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terms to all other customers competing in the distribution or resale of such products.

It is further ordered, That respondent shall, within sixty (60) days after service upon it 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 the order set forth herein.

IN THE MATTER OF

THE PAPERCRAFT CORPORATION

ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 8489. Complaint, June 4, 1962—Decision, Dec. 24, 1963

Order requiring a Pittsburgh, Pa., manufacturer of gift wrappings, ribbons and related products, to cease misrepresenting the size of rolls of gift wrapping papers by such practices as packaging the rolls in display boxes with two inches of empty space at either end, thus creating the false impression that the rolls were as wide as the containers.

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 Papercraft Corporation, a corporation, hereinafter referred to as the respondent, 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, The Papercraft Corporation, is a corporation organized and existing under the laws of the State of Pennsylvania, with its office and principal place of business located at 5850 Centre Avenue, Pittsburgh, Pennsylvania.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the manufacture, offering for sale and sale of gift wrappings, ribbons and related products to distributors and retailers for resale to the consuming public.

PAR. 3. In the course and conduct of its business, the respondent now causes, and for some time last past has caused, its gift wrappings and related accessories when sold, to be shipped from its places of business in Pennsylvania to purchasers thereof located in various other

states of the United States. The respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent packages various assortments of gift wrapping papers in display boxes which reveal the number of rolls of such materials enclosed and the individual designs appearing upon each roll (Fig. 1). There is imprinted upon each box the number of rolls of gift wrapping paper contained therein, and the respective widths and lengths of the papers wrapped upon each roll, but certain of the boxes contain almost four inches of empty headspace (approximately two inches at either end) which is not readily apparent to prospective purchasers (Fig. 2). Other boxes are designed in a manner which partially covers the extended cores or tubes of a number of narrow-width papers in an assortment (Figs. 3 and 4).*

PAR. 5. While the respondent discloses the actual measurements of the wrapping papers contained in the various assortments, the method of packaging such papers creates the impression that such items are, in fact, as wide as the respective containers and that each roll of paper is of equal or uniform width.

PAR. 6. The impression created by the aforesaid method of packaging is false, misleading and deceptive. In truth and fact, certain of the wrapping papers are substantially narrower than the display boxes indicate.

PAR. 7. Respondent causes certain prices to be imprinted upon the cartons or display boxes in which gift wrappings are packaged for retail sale, thereby representing, directly or by implication, that such prices are the regular and usual retail prices for said merchandise. In truth and in fact, said imprinted prices are not the regular and usual retail prices of such items but are fictitious and greatly exaggerated prices.

PAR. 8. By packaging and pricing its merchandise as aforesaid, respondent supplies the means and instrumentalities by and through which retailers may mislead the purchasing public as to the contents and the usual and regular retail price of respondent's merchandise.

PAR. 9. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition in commerce, with corporations, firms and individuals in the sale of paper gift wrappings of the same general kind and nature as that sold by the respondent.

* Figures 1, 2, 3, and 4 are omitted in printing.

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PAR. 10. The use by the respondent of the aforesaid false, misleading and deceptive statements, representations, and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 11. The aforesaid acts and practices of the respondent, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. DeWitt T. Puckett, Mr. David J. Eden supporting the complaint.

Mr. Martin L. Friedman, Mr. Michael J. Shea, Chapman and Friedman, Wash., D.C., for the respondent.

Mr. Samuel Kaufman, Kaufman and Kaufman, Pittsburgh, Pa., and

Mr. Leonard H. Marks, Cohn and Marks, Wash., D.C. for the respondent.

INITIAL DECISION BY ELDON P. SCHRUP, HEARING EXAMINER

APRIL 3, 1963

STATEMENT OF PROCEEDINGS

The Federal Trade Commission on June 4, 1962, issued its complaint charging The Papercraft Corporation, a corporation, with violation of Section 5 of the Federal Trade Commission Act. The complaint alleges the respondent corporation to be engaged for some time last past in the manufacture and the interstate sale of gift wrapping products to distributors and retailers for resale to the consuming public.

Respondent's gift wrapping papers, as in part illustrated by the photographic attachments to the complaint, are packaged in display boxes which reveal through a transparent front cover the number of rolls and the color and particular designs appearing on the paper on each of the rolls contained in the box. Imprinted on each box cover is a further statement as to the number of rolls therein and the respective width and length in inches of the wrapping paper on each

of the various rolls. It is alleged in the complaint that despite this disclosure of actual measurements, prospective purchasers are misled as to the width of some or all of the enclosed wrapping papers contained in some of such boxes.

It is alleged that certain of such boxes are so constructed as to conceal four inches of empty end space or approximately two unfilled inches at each box end; other of the challenged boxes are alleged to be constructed in such manner as to conceal the fact that some of the wrapping papers are not equal in width to other of the papers in the assortment therein presented. It is alleged that such method of packaging creates the impression that all the wrapping papers in such boxes are of equal and uniform width and approximately as wide as the box within which they are enclosed. The complaint charges this alleged impression created on the purchaser by such method of packaging to be false, misleading and deceptive, because in truth and in fact some or all of the said wrapping papers are substantially narrower in width than the size or the manner of construction of said display boxes would allegedly visually represent and indicate.

The complaint further alleges that respondent also causes certain prices to be imprinted upon the cover of the display boxes in which its gift wrappings are packaged for retail sale, and thereby represents, directly or by implication, that such imprinted prices are the regular and usual retail prices for said merchandise. It is alleged that said imprinted prices are not the regular and usual retail prices of such items but are fictitious and greatly exaggerated prices, and that by packaging and pricing its merchandise as foresaid, respondent supplied the means and instrumentalities by and through which retailers may mislead the purchasing public as to the contents and the usual and regular retail price of respondent's merchandise.

The complaint alleges respondent's said acts and practices to cause the public to purchase substantial quantities of respondent's products and charges the aforesaid acts and practices of the respondent to be to the prejudice and injury of the public and of respondent's competitors, and to constitute unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Answer to the complaint both admitting and denying various of the allegations of the complaint was filed July 23, 1962. Said answer alleges discontinuance of the challenged packaging practices prior to the issuance of the complaint and states such practices not to be representative but to have constituted only a tiny fraction of respondent's total production. Respondent's answer also states the imprinting of

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retail prices on such merchandise to be a widespread practice in the gift wrapping industry and alleges that respondent has been unfairly singled out by being the only manufacturer subjected to a formal complaint in this particular regard.

Prior to such answer, respondent had filed a motion for more definite statement as to the complaint, and a motion to dismiss and reopen consent order proceedings with the incorporated request that such latter motion be certified to the Commission. Both motions were denied. Respondent's request for permission to reply and reply to the opposing answer to respondent's motion to dismiss and to reopen consent order proceedings was also denied. Following a prehearing conference held on August 7, 1962, and reconvened on August 22, 1962, made part of the public record by agreement of respective counsel, respondent filed another motion to suspend the proceeding and again requested that such motion be certified to the Commission. Said motion was again denied.

Notice and order setting the initial hearing herein for September 26, 1962, in Cleveland, Ohio, as agreed upon between counsel during the prehearing conference, was entered on September 5, 1962. Respondent on September 6, 1962, filed a request for permission to file an interlocutory appeal to the Commission accompanied by a request for a conference with the Commission or any designated Commission member. The Commission on September 17, 1962, entered its order denying such requests.

Pursuant to letter from respondent's counsel under date of September 18, 1962, accompanied by a medical certificate, the hearing scheduled for September 26, 1962, was ordered cancelled and reset for Cleveland, Ohio, on October 29, 1962. Respondent on October 24, 1962, filed another motion to suspend hearing date and proceeding and again requested its certification to the Commission. Said motion was denied by order dated October 25, 1962. Respondent on October 26, 1962, then filed another request for permission to file an interlocutory appeal, which was granted by the Commission on October 29, 1962, and the hearing was ordered to be suspended until disposition of said appeal. The Commission on November 19, 1962, entered its order denying respondent's said interlocutory appeal.

Following such denial by the Commission, respective counsel were directed to confer as to the earliest agreed upon available and suitable hearing date and the hearing was accordingly set for Cleveland, Ohio, to commence on January 21, 1963. Counsel supporting the complaint at such Cleveland hearing presented various witnesses and Commission exhibits marked for identification 1 through 14-B were admitted

into evidence; counsel for respondent also presented various witnesses and respondent's exhibits marked for identification 5 through 11 were admitted into evidence.

Respondent's rejected exhibits marked for identification 1, 2-A through 2-Z-30, 3-A through 3-Z-41, and 4-A through 4-Z-145 are subject to Section 4.12 (f) of the Commission's Rules of Practice for Adjudicative Proceedings which provides that rejected exhibits, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

All counsel were afforded full opportunity to be heard, to examine and cross-examine all witnesses presented, and to introduce such evidence as is provided for under Section 4.12 (b) of the Commission's Rules of Practice for Adjudicative Proceedings.

Both sides having completed their respective presentations, the case was ordered closed on January 23, 1963, and time was allowed for the filing of proposed findings, conclusions and briefs by respective counsel.

Proposed findings of fact, conclusions and supporting briefs were filed by respective counsel, and counsel supporting the complaint submitted a proposed order to cease and desist. Proposed findings and conclusions submitted and not adopted in substance or form as herein found and concluded are hereby rejected.

After carefully reviewing the entire record in this proceeding as hereinbefore described, and based on such record and the observation of the witnesses testifying herein, the following findings of fact and conclusions therefrom are made, and the following order issued.

FINDINGS OF FACT

1. Respondent, The Papercraft Corporation, is a corporation organized and existing under the laws of the State of Pennsylvania, with its office and principal place of business located at 5850 Centre Avenue, Pittsburgh, Pennsylvania. Respondent is now, and for some time last past has been, engaged in the manufacture, offering for sale and sale of gift wrapping products to wholesalers and retailers for resale to the consuming public.¹

2. In the course and conduct of its business, the respondent now causes, and for some time last past has caused, its gift wrapping products when sold, to be shipped from its places of business in Pennsylvania to purchasers thereof located in various other states of the

¹ Comm. Ex. Nos. 9, 10, 11, 12, 13, 14; Tr. 173.
Resp. Ex. Nos. 9, 10.

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United States. The respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Respondent sells its aforesaid products in all fifty states of the United States and its annual dollar sales volume of business in said products exceeds \$7,000,000.² Respondent's said products are sold in over 200,000 retail outlets across the United States.³

The Deceptive Packaging Charge

3. Respondent packages its various gift wrapping papers in display boxes which reveal through a transparent front cover the number of rolls of such materials enclosed and the individual designs appearing upon each roll. There is imprinted upon each front box cover the number of rolls of gift wrapping paper contained therein and a disclosure of the respective widths and lengths in inches of the papers wrapped upon each roll.⁴

Certain of the foregoing boxes contain almost four inches of empty end space or approximately two inches at each box end which is not visually apparent as being completely devoid of any gift wrapping paper.⁵ Other of such boxes are constructed in a manner which partially covers the extended cores or tubes of a number of narrow-width gift wrapping papers so that it is not visually apparent that such narrow-width papers do not extend the full width of the box as do other of the papers in the presented assortment.⁶ While the respondent discloses on the front box cover the actual measurements in inches of the width and length of the various gift wrapping papers contained in its various and numerous different display boxes, the complaint charges these two particular types of box construction or packaging to create a false, misleading and deceptive impression on prospective purchasers as to the width of the gift wrapping paper being purchased.

