

setting forth in detail the manner and form in which he has complied with the order contained in the initial decision.

IN THE MATTER OF
AVALON INDUSTRIES, INC., ET AL.
ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5
OF THE FEDERAL TRADE COMMISSION ACT

Docket 8925. Complaint, Apr. 13, 1973—Order, May 20, 1974.

Order requiring a Brooklyn, N. Y., seller and distributor of toy, gift, and hobby products to jobbers and retailers, among other things to cease deceptively packaging its products in oversized containers or otherwise misrepresenting their dimensions or quantities.

Appearances

For the Commission: *Herbert S. Forsmith, Alan Rubinstein and Armando Labrada.*

For the respondents: *Martin Greene of Aberman, Greene & Locker, New York, N. Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Avalon Industries, Inc., a corporation, and Morton R. Berman, individually, and as an officer 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 Avalon Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws

of the State of New York, with its principal office and place of business located at 95 Lorimer Street, Brooklyn, N.Y.

PAR. 2. Respondent Morton R. Berman is an individual and is president of the corporate respondent, and formulates, directs and controls its acts and practices, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 3. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of toy, gift and hobby products to jobbers and retailers for resale to the public.

PAR. 4. In the course and conduct of their business, respondents now cause, and for some time last past have caused, said products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States, 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. 5. Among the products which are offered for sale and sold by the respondents are a number of toy, gift and hobby products. Through the use of certain methods of packaging, respondents have represented, and have placed in the hands of others the means and instrumentalities through which they might represent, directly or indirectly, that certain of the above products, as depicted or otherwise described on the exteriors of packages, corresponded in their lengths and widths, or their lengths, widths and thicknesses, with the boxes in which they were contained and that others of such products were offered in quantities reasonably related to the size of the packages or containers in which they were presented for sale.

PAR. 6. In truth and in fact, such products often have not corresponded with their container or package dimensions and are often not offered in quantities reasonably related to the size of the containers or packages in which they are presented for sale purchasers of such a product are thereby given the mistaken impression that they are receiving a larger product or a product of greater volume than is actually the fact.

Therefore, the methods of packaging referred to in Paragraph Five hereof were and are unfair and false, misleading and deceptive.

PAR. 7. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as the products sold by the respondents.

PAR. 8. The use by respondents of the aforesaid unfair, false, misleading and deceptive methods of 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 quantum or amount of the product being sold was and is greater than the true such quantum or amount, and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of the 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 and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY DONALD R. MOORE, ADMINISTRATIVE LAW
JUDGE

APRIL 3, 1974

PRELIMINARY STATEMENT

The respondents in this proceeding are Avalon Industries, Inc., and Morton R. Berman, individually and as an officer (president) of the corporation. They are charged with violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. § 45), in the sale of toy, gift, and hobby products. The complaint, which was issued by the Federal Trade Commission on April 13, 1973, makes the following allegations:

Through the use of certain methods of packaging, respondents have represented, and have placed in the hands of others the means and instrumentalities through which they might represent, directly or indirectly, that certain * * * products, as depicted or otherwise described on the exteriors of packages, corresponded in their lengths and widths, or their lengths, widths and thicknesses, with the boxes in which they were contained and that others of such products were offered in quantities reasonably related to the size of the packages or containers in which they were presented for sale.

In truth and in fact, such products often have not corresponded with their container or package dimensions and are often not offered in quantities reasonably related to the size of the containers or packages in which they are presented for sale. Purchasers of such a product are thereby given the mistaken impression that they are receiving a larger product or a product of greater volume than is actually the fact.

The use by respondents of the aforesaid unfair, false, misleading and deceptive methods of 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 quantum or amount of the product being sold was and is greater than the true such quantum or amount, and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief. (Complaint, Pars. Five, Six, and Eight)

Respondents filed answer on May 24, 1973, admitting certain factual allegations of the complaint but denying generally any violation of law. In addition, respondents averred, as affirmative defenses, that before

the commencement of this proceeding, the corporate respondent redesigned certain of its toy craft products and discontinued the sale of certain products in boxes or other containers which might have caused the impression that the dimensions or the quantities of such products were appreciably greater than the fact, and that the use of certain containers is necessary for the efficient packaging of toy craft products, and the corporate respondent has made all reasonable efforts to prevent any misleading appearance or impression from being created by such containers.

After various prehearing procedures, hearings were held from Nov. 12 to 19, 1973, and on Dec. 4, 1973, in New York, N.Y.

At these hearings, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint. The testimony and evidence presented have been duly recorded and filed. The parties were represented by counsel and were afforded full opportunity to be heard, to examine and to cross-examine witnesses, and to introduce evidence bearing on the issues.

Complaint counsel's case-in-chief consisted primarily of the introduction into evidence of more than two dozen of respondents' products as packaged for sale to consumers, but in their proposed findings, they challenge as deceptive only 17 of such products. The record also contains packages of similar products sold by competitors of Avalon. Complaint counsel's only witness in their case-in-chief was the individual respondent, Morton R. Berman, president of Avalon.

Respondents' defense consisted of the testimony of Gerald Grey, chief of product development for Avalon; Edward Hertzberg, vice president of sales for Avalon; and Robert I. Goldberg, offered as a packaging expert. In rebuttal, Donald Doran testified as a packaging expert for complaint counsel.

After the presentation of evidence, proposed findings of fact and conclusions of law and a proposed form of order were filed by counsel supporting the complaint and by counsel for respondents, together with supporting briefs and reply briefs. The proposed findings of the parties not adopted, either in the form proposed or in substance, have been rejected as lacking support in the record or as involving immaterial matters.

Having heard and observed the witnesses and having carefully reviewed the entire record in this proceeding, together with the proposed findings and briefs filed by the parties, the administrative law judge makes the following findings of fact, enters his resulting conclusions, and issues an appropriate order.

As required by Section 3.51(b)(1) of the Commission's Rules of Practice, the findings of fact include references to the principal supporting

items of evidence in the record. Such references are intended to serve as convenient guides to the testimony and to the exhibits supporting the findings of fact, but they do not necessarily represent complete summaries of the evidence considered in arriving at such findings. Where references are made to proposed findings submitted by the parties, such references are intended to include their citations to the record unless otherwise indicated.

References to the record are made in parentheses, and certain abbreviations are used as follows:

CPF—"Proposed Findings, Conclusions of Law, Arguments in Support Thereof, and Order" filed by counsel supporting the complaint.

CRB—Reply Brief of counsel supporting the complaint ("Complaint Counsel's Exceptions to Respondents' Proposed Findings, Conclusions of Law and Arguments in Support Thereof").

CX—Commission Exhibit.

RPF—Respondents' "Proposed Findings, Conclusions of Law, Arguments in Support Thereof, and Order."

RRB—Respondent's "Reply Brief and Exceptions."

RX—Respondent's Exhibit.

