

In the Matter of Kellogg Company, FTC Docket No. C-4262

Concurring Statement of Commissioner Julie Brill
and Chairman Jon Leibowitz

June 3, 2010

Today the Commission announced that it has modified the order previously entered in this matter to bar the world's leading producer of breakfast cereals, the Kellogg Company ("Kellogg"), from making unsubstantiated or misleading claims about the health benefit of any food it produces, markets, or sells. The Commission's action is in response to dubious health claims made by Kellogg regarding the ability of its Rice Krispies cereal to boost children's immunity. We approve of the Commission's action announced today, and we appreciate the hard work of FTC staff who obtained the order modification.

We write separately, however, because we are concerned that while Kellogg was developing its questionable Rice Krispies campaign last year, it was simultaneously negotiating with the FTC to resolve earlier allegations that the company had deceptively marketed Frosted Mini-Wheats as improving children's attentiveness.

In April 2009, the Commission made public its concern that Kellogg had engaged in false advertising by claiming repeatedly — on the Internet, in print ads, on TV, and on product packaging — that eating a bowl of Frosted Mini-Wheats cereal was "clinically shown to improve kids' attentiveness by nearly 20%."¹ The Commission alleged that the claims were untrue and therefore violated Sections 5 and 12 of the FTC Act.² Kellogg resolved the Commission's concern about the Frosted Mini-Wheats campaign by agreeing in February 2009 to a proposed consent order that prohibits Kellogg from making false or unsubstantiated claims about the benefits, performance, or efficacy of Frosted Mini-Wheats, or any other morning food or snack food, for cognitive function, cognitive processes, or cognitive health. After publishing an analysis of the proposed settlement in the Federal Register, and after the close of a public comment period, the Commission issued its final Decision and Order on July 27, 2009, incorporating the terms of the negotiated settlement.³

What is particularly disconcerting to us is that at the same time that Kellogg was making promises to the Commission regarding Frosted Mini-

¹ *In re Kellogg Co.*, FTC Docket No. C-4262 (Compl. Apr. 20, 2009), available at <http://www.ftc.gov/os/caselist/0823145/090420kelloggcmpt.pdf>; *id.* (Exs. A-H), available at <http://www.ftc.gov/os/caselist/0823145/090420kelloggcomplaintexha-h.pdf>.

² 15 U.S.C. §§ 45, 52.

³ *Kellogg*, *supra* note 1 (Decision and Order, July 27, 2009), available at <http://www.ftc.gov/os/caselist/0823145/090731kelloggdo.pdf>.

Wheats, the company was preparing to make problematic claims about Rice Krispies.

Around July 2009, Kellogg unveiled a new advertising campaign for Rice Krispies and other varieties of Krispies cereals (including Cocoa Krispies) that promoted the purported benefits of the Krispies cereals for children's immunity. On product packaging, for example, Kellogg claimed that Rice Krispies cereal "now helps support your child's immunity," with "25 percent Daily Value of Antioxidants and Nutrients — Vitamins A, B, C, and E." The back of the cereal box stated that "Kellogg's Rice Krispies has been improved to include antioxidants and nutrients that your family needs to help them stay healthy."

Kellogg's dubious claims that Rice Krispies boosts children's immunity were no doubt months in the making, as they required development by Kellogg's creative team, designing and printing of new packaging, the production of a new television commercial, and approval by management, before the new campaign's public roll-out in the summer of 2009. In light of the timing of the launch of the Rice Krispies campaign, it is reasonable to conclude that planning for the new "immunity" claims was well underway while Kellogg was negotiating and finalizing its agreement with the FTC to not make unsubstantiated "cognitive ability" claims about Frosted Mini-Wheats.

In 2009, Kellogg had sales of nearly \$13 billion and a marketing and advertising budget of over \$1 billion.⁴ The company clearly has the means and ability to carefully test its children's food products to determine if the products in fact provide health benefits for kids. We are also confident that Kellogg has the wherewithal to carefully develop truthful and nonmisleading advertising about such health benefits. As a trusted, long-established company with a presence in millions of American homes, Kellogg must not shirk its responsibility to do the right thing when it advertises the food we feed our children.

We hope that the Commission action announced today communicates to industry that it has an obligation to be honest with the public, and that the FTC will act swiftly to challenge questionable health claims about children's food products. Our kids and parents deserve no less.

⁴ See Kellogg Company 2009 Annual Report, at 56 (Note 18), *available at* <http://annualreport2009.kelloggcompany.com/note18-10K.html>.