4. Six consumer members of the purchasing public testified in this proceeding as to the alleged deceptive packaging or slack-filling

² Tr. 165.

³ Tr. 205.

⁴ Comm. Ex. Nos. 9, 10, 11, 12, 13, 14.

Resp. Ex. Nos. 8, 11.

⁵ Comm. Ex. Nos. 1, 2, 5, 6.

Resp. Ex. Nos. 6, being a photograph of Comm. Ex. No. 1; 6-A, a photograph of Comm. Ex. No. 2; 6-D, a photograph of Comm. Ex. No. 6. No photograph of Comm. Ex. No. 5 was offered in evidence.

⁶ Comm. Ex. Nos. 3 and 4.

Resp. Ex. Nos. 6-B and 6-C, being photographs of Comm. Ex. Nos. 3 and 4.

charge of the complaint, two at the instance of Commission counsel and four on behalf of the respondent. As shown by the record herein, all appear to have been fully interrogated in such particular regard by respective counsel prior to testifying⁷ and their ensuing somewhat ambiguous, conflicting and apparently preconceived testimony sheds little light of any probative, determinable and reliable weight in the reflecting of a spontaneous, unguided individualistic first impression during the process of a second viewing of the challenged packaging from the witness stand. Under the circumstances shown herein, all such testimony is regarded as being nonproductive of any probative, determinable and reliable weight.

5. Henry J. Rossi, a packaging engineer employed in the folding carton division of the Continental Can Company, Elkhart, Indiana, also testified herein on behalf of the respondent. Mr. Rossi testified to having engineered the design or construction of the product display boxes sold by Continental to The Papercraft Corporation. Referring to Comm. Ex. Nos. 1, 2, 5 and 6, the witness described such display boxes as being cushion end boxes, commonly used, it was stated, to provide extra structural strength at both ends of the box. According to the witness, product display boxes are fashioned to show as much of the enclosed printed paper to the prospective purchaser or viewer as possible and still leave sufficient descriptive copy area at each end of the box.

The witness examined Comm. Ex. No. 2, a cushion end display box entitled, "Rhapsody, 4 big rolls, 540 inches long (total), 20 inches wide, special value \$1.49", and stated its external dimensions to be 7 by 2 by 24 inches in width. The witness then also examined Resp. Ex. No. 8, a non-cushion end display box entitled "Kaycrest, 4 Beautiful Designs, 360 inches total, 20 inches wide, 98¢", and stated its external dimensions to be 7 by 2 by 20 inches in width. The witness, with regard to Resp. Ex. No. 8, stated that the 20 inches external width dimension of this non-cushion end display box would also coincide with the actual width of the gift wrapping papers contained in said box.

Upon being questioned, after a side-by-side visual comparison of Resp. Ex. No. 8 with Comm. Ex. No. 2, the witness then testified that solely with relation only to the external size of each box that he could not tell which box contained more gift wrappings.

This testimony, of course, does not answer the pertinent question presented which is directed not to the actual quantity of gift wrap-

⁷ Witnesses Fox, Tr. 363-371; Holasek, Tr. 372-378; Steiger, Tr. 409-412; Kochis, Tr. 413-419; Lewis, Tr. 420-427; Sensel, Tr. 427-431.

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pings in either box, but rather does the cushion end display box which is Comm. Ex. No. 2, by its larger external size, visually misrepresent to the viewer or purchaser the width and thereby the apparent quantity of the wrapping papers enclosed. The hearing Examiner, as the record shows,⁸ made the same visual observation and side by side comparison of the external size of the two exhibits from the same vantage point as did the witness, and the ensuing inescapable conclusion was reached from such observation that, based on external box sizes, the width of the papers enclosed in cushion end Comm. Ex. No. 2 appeared to be obviously and substantially wider than those papers enclosed in non-cushion end Resp. Ex. No. 8.

Further, and in the light of respondent's commercial use of the non-cushion end display box, which is Resp. Ex. No. 8, the arguments advanced by the witness for the needed use of the misleading and deceptive cushion end display box, Comm. Ex. No. 2, are herewith rejected. The cushion end display boxes used by respondent, of which Comm. Ex. No. 2 is an example, are accordingly herein found to be false, misleading and deceptive to prospective purchasers with relation to the visually apparent width and thereby the quantity content of the gift wrapping papers enclosed in such boxes.

This false, misleading and deceptive first impression created by the external size of these particular boxes is further found not to be eliminated because of any imprinted lettering on such boxes as to the actual measurements of the width of the papers therein contained. To hold otherwise would unnecessarily raise and invite, under varying circumstances, unlimited questions of doubtful value as to whether or not such disclosure was likely to be or was actually noticed or unnoticed at the time of purchase, and if actually noticed, whether or not such a disclosure would be fully understood and operate to completely eliminate the false, misleading and deceptive impression first given to prospective purchasers by the external width size of such boxes.⁹

6. Mr. Rossi further testified as to the other or second type of display box construction or design also challenged by the complaint

⁸ Tr. 395; see, Commission opinion, Docket No. 7834, *Gimbel Brothers.*, (1962), page 5 and footnote 2; page 7 and footnote 4.

⁹ See, *Marlborough Laboratories, Inc., et al.*, (1941) 32 F.T.C. 1014 at 1027, where the Commission findings states:

"Some of the shaving creams and tooth pastes made and sold by respondents are put up in ordinary-sized tubes and then enclosed in much larger cartons. This method of filling misleads and deceives purchasers of such products into the belief that they are securing a greater quantity of such products than they would receive in the ordinary package or container. The packaging of products in such a manner is known in the trade as 'slack filling,' a practice which misleads and deceives the purchasing public and is unfair to honest competitors."

herein as being false, misleading and deceptive to prospective purchasers. This latter box type of construction or design differs from the first challenged cushion end type in that, while in the cushion end display box the apparent width size of all the papers in the box as visually pre-determined and expected by the viewer are not known or found to be substantially and actually different until after the box is opened, in the second or latter type of construction or design, certain of the assortment of different sized papers therein are actually of the same expected width as the external size of the display box would visually indicate to the viewer.

The question here presented by this second type construction or design is whether the prospective purchaser is misled or deceived as to the fact that some of the contained assortment of different sized papers are not of the same approximate width as the external box size, and any existing deception would be due not to the external size of the box itself, but only that which might be caused by the manner of the configuration of the nontransparent part of the front box cover.

In the first type cushion end display box construction or design challenged by the complaint, such as exemplified by Comm. Ex. No. 2, it was found upon examination that the amount of transparent front box cover display present was not materially different than that observed also present in the commercially used non-cushion end display box, Resp. Ex. No. 8. It was, therefore, apparent that cushion box ends in reality were not necessary of being commercially used to achieve a comparable product display.

Examples of record herein with relation to the challenged second type of display box construction or design are Comm. Ex. No. 3, and No. 4. Imprinted on the front box covers of these exhibits is the disclosure that two different widths of wrapping paper are enclosed, that is, a number of rolls of a 26 inch width actually coinciding with the external box size width, and a number of rolls of 20 inch width and less than external box size width. Comm. Ex. No. 3, for example, states "Economy Gift Wrappings, 26 inch wide gift wrap for those extra large packages, 20 inch wide gift wrap for those small and large packages", and further "600 inches (total), 6 beautiful designs 3 rolls 26" wide 150", 3 rolls 20" wide 450", total 600", \$1.98 special". Another example of such construction and design, Comm. Ex. No. 4, also has imprinted on its front box cover much the same disclosure, to the effect that it contains an assortment of rolls of two different sizes, a number of rolls of 26 inches width, the actual external box size width, and a number of rolls of a lesser 20 inches width.

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With regard to Comm. Ex. Nos. 3 and 4, the witness testified¹⁰ that constructing or designing a display box for rolls of two different widths of gift wrapping paper posed a problem different than constructing a display box for rolls of only one and the same width of wrapping papers, because the box containing rolls of two different widths must be wide enough to accommodate the widest rolls used. This, according to the witness, gave rise to a situation which necessarily left a void and unsightly space caused by the exposed and uncovered bare core of the less wide rolls which was not suitable for display purposes and was required to be covered up for an acceptable appearing product. It was the gist of the witness's testimony that with the commercial need of displaying to the viewer or prospective purchaser as much of the gift wrapped paper covered rolls in the box as possible, it was found necessary that Comm. Ex. Nos. 3 and 4 be constructed and designed in their present manner and form so as to supply as much of this visible display as feasible.

The question here is accordingly different than that posed by the cushion end display box, because there is absent the basic deception caused by a falsely enlarged box size. The prospective purchaser in the present situation obtains the larger width size expected by the external box dimensions, and the only remaining question for decision is whether it is to be reasonably further expected that all the paper sizes therein contained will be of the larger width size. It thus becomes apparent that a prospective purchaser looking for different sized gift wrapping paper widths would look for and could only but expect from the imprinted disclosure on the box that some shorter width sizes other than the box dimensions would provide for and indicate to be the largest width sizes are therein contained.

The disclosure on the front box cover in these situations reveals all wrapping papers therein are not of equal but of different width sizes. There is present no deception as to any width sizes due to or caused by the external width dimensions of the box, and it would appear that there could reasonably be no deception to prospective purchasers seeking different widths, that there would be lesser width sizes contained in the box which were not related to the external dimensions of the box. To require the packaging of only one uniform width of gift wrapping papers in a single display box and thus deprive prospective purchasers of a wanted width size assortment obtainable only through the purchasing of one or more additional boxes in an effort to achieve such wanted widths, does not appear to be a desired end.

¹⁰ Tr. 405-406.

Accordingly, the witness's contentions as regards the commercial necessity of such manner of packaging is accepted and, there being no evidence presented to the contrary in such respect, the charge of the complaint as to deception in this regard is found to be unsupported by the record.

The Fictitious Pricing Charge

7. Respondent manufactures and sells three lines of gift wrapping products which respondent markets under the trade names of Kaycrest, Rhapsody and PR. The PR line is also known or referred to as Promotional, Super Value and Economy. The PR line is a less expensive line than either Kaycrest or Rhapsody and represents approximately 7% of respondent's annual sales of gift wrapping products. The Kaycrest and Rhapsody lines are identical as to quality and as to sales price, and the balance or remaining 93% of respondent's total annual sales are accounted for by the Kaycrest and the Rhapsody lines of gift wrapping products. The record, however, is silent as to what proportion of such percentage balance of respondent's gift wrapping products sales were in the Kaycrest or in the Rhapsody product lines. Respondent's total sales of all lines exceed \$7,000,000 annually, and respondent's said product lines reach the consumer through over 200,000 retail outlets in the United States.

8. Mr. Sy Scheckner, Vice-President, Marketing, The Papercraft Corporation, 5850 Centre Avenue, Pittsburgh, Pennsylvania, testified that prior to his present position with the respondent he had served the respondent for seven years as National Field Sales Manager. The witness stated that even prior to his employment the respondent had been pre-ticketing its gift wrapping products and described the utility of such practice as follows:¹¹

There is a definite demand on pre-ticketing at all levels of the trade. Normally at the retail level it is of utmost importance for the convenience of the retailer. It saves him the effort and work of opening up all these cartons and then pre-ticketing the material before he puts it on sale. If this material is not pre-ticketed, it is necessary for him to open each of the cartons, pre-ticketing each item, closing the cartons, and putting them in the storeroom, then using them as required.