TR—Transcript. (References to testimony sometimes cite the name of the witness and the transcript page number without the abbreviation "Tr."—for example, Berman 123.)

FINDINGS OF FACT

Respondents and Their Business

1. Respondent Avalon Industries, Inc. ("Avalon") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 95 Lorimer Street, Brooklyn, N.Y. (Admitted by Respondents' Answer, Par. 1). Avalon is a closely-held family-owned corporation (Tr. 44, 327-28).

2. Respondent Morton R. Berman has been president and chief executive officer of the corporate respondent since 1966 (Tr. 47, 50-51).

3. In respondents' answer and in other documents, Mr. Berman denied formulating, directing, and controlling the acts and practices of Avalon and in his testimony he minimized his role in packaging activities (Tr. 61-69, 74-78, 131). But the record leaves no doubt that, as controlling stockholder and as president, he formulates, directs, and controls the acts and practices of the corporate respondent. Mr. Berman acknowledged that he has "ultimate responsibility" as president of Avalon; that he controls Avalon as executive officer and stockholder; that he is

"responsible for formulating the policy" of the company; and that he directs the actions and practices of the company, the "same as any other firm" (Tr. 48-49, 54, 61-63, 68-71, 211-12).

4. The fact that Mr. Berman delegated certain of his executive functions, including those relating to product development and packaging decisions, does not relieve him of responsibility. Even though packaging decisions may have been made by majority vote of a 6-member committee, on which Mr. Berman had one vote (Berman 63-68, 76-78, Grey 221-24, 232-41; Hertzberg 730-31), the ultimate responsibility for such decisions and actions was his.

5. Respondent Morton R. Berman has held a controlling interest in the stock of the corporate respondent and of one more predecessor corporations since 1947. Individually, Mr. Berman does not own a majority of the common stock of Avalon, but he and his wife own nearly 5200 shares of the 7750 shares outstanding. With the addition of the shares held by his children, the Berman family owns 7500 shares. (Berman 43-47, 50-52, 187-88, 202-05, 211-12, 327-328; Respondents' Admissions dated October 1, 1973.)

6. Mr. and Mrs. Berman constitute a majority of Avalon's board of directors (RPF, Par. 2, p. 3). It is noteworthy that Mr. Berman was not sure whether there was a fourth member of the board of directors (Tr. 47-48, 50).

7. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, and distribution of toy, gift, and hobby products to jobbers and retailers for resale to the public (Respondents' Answer, Par. 3; Respondents' Admissions dated October 1, 1973).

8. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their toy, gift, and hobby products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States, and maintain and at all times mentioned have maintained, a substantial course of trade in such products in commerce, as "commerce" is defined in the Federal Trade Commission Act (Respondents' Answer, Par. 4; Respondents' Admissions dated October 1, 1973). The corporate respondent currently realizes gross sales of between \$7,000,000 and \$10,000,000 annually (Berman 188).

9. In the course and conduct of their business, at all times mentioned, respondents have been in substantial competition in commerce with corporations, firms, and individuals in the sale of products of the same general kind and nature as the products sold by the respondents (Respondents' Answer, Par. 7; Respondents' Admissions dated October 1, 1973).

10. Respondents' packages are offered to a cross-section of the buying public through a variety of retail outlets, including large department stores, chain stores, and discount stores, which obtain such products directly from respondents or from respondents' jobber customers (Berman 57-58, 140-41; Grey 254).

11. The toy, gift, and hobby products displayed, offered for sale, and sold by customers of respondents have been and are substantially identical, both as to packaging and contents, to the products prepared and shipped by the respondents (Respondents' Admissions dated October 1, 1973).

Respondents' Packaging Practices

12. The products involved in this proceeding consist of craft toys and activity toys. Generally, they are purchased by adults as gifts for children (Berman 139, 145; Grey 234, 257-59; Goldberg 401-02). The extent to which children may purchase the products or influence the purchasing decisions of adults is not established by this record, but it is obvious that children are involved in the purchase of respondents' products (Berman 138-39; see Par. 10, *supra*).

13. Respondents' products are not advertised to consumers, on children's television programs or otherwise, so that the packages themselves must constitute a selling tool in showing the nature of the products and the manner of their use (Berman 78; Grey 233; Hertzberg 757-58). Additionally, because respondents' packages are customarily sealed in a plastic film ("shrink-wrapped"), the purchaser does not ordinarily inspect the contents of a package prior to purchase (Berman 79-80, 123-24, 135; Grey 230; CX 37; CPF, Par. 15, pp. 13-14; RPF, Par. 19, p. 19). (The suggestion that a purchaser may ordinarily do so (Berman 124-26) is not persuasive.) Thus, the necessity for attractive package graphics—photographs or artists' renditions—is one of the factors that influence package size (Berman 83-84, 145, 179-80; Grey 222-23, 260-63, 282-83, 291-94; Goldberg 395-96, 403-04, 410, 416-19, 428-29, 434-39, 461, 660-64; Hertzberg 757; Doran 859-60, 883). Purchases are generally made after very brief examination of a package (Grey 222-23, 221-63).

14. There are no government packaging standards for this industry (Doran 856-57), and the Commission has found toys exempt from the coverage of the Fair Packaging and Labeling Act, 80 Stat. 1296, 15 U.S.C. § 1451 (16 CFR 503.2, 503.5).

15. Complaint counsel did not present any consumer testimony to show consumer understanding as to the relationship between the size of a container and the size or quantity of the products contained therein. However, Mr. Berman ultimately conceded that a buyer at retail ex-

pects a package offered to be filled with merchandise in a way proportional to the size of the package. His qualification was that the consumer expected a package to be proportionately filled "within a reasonable amount." (Tr. 95-96; cf. Tr. 96-101.)

16. Respondents' packaging expert did not directly answer a question as to the understanding of purchasers and prospective purchasers of toys and craft products as to the relationship between the size of the package and the size or the quantity of its contents.¹ Dr. Goldberg stated:

I think that size is tied to factors such as the required space for communication of the message that must be communicated to express the content and the play value of a hobby item.

* * * I don't know if there is really a difference in a consumer's mind when he gets a large package if he is going to get a lot of things in that package, or if he gets a small package. He doesn't buy that way. He buys play value, he buys a gift, and he buys the communications on the package.

Size is a secondary factor. (Tr. 700-02; see also Tr. 648, 653-56)

17. A "Toy Packaging Evaluation Guide" (RX 35) prepared by Dr. Goldberg contains no specific reference to the relationship between the size of a package and the size or the quantity of its contents. The guide does suggest that photographs or illustrations should be "honestly reflective of the toy within" (No. 22). Interestingly enough, an accompanying article by Dr. Goldberg on the reverse of the guide states as follows:

We have in marketing today a concept I've always called the package/product concept. You don't just have a package, you have a packaged product. The toy and the package should be one * * *. What the manufacturer is doing is communicating to the consumer this totality.

Both in this article and in his testimony (Tr. 654), Dr. Goldberg called for smaller packages.

