

Complaint

IN THE MATTER OF

KELLOGG COMPANYCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4262; File No. 082 3145
Complaint, July 27, 2009 - Decision, July 27, 2009

This consent order addresses respondent's, Kellogg Company, product called "Frosted Mini-Wheats." According to the complaint, the respondent, a producer of cereal and convenience foods, violated Section 5 of the FTC Act by making false and misleading representations that eating a bowl of Kellogg's Frosted Mini-Wheats cereal for breakfast is clinically shown to improve kids' attentiveness by nearly 20%. The complaint alleges that this claim is false or misleading because the clinical study referred to in respondent's advertisements showed roughly only half the kids who ate Frosted Mini-Wheats cereal showed any improvement after three hours as compared to their pre-breakfast baseline. And, only one in seven kids who ate the cereal improved their attentiveness by 18% or more. The consent order prevents respondent from engaging in similar acts and practices in the future by prohibiting representation, unless the representation is true and non-misleading. In addition to filing compliance reports to the FTC, the Respondent must possess and maintain competent and reliable scientific evidence for its claims.

Participants

For the *Commission*: Kial S. Young

For the *Respondents*: Richard J. Leighton and Richard F. Mann, Keller and Heckman LLP

COMPLAINT

The Federal Trade Commission, having reason to believe that Kellogg Company, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Kellogg Company is a Delaware corporation with its principal office or place of business at One Kellogg Square, P.O. Box 3599, Battle Creek, Michigan, 49016.

Complaint

2. Respondent has labeled, advertised, promoted, offered for sale, sold, and distributed Kellogg's® Frosted Mini-Wheats® cereal to consumers.

3. Kellogg's® Frosted Mini-Wheats® cereal is a "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

4. The acts and practices of respondent, as alleged herein, have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

5. Respondent has disseminated or caused to be disseminated advertisements for Kellogg's® Frosted Mini-Wheats® cereal, including but not limited to the attached Exhibits A through H. These advertisements contain the following statements:

- a. **Television Advertisement:** "Where Were We?"
(Exhibit A - CDROM and storyboard)

Teacher: "Okay. Where were we?"

School Boy: "We were on the third paragraph of page 57 and you were explaining that the stone structures made by Ancient Romans were called aqueducts. And as you were writing that up on the board, your chalk broke. Into three pieces."

Teacher: "Right."

Mini-Wheat: "I've never been so proud."

Female Announcer: "A clinical study showed kids who had a filling breakfast of Frosted Mini-Wheats cereal improved their attentiveness by nearly 20 percent."

On screen: [appears in small, white font, for five seconds, against two different backgrounds, the first of which is in motion]

Complaint

“Based upon independent clinical research, kids who ate Frosted Mini-Wheats cereal for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast. For more information, visit www.frostedminiwheats.com.”

On screen: “20%”

Mini: “Nearly twenty percent? Okay, even I’m impressed by me.”

Female Announcer: “Keeps ‘em full. Keeps ‘em focused.”

b. **Television Advertisement:** “Crossing Guard”
(Exhibit B- CDRom and storyboard)

Mini-Wheat 1: “Ah, the first day of school. New pencils, new books.”

Mini-Wheat 2: “New backpack. Looks good.”

Mini-Wheat 1: “Just trying to look our best.”

Mini-Wheat 2: “It’s going to take more than looks. From what I hear, Ms. Haskins is a toughie.”

Mini-Wheat 1: “Oh, we had a good breakfast, so we’re ready.”

Mini-Wheat 3: “Gonna be another great year, huh guys?”

Mini-Wheat 1: “You bet your eight layers.”

Mini-Wheat 2: “Oh, yeah, long distance high five.”

Mini-Wheat 3: “Whoa.”

Complaint

Female Announcer: “A clinical study showed kids who had a filling breakfast of Frosted Mini-Wheats cereal improved their attentiveness by nearly 20 percent when compared to kids who missed out on breakfast.”

On Screen: [appears in small, white font, for approximately five seconds, against three different backgrounds, the first of which is in motion]

“Based upon independent clinical research, kids who ate Frosted Mini-Wheats cereal for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast. For more information, visit www.frostedminiwheats.com.”

On Screen: “Nearly 20%”

Mini-Wheat 3: “Look, a new kid.”