In the case of the wholesaler, the pre-ticketing establishes his selling price. In most cases the wholesaler uses the retail price or the pre-ticketed price as his sales price. He takes his discount off the printed price of the package. From the direct position of the consumer, it establishes in her mind a level, a level of the price and the quality of the package that she is purchasing. Most consumers when they buy a pre-ticketed product, pre-ticketed by the manufacturer, assume that the standard and the high level of the manufacturer are in the

¹¹ Tr. 200.

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product that she is buying, and she is going along with this assumption as a guide to her for true and honest value.¹²

Mr. Scheckner stated that respondent's Kaycrest line of gift wrapping products, to his knowledge, was regularly and usually sold at retail at its pre-ticketed price. The witness testified in this regard:¹³

Well, part of my duties are to be in the field. I am in the field at least six months a year, usually more than that. In my trips, working with our accounts, I have many opportunities to visit retail stores all over the country and observe what is going on. This is part of my job to check marketing areas, check retail stores to see what competition is doing, to see what products are being sold for.

All our salesmen are instructed to watch very carefully the sale of Kaycrest products at retail and if they at any time see any violations of the Kaycrest brand at retail being sold for less than the pre-ticketed price, they are instructed to contact the retailer or the chain, whoever the case might be, and try to explain to the man or the buyer or merchandiser that we want to have the Kaycrest brand sold at the pre-ticketed price. In many cases he is successful.

Where situations arise that he is not successful in doing this, we then will not ship any more Kaycrest products to this account.

As I said, we will not ship Kaycrest to this account. There have been instances where we have even gone so far as to have our salesman go into the store and buy up all of the Kaycrest stock to clean him out when he failed to cooperate with us.

The witness further stated that the Rhapsody line of gift wrapping products was initiated by the respondent in 1958 because the company did not want the Kaycrest line sold to discount houses. In this connection, the witness testified with relation to the initiation of the Rhapsody line:¹⁴

Primarily we were witnessing a tremendous change in the retailing organizations of the United States. The phenomenon known as the discount house was born during that period, and the obvious name of discount house applies to the fact that preparatory to selling a given product which normally sells for such a color and level at a certain price, they could discount it. The reason they could do this is because they bought direct. They didn't have to deal through a wholesaler. They usually operated out of the downtown areas. They didn't have high overhead. They didn't have any fancy fixtures. Their very existence depended on pre-ticketed merchandise. It was the only way

¹² Appropriate to the above is the following finding of the Commission in the *Mari-borough Laboratories* matter, *supra*, 32 F.T.C. 1014 at 1026:

"To a substantial extent the public measures the quality and retail value of an article of merchandise by its usual selling price. When a printed retail selling price appears on an article of merchandise, it is generally understood that it indicates the usual retail selling price. A comparatively high price conveys an impression to the public of higher quality. Reputable manufacturers price-mark articles of merchandise sold by them to retailers with the intention that the suggested prices will be followed, at least approximately."

¹³ Tr. 203-204.

¹⁴ Tr. 202.

they could show the customers they were getting an even better value in terms of their purchase. If it was pre-ticketed it was established as the value or as a value for that product.

Mr. Scheckner, under cross-examination, further testified that the respondent did not take the same protective measures with the Rhapsody line as it did with the Kaycrest line when it found a retailer selling below the preticketed price. The witness also admitted to knowledge that the Rhapsody line of the respondent would be sold by discount houses at prices below the preticketed prices, and the record shows the following testimony of the witness relative to the Rhapsody line:¹⁵

Q As a matter of fact, you sold a great proportion of these to the discount houses?

A The majority of the Rhapsody line was sold to discount houses.

Q And the discount prices were below the pre-ticketed items as a general proposition?

A That is correct.

The record in this matter other than as may be found to be indicated by the foregoing admission is completely barren of any factual showing or proof of the total annual dollar sales by respondent of its Rhapsody gift wrapping product line, the number of discount houses in any trade area or areas reselling any of such products, and the amount, description and the retail price of any of said products being sold below the preticketed price. The record also fails to disclose the number of other retail outlets in the same trade area or areas of any of said discount houses which also may be reselling respondent's said brand of products, and, further, whether or not said products are being resold at or below the preticketed price.

The record herein does show that products in respondent's three gift wrapping lines are sold in over 200,000 retail outlets across the United States but does not disclose the products handled nor the number of such retail outlets for any given trade area. The record shows that respondent's Kaycrest and Rhapsody lines account for 93% of the annual total dollar sales and the PR line for the remaining balance of 7%. The record also shows that the Kaycrest and Rhapsody lines are of equal quality and of like cost and corresponding pre-ticketed price¹⁶ and that while the Kaycrest product line is not sold by the respondent to discount houses, products of the Rhapsody line are sold to and accepted by retail outlets other than discount houses.¹⁷

¹⁵ Tr. 244.

¹⁶ Tr. 164; 181; 203.

¹⁷ Tr. 270; 336; 346.

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No breakdown of sales as between the Kaycrest and the Rhapsody lines is contained in the record. The only respondent official called to support the charges of the complaint in this respect stated his inability to furnish such information but indicated that Mr. Scheckner, another of respondent's officials present, might serve to answer in such regard.¹⁸ Mr. Scheckner, Vice-President, Director of Merchandising and former National Field Sales Manager for the respondent, was not called as a witness in the presentation of the Commission case.¹⁹

9. Eight witnesses testified in support of the charge of the complaint relative to alleged fictitious pricing by the respondent. One witness from the trade area of Detroit, Michigan and seven from the Cleveland, Ohio trade areas. Four witnesses from only the Cleveland, Ohio trade area testified on behalf of the respondent in opposition to such charge.

Detroit, Michigan: (1) Mr. Oscar Levy, 12300 Mark Twain, Detroit, Michigan, a buyer for Borman Food Stores, a 79 store chain, testified to the purchase of gift wrapping papers from the respondent.²⁰ The witness testified Borman Food Stores to have sold respondent's merchandise in an annual volume of around \$40,000 to \$50,000 for the year 1961 and for the year 1962. The witness stated Borman Food Stores sold none of the respondent's products in evidence²¹ and to have handled mostly its 98¢ merchandise. This merchandise was confined to respondent's Kaycrest line and was stated by the witness to have been preticketed or pre-marked at 98¢ and to have been retailed by the chain at 69¢ during certain times.

The witness testified that the chain had adopted the Kaycrest line in 1959 and had maintained the preticketed price thereon in 1959 and 1960. The price departure, according to the witness, was because competitive grocery stores and dime stores or syndicated stores were all cutting prices. The witness testified that the respondent was not notified of this change of policy with reference to this lower resale pricing by Borman Food Stores of its preticketed merchandise, and that respondent's sales price to the chain for such merchandise had, during such price cutting time, remained the same.

The witness also testified to having accepted, during one of the foregoing years, an item from the Rhapsody line as a fill-in substitute

¹⁸ Tr. 171.

¹⁹ The prehearing conference herein, made part of the record by agreement of respective counsel, developed the need for certain indicated information and sales data that would be furnished through this witness. See, Tr 52-56; 70-71; 114-118; 142-143; and further, Tr. 196-197; 252.

²⁰ Tr. 329-337.

²¹ Comm. Ex. Nos. 1, 2, 3, 4, 5, 6, 7, 8.

in lieu of a Kaycrest product. The witness was uncertain as to the exact year but stated that respondent's preticketed price on the Rhapsody product would have been maintained if that was one of the non-priced cutting years. The witness stated that respondent's price to the chain for the Rhapsody item and the equivalent Kaycrest product was the same for both products, and that the same preticketed or retail sales price was imprinted on each product.

The record is silent as to the various locations of the stores of this 79 retail store chain, and as to whether each store actually handled respondent's said merchandise. The record is also silent as to how many other retail outlets reselling respondent's like merchandise may be located in the trade area or areas serviced by this chain, and which of such other stores, if any, are or are not maintaining the preticketed price for such merchandise. Finally, the record is silent as to whether this cut price by Borman Food Stores was made to meet the sale of respondent's products being sold below the preticketed price or those of another manufacturer. The record does not show the number of stores and the extent of the retail sales in the Detroit trade area of respondent's said products, nor that the cut price by Borman's Food Stores was the prevailing usual lower price of other retail outlets similarly selling respondent's said products. Accordingly, the charge of the complaint relative to the Detroit trade area fails of adequate proof. The cut-price sale by Borman Food Stores, standing alone, does not prove that the regular, usual and prevailing price for respondent's said products was other than the preticketed price for said products in the trade area or areas concerned, and that said preticketed price was further a greatly exaggerated and fictitious price as alleged in the complaint.

Cleveland, Ohio: (1) Mr. Morton Levine, 1566 East 124th Street, Manager, Ohio Stationery Company. The witness testified that the business of the said company was the wholesale distribution of toys, novelties and school supplies. The witness testified to purchasing two different items during 1961 but the record does not show whether these items were products from respondent's Kaycrest, Rhapsody or PR lines, nor that they were resold under the preticketed price other than by the Ohio Stationery Company acting as a wholesaler selling to retailers. The purchases during 1961 from the respondent by Ohio Stationery Company of the two items in question amounted to only \$291.60.²²

²² Tr. 255-259.

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(2) Mr Jules Spector, employed by Louis L. Schaffer Company, Cleveland, Ohio, which according to the witness, was engaged in buying for four retail stores known as Economy Stores and respectively located one each in Cleveland, Mayfield, Brunswick and Lorain, Ohio. Mr. Spector stated he assisted in the buying of respondent's gift wrapping products for sale in the above stores and that these items were retailed under the preticketed price. The record again is silent as to the identity of any of the products as to which the witness had testified of sales having been at one-third off the preticketed price, and further as to whether they were products in the respondent's Kaycrest, Rhapsody or PR line. Mr. Spector's approximation as to the retail sales volume of these products, admittedly based "on an estimate or maybe a guess" by the witness, was stricken from the record upon motion by respondent's counsel.²³

(3) Mr. Irving Kopit, Manager, Club Sales Company, 1268 Ontario Street, Cleveland, Ohio. Mr. Kopit testified his business was that of a wholesaler-retailer of general merchandise. In 1961 and years preceding, the witness stated he had purchased products from respondent's Kaycrest line which were resold at a reduction of one-third off the preticketed retail price. What amount of sales of the respondent's products was made in a wholesaler or in a retailer capacity is not disclosed by the record. The annual purchases from respondent by the Club Sales Company during 1960 and 1961 were less than \$1,000.²⁴

(4) Mr. E. Robert Marcus, Vice-President and Treasurer, H & H Distributing Company, 3622 Prospect Avenue. The witness stated his business to be that of a jobber selling at wholesale to industrial accounts in case lots amounts for premium or gift use. Sales were also made to employees of these industrial accounts and friends of such employees. The company was described as being a catalog house and individuals coming to the premises would do so only because of having access to the catalog, as the company's location was not such as to attract off-the-street or walk-in traffic by the general public.

It was testified that respondent's said products have always been sold at less than the preticketed price whether in case lots to the industrial concerns or by the carton to individual purchasers. The record, however, does not disclose at what prices the respondent's products were resold either by the carton or in case lots. The witness stated respondent's products to have been recently eliminated from his

²³ Tr. 442-458.

²⁴ Tr. 289-302.

company's catalog but that they are still being sold during the Christmas season. When the catalog was in use, none of the copy therein was prepared or supplied by the respondent, according to the witness.