18. In any event, complaint counsel's case is essentially predicated on the proposition that consumers expect that the contents of a package will be reasonably related in dimensions, or in quantities, or in both, to the size of the package or container in which the products are presented for sale. Stated another way, the gravamen of the complaint is that when a product is packaged in a container that is oversized in relation to its contents, purchasers are misled into the belief that they are receiving a larger product or a product of greater volume than is actually the fact.

19. Complaint counsel rely on the well-established principle that the

¹ Although Mr. Doran, who testified in support of the complaint, was recognized as an expert in the technology of packaging, an objection to his lack of expertise on consumer understanding, etc., in the toy field was sustained, so that he did not testify on this subject (Tr. 793-804).

Commission may "predicate a finding of deception on its own visual examination of the alleged means of deception, unassisted by 'consumer testimony' " (*The Papercraft Corp.*, 63 F.T.C. 1965, 1991 (1963)). As surrogate for the Commission, the administrative law judge is likewise authorized to make such a determination. The Commission has delegated to its administrative law judges the "initial performance of its adjudicative fact-finding functions" (Statement of Organization, Section 14).

20. Thus, the determination whether certain packages are actionably deceptive, as alleged in the complaint, is based primarily on the inspection and measurement of the containers and their contents. The undersigned has taken into account the observations and opinions of both of the expert witnesses² and of the officials of the corporate respondent, including the individual respondent Morton R. Berman, but such observations and opinions are not necessarily controlling.

21. The cardboard boxes in which respondents package some of their toy, gift, and hobby products are of a size and capacity greatly in excess of that required to package the quantities and sizes of products contained therein. Through such packaging, respondents have represented, and have placed in the hands of others the means and instrumentalities through which they might represent, directly or indirectly, that certain products, as depicted or otherwise described on the exteriors of packages, corresponded in their lengths and widths, or their lengths, widths, and thicknesses, with the boxes in which they were contained and that others of such products were offered in quantities reasonably related to the size of the packages or containers in which they were presented for sale.

22. The products listed below do not correspond with their container or package dimensions or are not offered in quantities reasonably related to the size of the containers or packages in which they are presented for sale. Such packaging methods have the capacity and tendency to create in purchasers the mistaken impression that they are receiving a larger product or a product of greater volume than is actually the fact.

(a) CX 4—This a toy craft product entitled "Link Together Charm Jewelry Set." The contents comprise two transparent envelopes. One of

²Complaint counsel sought to discredit the testimony of respondents' packaging expert by challenging certain statements in his *curriculum vitae* (CX 73 A-B), as well as in published biographical data, and by questioning the validity of his Ph.D. degree from Philathea College, a Canadian institution (CPF, p. 57; RRB, p. 13; Tr. 472-622, 666-700; CXs 65B, 69A-72D; RXs 36-46). However, in the opinion of the administrative law judge, such discrepancies, as may have existed are not such as to impeach Dr. Goldberg's credibility, and his testimony has been accorded appropriate weight in the light of the whole record. Similarly, respondents' suggestion of bias on the part of complaint counsel's packaging expert (RPF, Par. 41, p. 38) is rejected, as is respondents' charge that Dr. Goldberg was "intimidated" by complaint counsel's inquiry (RPF, Par. 40, pp. 36-38).

them, 5½" x 3", contains 16 three-hole links and 32 two-hole links. The other envelope, which is 3" x 3", contains 15 assorted charms.

These products are packaged in a box 9" x 9¼" x 1¼", with a one-inch platform inside the box. The box top states that the product is for girls aged 5 to 12 and depicts a young girl wearing a charm necklace and a charm bracelet. She is pictured in the process of assembling another charm necklace. A printed legend plainly discloses the number of links of each type and the number of charms.³ However, the charms pictured number about half again as many charms as are contained in the package, and the depiction exaggerates their size.

Complaint counsel's packaging expert, Donald Doran, was of the opinion that CX 4 was not filled in a way proportional to its size (Tr. 794-96). The undersigned agrees; the contents of this box could be packaged in a box approximately one-third to one-half of the size of the present container. The graphics also suggest a greater quantity than is the fact, and the explicit disclosure of the contents does not overcome the impression created by the size of the package in conjunction with the illustration.

Mr. Berman conceded that the contents could be packaged in a smaller box, but he testified that CX 4 was part of an assortment of several related items and that from a merchandising and display standpoint, it was desirable that the boxes be of the same size. Additionally, he said, as part of an assortment, the box must be of a uniform size so as to fit into standardized shipping cartons. He stated further that the box needed to be big enough to permit graphics that show the nature of the product and what might be done with it. (Tr. 177-80)

Respondents' packaging expert, Dr. Robert I. Goldberg thought that the box could not be materially smaller and that it was not deceptive (Tr. 394-403). He also referred to it as part of an assortment requiring package uniformity (Tr. 424-27).

The justification offered is not persuasive. The other product in the assortment (CX 49⁴) is also packaged in an oversized box (Doran 807; see *infra*).

The Charm Jewelry Set was withdrawn from the Avalon line in late 1971 (Hertzberg 721, 741-42).

(b) CX 5—This package is entitled "So Easy Sewing Cards." The box is 10" x 15" x 1¼" and contains a 1¾" platform. Positioned atop the platform are 8 sewing cards, each measuring 6¾" x 4¾", two cards in

³ Although the contents legend lists 16 charms, the package contained only 15 (Tr. 644-47). However, a single discrepancy of this nature, which respondents characterize as "obviously due to an assembly line malfunction" (RRB, p. 2), does not constitute proof of a practice of misstating the contents of packages.

⁴ The specific reference was to CX 28, which was withdrawn from evidence as duplicative of CX 49 (Tr. 450-51).

each corner of the box. In the upper right hand corner of the box is a rectangular outline approximately the size of the sewing cards. Part of this rectangle has been cut away to provide a "window" through which may be seen a portion of one of the cards. Another "window" makes visible the colored wool laces that are used with the cards. A cartoon type figure of a boy is shown holding one of the cards, and the proportion—approximately 4 to 1—is such as to suggest that the cards are larger than they actually are. A cartoon figure of a girl purports to be handling one of the laces. Although complaint counsel contend that the little girl "appears to be holding rope rather than thread" (CPF, Par. 18, p. 16), this impression is occasioned by a shadow outline, and the juxtaposition of the pictured yarn with the actual yarn visible through a "window" satisfies the undersigned that this is not an actionable misrepresentation.

The product is represented on the package as intended for boys and girls aged 3 to 7. In the lower left hand corner of the top of the box the contents are plainly disclosed as consisting of "8 Large Sewing Cards" and "8 Wool Safety Tipped Colorful Laces."

The contents of this box could be packaged in a box 25 percent to 50 percent of the size of the present container. To complaint counsel's expert, CX 5 was not proportionately filled with merchandise; the box was at least 50 percent too large (Doran Tr. 832-33).

