of Kraft Singles has five ounces of milk as an ingredient, while imitation slices use very little milk, or are made predominantly from vegetable oil and water. *See* IDF 19, 21, 26; CX 276. One purpose of the campaign was to educate consumers about the difference in milk content between Kraft Singles and non-dairy slices because Kraft believed that consumers were unaware that the price differential between these products was attributable to differences in ingredient costs. IDF 18.

The “Skimp” ads ran nationally from February 1985 through June 1987, and featured the message that Kraft Singles have five ounces of milk per slice, while imitation slices use “hardly any milk.” *See* IDF 23; CX 276. The “Skimp” ads differed from previous executions in the “Five Ounces of Milk” campaign in that they were designed to communicate the nutritional benefit of Kraft Singles by referring expressly to calcium in the ad copy as [3] the key nutritional element. IDF 23-37, 87; *see* CX 276C. Calcium was identified as an example of the nutritional benefit provided by Kraft Singles in order to capitalize on high consumer interest in calcium at the time, and to respond to the increasing number of products, including competing slices, that were being advertised as good sources of calcium. IDF 27.

The “Class Picture/5 ounce” television ads ran nationally from June 1986 through January 1987. IDF 40; *see* CX 276F. They reflected a different creative strategy than the “Skimp” ads, and were intended to communicate that Kraft Singles are an “excellent source of calcium.” IDF 38; *see* IDF 39. Although the “Class Picture/5 ounce”

² Some background on the products involved is helpful to understanding the issues in this case. Pasteurized process cheese foods, such as Kraft Singles, are subject to a Food and Drug Administration (“FDA”) definition and standard of identity that requires a certain minimum level of mandatory ingredients, and permits specified optional ingredients. 21 CFR 133.173. FDA regulations require that pasteurized process cheese food contain at least 51 percent natural cheese. 21 CFR 133.173(a)(5). A slice of Kraft Singles contains about 67 to 68 percent natural cheese. IDF 6. Imitation slices can be any combination of ingredients that resembles and can be substituted for pasteurized processed cheese food, but they must be labelled “imitation.” *Id.* Typically, imitation slices are a combination of water, vegetable oil, flavoring agents and fortifying ingredients. IDF 8. Imitation slices and substitute slices also compete in the individually wrapped process slices category. IDF 7. Imitation slices are, by FDA definition, “nutritionally inferior” to pasteurized process cheese food slices like Kraft Singles even though they may contain more of certain nutrients than their natural counterparts. IDF 9, 216, 218. “Nutritional inferiority” is defined by the FDA as any reduction in the content of any “essential ingredient” that is present in a measurable amount in the food being imitated. 21 CFR 101.3(e)(4). Substitute slices are cheese slices that do not meet the FDA standard of identity for pasteurized process cheese food slices, but are not “nutritionally inferior” to those slices, and so are not required under federal law to be labelled “imitation.” 21 CFR 101.3(e)(2). Although the complaint refers only to “imitation slices,” we interpret this phrase to refer to both imitation and substitute cheese slices. *See* IDF 219.

ads stated that Kraft Singles are made from five ounces of milk per slice so they are "concentrated with calcium," these ads are not expressly comparative in that they do not mention imitation or substitute slices. IDF 38.

On June 17, 1987, the Commission issued a complaint alleging that the aforementioned advertisements materially represented, directly or by implication: (1) that a slice of Kraft Singles contains the same amount of calcium as five ounces of milk (the "milk equivalency" claim; Complaint ¶ 6), and (2) that Kraft Singles contain more calcium than do most imitation cheese slices (the "imitation superiority" claim; Complaint ¶ 8). The complaint alleges that neither of these calcium claims is in fact true (Complaint ¶¶ 7, 9), and further alleges that Kraft represented in its advertisements that it possessed and relied upon a reasonable basis for the challenged representations, when it did not (Complaint ¶¶ 10, 11). The complaint charges that these representations were thus false and misleading in violation of Sections 5 and 12 of the Federal Trade Commission Act. The matter was assigned to Administrative Law Judge Lewis F. Parker for hearing. The trial began on July 5, 1988, and ended on November 17, 1988. The record closed on November 29, 1988. The parties filed their proposed findings of fact and conclusions of law on January 10, 1989, and their answers on February 10, 1989. The initial decision and order of the ALJ were filed on April 3, 1989.

The ALJ found Kraft liable for making both of the alleged calcium claims in each of the challenged ad series. ID at 64-65, 69. He found that the claims were material because they involved important health concerns. ID at 70-71. He also found that the claims were objective product claims, and that they were false and unsubstantiated. ID at 69-70. The ALJ's order adopts the relief proposed by complaint counsel in the notice order attached to the Commission's complaint, with the exception of the scope of product coverage. He concluded that Kraft did not intend to make the misrepresentations, that there was insufficient evidence of a persistent, long-term pattern of deceptive advertising, and that [4] the order proposed by complaint counsel would expose Kraft to liability in the future for "unpredictable interpretations of its ads." ID at 71-72. Accordingly, he rejected the scope of product coverage proposed in the notice order, which would have included "any product that is a cheese, related cheese product, imitation cheese, or substitute cheese," and limited his order to "individually wrapped slices of pasteurized process, imitation or substitute cheese products." ID at 72.

Kraft appeals from the ALJ's initial decision and order. Kraft's principal arguments on appeal are that: (1) neither the ALJ nor, by implication, the Commission can find the alleged implied claims in this case based only on review and analysis of the challenged ads, but must rely on extrinsic evidence; (2) the ALJ erred in finding that, based on the extrinsic evidence in the record, consumers would take the alleged implications from the challenged ads; (3) the ALJ erred in concluding that the alleged calcium claims would have been material to consumers; and (4) the entry of any order based on the ALJ's underlying liability findings would prevent Kraft from engaging in truthful informative advertising for covered products, and would thus be an unconstitutional restraint on commercial speech. Complaint counsel appeals the narrow scope of product coverage of the ALJ's order.

We affirm liability under Sections 5 and 12 of the FTC Act,³ although we differ with the initial decision in certain respects, as discussed in this opinion. In particular, we agree that the milk equivalency claim is conveyed by both the "Skimp" ads and the "Class Picture/5 ounce" ads, but we conclude that the imitation superiority claim is conveyed only by the "Skimp" ads. We generally agree with the ALJ's findings and conclusions to the extent they are consistent with those set forth in this opinion, and, except as noted herein, adopt them as our own. Based on our consideration of the record in this case and the arguments of counsel for both parties, we grant complaint counsel's appeal. The order we adopt includes the broader provision for product coverage as set forth in the notice order. [5]

Kraft does not appeal the ALJ's findings that the alleged calcium claims are false and unsubstantiated if they are in fact made in the challenged ads. Accordingly, we adopt the ALJ's findings and conclusions on this issue. IDF 211-280; ID at 69-70. Thus, with respect to the milk equivalency claim, we find that a $\frac{3}{4}$ -ounce slice of Kraft Singles has 70 percent, not 100 percent, of the calcium of five ounces of whole milk, by Kraft's own analysis and admission.⁴ With

³ 15 U.S.C. 45 and 52. Section 5 of the FTC Act declares unfair or deceptive acts or practices unlawful. Section 12 prohibits false advertising likely to induce the purchase of food, drugs, devices or cosmetics. Section 15 of the Act defines false advertising for purposes of Section 12 as advertising that is misleading in a material respect. 15 U.S.C. 55. If an act or practice violates Section 12, it also violates Section 5. 15 U.S.C. 52(b).

⁴ The calcium in Kraft Singles is derived from three dairy sources: natural cheese, whey, and skim milk, with the largest percentage of calcium coming from the natural cheese component. IDF 7. Even though it takes five ounces of milk to make the natural cheese contained in a $\frac{3}{4}$ -ounce slice of Kraft Singles, that slice contains less than the amount of nutrients found in five ounces of milk due to whey losses associated with cheesemaking and the dilution effect of other ingredients added to the cheese food. Answer ¶ 7; CX 100; *see also* IDF 12, 211, 212.

respect to the imitation superiority claim, we find that Kraft Singles contain, on average, 15 percent of the U.S. Recommended Daily Allowance ("RDA") of calcium per ounce,⁵ and that the vast majority of imitation slices sold in the United States during the relevant time period also contained 15 percent or more of the U.S. RDA of calcium per ounce.⁶ IDF 224, 234-35.

Our analysis of the issues on appeal is presented below.

II. WERE THE CLAIMS MADE?

A. Legal Framework

The Commission will deem an advertisement to convey a claim if consumers, acting reasonably under the circumstances, would [6] interpret the advertisement to contain that message.⁷ *Thompson Medical Co.*, 104 FTC 648, 788 (1984), *aff'd*, 791 F. 2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *Cliffdale Associates, Inc.*, 103 FTC 110, 164-66 (1984); Federal Trade Commission Policy Statement on Deception, *appended to Cliffdale Associates, Inc.*, 103 FTC 176-77 (1984) [hereinafter "*Deception Statement*"]. For analytic purposes, the Commission often distinguishes between express claims and implied claims in evaluating what messages an ad can reasonably be interpreted as containing. Express claims directly state the representation at issue. *Thompson Medical*, 104 FTC at 788. Implied claims are any claims that are not express. They range on a continuum from claims that would be "virtually synonymous with an express claim through language that literally says one thing but strongly suggests another to language which relatively few consumers would interpret as making a particular representation." *Id.* at 789.⁸

⁵ The U.S. RDA for calcium is 1 gram, or 1000 milligrams ("mg."). See 21 CFR 101.9(c)(7)(iv); Recker Tr. 597-98.

⁶ Respondent did not substantiate the assertion that Kraft Singles contain more calcium than most imitation slices. However, respondent presented evidence at trial suggesting that the dairy calcium in Kraft Singles is more beneficial to the body due to the greater "bioavailability" (*i.e.*, the amount absorbed from the gastrointestinal tract into the bloodstream) of dairy calcium relative to the non-dairy calcium in imitation slices. IDF 237-278. The ALJ found that the evidence Kraft presented in support of its bioavailability claim was not convincing. IDF 279. We agree.