The witness testified that the company handled only respondent's Kaycrest line, but the record neither shows the annual dollar amount involved nor that part of such amount allegedly sold as a wholesaler to industrial concerns in case lots or at retail to individual purchasers in single cartons.^{24-a}

(5) Mr. Byer Mazur, President, State Wholesale Merchandise Company, 624 St. Clair Avenue, West Cleveland, Ohio. The testimony of this witness developed that his only purchases over the years from the respondent was what was described as being a 30-sheet thrift pack, an unboxed item not identified as being in either the Kaycrest, Rhapsody or PR lines.

The testimony of the witness was that he did not recall whether the item was preticketed or not but that the company always sold at less than the retail price marked on the package but at what lesser price and what amount was sold as a wholesaler or as a retailer was not disclosed. The purchases of this one item by the witness from the respondent as disclosed by the record were \$165.76 for 1958; \$151.20 for 1959; nothing for 1960; and \$357.50 for 1961.²⁵

(6) Mr. John M. Shelby, Manager of Store No. 13, Western Auto Stores, 4253 Fulton Road, Cleveland, Ohio. This witness testified to sales of respondent's products by his store, stating "We sell on an average, I would say as a guess, oh, about 24 cases per year, which would be about 12 packages to a case. I would say that would be pretty close to it." The products involved were not identified as being from either the Kaycrest, Rhapsody or PR lines. The witness stated there were eight other company stores in the Cleveland area which he assumed would also have carried the same Papercraft items, but that he would have no personal knowledge of this other than he knew that purchases for all company-owned stores were made by a central buying department.

The witness stated these items to be seasonal and usually sold at less than their preticketed prices based on a master price list established by the company for their resale. The witness testified that he had not recently consulted this master price list but from memory such resale would have been either \$1.95 or \$1.98 for items possibly preticketed at \$2.49, \$2.98 or \$1.98. In this connection the witness

^{24-a} Tr. 303-312; see Docket No. 8140, *Leeds Travelwear, Inc.* (1962) citing *L. & C. Mayers Co. v. FTC* (1938) 97 F. 2d 365.

²⁵ Tr. 313-328.

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stated, "You see, this merchandise here is not a year around product with us. We bring it into the store for a couple of months of the year, we sell it and we get out from under it as quickly as possible. Therefore, the prices are not such that I would remember as I would my regular line of merchandise."²⁶

(7) Mr. Herbert H. Durr, vice-president, Gray Drug Stores, Inc., 2400 Superior, Cleveland, Ohio, stated his prime responsibility to be that of merchandise buyer for the company. The witness testified that Gray Drug Stores was a retail store chain of 148 stores operating throughout the State of Ohio as well as in other states. Twenty-three stores were stated to be located in the greater Cleveland trade area. The chain purchases respondent's Kaycrest, Rhapsody and PR lines of gift wrapping products, but again the annual volume of purchases was not developed and the record is silent as to the amount of sales by these stores in any trade area, including the pertinent greater Cleveland area.

The Kaycrest line is handled by the chain as a full line of products and, according to the witness, it was company policy not to deviate from the preticketed price in the resale of the Kaycrest line product merchandise.²⁷ The Rhapsody line, on the other hand, was sold by the chain through leased departments in various discount stores operating under different store names, in which it was said to be the general policy to sell at a reduced price. The witness stated that while the preticketed price of the Rhapsody line was cut, he could not say as to how much, because it was sold through discount operations and that it would vary market to market. The record does not disclose the name or location of any of these markets or the name or number of any of these discount stores that might be therein located.

With reference to the PR line, the witness testified to handling only two different items and that such were sold by the chain at less than the preticketed price, a 98¢ package sold for 66¢ and a \$1.98 package sold for 99¢. The annual dollar volume of these sales of these packages and whether all or any of the Cleveland stores of the chain resold these items does not appear in the record. The record also fails to disclose the names and number of all retail stores in the greater Cleveland trade area which might also handle products in the respondent's PR line and the prices at which said products were resold. For example, see pages 23-24 herein following.

²⁶ Tr. 271-289.

²⁷ Resp. Ex. No. 7 shows an advertisement by Gray Rexall Drug Stores of Kaycrest Gift Wrap \$1.49, stated by the witness to be the preticketed price for such item (Tr. 266).

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The witness concluded by stating it to be his belief that Rhapsody was merely another name used by the respondent in place of Kaycrest because of competitive conditions whereunder certain people do not like to have the same name as somebody else, and further, that the contents of Rhapsody were the same as the contents of Kaycrest and that the pricing was the same.²⁸

10. *Cleveland, Ohio*: Called as witnesses on behalf of the respondent were (1) Mr. Maurice G. Lader, Crown Drug & Sundries Company, 1383 West Ninth Street, Cleveland, Ohio. The witness stated the company to be in the wholesale toy business and that in such connection sales of gift wrappings were made to retail stores and department stores. The witness testified to purchasing respondent's Kaycrest line of gift wrap products and reselling such to retail stores, although the number of said stores, their locations and the volume of such sales are not disclosed by the record.

The witness testified these products to be preticketed and said that to his knowledge such products were resold at the preticketed price in the stores he visited, stating, "I would say that they do so, yes, because we basically sell to the smaller stores and they very well cannot afford to discount or mark the stuff down." The witness stated the company only handled infant gift wrapping during the entire year as distinguished from Christmas gift wrapping, and that the infant gift wrapping was sold to department stores like May's or Higbees. The witness further testified he had visited the latter stores and had observed the preticketed price of this merchandise on display and that it was not marked down in price.²⁹

(2) Mr. Morris Lefkowitz, Cardcraft Company, 1220 West Sixth Street, Cleveland, Ohio. The witness stated the company to be in the business of the wholesale selling of greeting cards and gift wrappings to retailers. The company purchased and resold products from both respondent's Kaycrest and Rhapsody lines, and, according to the witness, approximately 95% of his retailer customers resold these products at the preticketed price. The witness stated in such connection, "Well, I contact my slow selling accounts approximately once in two months and my good accounts, oh, at least once a month, some better ones I see every two weeks; so I am in the store quite often. I am able to see the prices that they have marked on their merchandise." The witness also testified to having observed some marked down prices on products in both the Kaycrest and Rhapsody lines of respondent in what were said to be a very few of his accounts and

²⁸ Tr. 260-270.

²⁹ Tr. 338-344.

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which were described as being discount stores. According to the witness, these were retail stores paying the same cost price but which were willing to operate on a lesser margin of profit per item for a faster turnover and more sales.

The number, names and location of the foregoing stores are not shown on the record but the Cardcraft Company over-all wholesale sales for the last year were stated to have been \$98,000. Included in this amount were some sales made at the wholesale price and below the preticketed price to employees in the building wherein the Cardcraft Company is located. These were said by the witness to have been accommodation sales and to have amounted to one or two hundred dollars throughout the entire year.³⁰

(3) Mr. Ronald Kohn, National Merchandising Service, 1523 East 45th Street, Cleveland, Ohio. The witness stated his business to be that of a rack jobber servicing approximately 200 supermarkets in Cleveland, Ohio and northeastern Ohio. The witness testified that a rack jobber maintained displays and guaranteed the resale of the merchandise by the store to which it is sold and in which it is placed on display. Unsold merchandise is allowed to be returned to the store for credit under this method of operation. During the Christmas season, National Merchandising Service handles respondent's Kaycrest and PR lines of gift wrappings and has sold these products to the 200 retail stores it services.

The witness stated these Kaycrest and PR lines to have all been preticketed and to have been sold by the said stores at the preticketed price.³¹ The witness testified that in the event any of the supermarkets had not resold at the preticketed price, he would reclaim the merchandise and credit the price at which he had sold it to the store and refuse to deal further unless the store agreed to maintain the preticketed price. The record discloses the witness estimated the volume of sales by National Merchandising Service in the said products to have been around \$15,000 during the past year.³²

(4) Mr. Varned Stilgenbauer, 16110 Brookpark Road, Cleveland, Ohio. The witness stated his business to be that of a rack jobber, that is, a service jobber of non-foods, primarily to the grocery industry. As a rack jobber, the witness stated ninety percent of the business was in preticketed items which helped cut overhead business costs and that he, therefore, preferred to deal in such items. During the Christmas season of 1961, the witness testified to servicing approximately 500 stores of which 200 were in the Cleveland trade area.

³⁰ Tr. 345-351.

³¹ Tr. 353, 355.

³² Tr. 352-359.

The witness at this time handled preticketed items from the respondent's Kaycrest product line, which were sold to approximately 200 of these 500 stores. It was the witness's testimony that he checked all these stores, knew what each piece of merchandise went into the store for and at what price it went out, and that the Kaycrest products had been sold at their preticketed price.

The witness, although not acting as the Manager in 1962, further testified as to the handling of respondent's Kaycrest line in 1962 together with one or two promotional items of the respondent's PR line, which were allegedly sold at less than the preticketed price. As to the Kaycrest line, the witness again testified that it was sold by the aforesaid stores at the preticketed price. The witness estimated the retail sales of the Kaycrest line for 1961 as being between \$50,000 and \$60,000. The retail sales of respondent's aforesaid products for 1962 were estimated as being about one-half of the 1961 sales or \$25,000 to \$30,000, and of this latter sales amount, the respondent's PR items were stated to have constituted ten or fifteen percent of the 1962 sales.³³

The witness on cross-examination indicated that respondent's PR items were resold by the aforesaid stores at less than their preticketed price. On redirect examination, however, the witness stated that he did not actually know whether these PR items were preticketed in 1962 because he was not active in the 1962 line of merchandising.³⁴

11. The record shows respondent to be selling products in the Kaycrest, Rhapsody and PR lines in the greater Cleveland trade area to which are affixed preticketed retail prices. The total annual dollar volume of such sales by the respondent in this area is not disclosed for any of the said lines, nor does the record reveal what number of wholesalers or retail stores in this area are reselling said products from the said different lines. The record also fails to show in relation to respondent's total sales any substantial volume or percentage of retail sales being made at less than the preticketed price by a representative group of the total number of the wholesalers and stores handling these product lines in this area.

With regard to the Kaycrest line, the record shows sales in only a small annual dollar amount by the witness Kopit, a wholesaler-retailer; in an unknown annual dollar amount by the witness Marcus, a wholesaler-retailer; in an unknown annual dollar amount by the

³³ Tr. 378-383.

³⁴ A prior witness had testified to selling products of the PR line or promotional items during 1962 and stated they were not preticketed. See, witness Levy (Tr. 337). Still another witness stated to the contrary of Mr. Levy. See, witness Durr (Tr. 264).

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witness Durr, a chain retailer; in an unknown annual dollar amount by the witness Lader, a wholesaler; in some part of \$98,000 over-all sales by the witness Lefkowitz, a wholesaler; in some part of \$15,000 annual sales in 1962 by the witness Kohn, a rack jobber; and in some part of \$50,000 to \$60,000 annual sales for 1961 and \$25,000 to \$30,000 annual sales for 1962 by the witness Stilgenbauer, a rack jobber.

Witnesses Kopit and Marcus testified to the retail selling of an undisclosed annual dollar amount of products in the Kaycrest line below the preticketed price. Witnesses Durr, Lefkowitz, Kohn and Stilgenbauer testified to the retail selling of products in the Kaycrest line at the preticketed price, based on an annual sales volume as above shown. With respect to the PR line, the testimony shows products of this line to have been sold only in part of the above annual sales by the witness Kohn, servicing 200 retail supermarkets in Cleveland and northeastern Ohio said to be selling at the preticketed price.