The packaging and the graphics have the capacity and tendency to deceive the purchasing public as to the size of the sewing cards.

Respondents' defense of this package was not persuasive. Mr. Berman insisted that the sewing cards were "large" in trade usage (Tr. 126-28), and Avalon's chief of product development testified that they were "standard" for children aged 3 to 7 (Grey 266-67). Mr. Berman defended the packaging as conforming to customary practices in the industry (Tr. 132-35, 210).

Dr. Goldberg's testimony regarding CX 5 was equivocal and contradictory. On direct examination, he characterized the package as well designed and efficient, without any capacity to deceive a substantial number of consumers with respect to the quantity of its contents. He indicated that if the package were reduced in size, the result would not be consistent with good and efficient packaging technique. (Tr. 404-05) On cross-examination, he first testified that the size of the sewing cards was indicated by the rectangular outline in the upper right hand corner. After conceding that the package could have contained sewing cards corresponding to the dimensions of the box, he also suggested that the "window" might have been enlarged to show the actual dimensions of the sewing cards. He did not know whether people might reasonably believe that the sewing cards were larger than they actually were. As

far as the graphics were concerned, he described the lack of proportion between the size of the children depicted and the size of the sewing cards as "artistic license"—intended "to be cute, to be playful, to be humorous" rather than to deceive a prospective purchaser. (Tr. 641-44)

(c) CX 6—This is a kit for teenagers and adults designated as "Bottle 'n Jug Cutting & Decorating Kit." The box is 12" x 15" x 3¼". The contents are listed in the lower right hand corner of the box top, as follows: "Bottle and Jug Cutter, Candle, Emery Polishing Paper, Supply of Colored Decorative Tissue, Glaze, Tube of Bonding Adhesive, Supply of Genuine Lead Strips, Brush, Complete Illustrated Instructions." All such contents are included. The box top depicts the bottle-cutting mechanism, as well as a number of objects that can be made with the kit. There was testimony that the box contained sufficient material to cut and decorate all the bottles depicted on the front panel (Berman 105, Grey 264-65).

The bottle cutter measures 8" x 3¾" x 3¼". The last dimension is its height, and this determines the depth of the box. The remainder of the box holds the other contents through the use of a platform measuring 11¾" x 10¾" x 2½".

The box is oversized in relation to its contents. Mr. Doran testified that CX 6 was not proportionately filled with merchandise; that the contents could be packaged in a box one-third the size of CX 6 (Tr. 822-23). Compare CX 7; see Grey 275-79; Doran 823-24. Testimony defending the packaging of CX 6 includes Berman 97-122; Grey 263-66, 275-79; Goldberg 406-12, 655-60.

(d) CX 9(a)—This is a package designated "Tom Sawyer Modeling Clay." The package, measuring 10" x 15" x 1¼", contains two packages of multi-colored clay, each measuring 4" x 5" x ¾"; 2 plastic molds, each 2" x 2½"; 2 "clay doodle" cards, each measuring 5½" x 4½"; and a wooden working tool.^{4a} The various components in the package are positioned on a ¾" platform, with the packages of clay resting on a 1¼" platform secured in cutouts of the larger platform. All components are visible through a "window" in the box top. The arrangement of the clay is such that a customer might assume that it extended the full depth of the package—that is, that its depth was more than an inch rather than ¾".

Printed material on the package indicates that the kit is designed for boys and girls of all ages. The contents are listed as follows: "Clay, Molds, Clay Doodles and Wooden Working Tool." The weight of the clay is shown as 7 ounces.

The contents could be contained in a box half the size of the present

^{4a} The wooden working tool was not actually contained in the package upon post-hearing examination, but the platform in the package has a cutout designed to hold such an implement. It is assumed that this was lost in the course of trial or in subsequent handling.

package, or perhaps even smaller. The fact that the components are visible does not justify the percentage of empty space.

CX 9(a) was withdrawn from the Avalon line in late 1972 and replaced by CX 33 (Hertzberg 724-27, 745-46). For other testimony concerning this exhibit, see Berman 186-91; Grey 279-84; Goldberg 412-14; Doran 836.

(e) CX 13—This item is entitled "Stickcraft Fun." The package, measuring $15\frac{5}{8}$ " x $11\frac{1}{8}$ " x $1\frac{1}{2}$ ", contains 147 sticks (comparable to popsicle sticks) taped to form 3 bundles of 49 sticks each. Each stick, with rounded ends, is $4\frac{1}{2}$ " long, $\frac{3}{8}$ " wide, and $\frac{1}{16}$ " thick. Other components are 3 plywood squares, $4\frac{1}{4}$ " x $4\frac{1}{4}$ "; one cardboard cup (open ended), $3\frac{3}{8}$ " tall, with a diameter of $1\frac{1}{4}$ "; and a package of 4 crayons, the container for which measures $3\frac{3}{8}$ " x $1\frac{1}{2}$ " x $\frac{3}{8}$ ". A sheet of instructions is also enclosed.

The box contains a platform $1\frac{1}{8}$ " high, with each corner cut out to position the sticks, the plywood squares, and the crayons. The plywood squares are positioned on a platform $\frac{5}{8}$ " high. In the lower right hand corner is a cutout, with a platform $\frac{3}{4}$ " high, but at the time of post-hearing examination, there was no component positioned there.

The box top depicts a boy and a girl, with the boy holding a completed bowl made from the sticks. Between the boy and the girl is depicted a combination pencil holder and calendar. To the left of the girl, enclosed in colored circles, are depicted a bowl like the one held by the boy; a candy box; and an album. A printed legend in the lower left quadrant states: "Easy to Make! Complete! All Materials Included in This Kit!" The album covers are depicted held together with yarn; the candy box has a bow on its cover; and the pencil holder assembly is depicted with a calendar. None of these components are included in the package. Although respondents urge that it is "far-fetched to contend that a consumer would expect a bow or piece of wool or calender," noting that a calendar would date the product (RRB, p. 4), their absence, in the face of the specific claim of "All Materials Included," aggravates the deceptive nature of the packaging.

The box is substantially oversized for its contents. It is not proportionately filled; the contents could fit in a container approximately one-sixth the size of CX 13 (Doran 825-26). Aside from the graphics, there is no disclosure of the nature or quantity of the contents, or the number of the pictured projects that can be made with the components included.

CX 13 was withdrawn from the Avalon line in the fall of 1971 (Hertzberg 722, 743-44). Other references to this product are as follows: Berman 191-94; Goldberg 416-19, 647-53.

(f) CX 30—This package is entitled "Boutique Easel-Art," with a

prominent subheading further describing the item as "Miniature Easel-Art Paint-by-Number Set."

The box, which measures 13" x 17¼" x 1½", lists the contents on the cover as follows: "2 Boutique Easels—One 8" x 6" Panel—One 7" x 5" Panel (As Illustrated)—16½ Dram Vials of Oil Paints—Two Artist's Brushes—Instructions." All contents were evidently included, except that at the time of post-hearing examination, one of the easels and one of the paint vials were missing.