⁷ This standard is intended to ensure that the flow of useful and accurate product information conveyed to consumers through advertising is not deterred. See *Thompson Medical Co.*, 104 FTC 648, 788 (1984). We note, for example, that a study conducted by the Commission's Bureau of Economics on producer advertising of the health benefits of fiber consumption in the ready-to-eat cereal market indicates that such advertising was a particularly effective source of important health information to segments of the population not previously reached by government and general information sources. See P. Ippolito & A. Mathios, *Health Claims in Advertising and Labeling: A Study of the Cereal Market*, Bureau of Economics Staff Report, Federal Trade Commission (August 1989).

⁸ Advertisements do not necessarily convey one message to all persons, and the same advertising elements may be amenable to more than one reasonable interpretation. Each interpretation is reasonable as long as the subset of consumers making it is representative of the group of consumers to whom the ad is addressed.

(footnote cont'd)

Both express claims and implied claims can be deceptive. *See, e.g., Removatron International Corp.*, 111 FTC 206, 292-95 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989). [7]

Advertisers can be liable for misleading consumers by innuendo as well as by outright false statements. *See Deception Statement*, 103 FTC at 175 n. 4, 176-77; *Cliffdale*, 103 FTC at 170-71; *Fedders Corp. v. FTC*, 529 F.2d 1398, 1402-03 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976). Evidence of intent to deceive is not required to find liability. *See Chrysler Corp. v. FTC*, 561 F.2d 357, 363 & n. 5 (D.C. Cir. 1977).

The primary evidence of what claims an advertisement can convey to reasonable consumers consists of the advertisement itself. While express claims are necessarily self-evident from the ad, implied claims may or may not be apparent. *See Deception Statement*, 103 FTC at 176. We are often able to conclude that an advertisement contains an implied claim by evaluating the content of the ad and the circumstances surrounding it. *Thompson Medical*, 104 FTC at 789, 799; *Cliffdale*, 103 FTC at 164; *Deception Statement*, 103 FTC at 176. This technique is primarily useful in evaluating advertisements whose language or depictions are clear enough to permit us to conclude with confidence, after examining the interaction of all the constituent elements, that they convey a particular implied claim to consumers acting reasonably under the circumstances. *Thompson Medical*, 104 FTC at 789.

If, based on our initial review of the evidence from the advertisement itself, we cannot conclude with confidence that an advertisement can reasonably be read to contain a particular implied message, we will not find the ad to have made the claim unless extrinsic evidence allows us to conclude that such a reading of the ad is reasonable. *Thompson Medical*, 104 FTC at 789; *Bristol-Myers Co.*, 102 FTC 21, 319 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985). Such evidence can include reliable results from methodologically sound consumer surveys. *Thompson Medical*, 104 FTC at 790. The Commission might also consider evidence respecting the common usage of terms, as well as generally accepted principles drawn from market research showing that consumers generally

Thompson Medical, 104 FTC at 789 n.7. An advertisement that reasonably can be interpreted in a misleading way is deceptive, even though other, non-misleading interpretations may be equally possible. *Id.* at 789 n.7, 818; *Bristol-Myers Co.*, 102 FTC 21, 320 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985). Advertisements may also contain a secondary message that tends to support or re-enforce the primary message. The secondary message understood by reasonable consumers is actionable if deceptive even though the primary message is accurate. *Deception Statement*, 103 FTC at 178 n.21.

respond in a certain manner to advertisements that are presented in a particular way. *Id.* The Commission can also consider the opinions of expert witnesses in the proceeding as to how an advertisement might reasonably be interpreted, if such opinions are adequately supported. *Id.* at 790 & n.11.

In all instances, the Commission will carefully consider any extrinsic evidence that is introduced, taking into account the quality and reliability of the evidence. *Deception Statement*, 103 FTC at 176. Whether looking at evidence from the ad itself, extrinsic evidence, or both, the Commission considers the [8] overall, net impression made by the advertisement in determining what messages may reasonably be ascribed to it. *Thompson Medical*, 104 FTC at 790. An interpretation may be reasonable even though it is not shared by a majority of consumers in the relevant class, or by particularly sophisticated consumers. A material practice that misleads a significant minority of reasonable consumers is deceptive. *Deception Statement*, 103 FTC at 177 n.20.

B. *The Claims*

The challenged “Skimp” and “Class Picture/5 ounce” ads do not expressly state the alleged calcium claims, but complaint counsel argues that the ads can reasonably be interpreted as conveying the claims by implication. Kraft denies that its ads make either of the representations specified in the complaint. We examine each of the alleged claims to determine whether consumers acting reasonably under the circumstances would interpret the challenged ads to have made the alleged claims.

1. Milk Equivalency Claim

a. *The “Skimp” Ads*

The following is characteristic ad copy taken from a television commercial version of a “Skimp” ad:⁹

Lady (voice over): I admit it. I thought of skimping. Could you look into those big blue eyes and skimp on her? So I buy KRAFT Singles. Imitation slices use hardly any milk. But KRAFT has five ounces per slice. Five ounces. So her little bones get calcium they need to grow. No, she doesn't know what that big KRAFT means. Good thing I do. Singers: KRAFT Singles. More milk makes 'em . . . more milk makes 'em good. Lady (voice over): Skimp on her? No way.

⁹ Each television and print execution was somewhat different, and most were disseminated with a number of variations.

See CX 62 C & Z-72 (television ad); CX 62 Z-33 (print ad) (reproduced in Appendix A hereto); see also Complaint ¶ 5 and [9] Exhibits A-D; IDF 26, 44. The visual portion corresponding to the statement “imitation slices use hardly any milk” shows a small amount of milk being poured into the bottom of a glass. The audio continues, “but Kraft has five ounces per slice. Five ounces. So her little bones get calcium they need to grow.” Simultaneously, milk continues to pour into the glass, filling it up to the five ounce mark. The commercial also shows milk pouring into a glass which then animates back onto a package of Kraft Singles, the front label of which displays the phrase “5 oz. milk slice” inside the image of a glass. CX 95.

In January 1986, Kraft ran a revised version of the “Skimp” ads which changed “Kraft has five ounces per slice” to “Kraft is made from five ounces per slice.” IDF 28; see CX 276F, CX 106. In July 1986, J. Walter Thompson developed several additional copy alternatives, which Kraft declined to adopt at that time. IDF 89. In March 1987, near the end of the “Skimp” campaign, Kraft made a further change to the text of the ads, adding the disclosure “one $\frac{3}{4}$ ounce slice has 70% of the calcium of five oz. of milk” as a superscript in the television commercials and as a footnote in the print ads.¹⁰ IDF 28; CX 276I; see also CX 275B.

The ALJ found that the reference in the “Skimp” ad copy of the precise amount of milk in a Kraft Single, together with the reference to calcium, can be interpreted as implying that a slice of Kraft Singles contains the same amount of calcium as five ounces of milk; because there is no mention that calcium is in fact lost in the processing of cheese, the “Skimp” ads convey the milk equivalency claim. IDF 45. He concluded that reasonable consumers would take the net impression of milk equivalency from the language used and its interaction with the various elements in the challenged ads. ID at 63-64. Finally, he found that most of the ads did not try to dispel the impression of milk equivalency, and that the few later ads that contained altered copy (“has” rather than “is made from”) or added a disclaimer (“one $\frac{3}{4}$ ounce slice has 70% of the calcium of five ounces of milk”) were ineffective due to the confusing and inconspicuous nature of these modifications. ID at 64; see IDF 57-58, 133.

We agree that each ad in the “Skimp” series, viewed as a whole, conveys an overall net impression that Kraft Singles contain the same

¹⁰ Respondent also claims that a third change was made to the “Skimp” ad copy, *i.e.*, the phrase “so her little bones get calcium” was allegedly changed to “plus her little bones get calcium.” See RAB at 16 n.14. There is, however, very little record evidence pertaining to this change.

amount of calcium as five ounces of milk. [10] Several elements reinforce this impression. The word “has,” and the repetition of the precise amount of milk in a Kraft Singles—five ounces—followed by express reference to a specific nutrient—calcium—linked by the causal word “so,” suggest that a slice of Kraft Singles contains as much calcium as the five ounces of milk from which it is made. The visual image of milk being poured into a glass up to a five-ounce mark, which is then superimposed onto a package of Kraft Singles, further reinforces the linkage between the specific amount of milk ingredient in the product and the product’s calcium value, which is mentioned in the audio portion of the television advertisement and in the print ad copy. We agree that no element in the ads successfully dispels this impression.

We also find that the later-added copy modifications and disclosures were ineffective to dispel the net impression that Kraft Singles contain the same amount of calcium as five ounces of milk. For example, the superimposed caption in the television commercials appears briefly in a middle frame in conjunction with another caption (“milk amounts based on cheese content”), and conveys a complicated quantitative message (“one $\frac{3}{4}$ ounce slice has 70% of the calcium of five ounces of milk”). Generally recognized marketing principles suggest that, given the distracting visual and audio elements and the brief appearance of the complex superscript in the middle of the commercial, it is unlikely that the visual disclosure is effective as a corrective measure. See *Thompson Medical*, 104 FTC at 797-98 & n. 22; *Deception Statement*, 103 FTC at 180. We conclude, based on our review of the television and print versions of the “Skimp” ads themselves, that they contain elements that are likely to cause reasonable consumers to interpret the ads as claiming that Kraft Singles contain the same amount of calcium as five ounces of milk.

Respondent asserts that the implied claims at issue in this case involve “language which relatively few consumers would interpret as making” the claims at issue, in contrast with the implied claims at issue in *Thompson Medical* and *Removatron*, which were “virtually synonymous” with express claims, and where it was “entirely appropriate to find from a mere reading of the ad copy that consumers were likely to take away those implications.” RAB at 19-20. Although respondent attempts to contrast the Kraft ads with those at issue in *Thompson Medical* and *Removatron*, we view the relevant ads as more comparable than contrasting in that they all contain facially

evident elements that indicate the existence of implied claims. For example, in the “Aspercreme” ads, the visual image of two aspirins being replaced by a tube of Aspercreme is similar to the visual technique used in Kraft’s [11] “Skimp” ads in which a glass is shown filling to the five-ounce mark with milk. As reinforced by these visual images, the textual passages in the two advertising campaigns (*e.g.*, “Kraft has five ounces...so her little bones get calcium” and “with amazing Aspercreme, you can get the strong relief of aspirin”), place both ads in a very similar position; that is, they both contain implied claims that are close to express.