With regard to the Rhapsody line, the testimony shows it to have been sold by only the witnesses Durr and Lefkowitz. Witness Durr testified products from the Rhapsody line to have been sold in an unknown volume, at an undisclosed retail price below the preticketed price, through a discount operation in an unrevealed number of stores. Witness Lefkowitz testified to some part of annual over-all sales of \$98,000 being made to approximately 95% of an undisclosed number of retailer customers stated to sell products from this line at the preticketed price.

Based on this state of the record, no finding can be made sustaining the fictitious pricing charge made as to respondent's Kaycrest and PR product lines in the Cleveland trade area. The record is also inadequate to make a proper finding sustaining such charge as regards respondent's Rhapsody product line in said area.

Evidence of price cutting, standing alone and without more, is not sufficient despite a testimonial admission of its known occurrence. Absent in this proceeding is the factual presentation shown in various past-decided cases.³⁵

In dismissing the complaint in the *Sun Gold Industries* matter, (1960) 56 F.T.C. 1368, the opinion of the Commission held that upon a showing that products have an affixed preticketed price, the only additional proof required is that the preticketed price is not the usual and regular retail price of such products but is an exaggerated or

³⁵ For example, see *Baltimore Luggage Company v. FTC*, (1961) 296 F. 2d 608, cert. denied 369 U.S. 860; Docket No. 8140, *Leeds Travelwear, Inc.* (1962); Opinion Vacating Initial Decision and Remanding Matter to Hearing Examiner, Docket No. 7714, *J. Weingarten, Inc.* (1963).

fictitious price. If it is shown that the product ordinarily retailed for less than the preticketed price, regardless of what these prices may be, the burden of proof imposed on counsel supporting the complaint has been met.³⁶ With relation to the evidence of record in support of this charge of the complaint in the *Sun Gold Industries* matter, the opinion stated further, that there was no evidence as to the amount of the sales at retail by the witnesses testifying, that the percentage relationship of such sales to the total sales at retail of the preticketed products in their trade area or areas was not disclosed, nor was it shown that these witnesses were the only sellers of the preticketed products in their respective trade area or areas.

Accordingly, and for the reasons herein set forth with relation to the Detroit trade area, *supra.*, this charge of the complaint relative to the Cleveland trade area also fails of adequate proof. The cut price sales testified to by some of the foregoing witnesses, standing alone and without more, does not prove that the regular usual and prevailing price for respondent's said products was other than the preticketed price for said products in the trade area or areas concerned, and that the said preticketed price for the same was further a greatly exaggerated and fictitious price as alleged in the complaint.

12. Received in evidence as respondent's exhibit no. 5 is a tabulation disclosing the dates of discontinuance by respondent of the packaging techniques alleged by the complaint to be false, misleading and deceptive. Examples in evidence are Commission exhibits 1, 2, 3, 4, 5, 6 and 7. Commission exhibits no. 1, 2, 5, 6 and 7 are the cushion-end type box found to be false, misleading and deceptive to prospective purchasers as hereinbefore related in finding number 5, *supra.* These packaging techniques were discontinued at various dates during the year 1961. Respondent, although denying such packaging was false, misleading and deceptive, represents that it will not again resume such manner of packaging.³⁷

In the *Gimble Brothers, Inc.* matter, cited *supra.*, the Commission discussed the effect of such discontinuance and cited numerous legal precedents. It was stated that in essence a showing of facts is required which guarantees or assures against resumption of the practice, particularly so where respondent asserts the challenged practice

³⁶ The court in *Helbros Watch Company, Inc. v. FTC*, (1962), 310 F. 2d 868, speaks of "sales at substantially less than the preticketed price".

³⁷ Respondent also urges that such packaging was *de minimis* in relation to over-all product sales. Respondent's interlocutory appeal herein denied by the Commission under date of November 19, 1962, however, reveals that such packaging constituted about 5% of said sales of over \$7,000,000 annually.

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to be non-deceptive. Such required showing is not found to be present in the instant proceeding as to the discontinuance of certain packaging nor for any discontinuance of certain preticketing by the respondent.

In this latter connection, it would appear appropriate to mention respondent's rejected exhibits marked for identification 2-A through 2-Z-30, 3-A through 3-Z-41, 4-A through 4-Z-145, being surveys conducted by respondent as to alleged preticketing practices of respondent's competitors. It should be noted that preticketing itself is not prohibited, only that which is fictitious. If respondent's preticketing had been herein proven not the usual and regular price for such products in the same marketing or trade area and thus fictitious, and respondent's competitors' pricing therein was of the like calibre and thus also fictitious, it still would not have made these rejected exhibits admissible. It is immaterial that competitors employ the same or similar methods.³⁸

Further, any alleged resulting business hardship because of any respondent being restricted to honest practices while competitors are still free to employ the prohibited practices would not operate to make the rejected exhibits admissible.³⁹

13. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of gift wrapping products of the same general kind and nature as those sold by respondent.⁴⁰ By use of the acts and practices set forth and described herein in finding number 5, *supra*, respondent places in the hands of others a means and instrumentality by and through which the purchasing public may be misled as to the width and the quantity of the gift wrapping paper enclosed and contained in the said display boxes.

14. The use by the respondent of the said false, misleading and deceptive packaging has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the aforesaid display boxes contain gift wrapping paper of greater width and quantity than is the fact and into the purchase of substantial amounts of respondent's said products by reason of said erroneous and mistaken belief.⁴¹

³⁸ *International Art Company v. FTC* (1940) 109 F. 2d 393, cert. denied 310 U.S. 632.

³⁹ *Clinton Watch Co. v. FTC* (1961) 291 F. 2d 838, cert. denied 368 U.S. 952.

⁴⁰ Tr. 165; 205-206.

⁴¹ *Marlborough Laboratories, Inc., et al., supra; FTC v. Winstead Hosiery Co.* (1922) 258 U.S. 483; *Charles of the Ritz Dist. Corp. v. FTC* (1944) 143 F. 2d 676.

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CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

2. The complaint herein states a cause of action and this proceeding is in the public interest.

3. The aforesaid acts and practices of respondent as hereinbefore found and as are particularly set forth and described in finding number 5, were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

4. The aforesaid acts and practices of respondent as hereinbefore found and as are particularly set forth and detailed in findings number 7 through 11, do not disclose adequate proof of and do not sustain the fictitious pricing charge of Paragraph Seven of the complaint, and such charge of the complaint should accordingly be dismissed without prejudice.

ORDER ⁴²

It is ordered, That respondent, The Papercraft Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device in connection with the offering for sale, sale and distribution of gift wrapping or other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or indirectly, by the device of slack-filling or by any means or other manner of packaging which gives the appearance, states or implies that the products therein are larger in size, such as width, length, area, weight, thickness or quantity than is the actual fact

2. Engaging in any act, practice or plan which will provide wholesalers, retailers or other distributors of the above products with the means of misrepresenting said products as set forth in Paragraph 1 above.

It is further ordered, That the charges in Paragraph Seven of the complaint be, and they hereby are, dismissed without prejudice.

⁴² See, order entered by Commission in Docket No. C-206, Superior Insulating Tape Company, et al. (1962) [61 F.T.C. 416, 418].

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OPINION OF THE COMMISSION

DECEMBER 24, 1963

By ELMAN, *Commissioner*:

Respondent, a Pennsylvania corporation, manufactures gift wrapping papers, ribbons, and related products and sells them throughout the United States to distributors and retailers for resale to the consuming public.¹ The Commission's complaint, issued on June 4, 1962, charged respondent with having violated Section 5 of the Federal Trade Commission Act through deceptive packaging and fictitious pricing of its gift wrapping paper.² After evidentiary hearings, the hearing examiner, on April 3, 1963, filed his initial decision, in which he dismissed the complaint as to fictitious pricing for failure of proof, but upheld it as to the principal deceptive-packaging allegations and entered a cease and desist order.³ The matter is before the Commission on the cross-appeals of respondent and complaint counsel.

Respondent's appeal challenges various aspects of the analysis by which the examiner reached the conclusion that respondent's packaging was deceptive. We find it unnecessary to decide whether these objections to the initial decision are valid. The members of the Commission have inspected the actual boxes, which are a part of the record, upon which the charge of deceptive packaging is based; and our finding of deception is based, not on the analysis in the initial decision, but on our independent, first-hand examination of these boxes. That the Commission may, where appropriate, predicate a finding of deception on its own visual examination of the alleged means of deception, unassisted by "consumer testimony", is too well settled to require citation or discussion.

Commission Exhibit 2,⁴ for example, is a box in which respondent packs its rolls of gift wrapping papers for display and sale to the

¹ It is conceded that respondent sells its gift wrapping papers (the only product involved in this case) in commerce.

² The fictitious-pricing charge was based on respondent's having imprinted allegedly exaggerated retail prices on boxes, designed to be displayed to the consuming public, of its gift wrapping paper rolls.

³ The examiner dismissed the part of the complaint dealing with alleged deceptive packaging of rolls of different width in a single box (see initial decision p. 1975). Complaint counsel has not appealed from this part of the initial decision, and we shall not consider it further.

⁴ Photographs of the exhibit, showing (1) the box as it is sold to the consumer, and (2) the empty box with the rolls of gift wrapping paper contained in it placed alongside the box, are appended to this opinion [pp. 2001, 2002 herein].

consuming public. The box, which contains four rolls of gift wrapping papers of different design laid side by side, is 24 inches long, and has a transparent acetate "window" approximately 19 inches long, through which the rolls are visible. To one examining or handling (but not opening) the box it appears that the width of the rolls is coextensive with the length of the box, for the ends of the rolls cannot be seen through the window. In fact, however, the rolls have a uniform width of only 20 inches, and the box contains two inches of empty space at either end. Respondent contends that this "cushion end" construction is necessary to enable the rolls to be fully displayed through the window, and points out that the true width of the rolls is stated, in terms of inches, on the box. We find, nevertheless, that this manner of packaging is deceptive and unlawful.

"Slack filling"—broadly, any use of oversized containers to create a false and misleading impression of the quantities contained in them—is an unlawful trade practice.⁵ For a seller to package goods in containers which—unknown to the consumer—are appreciably oversized, or in containers so shaped as to create the optical illusion of being larger than conventionally shaped containers of equal or greater capacity, is as much a deceptive practice, and an unfair method of competition, as if the seller were to make an explicit false statement of the quantity or dimensions of his goods. While the Commission is not concerned with requiring standardized or uniform packaging as such, it is concerned with all forms and methods of deceptive packaging of goods in commerce, no less than with false and misleading advertising or labeling of such goods.

The tendency of oversized or deceptively shaped containers to mislead is not, as respondent urges, cured by accurately stating on the container the actual quantity (here, the width of the rolls of gift wrapping papers) of the goods, any more than an explicit false statement of quantity would be cured by use of a non-deceptive container. To be sure, a shopper looking for gift wrapping paper of a specific width might not be greatly influenced, in making his purchase, by the

⁵ *Baltimore Paint & Color Works, Inc.*, 9 F.T.C. 242, *aff'd.* 41 F.2d 474 (4th Cir. 1930); *Esport Petroleum Co.*, 17 F.T.C. 119; *Trade Laboratories, Inc.*, 25 F.T.C. 937; *Marlborough Laboratories, Inc.*, 32 F.T.C. 1014; *Burry Biscuit Corp.*, 33 F.T.C. 89; *United Drug Co.*, 35 F.T.C. 643; *Harry Greenberg*, 39 F.T.C. 188. The practice has also been a matter of concern to the Congress. Cf. the proposed "truth in packaging" legislation aimed in part at slack filling and related misrepresentations of quantity. S. 387, 88th Cong., 1st Sess., p. 5, §3A(e)(2).