The remaining easel is 8" tall, 4¼" wide at the base, and 3" wide at the top. It appears that the other easel was somewhat smaller. The paint brushes are 8½" long, and the paint vials are approximately 1" tall.

Although the components could be packaged in a smaller box, the size of the box is not inherently deceptive. However, the undersigned agrees with complaint counsel (CPF, Par. 18, p. 21) that the graphics on the face of the box exaggerate the size of both the painting panels and the easels. Even though close examination indicates, as noted by respondents (RRB, p. 6), that the easels and paintings are displayed on a table top in relation to a jewelry box, the first impression is that the mounted paintings are displayed in relation to a chest resting on the floor. When this representation is considered in conjunction with the size of the box, there is a capacity and tendency to mislead and deceive that is not cured by the clear disclosure of the dimensions of the painting panels.

The undersigned rejects as irrelevant and immaterial, and also unsupported by the record, complaint counsel's proposed findings as to the description of the paint contents in terms of drams (CPF, Par. 18, p. 21).

CX 30 was withdrawn from the Avalon line, apparently about 1971 (Hertzberg 724). Other testimony includes Grey 299-301 and Goldberg 428-31.

(g) CX 35(d)—This is a "Weaving Loom Set," consisting of a plastic loom 7½" x 7½", 3 small skeins of yarn, and 2 plastic bags of colored loopers.

The box is 18" x 12½" x 1½" and contains a platform ¾" high. All components are visible through "windows" in the box top. One bag of loopers measures 4" x 8", and the other, 3½" x 7". Both are partially visible through "windows" 2" x 5¼", with the result that the quantity of the loopers cannot be determined. Suggested projects depicted include a book cover, a doily or place mat, and a potholder.

Complaint counsel's objections are that the printed words on the package "do not indicate the quantities of components included" or the "quantities or sizes of objects which can be made with this set" (CPF,

Par. 18, pp. 23-24). They also object to the partial visibility of the looper bags.

Mr. Doran testified that CX 35 D was not proportionately filled with merchandise. He characterized the length of the box as 50 percent too large and the width as 10 or 15 percent too large (Tr. 834-35). The excessive size of the box creates the impression of a greater volume of product than is the fact. The partial visibility of the loopers is also a contributing factor.

CX 35 D was withdrawn from the Avalon line in late 1972 and replaced by CX 57 (Hertzberg 728-30, 744-45).

(h) CX 49—This item is designated "Circle 'Round Jumbo Knitter Set" and is designed for girls aged 5 to 12. The top of the box depicts a young girl using the knitter and describes the contents of the box as follows:

Circle 'round Jumbo Knitter, Training hank of yarn. Three inches in diameter

The sides of the box contain the Avalon logotype, the words "Jumbo Knitter Set", together with a diagonal band containing the legend "Circle 3" 'Round."

The box, measuring 9" x 9¼" x 1¼", contains the knitter, which is 3" in diameter, 1¼" high, and 9¾" in circumference; a 5" knitting needle or knitting hook; a small hank of yarn; and the directions. These items are positioned in a cardboard circlet 1¾" high, 7" in diameter, and 22¼" in circumference.

CX 49 is not proportionately filled with merchandise. Mr. Doran noted "perhaps better than 60 percent * * * empty dead space" (Tr. 805-06). Dr. Goldberg found nothing essentially wrong with CX 49 (Tr. 632-41).

When the excessive size of the box is coupled with the gross disproportion of the size of the knitting device in relation to the girl pictured, misrepresentation of the contents is the result.

CX 49 was withdrawn from the Avalon line in late 1971 (Hertzberg 721-22).

23. The products listed below are found nondeceptive, either because package dimensions sufficiently correspond to product dimensions or because the package does not have the capacity and tendency to create in purchasers the mistaken impression that they are receiving a larger product or a product of greater volume than is actually the fact, even though the package is larger than necessary. These are "instances in which an oversized container creates no substantial danger of deception" (*The Papercraft Corp.*, 63 F.T.C. 1965, 1993 (1963)).

(a) CX—This package is designated "Magic Paint Brush." Represented as a product for girls and boys aged 3 to 8, the package

contains 4 coloring books, each measuring $8\frac{1}{4}$ " x 11", plus a 7" paint brush. The box measures 9" x $11\frac{1}{2}$ " x $1\frac{1}{2}$ ". The contents are mounted on a $\frac{7}{8}$ " platform. The depth of the 4 coloring books is about $\frac{1}{4}$ ".

This package does not list the contents, but respondents later presented an otherwise identical box except for the following imprint in the lower right-hand corner: "4 books. Contents: 64 11" x $8\frac{1}{2}$ " Pictures to Color. One Paint Brush" (RX 11; Goldberg 451-55). According to respondents, CX 15 was a "misprint" in its omission of a statement of contents (Grey 268-70). Dr. Goldberg considered the contents disclosure on RX 11 to be adequate (Tr. 451-55, 664-65).

Mr. Doran presented testimony suggesting that RX 11 was a "proof" or "sample" rather than a "production setup box" (Tr. 828-32), but this was not further developed in the record. However, CX 37 (p. 7 of blue-colored Avalon catalog for 1971-72) shows a contents legend on the "Magic Paint Brush" package.

Graphics on the box cover display the coloring pages and the paint brush in gross disproportion to the sizes of the children using them.

Whatever vice there may be in the graphics (CPF, Par. 18, pp. 18-19), it does not fit within the boundaries of the complaint's challenge to representations that product dimensions correspond to package dimensions. The length and the width of the box are only slightly larger than the corresponding dimensions of the coloring books. Obviously, the depth of the box does not need to be $1\frac{1}{2}$ " to accommodate the books and the brush, but, all things considered, including the contents disclosure, this does not appear to constitute an actionable misrepresentation.

(b) CX 22—This package is designated "Tom Sawyer Slate 'n Chalk." It is represented to be for children aged 4 to 10. Underneath the trade name is a printed legend: "Set Includes Slate Board, Chalk, Eraser and Stencils." At the bottom of the box cover the contents are shown as follows: "Slate Board Size 8" x $9\frac{1}{2}$ "; 8 Colored Chalks. Sponge Eraser. Stencils." The package contains these components. The box measures $8\frac{7}{8}$ " x $11\frac{3}{8}$ " x $1\frac{1}{2}$ ". The components are positioned on a platform $\frac{3}{4}$ " high. The slate has the dimensions described; the sponge eraser is 4" x $2\frac{1}{4}$ ", and the card of 7 stencils measures 7" x $9\frac{1}{2}$ ", with one of the stencils folded over. The 8 chalks are in a box $3\frac{1}{4}$ " x $3\frac{5}{8}$ ".

Considering the dimensions of the slate in relation to the size of the package, and taking into account the other components included, in the light of the graphics and the contents disclosures, the undersigned finds no actionable deception. The criticisms of complaint counsel (CPF, Par. 18, pp. 19-20) are ultratechnical. (See Goldberg 439-41.)