In addition, the implied effect of some of the statements in the “Skimp” ads was similar to the effect of some of the ads in *Removatron*. Advertisements for the *Removatron* device stated that it “works toward dehydrating and destroying the papilla, which is the source of nourishment for the hair” and that “further hair growth is prevented.” The natural implication from this statement—that destroying the papilla prevents further hair growth—is that the hair won’t grow back. Similarly, when the Kraft “Skimp” ads proclaimed that a slice of Kraft Singles has or is made from five ounces of milk “so her little bones get calcium” (emphasis added), the causal link of the phrases naturally implied that a Kraft Single has the same amount of calcium as five ounces of milk.

Because we find the evidence from the ads themselves to be sufficiently clear, we find it unnecessary in this case to resort to extrinsic evidence in order to conclude that the milk equivalency claim is made by the “Skimp” ads.¹¹ We reject [12] Kraft’s argument that the Commission cannot, as a matter of law, find the implied claims in this case based on evidence from the challenged ads themselves, but must rely on extrinsic evidence.¹² RAB at 3, 5-6, 19-21; RRAB at 7-

¹¹ Respondent claims that the testimony of six of its witnesses and two of complaint counsel’s experts supports the contention that consumer survey evidence is required in this case to determine whether consumers are likely to take the alleged implied calcium claims from the challenged ads. RAB at 20 & n. 18. We read the testimony cited by Kraft to say that, as a general matter of methodology, reliable consumer survey evidence is the preferred means of confirming what messages consumers actually take from advertisements and quantifying the degree to which those messages are communicated. We do not find that this testimony establishes that the claims in this case can only be found through consumer surveys, or that no reasonable interpretation of the ads can be made based on evidence from the ads themselves. Where we cannot conclude that an advertisement contains a particular implied message based on our review of evidence from the ad itself, we will give great weight to reliable consumer survey evidence. *Thompson Medical*, 104 FTC at 789-90. In this case, we disagree with respondent’s overly rigid reading of the challenged ad copy, and find that we do not need extrinsic evidence given the combination of misleading elements clearly present on the face of the ads.

¹² At oral argument, counsel for Kraft appeared to concede that it is the Commission’s province to determine whether the existence of the implied claims at issue is subject to interpretation based on evidence from the ads themselves. 12/7/89 Transcript of Oral Argument at 27-30.

13. It is well settled that the Commission can determine whether a claim is made in an advertisement without resorting to extrinsic evidence even if the claim is implied. *Removatron*, 111 FTC at 291-96; *Thompson Medical*, 104 FTC at 789; *Cliffdale*, 103 FTC at 166; *Bristol-Myers Co.*, 102 FTC 21, 319 (1983). See also *American Home Products Corp. v. FTC*, 695 F.2d 681, 687 & n. 10 (3d Cir. 1982); *Carter Products, Inc. v. FTC*, 323 F.2d 523, 528 (5th Cir. 1963). Nor do we agree with Kraft that the First Amendment mandates that the Commission rely on consumer survey evidence to find an implied claim that we find evident from elements on the face of the ad itself. RAB at 3, 5-6, 19-21; RAB at 7-13. In discussing the extent of constitutional protection accorded commercial speech, the Supreme Court clearly has stated that:

[w]hen the possibility of deception is as self-evident as it is in this case, we need not require the State to "conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead."

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 652-53 (1985), quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965).

We conclude that our review of the evidence from the "Skimp" ads themselves is sufficient to establish that they contain the milk equivalency message. However, because extrinsic evidence has also been offered on this issue, we also considered that evidence. We find that the weight of the probative extrinsic evidence is consistent with our determination that the "Skimp" [13] ads convey the milk equivalency claim to at least some groups of reasonable consumers.¹³

[14]

¹³ This evidence includes, but is not limited to, the results of the Market Opinion Research ("MOR") consumer survey (CX 196), which measured consumer reaction to three challenged "Skimp" ads (two television ads and one print ad), and which, after taking into account control group responses, indicate that between 45 percent and 53 percent of survey respondents took the milk equivalency message from the ads in response to closed-ended questions. IDF 99-171; ID 69; see IDF 48-52. The evidence also includes the opinion of complaint counsel's expert Dr. David Stewart, who designed and testified about the MOR survey, and whose testimony, in our view, was adequately supported. See IDF 48, 71; see also Stewart Tr. 1081-82. Although we agree with respondent that the design of the MOR survey questionnaire is not without flaws, and that alternative or additional means could have been used to better minimize the potential for yea-saying bias inherent in using a closed-ended question format, on balance, we find the MOR survey results to be of some probative value.

We have also considered the extrinsic evidence cited by respondent to support a finding that the alleged claims were not made in the ads. See RAB at 49-56; RRAB at 49-55. The consumer survey evidence consists of: (1) results from copy tests conducted for Kraft in the ordinary course of business by ASI Market Research (RX 7; CX 79), and for purposes of this proceeding by Opinion Research Corporation (RX 47); and (2) analyses of the verbatim responses to the MOR survey's open-ended questions by Kraft's experts, Dr. James Heisler and Dr. Leon Kaplan (RX 83; RX 85); See RAB at 49 n. 41; see also IDF 73-78, 80, 169-172, 175-185. The

(footnote cont'd)

b. *The “Class Picture/5 ounce” Ads*

The “Class Picture/5 ounce” ads were not part of the earlier “Skimp” campaign, and were executed somewhat differently. The visual elements depict a group of school children having their group pictures taken. The following is characteristic ad copy taken from the television commercial version of these ads:

Announcer (voice over): Can you see what’s missing in this picture? Well, a government study says that half the school kids in America don’t get all the calcium recommended for growing kids. That’s why KRAFT Singles are important. KRAFT is made from five ounces of milk per slice. So they’re concentrated with calcium. Calcium the government recommends for strong bones and healthy teeth.

Photographer: Say Cheese!

Kids: Cheese!

Announcer (voice over): Say KRAFT Singles. ‘Cause kids love KRAFT Singles, right down to their bones.

See CX 275I & CX 62 Z-11 (television ad); CX 62 Z-55 (print ad) (reproduced in Appendix B hereto); see also IDF 38. The “Class [15] Picture/5 ounce” ads were disseminated with a superscript that states: “[o]ne $\frac{3}{4}$ ounce slice has 70% of the calcium of five ounces of milk.” *Id.*; see also CX 62 Z-12, Z-13; CX 276F-G; CX 277D.

According to the ALJ, the copy elements that prompted his finding of the milk equivalency claim in the “Skimp” ads were also present in the “Class Picture/5 ounce” ads. ID at 63; see IDF 57, 59-60, 134, 165. He concluded that ads containing those elements were likely to

ASI copy test results relied upon by Kraft in this proceeding derive from a survey methodology designed primarily to measure ad memorability, and not ad communication. As a result, we find that the ASI survey questions did not fully probe for all of the messages, including secondary messages, conveyed by the ads to survey participants. See IDF 185. With respect to the survey conducted by Opinion Research Corporation (“ORC”), we again find that the survey questions yielding the results upon which respondent relies were not sufficiently directed to compensate for normal variations in consumers’ ability to recall and articulate their impressions on viewing the test ads, and thus did not fully elicit the messages, including secondary messages, received. The ORC results may thus understate the number of survey participants that received the challenged claims from the test ads. See IDF 183, 184. We have also considered, but are not persuaded by, the testimony, including expert testimony, cited by Kraft in support of the proposition that the open-ended questions used in the consumer surveys in question did elicit all of the messages taken by consumers. See RRAB at 47 n.43, 50 n.46, 51-52 & n.48, 53, 55; see also RAB at 54-55. Although there may well be instances where the only reliable extrinsic evidence consists of responses to open-ended questions, that is not the case here. We therefore find the extrinsic evidence cited by Kraft to be insufficiently probative to outweigh the record evidence that is consistent with our reading of the “Skimp” ads. See *Thompson Medical*, 104 FTC at 805 (while results from unaided recall questions supported respondent’s position, results from aided recall questions “tell an entirely different story”).

We disagree that our conclusion regarding the survey evidence relied upon by respondent in this case creates “intolerable uncertainty for advertisers” who use this form of copy testing in the ordinary course of business. RAB at 56. The quality of any consumer research offered as evidence will be evaluated in the totality of the circumstances, including whether the advertiser was alerted to potentially misleading messages in its ads. See *Thompson Medical*, 104 FTC at 835-36; discussion *infra* at Part V.

give reasonable consumers the net impression of milk equivalency, and that the superscript disclosure was ineffective to correct this net impression. ID at 64. We agree that the “Class Picture/5 ounce” ads contain copy elements substantially similar to the “Skimp” ad elements that convey the impression of milk equivalence. Those elements include juxtaposition of the reference to the five ounces of milk used to make Kraft Singles with the statement “so they’re concentrated with calcium,” a linkage that is reinforced by subsequent repetition of the reference to calcium. We also find, for the reasons discussed above in connection with the “Skimp” ads, that the superscript disclaimer does not effectively correct the ad’s overall impression. Considering all elements, we conclude that the “Class Picture/5 ounce” ads convey a net impression that Kraft Singles contain the same amount of calcium as five ounces of milk. While this conclusion can be supported by evidence from the ads themselves, we also find that this conclusion is consistent with the weight of the probative extrinsic evidence in the record, including inferences reasonably drawn from the same evidence that supports such a conclusion with respect to the “Skimp” ads.¹⁴ [16]

2. Imitation Superiority Claim

a. *The “Skimp” Ads*

In examining the “Skimp” ads with respect to the imitation superiority claim, the ALJ considered such characteristic ad copy language as:

Imitation slices use hardly any milk. But KRAFT has five ounces per slice. Five ounces. So her little bones get calcium they need to grow.