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length of the box; he would be more concerned with the stated than with the apparent width of the rolls. However, many, and perhaps most, shoppers probably have no more than a rough idea of the width they desire in gift wrapping paper. Such a person will measure with his eyes, and will be influenced to purchase respondent's rolls by the length of the box. Even if he notices the statement of actual width, in inches, on the box, he is not likely to infer therefrom that the rolls do not extend the full length of the box; and, needless to say, most shoppers do not carry tape measures with them. After he has purchased respondent's rolls and brought them home, he may discover with surprise and dismay that the rolls are narrower than he had thought and inadequate to his needs. Clearly, a person deceived in this fashion is not one of the "foolish or feeble-minded" who are not entitled to the Commission's protection. *Heinz W. Kirchner*, F.T.C. Docket 8538 (decided November 7, 1963) [p. 1282 herein].

This form of deception is, moreover, an unfair method of competition. Consider the case of a manufacturer of gift wrapping paper who packages his 20-inch rolls in 20-inch boxes; he will lose sales to respondent because respondent appears to be offering more for the price. Or consider the manufacturer of 24-inch rolls, which he packages in 24-inch boxes; he will lose sales to respondent because many consumers will believe that respondent is offering paper of the same width at a lower price.

We do not suggest that a discrepancy between the inside and outside dimensions of a container is deceptive and unlawful under any and all circumstances. There may be instances in which an oversized container creates no substantial danger of deception. That might be true of respondent's "cushion end" box if the entire width of the rolls (including both ends) was visible (as it is not) through the window, so that even the casual shopper would immediately perceive that the rolls were not coterminous with the box.⁶ Also, technical factors (e.g., fragility) may require the use of oversized containers, though if such a *bona fide* oversized container could create a misleading impression, the seller must take all reasonable precautions to prevent deception.

⁶In this connection, we note that the purchaser of gift wrapping paper probably realizes that the rolls contain a hollow cardboard core, and hence this form of "slack filling" is probably not deceptive—on the assumption, of course, that the core is not so abnormal in size as to deceive, and that the seller does not represent that there is no core or that the core is smaller than is the fact.

Respondent in this case introduced evidence to show that its "cushion end" box was justified because it enabled the rolls of gift wrapping papers to be fully exhibited through the acetate windows. Such evidence is wide of the mark. If respondent desired to disclose the full width of its rolls, it could easily have done so in a non-deceptive fashion, as has been suggested, by mounting them so that their full width, including their ends, was visible through the window. Since respondent could so readily have avoided deceiving the consumer, we think its failure to do so vitiates the asserted defense. We need not consider what respondent's liability would have been if, for some reason not present here, the requirements of effective, legitimate packaging were in irreconcilable conflict with the needs of consumer protection. Compare *United States v. 174 Cases, More or Less, Delson Thin Mints*, 287 F. 2d 246 (3d Cir. 1961); Note, *Federal Regulation of Deceptive Packaging: The Relevance of Technological Justification*, 72 Yale L. J. 788 (1963).⁷

Commissioner Anderson concurs in the result; Commissioner MacIntyre dissents and has filed a separate opinion.

DISSENTING OPINION

DECEMBER 24, 1963

By MACINTYRE, Commissioner:

With the action of the majority I cannot agree. However, it is my hope that the Gift Wrappings and Tyings Industry will understand it better than I do.

The representatives of the Gift Wrappings and Tyings Industry not only acknowledge but contend that fictitious pricing is widely

⁷ With respect to the fictitious-pricing charge in the complaint, we have decided that, in the particular circumstances of this case, the public interest requires that the initial decision be vacated, and the complaint and complaint counsel's appeal dismissed, without determination of the merits of the charge. The Commission is at present engaged in a comprehensive reexamination and revision of its policy toward deceptive pricing, as expressed in the current (1958) version of the Guides Against Deceptive Pricing, and we believe that entry of a cease and desist order at this time, even if justified by the record, would be inappropriate. If conditions in the gift wrapping paper industry indicate the need for industry-wide, non-adjudicative correction action (cf. *Papercraft Corp.*, F.T.C. Docket 8489 (Order Denying Interlocutory Appeal, November 19, 1962)) [p. 1998 herein], that course is also open to the Commission. Cf. *Atlantic Products Corp.*, F.T.C. Docket 8513 (Order of December 13, 1963) [p. 2237 herein]. For these reasons, in the exercise of our discretion to choose among the various remedies and courses of action available to the Commission for the effectuation of its statutory responsibilities, we have decided to terminate the present proceeding, in its fictitious-pricing aspect, without a final adjudication of the merits.

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practiced in this industry. The complaint charged that the respondent was engaged in the practice of pre-ticketing fictitious prices on its merchandise. During the course of the hearings, its Vice-President in Charge of Marketing, Mr. Scheckner, at Transcript Page 244, testified regarding that practice. The hearing examiner was sufficiently impressed by that testimony that he not only referred to it but quoted it in the initial decision as follows:

Mr. Scheckner, under cross-examination, further testified that the respondent did not take the same protective measures with the Rhapsody line as it did with the Kaycrest line when it found a retailer selling below the preticketed price. The witness also admitted to knowledge that the Rhapsody line of the respondent would be sold by discount houses at prices below the preticketed prices, and the record shows the following testimony of the witness relative to the Rhapsody line:

Q. As a matter of fact, you sold a great proportion of these to the discount houses?

A. The majority of the Rhapsody line was sold to discount houses.

Q. And the discount prices were below the pre-ticketed items as a general proposition?

A. That is correct. (See page 1978, Initial Decision.)

Such admissions regarding the facts and other testimony regarding the evidentiary facts proved unconvincing to the Hearing Examiner. Therefore, he proceeded to conclude that on the record in the case he would make no findings sustaining the fictitious pricing charge. I am unable to determine what factors persuaded him to dismiss the charge. Counsel for the respondent at page 30 of the brief in reply to counsel supporting the complaint when appeal was taken to the Commission, had this to say:

1. Preticketing is an industry-wide practice in the gift wrapping industry and Respondent contends that the public interest requires that it be dealt with on an industry-wide basis.

2. The Commission's action in singling out and issuing a complaint against Respondent alone does not really further the public interest and it is unfair and prejudicial to Respondent.

In the face of all these admissions and contentions the majority found it difficult to dismiss the charge of fictitious pricing on the basis of any decision that it just simply does not exist. Instead, the majority stated:

With respect to the fictitious-pricing charge in the complaint, we have decided that, in the particular circumstances of this case, the public interest requires that the initial decision be vacated, and the complaint and complaint counsel's appeal dismissed, without determination of the merits of the charge.

The majority has thus acted, although on September 17, 1962, in an order denying respondent permission to file an interlocutory appeal for suspension of this proceeding, it was stated:

Respondent's motion for suspension recites that the Commission is investigating fictitious pricing practices of nine competitors of respondent and that the Gift Wrapping and Tyings Association has petitioned the Commission to initiate a Trade Regulation Rule proceeding in connection with industry-wide price preticketing practices in the gift wrapping industry. Respondent requests suspension of the present proceeding until the Commission's investigation of its competitors has been completed and until the Commission has disposed of the petition for a Trade Regulation Rule proceeding for the industry.

Thereafter, on November 19, 1962, in an order denying respondent an interlocutory appeal, the Commission stated:

The Commission having determined, for the reasons set out in its order of September 17, 1962, denying respondent's initial request for permission to file an interlocutory appeal, that a suspension of this proceeding at the present time would not be in the public interest, and that the question of whether a final order to cease and desist should be issued in this proceeding, the scope of such an order, and its effective date, may be more appropriately considered after the Commission has determined whether a violation of law has occurred.

From the foregoing it can be seen that the Commission disposed of this matter without acting upon it in this case. Also, it has avoided acting upon it in the broader sense of an industry-wide proceeding as was suggested by the respondent. The majority accomplished the latter through its suspension of an application for a Trade Regulation Rule Proceeding which had been filed with the Commission by representatives of the Gift Wrappings and Tyings Industry. On December 4, 1963, the Commission notified those representatives, who had filed that application, of its action in suspending the application. That notice is quoted as follows:

The Commission has considered the application of the Gift Wrappings and Tyings Association for a trade regulation rule proceeding and has directed that further action in this matter be suspended pending the promulgation and issuance of revised Guides Against Deceptive Pricing.

Commissioner MacIntyre did not concur in this action of the Commission. It is his wish that the following statement of his be made a part of this letter.

"It is my view that the Commission should have acted favorably on the application made in 1962 on behalf of the Gift Wrappings and Tyings Industry for the institution of a Trade Regulation Rule Proceeding. In that application a showing was made that fictitious pricing by way of pre-ticketing presents a serious competitive problem in the Gift Wrappings and Tyings Industry. Moreover, the Commission has made sufficient investigation of its own to provide it with information to the effect that fictitious pricing by way of pre-ticketing is, in fact, a serious competitive problem in the Gift Wrappings and Tyings Industry. This is true despite the fact that the Commission in 1958 promulgated and published widely 'Guides' containing a statement of the law

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applicable to fictitious pricing by way of pre-ticketing. With this experience and knowledge at hand the Commission, certainly for the time being, has disposed of the application for a Trade Regulation Rule proceeding regarding fictitious pricing by way of pre-ticketing in the Gift Wrappings and Tying Industry. It did this by directing that 'further action in this matter be suspended pending the promulgation and issuance of revised Guides against deceptive pricing.' On the basis of our experience, I cannot agree with that action of the Commission."

Commissioner Anderson did not participate in this action for the reason that he was absent.

By direction of the Commission.

The Commission's failure to make a decision on the pricing practices challenged in this proceeding has left that aspect of the case in a kind of quasi-judicial limbo. In effect, the Commission in this instance has refrained from action in its judicial capacity and from taking effective administrative measures.

Turning to the deceptive packaging allegation, I concur with the majority's disposition of that charge. The discussion of this issue is discerning and should prove a helpful guide to the Commission's staff in charting future action to protect the public from activities which are becoming increasingly troublesome and which have recently become the object of considerable Congressional concern. However, I wish to disassociate myself from the majority's statement that the portion of the public deceived by respondent's practices in this respect is not the "foolish or feeble minded" segment undeserving of the Commission's protection. That statement is gratuitous under the facts of this case. It may be innocuous on its face, but should this observation be construed as a retreat from our long-held position that the public as a whole is entitled to protection, including even "the ignorant, the unthinking and the credulous"¹, then the result may well be confusion in the Commission's activities in the deceptive practices field as well as less protection for the consumer.

ORDER GRANTING PERMISSION TO FILE INTERLOCUTORY APPEAL *

The hearing examiner having denied the respondent's motion to suspend the October 29, 1962, date for the hearing in this proceeding or, in the alternative, to certify the question to the Commission for its consideration; and

The respondent having filed a request for permission to file an interlocutory appeal from said ruling, contending that it is being

¹ *Dorfman, et al. v. Federal Trade Commission*, 144 F. 2d 737 (8th Cir. 1944); *Charles of the Ritz Dist. Corp. v. Federal Trade Commission*, 143 F. 2d 676 (2nd Cir. 1944).

* Issued Oct. 29, 1962.