(c) CX 27—This is a package of "Nancy Nurse Plasticons." The box is 13" x $8\frac{1}{2}$ " x $1\frac{1}{4}$ ", with a platform one inch high. Mounted on this platform is a card $8\frac{3}{4}$ " x 8" depicting a sickroom scene. There are also two cards

of plasticons, each card measuring 4" x 6" and containing some 35 items, including human figures and various items of a medical nature. These are designed to be affixed to the sickroom scene and are removable. The contents of the package are essentially visible through a partial "window"; the package contains no statement of contents.

Although CX 27 could be packaged in a smaller box, the likelihood of deception stemming from the size of the box is not apparent.

CX 27 was withdrawn from the Avalon line in 1971 (Hertzberg 722-23). Other record references concerning CX 27 include Berman 143-44; Grey 270-72; and Goldberg 421-24.

(d) CX 33—This package is designated "Tom Sawyer Non-Hardening Modeling Clay," with a line underneath stating: "Set Includes Clay, Molds and Tools." The contents are graphically indicated and listed as follows: "5 Bars of Modeling Clay in Assorted Colors, Net Weight 8 ounces—2 Clay Molds—Clay Doodle Card—Clay Modeling Tool." All components are included. The box measures 11¼" x 8¾" x 1½". All the components are positioned on a 1" platform. The clay bars measure in the aggregate 6¾" x 3¾" x ¾". The card of clay doodles measures 6" x 6½"; the so-called tool (a wooden stick like a popsicle stick) is 4½" long. The molds are 2½" x 2". The product is for children aged 3 to 10.

Although the components could be packaged in a smaller box, the undersigned is unable to find that the package size is inherently deceptive within the meaning of the complaint or is made so by the graphics or printed representations. The proposed findings of complaint counsel as to this item (CPF, Par. 18, pp. 21-22) are not persuasive.

CX 33 is the successor product to CX 9(a) Hertzberg 724-27). Dr. Goldberg found CX 33 to be an acceptable nondeceptive package (Tr. 441-42).

(e) CX 35(a)—This item is entitled "Marker Fun Coloring Set, featuring jumbo felt tip water color markers." It is billed as an activity toy for children aged 4 to 9. The contents are accurately listed as follows: "Five Jumbo Water Color Markers and Ten 11" x 9" Pictures to Color." The pictures and the 5" markers are positioned atop a ¾" platform. The box measures 12¼" x 15¼" x 1½". The graphics appear to be a "scale photograph of two children using the components" (RRB, p. 7; Goldberg 431-35).

Complaint counsel's objections (CPF, Par. 18, pp. 221-23) are cap-
tious.

Although these components could be packaged differently, the undersigned finds nothing deceptive in the packaging or in the verbal and pictorial representations.

(f) CX 35(c)—This item is designated "creative play with 'Instant'

Paper Maché," represented as for children aged 5 and up. The contents are plainly listed as follows: "65 $\frac{3}{4}$ " x 4 $\frac{1}{2}$ " Pieces of Heavy Cardboard with Press-Out Parts to Assemble Objects. 8 ounces of Instant Paper Maché. 8 Water Color Tablets. 1 Brush. Complete Instructions." All components are included, except that the cardboard pieces are actually 9" x 5 $\frac{3}{4}$ " instead of the dimensions indicated on the package.

The box, measuring 12" x 15" x 1 $\frac{3}{4}$ ", contains a platform 1 $\frac{1}{4}$ " high on which are mounted the cards and the watercolor tablets. The paper maché material is enclosed in a plastic bag and measures 6" x 7 $\frac{1}{2}$ " x 1 $\frac{1}{2}$ ". It is positioned in an insert in the platform. Although not listed, the package also contains a small bottle of a white liquid—presumably the "glaze" referred to in Step 5 in the instructions.

Mr. Doran described the box size as "about 40 percent excessive" (Tr. 826-27), but the undersigned finds nothing deceptive in the packaging. Complaint counsel note that the graphics grossly exaggerate the size of the animal objects that can be made (CPF, Par. 18, p. 23). For example, a giraffe appears to be about as tall as the little girl shown painting the animal. On the other hand, the animals depicted in a panel on the cover of the box are smaller than the cardboard cutouts. Respondents explain that the "graphics are cartoon drawings which everyone realizes are 'fantasy'" (RRB, p. 8; Goldberg 435-39; Berman 181-85).

In the opinion of the undersigned, it would be unreasonably technical to find CX 35(c) to be deceptive on the basis of the graphics.

(g) CX46—This item is designated "Connie 'Magic Lock-Et' Paper Doll." The box, measuring 8" x 15" x 1 $\frac{1}{4}$ ", has a depiction of "Connie" 12" tall, whereas the figure contained in the box is 10" tall. The product is specified as intended for ages 3 to 8.

A legend in the lower left-hand corner of the box top reads as follows:

Complete Sophisticate's Wardrobe

Contents: This Set Contains 1 10" 'Magic Lock-Et' Paper Doll with Plastic Doll Stand, 6 Magic Lock-Ets, and a Complete Set of Dresses and Accessories. No Tabs; No Paste Required.

All components are included in the package. The wardrobe consists of 18 outfits plus a hat, on five sheets of paper, each measuring 7 $\frac{1}{2}$ " x 12". All components are mounted on a platform 1 $\frac{3}{16}$ " in height.

Complaint counsel object that the printed text on the package does not disclose the sizes and quantities of all product components; that the "graphic depiction of the doll is considerably larger than the doll included;" and that this misrepresentation is not overcome by the disclosure that the doll is 10" tall (CPF, Par. 18, pp. 24-25).

The box top contains, in addition to the 12" depiction of Connie, 9 panels, each measuring 1 $\frac{1}{4}$ " x 2 $\frac{3}{8}$ ", indicating some of the various wardrobe items contained. Respondents note that the actual wardrobe

items contained are more numerous than those depicted and also defend the exaggeration of the size of the doll on the basis that the drawings are "artist's renditions" (RRB, pp. 8-9; Goldberg 447-49).

Although this kit might be packaged in a somewhat smaller container (Doran 836-38), the undersigned is unable to find that the size of the package is deceptive. Neither can he find that the graphic exaggeration of the doll's size amounts to actionable deception.

(h) CX 50—This item is designated "Tom Sawyer Finger Paints," for ages 3 to 12. The box measures 12" x 13" x 2". It contains 7 jars of finger paints, each 1 $\frac{7}{8}$ " high and 2" in diameter across the top; 2 wooden spatulas; 9 sheets of paper 8 $\frac{1}{2}$ " x 11"; and an instruction sheet. The jars are inserted in a platform 1 $\frac{1}{6}$ " high. The box top features a photograph of two children using the set. Only 4 of the 7 paint jars are depicted. In the lower right-hand corner of the box top is an accurate statement of contents, above which is a circle containing the legend "7 Finger Paints."