He also considered the visual elements in the ad that reinforced the ad copy message. The ALJ concluded that reasonable consumers would

¹⁴ See note 13, *supra*; IDF 134, 165. We have also considered the extrinsic evidence cited by respondent as showing that the “Class Picture/5 ounce” ads did not convey the milk equivalency claim. See RAB at 49 n.41, 54, 58-59; RRAB at 47 & n.43, 49, 51-52 & n.48. The consumer survey evidence consists of results from copy tests conducted for Kraft in the ordinary course of business by ASI Market Research (RX 8, RX 128; see IDF 73, 81, 172), and by Communication Workshop Incorporated (“CWI”) (RX 9, RX 128; see IDF 73, 82-85, 173-74). Our conclusions with respect to the ASI survey results and the testimony cited by Kraft are discussed above at note 13. With respect to the survey conducted by CWI, we conclude that the survey questions yielding the results relied upon by Kraft in this proceeding did not probe survey participants sufficiently, under conditions calculated to correct for bias, to provide a reliable measure of the messages, including secondary messages, received by reasonable consumers. See IDF 185. We therefore find the extrinsic evidence cited by Kraft to be insufficiently probative to outweigh the record evidence that is consistent with our interpretation of the “Class Picture/5 ounce” ads.

take away the net impression that Kraft Singles are superior to imitation slices because they have five ounces of milk and the equivalent amount of calcium, whereas imitation slices (which, according to the ad, use hardly any milk) have less calcium. ID 64; IDF 44, 47.

We agree. The imitation superiority message is raised by the express reference to imitation slices in the audio and copy portions of the ads and the use of comparative language (“hardly any,” “but”). We find that the visual image of a glass containing very little milk during the audio reference to imitation slices, followed by the image of the glass being filled to the five-ounce mark while the corresponding audio portion refers to Kraft Singles and states “so her little bones get calcium they need to grow,” create a net impression that Kraft Singles contain more calcium than most imitation slices. Since no element in the ads effectively corrects this impression, we conclude that the “Skimp” ads on their face contain elements that reasonable consumers are likely to take as communicating an imitation superiority message. We also conclude that the weight of the probative extrinsic evidence in the record is consistent with our conclusion that one net impression conveyed to reasonable consumers by the “Skimp” ads is the imitation superiority claim.¹⁵ [17]

b. *The “Class Picture/5 ounce” Ads*

While the Initial Decision can be read as holding that the “Class Picture/5 ounce” ads also convey the imitation superiority claim, the precise basis for the ALJ’s conclusion on this issue is not clear. His general statement that:

ads containing the same elements . . . are likely to give reasonable consumers the net impression of . . . imitation superiority as charged in the complaint

(ID at 64) is not dispositive. The imitation superiority claim cannot be ascribed to the “Class Picture/5 ounce” ads by relying on the presence of elements found to convey that claim in the “Skimp” ads, because the ALJ found that “[the “Class Picture/5 ounce”] ads were not

¹⁵ This evidence includes, but is not limited to, the MOR survey results which, taking into account control group responses, indicate that between 23 percent and 39 percent of survey respondents took the imitation superiority message from the challenged “Skimp” ad language in response to closed-ended questions (ID at 69; see IDF 161-163, 170-171; see also ID at 69; IDF 92, 95, 184); and the opinion of marketing expert Dr. Stewart (IDF 71; see Tr. 1081-82). We have considered the extrinsic evidence cited by Kraft in support of its contention that the “Skimp” ads do not convey an imitation superiority claim, and conclude that this evidence does not outweigh the record evidence that is consistent with our reading of these ads. See discussion *supra* at note 13.

expressly comparative . . . [due to the fact that they] did not mention imitations or substitutes.” IDF 38; compare IDF 47. However, the ALJ did conclude that:

other valid extrinsic evidence in addition to expert analysis of the ads’ language establishes that the challenged messages which I and complaint counsel’s experts find in the challenged ads were actually conveyed to consumers.

ID at 65.

The extrinsic evidence cited in the initial decision consists of certain results from Kraft’s 1986 Communication Workshop Incorporated (“CWI”) copy test (IDF 96), and the opinion of Dr. Deborah MacInnis, one of complaint counsel’s marketing experts.¹⁶ IDF 66, 69. The ALJ’s conclusion would not appear to rest on the CWI data, however, because he separately concluded that none of Kraft’s copy tests, including the CWI copy test, are [18] probative.¹⁷ ID at 69. And while the ALJ found the opinion of Dr. MacInnis generally to be entitled to “substantial respect” (ID at 65), the initial decision does not indicate what conclusion if any he drew from Dr. MacInnis’ opinion on this specific issue.

We have reviewed the “Class Picture/5 ounce” ads and are not able to conclude with adequate confidence, by looking solely at the ads themselves, that reasonable consumers would understand them to be claiming that Kraft Singles contain more calcium than most imitation or substitute slices. Such representative ad copy as:

KRAFT is made from five ounces of milk per slice. So they’re concentrated with calcium. Calcium the government recommends for strong bones and healthy teeth.

contains no explicit comparison between Kraft Singles and non-dairy slices. Instead, the ads make claims only about the attributes of Kraft Singles, and do not contrast these attributes with those of non-dairy slices. Similarly, there are no visual cues that prompt a comparison with other slices. Where an examination of the ads does not provide us with sufficient information to determine whether reasonable consum-

¹⁶ No other expert witness besides Dr. MacInnis stated an opinion that the “Class Picture/5 ounce” ads conveyed the imitation superiority claim. Dr. Stewart, who designed the MOR copy test which tested three “Skimp” ads, offered an opinion only as to the similarity in ad copy between the tested “Skimp” ads and the “Class Picture/5 ounce” ads as that pertained to the milk equivalency claim. IDF 134, 165; *see* Stewart Tr. 1155-56.

¹⁷ While the ALJ found that reliance on the responses to closed-ended questions was appropriate (IDF 187), and described the one CWI question cited in his findings on this issue as a “closed-ended question” (*see* IDF 96), it is not clear that he intended to except the response to this one CWI question from his general conclusion that Kraft’s CWI copy test is not probative.

ers take the implied message urged upon us by complaint counsel, we will require extrinsic evidence before concluding that the ads convey the alleged implication. *See Thompson Medical*, 104 FTC at 812; *Sterling Drug, Inc.*, 102 FTC 395, 756-57 (1983).

In this instance, we find the extrinsic record evidence insufficient to support a conclusion that the imitation superiority claim is conveyed by the “Class Picture/5 ounce” ads. Both complaint counsel and the ALJ’s findings cite results taken from Kraft’s CWI copy test which indicate that 45 percent of the [19] people surveyed took an imitation superiority message.¹⁸ *See* CAB at 73-74; 12/7/89 Transcript of Oral Argument at 48-49; IDF 96. However, we are unable to conclude that this evidence is, on balance, reasonably reliable.¹⁹ We also are not persuaded by complaint counsel’s marketing expert, and find her opinion to be [20] inadequately supported with respect to this issue.²⁰ *See Thompson Medical*, 104 FTC 790 & n.11.

We therefore, conclude that the milk equivalency claim is conveyed

¹⁸ The CWI copy test surveyed forty participants in one city. CX 54 G-H; CX 36 B. Participants were asked if there was anything “said or shown [in the ad] that makes you think KRAFT Singles is different from other brands of individually wrapped cheese slices.” IDF 96; *see* CX 58 Z-3. According to the CWI’s coding methodology, 45 percent of the participants said that what differentiated Kraft Singles was that they contain more calcium than other individually wrapped cheese slices. IDF 96; *see* CX 57 Z-32. Respondent argues that the 45 percent figure is not an accurate reflection of the messages consumers took from the tested ad, and that it overstates the actual response rate based on the underlying data. RAB 58 n. 45; *see* Simon Tr. 2035-36, 2039; RX 151; RX 128 Z133-Z237; Simon Tr. 2116-18.

¹⁹ No measures were used in the CWI survey to correct for pre-existing or inherent survey bias. *Compare Thompson Medical*, 104 FTC at 807-08 (control measures used with both aided and unaided recall questions to minimize bias). The apparent 45 percent response rate suggesting that an imitation superiority message was taken by survey participants may well be attributable to consumers’ prior exposure to the “Skimp” ads, which did contain an explicit comparison to imitation slices, and which were disseminated extensively prior to the “Class Picture/5 ounce” ads. *See, e.g.*, CX 34C; CX 136R. We note that the control ads used in complaint counsel’s Market Opinion Research (“MOR”) survey also received relatively high response rates in support of an imitation superiority message. *See* IDF 126, 131; CX 196, pp. 51, 84. The MOR survey results that we find probative, however, are the net results derived from the test and control ads together. *See* notes 13 & 15, *supra*; *see also* ID 69; IDF 127-31.

²⁰ Dr. MacInnis interpreted the “Class Picture/5 ounce” ads as implying that Kraft Singles have more calcium than competing cheese slices. IDF 66; Tr. 117-19. As the basis for her copy analysis, Dr. MacInnis cited both “pragmatic implications” theory, which concerns linguistic constructions that automatically cause listeners to hear more than what is directly asserted, and the corollary concept of “implied slur.” Tr. 78, 81, 118-19. According to Dr. MacInnis, by stating that Kraft Singles are concentrated with calcium, the implication is that competing slices are not concentrated with calcium. Tr. 118-19. *See also* Tr. 163-64. However, given the absence of any explicit comparative elements from the “Class Picture/5 ounce” ads, we are unwilling to read an imitation superiority implication into these ads without better evidence that reasonable consumers would be likely to take such a message. *See, e.g., Bristol-Myers Co.*, 102 FTC 21, 326-27 (1983). Dr. MacInnis cited the CWI copy test results, discussed above, as corroborating her analysis with respect to the television commercial version of “Class Picture/5 ounce.” Tr. 119, 168-69; *see* Tr. 275, 329. However, nothing in her testimony alleviates our concerns about the reliability of the CWI survey evidence, and thus it does not provide her opinion with adequate support. Dr. MacInnis also referred to empirical research supporting the general principle of “implied slur” in her analysis of the “Class Picture/5 ounce” ad copy. *See* Tr. 80, 83-84, 139-40. However, in this case we find her broad references to such research to be an insufficient basis on which to establish that application of this general principle is appropriate in this particular instance. *See* Tr. 252-68, 275.

by both the “Skimp” ads and the “Class Picture/5 ounce” ads, and that the imitation superiority claim is conveyed only by the “Skimp” ads.