Female Announcer: “Now available in blueberry muffin. Keeps ‘em full, keeps ‘em focused.”

c. **Product Packaging** (Exhibit C)

Appearing at the top of the front and back panels of Frosted Mini-Wheats cereal boxes:



Appearing at the bottom of the back panel of Frosted Mini-Wheats boxes, in small type:

Complaint

“Based upon independent clinical research, kids who ate Kellogg’s® Frosted Mini-Wheats® cereal for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast. For more information, visit www.frostedminiwheats.com.”

- d. **Internet Website** www.mini-wheats.com (excerpts)
(Exhibit D) From the homepage:

“A breakfast of Frosted Mini-Wheats® cereal is clinically shown to improve kids’ attentiveness by nearly 20%.*

* Based upon independent clinical research, kids who ate Kellogg’s® Frosted Mini-Wheats® cereal for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast.”

From the “News” page:

“The Daily Wheat: Attentiveness Put to the Test:

This is Mini™, reporting from an event that has captured our attention. A team of kids are attempting to show that a breakfast of Kellogg’s® Frosted Mini-Wheats® cereal can help keep them attentive all morning long.

It was apparent from the first test that the Frosted Mini-Wheats® team’s attentiveness was strong. And as the morning progressed, it didn’t waiver.

In the end, a round of enthusiastic cheers could be heard coming from the moms’ viewing section as the 8-layers of whole grain fiber in Frosted Mini-Wheats® cereal proved to improve kids’ attentiveness by nearly 20%*!

* Based upon independent clinical research, kids who ate Kellogg’s® Frosted Mini-Wheats® cereal

Complaint

for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast.”

e. **Other Internet Advertising** (Exhibit E)

Sponsored Link on Google.com - results of search for “frosted mini-wheats”:

“Frosted Mini Wheats®
www.mini-wheats.com Frosted Mini-Wheats® has clinically improved kids’ attentiveness by 20%”

f. **Milk Carton Labels** (Exhibit F)

**Clinically Shown
to Improve Kids'
Attentiveness
By Nearly ...
20%***

* Based upon independent clinical research, kids who ate Kellogg's® Frosted Mini-Wheats® cereal for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast. For more information, visit www.frostedminiwheats.com.

g. **Print Advertising** (Exhibit G)**“3 Strategies to Start Their Day Off Right**

Does your child need to pay more attention in school? Use the following tips to help keep your little ones ahead of the class:

Complaint

* * *

Start the Day with Breakfast.

Kids need an energy boost after a long night's sleep. A recent clinical study showed that a whole grain and fiber-filled breakfast of Frosted Mini-Wheats helps improve children's attentiveness by nearly 20%.*

* * *

* Based upon independent clinical research, kids who ate Kellogg's® Frosted Mini-Wheats® cereal for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast.

For more information, visit www.frostedminiwheats.com."

h. **Press Release** (Exhibit H)**"HELP YOUR KIDS EARN AN "A" FOR ATTENTIVENESS WITH A BOWL OF FROSTED MINI-WHEATS® CEREAL FOR BREAKFAST**

Eating a Bowl May Increase Attentiveness by Nearly 20 Percent

Battle Creek, Mich., March 12, 2008—Today's parents are going to great lengths to help their kids do their best in school. They sign them up for tutoring services, buy special learning software and pack their schedules with enrichment activities. While all of these things are great, it's important that parents not neglect one of the simplest ways to help ensure their kids do their best - a healthy breakfast.

A recent study commissioned by Kellogg helps demonstrate how eating a healthy, nutritious breakfast can help kids stay full and avoid the distraction of mid-morning hunger to help them do their best in school. The study, conducted by an independent research group, shows that eating a

Complaint

breakfast of **Frosted Mini-Wheats®** cereal helped improve kids' attentiveness by nearly 20 percent.*

* * *

Keeping 'Em Full and Focused

Kellogg recently commissioned research to measure the effect on kids of eating a breakfast of **Frosted Mini-Wheats®** cereal. An independent research group conducted a series of standardized, cognitive tests on children ages 8 to 12 who ate either a breakfast of **Frosted Mini-Wheats®** cereal or water. The result? The children who ate a breakfast of **Frosted Mini-Wheats®** cereal had a nearly 20% improvement in attentiveness.

* * *

* Based upon independent clinical research, kids who ate Kellogg's® Frosted Mini-Wheats® cereal for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast. For more information, visit www.frostedminiwheats.com.”