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seriously injured as a result of having been singled out as the only member of the gift wrappings industry to be formally charged with fictitious price pre-ticketing practices, which practices allegedly are widely used throughout the industry and indeed are the subject-matter of a petition for an industry-wide Trade Regulation rulemaking proceeding now under consideration by the Commission's staff; and

The Commission, being aware of the pending petition for an industry-wide rulemaking proceeding relating to fictitious pre-ticketing practices in the gift wrappings industry, and being of the opinion that if the respondent can show that the public interest would not be prejudiced thereby, further action in this proceeding should be abated pending disposition of the petition for the rulemaking proceeding; and

The Commission being of the further opinion that the respondent should be afforded an opportunity to make such showing:

It is ordered, That the respondent's petition for permission to file an interlocutory appeal from the hearing examiner's ruling be, and it hereby is, granted.

It is further ordered, That the hearing in this proceeding scheduled to begin at 2 p.m. on October 29, 1962, in Cleveland, Ohio, be and it hereby is, suspended pending disposition by the Commission of the respondent's appeal.

ORDER DENYING INTERLOCUTORY APPEAL *

Upon consideration of respondent's interlocutory appeal from the order of the hearing examiner denying its request for the suspension of this proceeding until such time as the Commission acts upon a petition filed by the Gift Wrappings and Tyings Association for a Trade Regulation Rule proceeding in connection with industry-wide price-preticketing practices in the gift wrapping industry, and

The Commission having determined, for the reasons set out in its order of September 17, 1962, denying respondent's initial request for permission to file an interlocutory appeal, that a suspension of this proceeding at the present time would not be in the public interest, and that the question of whether a final order to cease and desist should be issued in this proceeding, the scope of such an order, and its effective date, may be more appropriately considered after the Commission has determined whether a violation of law has occurred:

It is ordered, That respondent's interlocutory appeal be, and it hereby, is denied.

* Issued Nov. 19, 1962.

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ORDER DENYING PERMISSION FOR INTERLOCUTORY APPEAL *

By its motion filed September 6, 1962, respondent requests permission to file an interlocutory appeal from the hearing examiner's order dated August 30, 1962, denying its motion for suspension of this proceeding.

Respondent's motion for suspension recites that the Commission is investigating fictitious pricing practices of nine competitors of respondent and that the Gift Wrapping and Tying Association has petitioned the Commission to initiate a Trade Regulation Rule proceeding in connection with industry-wide price-preticketing practices in the gift wrapping industry. Respondent requests suspension of the present proceeding until the Commission's investigation of its competitors has been completed and until the Commission has disposed of the petition for a Trade Regulation Rule proceeding for the industry.

The Commission believes that a suspension of this proceeding at the present time would not be in the public interest. Fictitious pricing of respondent's merchandise is only one of the deceptive practices alleged in the complaint. Respondent makes no claim that its packaging practices, which are also challenged by the complaint, are of an industry-wide nature. No reason exists, therefore, for suspension of this proceeding so far as it relates to these practices. In any event, respondent will have the opportunity, prior to entry of any final order in this proceeding, to present to the Commission any reasons why the effective date of such order should be deferred to await industry-wide action with respect to illegal practices shown to be industry-wide. Accordingly,

It is ordered, That respondent's request for permission to file an interlocutory appeal be, and it hereby is, denied.

FINAL ORDER

This matter has been heard by the Commission on the cross-appeals of complaint counsel and respondent from the initial decision of the hearing examiner. For the reasons stated in the accompanying opinion, the Commission has determined that the initial decision should be vacated and set aside; that a final order to cease and desist, based on the findings of fact and conclusions of law contained in the accompanying opinion, should be entered at this time against respondent

* Issued Sept. 17, 1962.

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with respect to all but one deceptive-packaging allegation of the complaint, the remaining such allegation to be dismissed; and that with respect to the fictitious-pricing allegations of the complaint, the complaint and complaint counsel's appeal should, in the exercise of the Commission's administrative discretion, be dismissed. Accordingly,

It is ordered, That the initial decision be, and it hereby is, vacated and set aside.

It is further ordered, That respondent, The Papercraft Corporation, a corporation, and its officers, directors, agents, representatives, employees, successors and assigns, directly or indirectly, under any name or through any corporate or other device, in connection with the offering for sale, sale or distribution, in commerce, of rolls of gift wrapping papers, do forthwith cease and desist from:

(1) Packaging rolls of gift wrapping paper in oversized boxes or other containers so as to create the appearance or impression that the width or other dimensions or quantity of the gift wrapping paper contained in the box or container is appreciably greater than is the fact; but nothing in this order shall be construed as forbidding respondent to use oversized containers if respondent justifies the use of such containers as necessary for the efficient packaging of the rolls contained therein and establishes that respondent has made all reasonable efforts to prevent any misleading appearance or impression from being created by such containers;

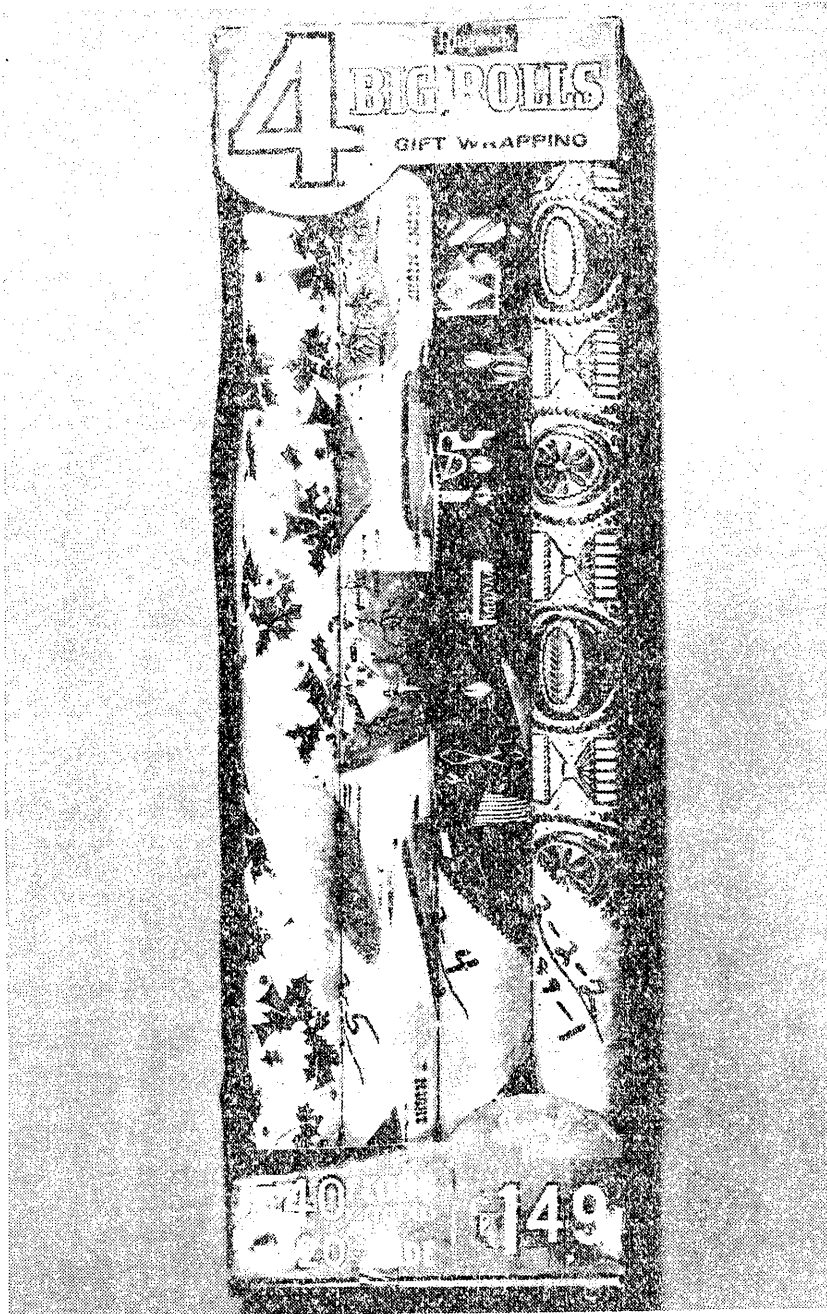
(2) Providing wholesalers, retailers or other distributors of respondent's rolls of gift wrapping papers with any means or instrumentality with which to deceive the purchasing public in the manner described in Paragraph (1) above.

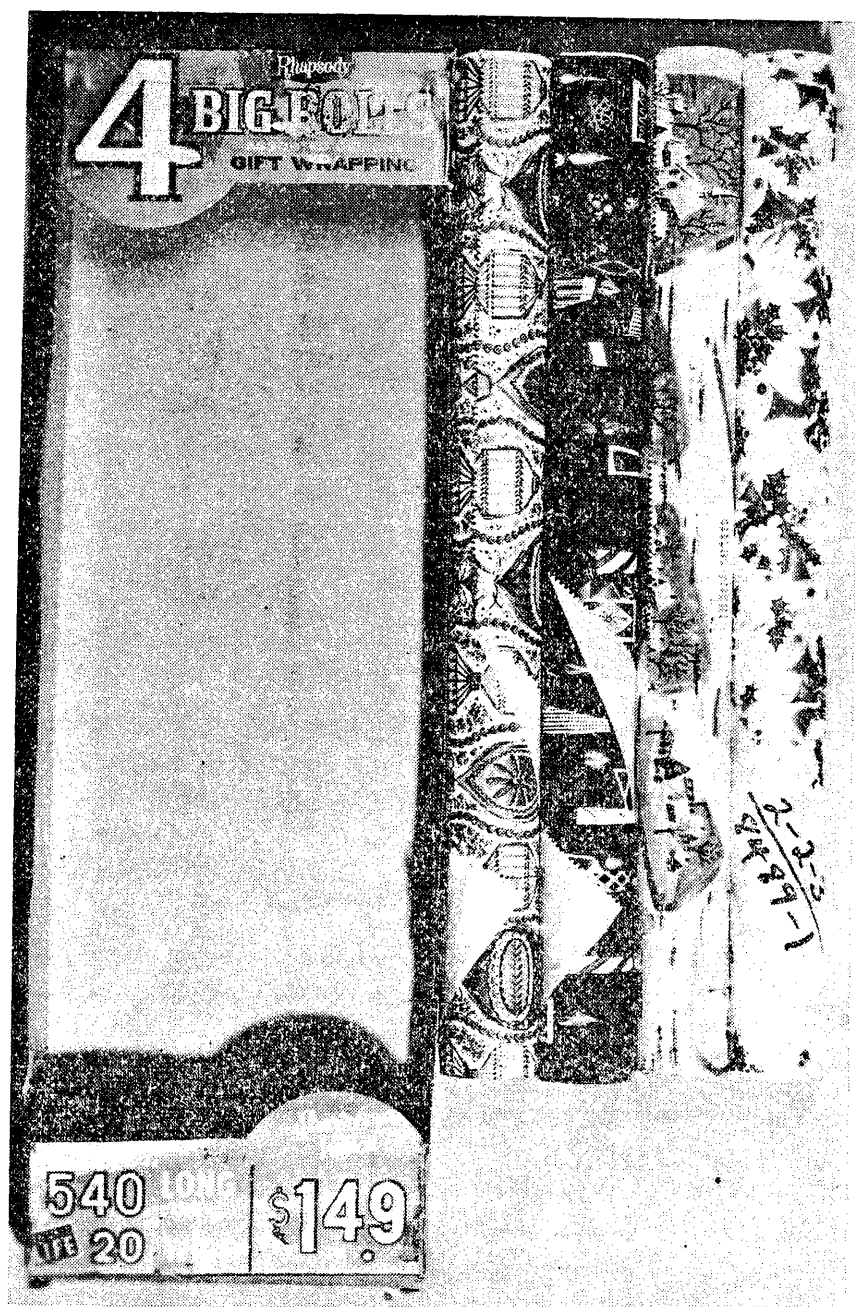
It is further ordered, That the complaint be, and it hereby is, dismissed with respect to the packaging of rolls of gift wrapping paper of different width in a single box.