C. Kraft's First Amendment Arguments

In addition to the First Amendment arguments discussed earlier in connection with the type of evidence required, respondent also contends that complaint counsel's theory of implied deception violates its First Amendment rights because certain evidence presented in this case would also classify as deceptive several other Kraft Singles ads that were not challenged in this proceeding. Respondent argues that the underlying findings of liability based on the record fail to distinguish meaningfully between lawful and unlawful advertising, thus violating First Amendment principles. RAB at 23, 31-32, 44-49; RRAB at 18-22, 56-57. Specifically, Kraft cites to testimony by complaint counsel's expert, Dr. MacInnis, that two [21] unchallenged ads (“Shopping Dad” and “Tell Me When”), neither of which mention calcium, are deceptive because consumers could infer a milk equivalency claim from the reference to milk made in those ads. RRAB at 18-19; RAB at 23. Kraft also argues that results from complaint counsel's MOR copy test show that the unchallenged control ad used (“Taste of Cheese”) conveys both of the implied calcium claims even though it does not mention milk, calcium, or competing products, and cites testimony by complaint counsel's experts in support of this argument. RAB at 25, 32; RRAB at 20-22. Finally, Kraft argues that the ALJ's apparent reliance on the testimony of Dr. MacInnis to find that the noncomparative “Class Picture/5 ounce” ads convey the imitation superiority claim similarly fails to distinguish meaningfully between deceptive and non-deceptive advertising. IDF 66; *see* RAB at 22-23; RRAB at 19-20.

Respondent's arguments, to the extent based on record evidence relating to advertisements not challenged in this proceeding, are without merit. It is no defense to a finding of deception in this case to assert that unchallenged ads might also be deceptive. The Commission is not obligated to challenge in a single proceeding all of the deceptive practices in which a respondent may be engaged. *See, e.g., Moog Industries, Inc. v. FTC*, 355 U.S. 411 (1958). Moreover, it would be inappropriate to speculate on the likelihood that we would find the unchallenged ads to which respondent refers to be deceptive, since a full record on the potential of those ads to deceive has not been

developed and is not now before us. Respondent's argument that the findings in this case relating to the challenged "Class Picture/5 ounce" ads are unconstitutionally overbroad is also without merit in light of our own findings and conclusions regarding liability with respect to that ad, as discussed in the preceding section.

III. WERE THE CLAIMS LIKELY TO MISLEAD REASONABLE CONSUMERS?

The standard by which advertising is judged is whether it is likely to mislead reasonable consumers; proof of actual deception is not required. *Cliffdale*, 103 FTC at 165; *Deception Statement*, 103 FTC at 176. In this case, having found that certain implied calcium claims are conveyed by the challenged ads, and having adopted the ALJ's findings and conclusions that such claims are false and unsubstantiated, we also conclude that such claims are likely to mislead consumers acting reasonably under the circumstances.

Despite respondent's assertions (*see* RAB at 21-22 & n.21; RRAB at 16-18 & n.14), we agree with the ALJ that it is reasonable to presume that a significant number of consumers are not aware that the calcium in five ounces of milk is reduced or lost during the processing of Kraft Singles, and that they are also not aware that imitation cheese slices may be fortified with [22] calcium.²¹ ID at 65 & n. 6; *see* IDF 70. The implied calcium claims in this case are credence claims because consumers cannot readily determine by purchasing and consuming Kraft Singles whether or not they are in fact providing the amount of calcium benefit implicitly promised.²² *Thompson Medical*, 104 FTC at 834; *American Home Products Corp.*, 98 FTC 136, 370 (1981), *aff'd*, 695 F. 2d 681 (3d Cir. 1982). Therefore, reasonable consumers would not be aware of these facts.

IV. WERE THE CLAIMS MATERIAL?

The Commission will find an advertisement deceptive if there is a

²¹ In appropriate circumstances, the Commission can presume that consumers are likely to reach false beliefs about a product because of an omission. *Deception Statement*, 103 FTC at 177. We also agree that the record does not support respondent's assertion that consumers generally would know that processed foods do not contain all of the same nutrients in the same amounts as the ingredients from which they are made (ID at 65; *see* RRAB at 16-17), or that a significant number of consumers were aware at the time the ads were disseminated that imitation cheese slices may be fortified with calcium (ID at 65 & n.6; IDF 70).

²² Nor do we find it reasonable to expect consumers to ascertain the accuracy of respondent's calcium claims by comparing the nutrient information provided on the labels of milk, Kraft Singles, and imitation and substitute slices, even though it may be technically possible to do so. *See American Home Products Corp.*, 98 FTC 136, 370 (1981), *aff'd*, 695 F. 2d 681, 688 (3d Cir. 1982) (disclosure on product label did not cure deception in advertising). A comparison between the calcium content of Kraft Singles and milk would require considerable calculation since the nutrient information on milk cartons is not based on a five ounce serving. *See* CRB at 17 n. 16. Kraft's materiality survey shows that 98 percent of the survey participants did not know how much calcium is contained in five ounces of milk. RX 82E, Z-2.

claim or omission that is likely to mislead consumers acting reasonably under the circumstances, and the claim or omission is material. *Thompson Medical*, 104 FTC at 816; *Cliffdale*, 103 FTC at 164-165; *Deception Statement*, 103 FTC at 175-76, 182-83. A “material” misrepresentation is one that involves information that is important to consumers, and that is therefore likely to affect a consumer’s choice of or conduct regarding a product. Proof of actual consumer injury is not required. *Cliffdale*, 103 FTC at 166 n. 11; *Deception Statement*, 103 FTC at 183. The Commission presumes several types of claims to be material: express claims; implied claims where there is evidence that the seller intended to make the claim; and claims [23] or omissions that significantly involve health, safety, or other areas with which reasonable consumers would be concerned, *e.g.*, those pertaining to a product’s purpose, safety, efficacy, or cost. *Thompson Medical*, 104 FTC at 816-17; *Deception Statement*, 103 FTC at 182-83. In addition to information that is presumptively material, the Commission may also find materiality based on evidence that the claim or omission is likely to be considered important by consumers. *Deception Statement*, 103 FTC at 183.

The ALJ concluded that the calcium claims in the challenged advertisements are significant health claims and thus presumptively material. IDF 188, 190; ID at 70. He also cited as probative, *inter alia*, evidence that the calcium claims were intended to induce consumers to purchase Kraft Singles, and that Kraft believed that the challenged ad copy contributed in some degree to the increased sales of the product. IDF 90-91, 189, 191-93; *see also* IDF 23, 27, 87. He rejected survey evidence that Kraft introduced to rebut the materiality of the claims, finding that the survey had not presented participants with sufficient response options to reveal all of the ways in which the implied claims at issue might affect consumer conduct with respect to Kraft Singles or alternative products.²³ IDF 194-210; ID at 70-71.

Respondent argues that the ALJ erred by basing his determination on a presumption that calcium claims generally are material, rather than explaining why the specific calcium claims at issue are material. *See* RAB at 61-63; RRAB at 67-70. We agree that the ALJ did not explicitly discuss why the “milk equivalency” and “imitation superiority” claims are independently material. Accordingly, we examine the

²³ The ALJ found that another significant fault in the survey was its failure to tell survey respondents that the ads made a claim of milk equivalency, thus providing no basis for a conclusion as to the impact of the claim on consumer behavior. IDF 207.

issue ourselves. We conclude that each of the implied calcium claims in this case is material.

A. Materiality of Milk Equivalency Claim

We find that the milk equivalency claim is material. We agree with the ALJ that the results of Kraft's materiality survey confirm the importance of calcium as a factor in consumers' purchase decisions with respect to the product. Of the survey participants, 71 percent rated "a source of calcium" as an "extremely" or "very important" factor in their decision to buy [24] Kraft Singles.²⁴ IDF 190; *see* RX 82W. Other evidence shows that comparative information about the calcium benefit of products would likely have been considered particularly important to consumers with calcium deficiency concerns, *e.g.*, mothers with children, pregnant women, and postmenopausal women. CX 41C; *see also* CX 78A; Recker Tr. 594-99, 726-30. For example, a January 1985 Kraft consumer survey shows that 52 percent of women surveyed who were purchasers of American cheese slices, and 40 percent of total survey respondents, reported significant personal concern about getting enough calcium. CX 137F-H; CX 33A; CX 303C.

The record shows that Kraft designed the challenged ads to capitalize on consumers' calcium deficiency concerns. *See* CX 32C. The target audience for both the "Skimp" and "Class Picture/5 ounce" ads was identified as female homemakers (aged 25-54) with children. CX 6J; CX 129E. The "Class Picture" ad copy, in particular, played upon the likely concerns of mothers with school-age children. *See* CX 54C; CX 56A. A Kraft analysis conducted to substantiate claims made in an earlier, unchallenged version of the "Class Picture" ads points out that girls aged 9-11, for example, require an additional 92 mg. of calcium per day on average to reach their RDA of calcium. CX 177E; CX 178D. Based on Kraft's analysis, we observe that the 60 mg. difference between the calcium content of five ounces of milk and that of a $\frac{3}{4}$ -ounce slice of Kraft Singles would account for most of the additional calcium needs of girls in this age group if a five ounce glass of milk were substituted for a slice of Kraft Singles daily. *Accord* Recker Tr. 603-04; CX 327, p. 72. Inasmuch as the calcium equivalency claim would be difficult for consumers to evaluate, consumers would likely rely on the accuracy of the nutritional

²⁴ About half of all American households purchase Kraft Singles, the largest selling product in the individually wrapped process cheese food slices category. IDF 13.

information implied in the ads. We therefore conclude that the misleading milk equivalency claim was a health claim of importance to reasonable consumers, particularly those [25] segments targeted by the ads.²⁵ *Deception Statement*, 103 FTC at 182 n. 46; see *Cliffdale*, 103 FTC at 172, 173.

We find further evidence of materiality in certain conduct by Kraft which suggests that Kraft itself considered that the challenged milk equivalency ad copy helped to induce consumer purchases of Kraft Singles. In October 1985, the Center for Science in the Public Interest ("CSPI"), a consumer group, informed Kraft that it believed the "Skimp" ads conveyed the message that a slice of Kraft Singles had the same amount of calcium and other nutrients as five ounces of milk, and asked that the ads be changed. IDF 88. The chief marketing employee for Kraft Singles recommended that the "Skimp" ad copy not be changed in response to CSPI's complaint, stating as one reason that "[t]he Singles business is growing for the first time in four years due in large part to the copy." CX 63B; see IDF 191. Kraft eventually made a slight modification to the challenged "Skimp" ad copy, as discussed earlier, but this change was not aired until January 1986.