6. Through the means described in Paragraph 5, including the statements contained in the advertisements attached as Exhibits A and C through H, among others, respondent has represented, expressly or by implication, that eating a bowl of Kellogg's® Frosted Mini- Wheats® cereal for breakfast is clinically shown to improve kids' attentiveness by nearly 20%.

7. In truth and in fact, eating a bowl of Kellogg's® Frosted Mini-Wheats® cereal for breakfast is not clinically shown to improve kids' attentiveness by nearly 20%. In the clinical study referred to in respondent's advertisements, for example, only about half the kids who ate Frosted Mini-Wheats® cereal showed any improvement after three hours as compared to their pre-breakfast baseline. In addition, overall, only one in seven kids who ate the cereal improved their attentiveness by 18% or more, and only about one in nine improved by 20% or more. Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

Complaint

8. Through the means described in Paragraph 5, including the statements contained in the advertisement attached as Exhibit B, among others, respondent has represented, expressly or by implication, that eating a bowl of Kellogg's® Frosted Mini-Wheats® cereal for breakfast is clinically shown to improve kids' attentiveness by nearly 20% compared to kids who ate no breakfast.

9. In truth and in fact, eating a bowl of Kellogg's® Frosted Mini-Wheats® cereal for breakfast is not clinically shown to improve kids' attentiveness by nearly 20% compared to kids who ate no breakfast. In the clinical study referred to in respondent's advertisements, for example, kids who ate Frosted Mini-Wheats® had an average of 10.6% better attentiveness three hours later than kids who had skipped breakfast; relatively few kids experienced better attentiveness near the 20% level. Therefore, the representation set forth in Paragraph 8 was, and is, false or misleading.

10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission, this twenty-seventh day of July, 2009, has issued this complaint against respondent.

By the Commission.

Complaint

Exhibit A

Complaint

Exhibit B



Complaint

Exhibit C

Complaint

12 The above will be reported



Complaint

Exhibit D

Complaint

Do not place text in this area

Complaint

Exhibit E

Complaint

12 The above will be reported

Decision and Order

Exhibits F, G, and H**Redacted as****CONFIDENTIAL****DECISION AND ORDER**

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondent with violation of the Federal Trade Commission Act, 15 U.S.C § 45 *et seq.*; and

The Respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order (“consent agreement”), an admission by the Respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of said consent agreement is for settlement purposes only and does not constitute an admission by the Respondent that the law has been violated as alleged in the complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the Respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such consent agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34

Decision and Order

of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Kellogg Company (“Kellogg”) is a Delaware corporation with its principal office or place of business at One Kellogg Square, Battle Creek, Michigan, 49016.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

For purposes of this Order, the following definitions shall apply:

- A. Unless otherwise specified, “respondent” shall mean Kellogg Company, a corporation, its successors and assigns and their officers, and each of the above’s agents, representatives, and employees.
- B. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- C. “Competent and reliable scientific evidence” shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
- D. “Food” shall mean “food” as defined in Section 15 of the FTC Act, 15 U.S.C. § 55.
- E. The term “including” in this Order shall mean “without limitation.”

Decision and Order

- F. The terms “and” and “or” in this Order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Kellogg’s® Frosted Mini-Wheats® cereal, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that:

- A. eating a bowl of Kellogg’s® Frosted Mini-Wheats® cereal for breakfast is clinically shown to improve children’s attentiveness by nearly 20%, or by any other specific percentage; or
- B. eating a bowl of Kellogg’s® Frosted Mini-Wheats® cereal for breakfast is clinically shown to improve children’s attentiveness by nearly 20%, or by any other specific percentage, compared to children who ate no breakfast, unless, at the time it is made, the representation is true and non-misleading.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Kellogg’s® Frosted Mini-Wheats® cereal or any other morning food or snack food, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a trade name or endorsement, about the benefits, performance, or efficacy of such product for cognitive function, cognitive processes, or cognitive health, unless the representation is true, non-misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

Decision and Order

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any morning food or snack food, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

IV.

IT IS FURTHER ORDERED that nothing in this order shall prohibit respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

V.

IT IS FURTHER ORDERED that respondent Kellogg Company, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon reasonable notice make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

Decision and Order

VI.

IT IS FURTHER ORDERED that respondent Kellogg Company, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and other employees having primary responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

IT IS FURTHER ORDERED that respondent Kellogg Company, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VIII.