It is further ordered, That Paragraph Seven of the complaint (fictitious pricing), and complaint counsel's appeal from the initial decision, be, and they hereby are, dismissed.

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

By the Commission, Commissioner Anderson concurring in the result; Commissioner MacIntyre dissenting.





Complaint

IN THE MATTER OF

AMT CORPORATION ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-633. Complaint, Dec. 24, 1963—Decision, Dec. 24, 1963*

Consent order requiring distributors of toys and related products in Troy, Mich., to cease representing by means of television commercials that their toy designated "Authentic Model Turnpike" included two cars when it had only one, and representing falsely that it included track infield grass, shrubbery and trees, driving course obstacles, and numerous miniature pieces such as, lamp posts, grandstand, first-aid shack, start and finish markers, scoreboard and human figures.

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 AMT Corporation, a corporation, and West H. Gallogly, John A. Bacon, Jr., Harry C. Haaxma, and Harold R. Smith, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent AMT Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1225 East Maple Road, in the City of Troy, State of Michigan.

Respondents West H. Gallogly, John A. Bacon, Jr., Harry C. Haaxma and Harold R. Smith are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. The address of respondent West H. Gallogly is 3793 Delano Road in the City of Oxford, State of Michigan. The address of respondent John A. Bacon, Jr., is 239 Pilgrim Road in the City of Birmingham, State of Michigan. The address of respondent Harry C. Haaxma is 24337 Orangelawn in the City of Detroit, State of Michigan. The address of respondent Harold R. Smith is 2528 Buhl Building in the City of Detroit, State of Michigan.

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PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of toys and related products, including a toy designated "Authentic Model Turnpike", to distributors and to retailers for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of Michigan to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with other corporations, firms and individuals in the sale of toys and related products.

PAR. 5. In the course and conduct of their business and for the purpose of inducing the purchase in commerce of the said "Authentic Model Turnpike", respondents have made certain statements, representations and pictorial presentations with respect thereto by means of commercials transmitted by television stations located in various States of the United States and in the District of Columbia.

PAR. 6. Enlargements of individual frames extracted from said television commercials, illustrating typical representations, with respect to the components contained in the "Authentic Model Turnpike", as allegedly packaged and sold to the public, as alleged in Paragraph Seven below, are attached hereto, marked Exhibits "A" to "C", inclusive, and incorporated herein by reference.*

PAR. 7. Through the use of the aforesaid advertisements, and others containing representations of the same import not specifically set forth herein, respondents have represented, directly and by implication:

That the "Authentic Model Turnpike", as packaged and sold to the purchasing public, includes:

- 1) two cars;
- 2) track infield grass, shrubbery and trees;
- 3) driving course obstacles; and
- 4) numerous miniature pieces, including among others, lamp posts, grandstand, first-aid shack, start and finish markers, scoreboard and human figures.

* Exhibits "A" to "C" are omitted in printing.

PAR. 8. In truth and in fact:

The "Authentic Model Turnpike", as packaged and sold to the purchasing public, does not include two cars but only one and does not include track infield grass, shrubbery or trees; driving course obstacles; or miniature pieces, such as lamp posts, grandstand, first-aid shack, start and finish markers, scoreboard or human figures.

Therefore, the statements, representations and depictions referred to in Paragraphs Five and Six are false, misleading and deceptive.

PAR. 9. Respondents' toys and related products, including the "Authentic Model Turnpike", are designed primarily for children, and are bought either by or for the benefit of children. Respondents' false, misleading and deceptive advertising claims thus unfairly exploit a consumer group unqualified by age or experience to anticipate or appreciate the possibility that the representation may be exaggerated or untrue. Further, respondents unfairly play upon the affection of adults, especially parents and other close relatives, for children, by inducing the purchase of toys and related products through false, misleading and deceptive claims of their appearance or performance, which claims appeal both to adults and to children who bring the toys to the attention of adults. As a consequence of respondents' exaggerated and untrue representations, toys are purchased in the expectation that they will have characteristics or perform in a manner not substantiated by the facts. Consumers are thus misled to their disappointment and competing advertisers who do not engage in false, misleading or deceptive advertising are unfairly prejudiced.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive representations has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said representations were, and are, true and into the purchase of substantial quantities of the products of respondents by reason of said erroneous and mistaken belief.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with

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violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent AMT Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1225 East Maple Road, in the City of Troy, State of Michigan.

Respondent West H. Gallogly is an officer of said corporation. His address is 3793 Delano Road in the City of Oxford, State of Michigan.

Respondent John A. Bacon, Jr., is an officer of said corporation. His address is 239 Pilgrim Road in the City of Birmingham, State of Michigan.

Respondent Harry C. Haaxma is an officer of said corporation. His address is 24337 Orangelawn in the City of Detroit, State of Michigan.

Respondent Harold R. Smith is an officer of said corporation. His address is 2528 Buhl Building in the City of Detroit, State of Michigan.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents AMT Corporation, a corporation, and its officers, and West H. Gallogly, John A. Bacon, Jr., Harry C. Haaxma and Harold R. Smith, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with

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the offering for sale, sale or distribution of toys or related products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, by use of any illustration, depiction or demonstration, alone or accompanied by oral or written statements, purporting to illustrate, depict or demonstrate any toy or related product, or the characteristics thereof, or representing in any other manner, directly or by implication, that any toy or related product possesses any characteristic, or contains or includes any pieces, parts or components not in accordance with fact.

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

IN THE MATTER OF

SARAH COHEN, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION, THE TEXTILE FIBER PRODUCTS IDENTIFICATION,
AND THE WOOL PRODUCTS LABELING ACTS

Docket C-634. Complaint, Dec. 24, 1963—Decision, Dec. 24, 1963

Consent order requiring the operators of a ladies' specialty shop in Norfolk, Va., engaged in the retail sale of coats, dresses, sweaters and other apparel, to cease violating the Textile Fiber Products Identification and the Wool Products Labeling Acts by failing to label certain textile fiber and wool products with required information and by removing, prior to final sale, the stamps or other identification required to be affixed to such products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Textile Fiber Products Identification Act, and the Wool Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Sarah Cohen, Inc., a corporation, and Anna Klein, Herbert Goldberg and Jeanette Goldberg, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the

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Textile Fiber Products Identification Act and the Wool Products Labeling 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 Sarah Cohen, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its offices and principal place of business located at 107 College Place, Norfolk, Virginia.

Respondent Sarah Cohen, Inc., is a ladies' specialty shop engaged in the retail sales of coats, dresses, sweaters, and other apparel.

Proposed individual respondents Anna Klein, Herbert Goldberg and Jeanette Goldberg are officers of said corporation and they formulate, direct and control the policies, acts and practices of said corporation and their home address is 908 Pembroke Towers, Norfolk, Virginia while the business address is 107 College Place, Norfolk, Virginia.

PAR. 2. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondents have been and are now engaged in the introduction, delivery for sale, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported, and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported, and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce", and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified with the information required under Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

PAR. 4. After certain textile fiber products were shipped in commerce, respondents have removed, or caused or participated in the removal of, the stamp, tag, label or other identification required by the Textile Fiber Products Identification Act to be affixed to such

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products, prior to the time such textile fiber products were sold and delivered to the ultimate consumer, in violation of Section 5(a) of said Act.

PAR. 5 The acts and practices of respondents as set forth above were, and are in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder and constituted, and now constitute, unfair and deceptive acts and practices, and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

PAR. 6. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have introduced into commerce, sold, transported, distributed, delivered for shipment, and offered for sale in commerce, as "commerce" is defined in said Act, wool products as "wool product" is defined therein.

PAR. 7. Certain of said wool products were misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified with the information required under Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as required by the Rules and Regulations promulgated under said Act.

PAR. 8. After wool products were shipped to them in commerce, respondents with the intent of violating the provisions of the Wool Products Labeling Act of 1939 have removed or caused or participated in the removal of the stamp, tag, label or other identification required by the Wool Products Labeling Act of 1939 to be affixed to such wool products, prior to the time such wool products were sold and delivered to the ultimate consumer, in violation of Section 5 of said Act.

PAR. 9. The acts and practices of the respondents as set forth above in Paragraph Six, Seven and Eight were, and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939 and the Textile Fiber Products Identification Act, and the respondents having been served with notice of said de-

termination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Sarah Cohen, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its office and principal place of business located at 107 College Place, in the city of Norfolk, State of Virginia.

Respondents, Anna Klein, Herbert Goldberg and Jeanette Goldberg, are officers of said corporation, and their address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Sarah Cohen, Inc., a corporation, and its officers, and Anna Klein, Herbert Goldberg and Jeanette Goldberg, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, sale, advertising or offering for sale, in commerce, or in the transportation or causing to be transported in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber

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Decision and Order

Products Identification Act do forthwith cease and desist from misbranding textile fiber products by failing to affix labels to such products showing each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

It is further ordered, That respondents Sarah Cohen, Inc., a corporation, and its officers, and Anna Klein, Herbert Goldberg and Jeanette Goldberg, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, do forthwith cease and desist from removing, or causing or participating in the removal of, the stamp, tag, label or other identification required by the Textile Fiber Products Identification Act to be affixed to any textile fiber product, after such textile fiber product has been shipped in commerce and prior to the time such textile fiber product is sold and delivered to the ultimate consumer.

It is further ordered, That respondents Sarah Cohen, Inc., a corporation, and its officers, and Anna Klein, Herbert Goldberg and Jeanette Goldberg, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with the introduction into commerce, or the offering for sale, sale, transportation, or delivery for shipment, in commerce, of any wool product, as "wool product" and "commerce" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from failing to securely affix to or place on each product, a stamp, tag, label or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That respondents Sarah Cohen, Inc., a corporation, and its officers, and Anna Klein, Herbert Goldberg and Jeanette Goldberg, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, do forthwith cease and desist from removing, or causing or participating in the removal of any stamp, tag, label, or other means of identification affixed to any wool product subject to the provisions of the Wool Products Labeling Act of 1939 with intent to violate the provisions of the said Act.

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

Complaint

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IN THE MATTER OF

STATE BLIND SALES, INC., ET AL.

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

Docket C-635. Complaint, Dec. 24, 1963—Decision, Dec. 24, 1963

Consent order requiring Detroit, Mich., sellers of rugs, brooms, mops and other household articles direct to the public and to distributors for resale, to cease representing falsely in advertisements in magazines, hand circulars, telephone solicitations, radio broadcasts and by other means, that their commercial businesses operated for their own profit were charitable enterprises operated for the benefit of blind and handicapped persons, that only blind and handicapped persons were employed, and that such persons produced or packaged all their products and benefited from the sale thereof.

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 State Blind Sales, Inc., a corporation, and Norman W. Henson, individually and as an officer of said corporation, and Philip K. Dauvin, an individual trading and doing business as State Blind Sales, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent State Blind Sales, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its principal office and place of business located at 2972 East Seven Mile Road in the City of Detroit, State of Michigan.

Respondent Norman W. Henson is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of corporate respondent.

Respondent Philip K. Dauvin, is an individual trading and doing business as State Blind Sales. He is an agent of the corporate respondent and licensed to use the name of State Blind Sales by the corporate respondent. His office and principal place of business