In November 1985, an earlier, unchallenged version of the "Class Picture" ads was introduced on a regional test basis to determine its viability as an alternative to the "Five Ounces of Milk" strategy.²⁶ CX 50; CX 6N-P; CX 67A. This version, known as "Class Picture/4 times" (or "Class Picture/I"), states that "ounce for ounce, Kraft Singles have over four times more calcium than milk," which is a true claim: one ounce of Kraft Singles has at least 4.7 times the calcium of one ounce of milk. [26] CX 178C; CX 98. Subsequently, Kraft developed a version of "Class Picture" which incorporated the "five ounces of milk" message. See CX 6 Z-1. According to contemporaneous Kraft documents, both versions of "Class Picture" were intended to communicate that Kraft Singles are good tasting and a

²⁵ According to respondent, the testimony of two marketing experts that consumers would always state a preference for a slice of Kraft Singles with 100 percent of the calcium of five ounces of milk over one with 70 percent, all other things being equal, says nothing about whether the difference between these amounts actually matters to consumers. RRAB at 74; see Stewart Tr. 1176-78; Jacoby Tr. 3664. We find, however, that in the circumstances of this case, an implicit 30 percent exaggeration of the calcium benefit in Kraft Singles is sufficiently likely to have affected consumers' choices with respect to the product to be considered material. See Recker Tr. 603-04, 758; CX 327, p. 72.

²⁶ An October 1985 "Creative Review" by J. Walter Thompson stated that "CSPI & competitive complaints have repeatedly threatened long-term use of '5 oz. of milk' claim." CX 6Z. A 1986 "Creative Strategy" stated that "[a]lternative strategy and copy is needed as a back-up to the currently contested advertising," and indicated that the regional test of "Class Picture/4 times" was to "determine viability of this 'non-5 oz.' copy in the event that use of '5 oz.' claim be discontinued." CX 11 B, C, E.

good source of calcium, but the “Class Picture II” (5 oz.) version “[d]irectly links calcium claims to 5 oz. of milk claim of the current national campaign.”²⁷ IDF 90; *see* CX 36B; CX 56A.

In January and February 1986, respectively, the FTC and the California Attorney General’s Office notified Kraft that investigations had been initiated to determine, *inter alia*, whether Kraft’s ads conveyed the milk equivalency claim. IDF 88; *see* CX 286, CX 166. While copy tests conducted in late 1985 (on “4 times”) and early 1986 (on “5 ounce”) indicated that both versions of “Class Picture” were acceptable alternatives for meeting Kraft’s marketing goals (*see* CX 36E), Kraft ultimately selected the “Class Picture/5 ounce” version for national dissemination in June 1986, explaining that this was done to avoid consumer confusion. Feldmann Tr. 1524; *see* CX 62 Z-9, Z-13. Kraft also did not adopt any of several other versions of “Class Picture/5 ounce” print and broadcast copy described in a J. Walter Thompson memorandum as “acceptable options which do not imply nutritional equivalence,” even though there appeared to be some recognition, reflected in contemporaneous Kraft documents, of a possible “cause-effect relationship between ‘5 oz. milk’ and ‘calcium.’” CX 8A; *see also* CX 42; CX 84. We find it reasonable to infer from Kraft’s persistence in using the challenged ad copy under these circumstances, and in making only minor modifications, that Kraft believed this copy contributed to consumer purchases of Kraft Singles.

B. Materiality of Imitation Superiority Claim

We also find that the imitation superiority claim is material. We agree with the ALJ that there is evidence suggesting that Kraft intended the “Skimp” campaign to convey an imitation superiority message.²⁸ IDF 91, 189. We find this [27] evidence sufficient to allow

²⁷ A 1986 “Creative Strategy” stated as objectives: “[c]ontinue to realize benefits of ‘5 oz. of milk’ advertising,” and “[m]aximize impact of ‘calcium/5 oz.’ message on a national basis.” CX 11C.

²⁸ For example, a December 3, 1984 Kraft Marketing Research “Post Completion Summary” states:

ACTIONS TAKEN (PLANNED) BASED ON RESEARCH: The “5 oz. of milk” theme will continue to provide the primary support for Kraft Singles differentiation. The next phase creative development will link the end benefits of taste and nutrition to the 5 oz. of milk comparative.

CX 120. A subsequent “Request for Marketing Research,” dated January 4, 1985, identifies as the objective of the research on the new “Skimp” commercial:

Measure the breakthrough and communication of the taste, nutrition benefits linked to the 5 oz. of milk reason why. The spot should communicate calcium as the key nutrition element, and more milk makes ‘em good as the summary line. Retention of 5 oz. of milk as a measure of superiority is also key.

CX 122A. A March 28, 1985 Kraft Singles “Creative Presentation” states:

Kraft Singles is the premium-priced brand in the IWPS category. However, it is not clear to consumers what the difference is between Kraft and private label or imitation brands.

(footnote cont’d)

us to presume the materiality of this claim.²⁹ We also agree that materiality is shown by evidence that the challenged ad copy led to increased sales, and find that there is sufficient evidence to infer that the imitation superiority message contributed to the increase in consumer purchases of Kraft Singles at a time when that product was priced about 40 percent higher than imitation slices. [28] *See, e.g.*, IDF 190-192; *Deception Statement*, 103 FTC at 183 & n. 57; *American Home Products Corp.*, 98 FTC 136, 369-70 (1981), *aff'd*, 695 F. 2d 681 (3d Cir. 1982).

We have considered the results of Kraft's materiality survey, and agree with the ALJ's findings that it is insufficiently probative to rebut the evidence in support of the materiality of the milk equivalency claim.³⁰ IDF 194-210; *see* RX 82. In particular, we agree that the limited response options offered to survey participants did not adequately elicit all of the ways in which consumer conduct with respect to the product might be affected by the implied claims at issue. IDF 203, 205, 207-10.

V. SCOPE OF RELIEF

Having found that respondent's ads convey material claims that are false, unsubstantiated and likely to mislead consumers acting reasonably in the circumstances, we affirm the ALJ's conclusion that these ads violate Sections 5 and 12 of the Federal Trade Commission Act, and issue the attached order. The order we adopt differs significantly from the order entered by the ALJ in that we broaden coverage in Part I from "individually wrapped slices of pasteurized process, imitation or substitute cheese products" to "any product that is a cheese, related cheese product, imitation cheese, or substitute

Our current advertising addresses this situation by seeking to convince consumers that Kraft Singles is worth its premium price because of the superior nutritional value in its "5-oz. of milk in every slice."

CX 32B.

²⁹ *See Deception Statement*, 103 FTC at 182 & n. 51, citing *American Home Products Corp.*, 98 FTC 136, 368-69 (1981):

The very fact that AHP sought to distinguish its products from aspirin strongly implies that knowledge of the true ingredients of those products would be material to purchasers.

A comparative claim such as this one, which not only describes the contents of the advertised product but also distinguishes that product from competing products, seems particularly likely to be material.

³⁰ Respondent argues that its materiality survey also demonstrates that the imitation superiority claim is not material because it shows that survey participants ranked calcium only seventh out of nine characteristics in terms of importance to their decision to purchase Kraft Singles, and thus, that a calcium superiority claim would not be material to consumers. RAB at 66, 69; RRAB at 77-78. We agree with the ALJ that the survey results confirm the importance of calcium to consumers in their purchase decisions since over 71% of the survey participants rated "a source of calcium" as an "extremely" or "very important" factor in their purchase decision. IDF 190.

cheese,” as proposed in the Notice order.³¹ The final order prohibits misrepresentations [29] about the absolute or comparative content of calcium or any other nutrient in the covered products, and prohibits any such nutrient content claim that is not substantiated by competent and reliable scientific evidence. We are persuaded that an order extending not only to Kraft Singles, but also to Kraft’s other cheeses and cheese-related products, is warranted by the record in this case. We disagree that the narrower order entered by the ALJ is sufficient. We therefore grant complaint counsel’s appeal.

The ability of the Commission to issue orders containing such fencing-in requirements is well established. *See, e.g., FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 391-92 (9th Cir. 1982); *Jay Norris, Inc. v. FTC*, 598 F.2d 1244, 1250 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979); *ITT Continental Baking Co.*, 532 F.2d 207, 223 (2d Cir. 1976); *Litton Industries, Inc.*, 97 FTC 1, 78-80 (1981), *aff’d*, 676 F.2d 364 (9th Cir. 1982). The Commission has wide latitude in fashioning appropriate orders to prevent inventive respondents from pursuing a course of conduct similar to that found to have been deceptive in the past. *FTC v. National Lead Co.*, 352 U.S. 419, 429 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946). However, the Commission’s discretion is subject to two constraints. First, to assure that the order is understood by the violator, the order’s provisions must be sufficiently clear and as precise as circumstances permit. *FTC v. Colgate-Palmolive Co.*, 380 U.S. at 393; *American Home Products Corp. v. FTC*, 695 F.2d 681, 705 (3d Cir. 1982). Second, there must be a “reasonable relationship” between the remedy and the unlawful conduct found to exist. *FTC v. Colgate-Palmolive Co.*, 380 U.S. at 394-95; *Jacob Siegel Co. v. FTC*, 327 U.S. at 613; *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 392 (1959); *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952); *Jay Norris, Inc. v. FTC*, 598 F.2d at 1250-51; *Avnet, Inc. v. FTC*, 511 F.2d 70, 79 (7th Cir. 1975). To ensure that any order requirement bears a reasonable relationship to the unlawful conduct found to exist, the Commission considers the deliberateness and seriousness of the violation, the degree of transferability of the violation to other products, and any history of prior violations.

³¹ The order we issue differs from the ALJ’s order in the following other respects: In Parts II, III, and IV of the order, we have made several language changes for clarification purposes. We have also modified the language of Part IV to require Kraft to provide a copy of the order to each of its operating divisions, and to all distributors of any products covered by the order, within thirty days after the order becomes final. Finally, Part V of the order has been amended to require Kraft to file a compliance report with the Commission within sixty days after the order becomes final, as well as at such other times as the Commission may require.