IT IS FURTHER ORDERED that respondent Kellogg Company, and its successors and assigns, shall, within sixty (60) days after service of this order, and, upon reasonable notice, at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in

Decision and Order

detail the manner and form in which they have complied with this order.

IX.

This order will terminate on July 27, 2029, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Analysis to Aid Public Comment

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Kellogg Company (“Respondent”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement’s proposed order.

This matter involves the advertising and promotion of Kellogg’s Frosted Mini-Wheats, a well-known breakfast cereal. According to the FTC complaint, Respondent represented, in various advertisements, that eating a bowl of Kellogg’s Frosted Mini-Wheats cereal for breakfast is clinically shown to improve kids’ attentiveness by nearly 20%. The complaint alleges that this claim is false or misleading because, in fact, in the clinical study referred to in respondent’s advertisements, only about half the kids who ate Frosted Mini-Wheats cereal showed any improvement after three hours as compared to their pre-breakfast baseline. In addition, overall, only one in seven kids who ate the cereal improved their attentiveness by 18% or more, and only about one in nine improved by 20% or more.

The FTC complaint also charges that Respondent represented, in other advertising, that eating a bowl of Kellogg’s Frosted Mini-Wheats cereal for breakfast is clinically shown to improve kids’ attentiveness by nearly 20% *when compared to kids who ate no breakfast*. The FTC alleges that this claim is also false or misleading, because in fact, kids in the clinical study who ate Frosted Mini-Wheats had an average of 10.6% better attentiveness three hours later than kids who had skipped breakfast. In addition, relatively few kids experienced better attentiveness near the 20% level.

The proposed consent order contains provisions designed to prevent Respondent from engaging in similar acts and practices in

Analysis to Aid Public Comment

the future. Part I of the proposed order prohibits Respondent from representing that (a) eating a bowl of Kellogg's Frosted Mini-Wheats cereal for breakfast is clinically shown to improve kids' attentiveness by nearly 20%, or any other specific percentage; and (b) eating a bowl of Kellogg's Frosted Mini-Wheats cereal for breakfast is clinically shown to improve kids' attentiveness by nearly 20%, or any other specific percentage, compared to kids who ate no breakfast, unless the representation is true and non-misleading at the time it is made.

Part II of the proposed order prohibits Respondent from making any representations in advertising for Frosted Mini-Wheats or any other morning food or snack food about the benefits, performance, or efficacy of the product for cognitive function, processes, or health, unless the representation is true and non-misleading. In addition, Respondent must possess competent and reliable scientific evidence for such claims.

Part III of the proposed order prohibits Respondent from making misrepresentations in advertising for any morning food or snack food about the existence, contents, validity, results, conclusions, or interpretations of any test, study or research.

Part IV of the proposed order states that the order does not prohibit Respondent from making representations for any product that are specifically permitted in labeling for that product by regulations issued by the FDA under the Nutrition Labeling and Education Act of 1990.

Parts V through VIII of the proposed order require Respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain of their personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part IX provides that the order will terminate after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official

Analysis to Aid Public Comment

interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

**SEARS HOLDINGS MANAGEMENT
CORPORATION**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4264; File No. 082 3099
Complaint, August 31, 2009 - Decision, August 31, 2009

This consent order addresses Sears Holdings Management Corporation's ("respondent") advertising and dissemination from April 2007 through January 2008 of a software application that tracked nearly all of the Internet activities that took place on the computers of consumers who installed it. According to the complaint, respondent represented, in the process of soliciting consumers to download and install the application, that it would track consumers' "online browsing." The complaint alleges that this claim is deceptive because respondent failed to disclose adequately that the application would monitor nearly all of the Internet behavior that occurs on consumers' computers and tracked certain non-Internet-related activities taking place on those computers. The order prevents respondent from engaging in similar acts and practices in the future and sets out the definition of a "Tracking Application". In advertising or disseminating any Tracking Application the respondent must obtain express consent from consumers prior to downloading or installing a Tracking Application.

Participants

For the *Commission*: David K. Koehler and Carl H. Settlemyer, III.

For the *Respondents*: Charulata Pagar, Virtual Law Partners, LLP.

COMPLAINT

The Federal Trade Commission, having reason to believe that Sears Holdings Management Corporation, a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Sears Holdings Management Corporation ("respondent" or "SHMC") is a Delaware corporation with its