Although the components could be packaged in a smaller box (Doran 824-25), it is the opinion of the undersigned that, in the light of the clear contents disclosure and the graphics, the package size is not deceptive. See Grey 287-92, 308-11; Goldberg 442-44, 660-64). The objections of complaint counsel (CPF, Par. 18, p. 26) are without substance.

(i) CX 57—This item is designated "Weaving Loom," for ages 6 to adult. A line immediately below the words "Weaving Loom" states: "Set Includes Sturdy Loom, Colored Loopers, Yarn." The box top depicts two children—a girl using the loom and a boy holding a completed potholder. In the lower right-hand corner of the box top are illustrations of a book cover, a table mat, and two potholders, above which is a line stating: "With Contents You Can Make All of the Pieces Shown Here." The contents are listed as follows:

Sturdy 1 Piece Looper and Yarn Loom—Weaving Hook—Supply of Over 300 Assorted Colored Loopers—3 Balls of Assorted Color Yarn—Instructions.

The box measures 12" x 15" x 1 $\frac{1}{2}$ " and contains a platform $\frac{3}{4}$ " high. The loom, hook, and bag of loopers are inserted in the platform, and 3 small balls of yarn are affixed to it.

These components could presumably be differently packaged, but respondents' method of packaging is not deceptive. Nor do the printed matter and the graphics constitute misrepresentation of the contents of the kit. See Goldberg 445-46; Grey 313-15; compare CX 35(g), which CX 57 replaced in the Avalon line (Hertzberg 729-30); also compare CX 42.⁵

⁵ Certain other Avalon products are contained in this record but have not been challenged as deceptive in the proposed findings of complaint counsel. Some were introduced to demonstrate alternative methods of packaging—for example, CXs 7, 12, 16, 17, 20, and 31 (CPF, p. 32). Other Avalon products in evidence have been omitted from complaint counsel's proposed findings, presumably either because they were considered cumulative or nondeceptive.

(Continued)

Respondents' Defenses

24. Respondents' principal defense is that their packaging methods "do not have the capacity to deceive a substantial portion of the buying public into believing that the quantity of contents in said packages is greater than is the fact, nor do they have the capacity to cause a substantial portion of the buying public to purchase substantial quantities of corporate respondent's products by reason of such belief" (RPF, Par 18, p. 17). This defense is largely based on respondents' theory that the purchase of their products is "motivated by considerations of concept and play value, rather than quantity of contents" (RPF, Par. 13, pp. 11-12). These defenses have been considered and essentially disposed of in Pars. 15-23, *supra*. As has been stated, the individual respondent acknowledged that consumers expect the contents of packages to be reasonably commensurate with the size of the package, and Dr. Goldberg, upon whose testimony the underlying defense theory is primarily based, conceded that package size is a factor in purchasing decisions, although he considered it "secondary" (Pars. 15-16, *supra*).

25. The fact that there is uncontradicted testimony that since 1947 respondents have never received any consumer complaints that their products were packaged in deceptively oversized containers (RPF, Par. 15, p. 13; Berman 206-07) does not establish lack of consumer dissatisfaction, nor does it prevent a finding that certain of respondents' packages are deceptively oversized.

26. Respondents' first affirmative defense is as follows:

Prior to the commencement of this proceeding, corporate respondent redesigned certain of its toy craft products and discontinued the sale of certain of said products in boxes or other containers which might have created the appearance or impression that the width or thickness or of other dimensions or quantity of said products was appreciably greater than was the fact (Answer, Par. 10; RPF, Pars. 37-39, pp. 35-36).

27. The facts respecting the five products whose sale was discontinued are set forth in Par 22(a), (e), (f), and (h) and Par. 23(c), *supra*. The redesign of two packages is covered in Par. 22(d) and (g) and Par. 23(d) and (i), *supra*. These steps were taken for reasons other than concern over the possibly deceptive nature of the packages (Hertzberg 721-30). Four of the discontinued products were found to be deceptively packaged (CXs 4, 13, 30, and 49). In the case of the redesigned packages, both of the former packages (CXs 9(a) and 35(d) were found

(Continued)

These include CXs 29, 42, 44, 45, and 51. In any event, since neither party has proposed any findings respecting these exhibits, the undersigned has made none. There are also several packages, presumably competitive with those of Avalon, which were referred to by one or more witnesses as illustrative of alternative methods of packaging. These include CXs 11, 18, 19, 34, 35, 53, 54, and 56.

deceptive, whereas the new packages (CXs 33 and 57) were found to be nondeceptive.

28. Respondents' second affirmative defense is as follows:

The use of certain containers is justified by corporate respondent as necessary for the efficient packaging of toy craft products contained therein and corporate respondent has made all reasonable efforts to prevent any misleading appearance or impression from being created by such containers (Answer, Par. 11; RPF, Pars. 25-36, pp. 25-35).

29. With respect to the packages found in Par. 22, *supra*, to be deceptively oversized, the record fails to establish that their size was "necessary for * * * efficient packaging."

(a) The record fails to establish that the size of any challenged package was necessary to protect fragile contents, to meet technological difficulties, to effect economies, or to satisfy other compelling factors. As for fragility, Mr. Doran testified that the greater the amount of empty space in a package, the greater the likelihood of damage in handling (Tr. 806, 826, 835).

(b) Some standardization of package sizes is obviously desirable (RPF, Par. 28, pp. 27-30), but respondents failed to establish any nexus between this consideration and the use of oversized packages. Instead, there was general agreement that a reduction in package sizes could result in economies in manufacturing, storing, shipping, and handling.

(c) Respondents' attempted justification of the size of the challenged packages boils down to a claim that large boxes are necessary for attractive graphics (Pars. 13, 16, *supra*; see RPF, Pars. 16-17, pp. 14-17; Pars. 25-27, pp. 25-27). However, the testimony to this effect was not persuasive; the claim was not proved.

30. In any event, the record does not support the further claim that respondents have "made all reasonable efforts to prevent any misleading appearance or impression from being created by such containers." Respondents have no guidelines as to the relationship between the size of boxes and the size or the quantity of their contents (Berman 76; Grey 241, 323-24), and there was no showing of any effort to provide packages of a size reasonably commensurate with their contents. In fact, Mr. Berman emphasized that respondents' current packaging practices are substantially similar to those in effect when he joined the company in 1947 (Tr. 200-01, 209-10). It appears that respondents' packaging practices have been influenced primarily by company and industry traditions, by the practices of competitors, and by fads (Berman 84-86, 133-35, 144-45, 174, 200-01, 209-10; Grey 231-32, 271-72, 291, 313), with little or no consideration of limiting box sizes so as to avoid any deceptive disproportion between a box and its contents.