Thompson Medical, 104 FTC at 833; *see also* *Sears, Roebuck & Co. v. FTC*, 676 F.2d at 391-92; *Litton Industries, Inc.*, 676 F.2d at 370-71.

The ALJ found that while respondent's misrepresentations were not an isolated occurrence, they were an "unintentionally deceptive response to significant competitive pressures." As the record did not evidence past deception, he concluded that there was no persistent, long-term pattern of deceptive advertising. ID at 71-72. We disagree with the ALJ's analysis, and conclude that the violations in this case were sufficiently serious and deliberate to warrant the broader product coverage we adopt in the attached order. [30]

The seriousness of the violations in this case is evidenced by the size and duration of Kraft's misleading advertising campaign. The challenged ads were widely disseminated in print and broadcast media for two and one-half years at a cost of more than \$15 million annually. IDF 23, CX 34C; *see also* IDF 24-25, 29-36, 40-42; *Thompson Medical*, 104 FTC at 833 & n. 79; *American Home Products Corp.*, 98 FTC 136, 401 (1981), *aff'd*, 695 F.2d 681, 707 (3d Cir. 1982). The seriousness of the violation is also affected by the fact that consumers could not readily judge the truth or falsity of the implied calcium claims. *Thompson Medical*, 104 FTC 834.

Deliberateness is evidenced by Kraft's persistence in running the challenged ad copy despite repeated warnings from various outside sources that the copy might be implicitly misleading. *See Thompson Medical*, 104 FTC at 834-35. In early 1985, prior to airing the "Skimp" commercials, the ABC television network requested substantiation for the "milk and calcium comparisons for Kraft Singles and imitation slices" that were conveyed in the "Skimp" script submitted for broadcast clearance. IDF 93-94. The record shows that Kraft's response to ABC's repeated requests for substantiation was inadequate and misleading (*see* IDF 93, 94, 235), and that a contemporaneous J. Walter Thompson legal memorandum acknowledged a possible imitation superiority claim and recommended that substantiation efforts be undertaken. IDF 95; CX 283; *see also* CX 165A; CX 226. Additional warnings followed in October 1985 from the Center for Science in the Public Interest, in January 1986 from the Federal Trade Commission, and in February 1986 from the California Attorney General's Office. IDF 88. At the very least, this pattern of warnings suggests that Kraft knew or should have known that more investigation needed to be done to determine whether its ads were

conveying misleading messages, notwithstanding Kraft's initial internal assessment that they were not. Moreover, although respondent was clearly aware of acceptable alternatives to the misleading ad copy, it declined to adopt them.³² See discussion *supra* at Part IV.

Respondent argues that it should be entitled to rely on its own internal analyses of the results from its pre-dissemination consumer surveys. Kraft claims that it reasonably believed, based on its internal analyses, that the challenged ads conveyed [31] no deceptive messages.³³ RAB 56-59, 70-78; RRAB at 56-62; see ID 71; IDF 80, 81, 84. However, respondent received repeated warnings from outside sources throughout the challenged ad campaigns, which should at least have alerted it that further inquiry would be appropriate, *e.g.*, copy testing designed to measure whether its ads conveyed the deceptive claims that were alleged. See, *e.g.*, *Thompson Medical*, 104 FTC at 835-36 & n.82. While Kraft did take some steps in response to the allegations concerning the ads (see IDF 28), it made no attempt to determine whether those steps effectively corrected any implicitly deceptive messages. Feldmann Tr. 1710. See, *e.g.*, *Thompson Medical*, 104 FTC at 836. We find that Kraft's reliance on its internal evaluation of its pre-dissemination copy test results was not sufficient in the circumstances.

Finally, we find that the violations in this case are readily transferable to other Kraft cheese products, given the general similarity between Kraft Singles and the additional cheese products that would be covered under the final order.³⁴ See *Thompson Medical*, 104 FTC at 836; *American Home Products*, 98 FTC at 405. Accordingly, this order will apply to "any product that is a cheese,

³² We reject, as a ground for limiting the scope of the order in this case, the ALJ's conclusion that "Kraft could be liable in the future for implied claims which it never intended to make, and could not have predicted it could be found to have made," as well as the evidentiary basis upon which that conclusion appears to rest. See ID 72.

³³ Neither the lack of intent nor the existence of good faith is a defense to a Section 5 violation; advertisers are liable for materially misleading claims or omissions that their advertisements convey to reasonable consumers, even if this is done inadvertently. See *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 & n. 5 (D.C. Cir. 1977); *Southwest Sunsites, Inc.*, 105 FTC 7, 164-65 (1985), *aff'd*, 785 F.2d 1431 (9th Cir.), *cert. denied*, 479 U.S. 828 (1986).

³⁴ Respondent's other cheeses and cheese products include the Cracker Barrel brand cheeses, Philadelphia Brand Cream Cheese, and Velveeta Pasteurized Process Cheese Spread. IDF 2. Respondent was on notice of the potential scope of product coverage we now adopt through the Notice Order attached to the Commission's complaint, and was also aware, through complaint counsel's proposed findings and briefs filed in this proceeding, that the rationale underlying the "ready transferability" argument is an asserted general similarity among Kraft cheeses and cheese products. Respondent has therefore had numerous opportunities, including at oral argument, to dispute the accuracy of this factual assertion, but has not provided any evidence indicating a pertinent distinction that would justify excepting any of its cheeses or cheese products from the order.

related cheese product, imitation cheese, or substitute cheese.” We do not find that the lack of a prior history of violations of this type outweighs the factors in support of such product coverage. [32]

Respondent argues that any order entered in this case would chill and thus unconstitutionally restrict nondeceptive commercial speech. RAB at 70-78; RRAB at 56-62. We find these arguments to be without merit. First Amendment protections do not extend to commercial speech found to be false and deceptive. *Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 110 S. Ct. 2281, 2287 (1990); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 68-69 (1983); *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of New York*, 447 U.S. 557, 563-64 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976). In this case, the only categories of commercial speech prohibited under the order would be advertising that is either expressly or implicitly false or deceptive, *i.e.*, unprotected speech that the government is free to restrict. We find that the record in this case establishes a reasonable fit between the violations found and the scope of the order’s prohibitions.³⁵ See *Board of Trustees of SUNY v. Fox*, 109 S. Ct. 3028, 3033-35 (1989) (First Amendment does not require use of “least restrictive means” but merely requires that there be a “‘fit’ between the legislature’s ends and the means chosen to accomplish those ends.”)

VI. CONCLUSION

For the reasons set forth above, we affirm the Administrative Law Judge’s finding of liability, and modify the initial decision as described. An appropriate order is appended.

³⁵ Also baseless is respondent’s concern over possible “astronomical” civil penalties for advertising claims covered by the order that it could not have anticipated would be found misleading. RAB at 49, 71. In any action to enforce the order, the Commission would have the burden of proving that the challenged advertisement violates the order’s prohibitions. Furthermore, in considering the appropriate amount of civil penalties on finding liability, a court could consider such factors as the willfulness of the violation and the good or bad faith of the defendant advertiser. Whatever remaining uncertainty the respondent faces with respect to its future conduct is no different from the uncertainty faced by any party under order. See *FTC v. Colgate-Palmolive Corp.*, 380 U.S. 374, 393 (1965).

APPENDIX A - "SKIMP"

[Selected television and print advertisements]

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

**TELEVISION COMMERCIAL**

CODE NUMBER: KRPS4231 CLIENT: Kraft, Inc. PRODUCT: Process Singles 1/25/85 cal	TITLE: "SKIMP/BLUE EYES" LENGTH: :30 STATUS: AS PRODUCED
VIDEO CU OF LITTLE GIRL'S FACE. CU OF GIRL PICKING UP PACKAGE OF KRAFT SINGLES. CU OF PITCHER POURING MILK INTO GLASS. IT ONLY FILLS UP PARTLY. MILK CONTINUES TO POUR. IT FILLS UP GLASS FARTHER. SUPER: MILK AMOUNTS BASED ON CHEESE CONTENT KID EATS SINGLES SLICE. BI-PACK OF KRAFT PACKAGE & LITTLE GIRL EATING. © 1985 Kraft, Inc. DISS TO CU OF MILK POURING INTO GLASS WHICH ANIMATES BACK INTO KRAFT PACKAGE. DISS TO KID WITH PACKAGE. SUPER: MORE MILK MAKES 'EM GOOD.	AUDIO LADY(VO): I admit it. I thought of skimping. Could you look in those big blue eyes and skimp on her? So I buy KRAFT Singles. Imitation Slices use hardly any milk. But KRAFT has five ounces per slice. Five ounces. So her little bones get calcium they need to grow. No, she doesn't know what that big KRAFT means. Good thing I do. SINGERS: KRAFT Singles. More milk makes 'em...more milk makes 'em good. LADY(VO): Skimp on her? No way.

CX-62 C-9208

10754



PROCESS SINGLES

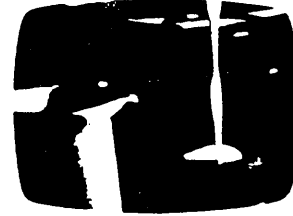
"Skimp/Blue Eyes" :30



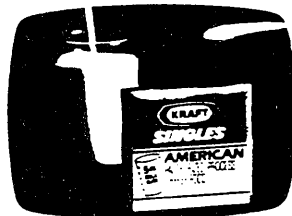
LADY (VO): I admit it. I thought of skimping. Could you look in those big blue eyes and skimp on her?



So I buy KRAFT Singles.



Imitation Slices use hardly any milk.



But KRAFT has five ounces per slice. Five ounces.



So her little bones get calcium they need to grow.



No, she doesn't know what that big KRAFT means. Good thing I do.



SINGERS: KRAFT Singles. More milk makes 'em...



more milk makes 'em good.



LADY (VO): Skimp on her? No way.

KRPS4231 MARCH, 1985

CX-62 Z-72-
9205

10849

How could I shortchange my shortstop?



Kraft Singles have five ounces of milk per slice, so I don't have to.

Because Kraft Singles give my kids great nutrition like calcium and protein. Sure, I could buy imitation slices. But some use hardly any milk. Could I shortchange my little shortstop? No way.

Kraft Singles. More milk makes 'em good.



Shortstop 143141

Better Homes & Gardens 2/85, 5/85
 Family Circle 3/19
 Good Housekeeping 3/85
 McCall's 5/85
 Redbook 3/85
 Parents 3/85
 Southern Living 2/85, 5/85
 True Story 4/85
 Women's Day 4/2

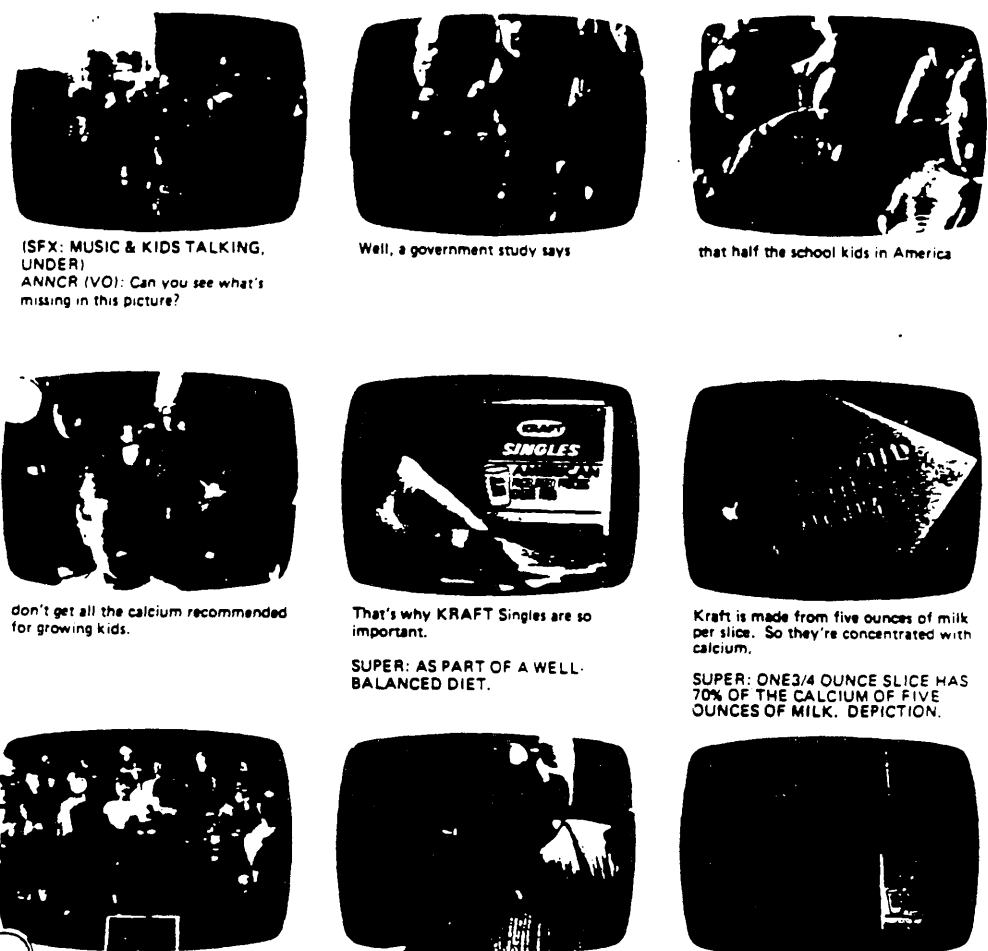
CX 62 2-33
 9201

10810

APPENDIX B - "CLASS PICTURE/5 OUNCE" ("CLASS PICTURE/II")

[Selected television and print advertisements]

KRAFT **PROCESS SINGLES**
 'Class Picture/II' :30
 (Five ounces Version)



(SFX: MUSIC & KIDS TALKING, UNDER)
 ANNCR (VO): Can you see what's missing in this picture?

Well, a government study says

that half the school kids in America

don't get all the calcium recommended for growing kids.

That's why KRAFT Singles are so important.

SUPER: AS PART OF A WELL-BALANCED DIET.

Kraft is made from five ounces of milk per slice. So they're concentrated with calcium.

SUPER: ONE 3/4 OUNCE SLICE HAS 70% OF THE CALCIUM OF FIVE OUNCES OF MILK. DEPICTION.

Calcium the government recommends for strong bones and healthy teeth.

PHOTOGRAPHER: Say cheese!
 KIDS: Cheese!

ANNCR (VO): Say KRAFT Singles. 'Cause kids love KRAFT Singles, right down to their bones.

CX-275 I9208

KRPS6510 FEBRUARY, 1987

J. WALTER THOMPSON COMPANY

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



TELEVISION COMMERCIAL

CODE NUMBER: KRPS6510
CLIENT: Kraft, Inc.
PRODUCT: Process Singles
kq 6/2/86

TITLE: "CLASS PICTURE/11"
LENGTH: :30
STATUS: AS PRODUCED

VIDEO

KIDS GETTING THEIR SCHOOL PICTURE TAKEN.

CU OF KRAFT SINGLES PACKAGE.

SUPER: AS PART OF A WELL-BALANCED DIET.

SUPER: ONE 3/4 OUNCE SLICE HAS 70% OF
THE CALCIUM OF FIVE OUNCES OF
MILK. DEPICTION.

TWO SLICES PUT ON BREAD.

DISSOLVE TO KIDS. PHOTO IS TAKEN.
PHOTO OF KIDS IN FRAME WITH PACKAGE IN
FRONT.

AUDIO

ANNCR(VD): Can you see what's missing
in this picture?

Well, a government study says that half
the school kids in America don't get all
the calcium recommended for growing kids.
That's why KRAFT Singles are important.

KRAFT is made from five ounces of milk
per slice. So they're concentrated with
calcium. Calcium the government recommend
for strong bones and healthy teeth.

PHOTOGRAPHER: Say Cheese!

KIDS: Cheese!

ANNCR(VD): Say KRAFT Singles.

'Cause kids love KRAFT Singles, right
down to their bones.

CX-62 2-11-9208 10788

Half of these kids have a deficiency no one can see.



50% of America's children aren't getting their recommended dietary allowance of calcium. A government study has uncovered some startling facts. Half of America's children have diets that don't meet the calcium recommendations of the U.S. Food and Nutrition Board. And that's not good.

Because calcium is essential to your children during their growth years, when bones and teeth are developing rapidly. An adequate calcium level helps keep your child's bones growing straight and sturdy. And helps make sure

new teeth grow in strong.

Kraft Singles are an excellent source of calcium. In fact, **Kraft Singles** are made from 5 ounces of milk per 1/2 ounce slice, so they're concentrated with calcium.*

Include **Kraft Singles** as a part of your children's well-balanced diet. You'll feel better knowing they're getting

calcium recommended for strong bones and healthy teeth.

Kids love Kraft Singles. Right down to their bones.

*The U.S. Food and Nutrition Board recommends that children 9 to 18 years old get 1,300 mg of calcium daily. A 1/2 ounce slice of Kraft Singles provides 1,300 mg of calcium.



JAN 31 1991

172060 Class Picture

Family Circle 4/14

CX 62 2-55-
9208

10832

FINAL ORDER

This matter has been heard by the Commission upon the appeals of respondent Kraft, Inc., and complaint counsel and upon briefs and oral argument in support of and in opposition to the appeals. For the reasons stated in the accompanying opinion, the Commission has determined to affirm the initial decision of the Administrative Law Judge, except as otherwise noted, and enter the following order. Accordingly,

I.

It is ordered, That respondent Kraft, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of any product that is a cheese, related cheese product, imitation cheese, or substitute cheese, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting in any manner, directly or by implication, the calcium content or amount, or the content or amount of any other nutrient of any such product;

B. Misrepresenting in any manner, directly or by implication, the comparative calcium content or amount, or the comparative content or amount of any other nutrient of any such product;

C. Representing in any manner, directly or by implication, the calcium content or amount, or the content or amount of any other nutrient of any such product, unless at the time of making such representation respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. "*Competent and reliable scientific evidence*" shall mean, for purposes of this order, those tests, analyses, research, studies or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession or science to yield accurate and reliable results; or

D. Representing in any manner, directly or by implication, the comparative calcium content or amount, or the comparative content or amount of any other nutrient of any such product, unless at the time of making such representation respondent possesses and relies upon

competent and reliable scientific evidence that substantiates the representation. "*Competent and reliable scientific evidence*" shall mean, for purposes of this order, those tests, analyses, research, studies or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession or science to yield accurate and reliable results.

II.

It is further ordered, That for three (3) years after the last date of dissemination of any representation concerning any product specified in Part I of this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying copies of:

1. All materials that were relied upon by respondent in disseminating such representation; and
2. All test reports, studies, surveys, demonstrations or other evidence in its possession or control that contradict, qualify, or call into question such representation.

III.

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

IV.

It is further ordered, That respondent shall, within thirty (30) days after this order becomes final, distribute a copy of this order to each of its operating divisions, and to all distributors of any product manufactured or marketed by respondent that is specified in Part I of this order.

V.

It is further ordered, That respondent shall, within sixty (60) days

after this order becomes final, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Starek not participating.

IN THE MATTER OF
EMPIRE STATE PHARMACEUTICAL SOCIETY, INC.

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

Docket 9238. Complaint, Mar. 15, 1990—Decision, Feb. 5, 1991

This consent order prohibits, among other things, a trade association from organizing or encouraging any agreement among pharmacy firms to refuse to enter into or to withdraw from any third-party prescription plan. The consent agreement, among other things, also prohibits the respondent, for a period of ten years, from continuing any meeting at which representatives of pharmacy firms exchange information concerning the firms' intention to enter into, refuse to enter into, or withdraw from any third-party prescription plan, and from communicating to any firm any information concerning any other pharmacy firm's intention to enter into, refuse to enter into, or to withdraw from any existing or proposed third-party prescription plan.

Appearances

For the Commission: *Karen G. Bokat* and *Michael D. McNeely*.

For the respondent: *Jerome I. Sager*, *Empire State Pharmaceutical Society*, New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Empire State Pharmaceutical Society, Inc. has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Empire State Pharmaceutical Society, Inc. ("Empire") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office located at 12 West 23rd Street, New York, New York. Respondent Empire is an association of pharmacy owners in the State of New York. In 1986, respondent Empire was affiliated with the Long Island Pharmaceutical Society.