31. Respondents and their expert witness appeared to be relying on the exemption of the toy industry from the coverage of the Fair Packag-

ing and Labeling Act (Par. 14, *supra*; Berman 123, 148, 175, 183-84). Dr. Goldberg testified that he had not followed the Commission's legal proceedings regarding slack filling, and that in evaluating respondents' packages, he had not employed the standards relating to deceptive practices under Section 5 of the Federal Trade Commission Act. He even said that he had not heard of Section 5 of the Federal Trade Commission Act, but later testimony suggests some familiarity with Commission activities in the field of packaging. (Tr. 622-26; Par. 17, *supra*) Nevertheless, these are factors that detract from the weight of Dr. Goldberg's testimony in which he generally approved respondents' packaging as efficient and nondeceptive.

SUMMARY, ANALYSIS, AND CONCLUSIONS

The basic principle underlying this proceeding is that packaged products should reasonably correspond in size with their container or package dimensions or that the contents should be of a quantum reasonably related to the size of the containers or packages in which they are presented for sale. A corollary principle is that purchasers ordinarily operate on the basis of such a general rule.

Given this predicate—essentially conceded by the individual respondent—that purchasers expect a package to be filled with merchandise of a size or in an amount reasonably proportionate to the size of the package, the administrative law judge, initially, and thereafter the Commission, may by visual inspection determine whether the size of a package is reasonably related to its contents, either in size or in quantity (*The Papercraft Corp.*, 63 F.T.C. 1965, 1991 (1963)).

On this basis, the Commission has consistently ruled over a period of many years that the use of oversized containers, sometimes known as "slack filling," has the capacity and tendency to mislead and deceive the purchasing public (*The Papercraft Corp.*, *supra*, 63 F.T.C. 1965 (1963), and cases there cited). In *Papercraft*, the Commission ruled:

"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. For a seller to package goods in containers which—unknown to the consumer—are appreciably oversized * * * 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. (63 F.T.C., at 1992; footnote omitted)

That this is sound public policy is demonstrated by the passage in 1966 of the Fair Packaging and Labeling Act, 80 Stat. 1296, 15 U.S.C. §1451. In recommending this legislation, the House Committee on Interstate and Foreign Commerce stated:

When a consumer buys a nontransparent package containing a consumer commodity, he expects it to be as full as can be reasonably expected. He makes his purchase in many instances on the basis of the size of the box * * * . [N]onfunctional slack fill which involves, for example, the use of false bottoms and/or unnecessary bulky packaging is not justified * * * . (H.R. Rep. No. 2076, 89th Cong. 2d Sess. 8 (1966))

The principal argument of respondents is that even though some of their packages may be oversized in relation to their contents, there is no substantial danger of consumer deception. Relying in part on the exemption of toys from the coverage of the Fair Packaging and Labeling Act, they contend that the purchase of craft and hobby toys is motivated primarily by considerations of concept and play value rather than net quantity of contents; that their products are so different from the "consumer commodities" covered by the Packaging Act as to warrant different treatment.

This argument is rejected. Respondents have not established that size and quantity are irrelevant to purchasers of their products so as to create for such products an exception from the general rule against slack filling. The size of toys and craft devices and the quantity of materials supplied for craft projects are obviously factors material to a purchasing decision (CPF, pp. 39-41). In any event, the undersigned has recognized here (Par. 23, *supra*), as did the Commission in *Paper-craft, supra*, 63 F.T.C., at 1993, that there are instances in which an oversized container creates no substantial danger of deception. But there exists no reason to give the toy and hobby craft industry unrestricted license to use oversized containers.

Another argument made by respondents is that their oversized containers do not have the capacity and tendency to deceive "an ordinary person with a common degree of familiarity with industrial civilization" (Respondents' Trial Brief, pp. 18-19). This argument is specious on at least three grounds.

First, the Commission is not bound to use such a standard in assessing the likelihood of deception but may consider its duty to protect the gullible and the credulous, as well as the cautious and knowledgeable (*Charles of the Ritz Dist. Corp.*, 143 F. 2d 676, 679 (2d Cir. 1944)).

Second, respondents have emphasized the public's lack of familiarity with the products here in question. Under these circumstances, an "ordinary person with a common degree of familiarity with industrial civilization" would expect a reasonable relationship between size of package and size of quantity of contents. He would have no reason to anticipate slack filling.

Third, children play a significant role in purchasing, or in influencing an adult to purchase, respondents' products. This, too, commends a higher standard of care than that espoused by respondents.

Respondents have presented testimony showing or tending to show that respondents consider certain alternative forms of packaging unsuitable (RPF, Pars. 21-24, pp. 21-25; Par. 35, p. 34); that it is traditional in the toy industry to package craft and activity products as gifts in attractive containers (RPF, Par. 26, p. 26); that boxes must be sturdy (RPF, Par. 29, p. 30); that platforms, partitions, and package depth are necessary to protect fragile contents (RPF, Par. 30, p. 31); that equipment available to respondents requires a minimum package depth of 1¼" (RPF, Par. 31, p. 31);⁶ and that boxes are designed to provide storage for toy and craft components after purchase (RPF, Par. 32, pp. 31-32). The difficulty is that, contrary to RPF, Par. 36, p. 35, none of these considerations were shown to justify the oversized packages in issue. The suggestion that toy and craft components must be attractively and separately displayed when the package is opened after purchase (RPF, Par. 33, pp. 32-33) is hardly tenable as a justification for oversized packages.

The Remedy

The record establishes that respondents have discontinued the sale of four products found herein to have been deceptively packaged and have redesigned two other packages in such a manner as to cure the deceptive nature of the predecessor packages. Thus, only two products currently being sold by respondents (CXs 5 and 6) have been found to be deceptively packaged, compared to eight current packages challenged as deceptive by complaint counsel but found herein to be nondeceptive. Respondents may accordingly argue that there is not such public interest as to require an order (see RPF, Par. 39, p. 36).

However, these circumstances do not establish any lack of public interest in the issuance of a prohibitory order. First, the package withdrawals were for reasons other than their possible deceptiveness. Second, in the absence of an order, respondents would be free to continue the packaging practices herein found deceptive.

This conclusion is reinforced by the fact that predecessor or affiliated corporations have been the subject of prior orders that put respondents on notice as to the Commission's interpretation of the law applicable to oversized packages. The undersigned has taken official notice (Tr. 155) of the fact that two corporations that eventually emerged as Avalon Industries, Inc., were cited in Commission complaints in 1967 for the use of oversized packages and that both signed consent orders in disposition thereof: *Standard Toykraft, Inc.*, Docket No. C-1217, and

⁶ We need not undertake to resolve the dispute over minimum package depth (CPF, pp. 65-66; RPF, Par. 31, p. 31; RRB, p. 19). The depth of packages was not generally in issue. The findings of deception (Par. 22, *supra*) relate almost entirely to excessive length or width or both.

Avalon Manufacturing Corp., Docket No. C-1220, 71 F.T.C. 1293 (1967).

The *Standard* case involved a toy craft product designated "Petal Pictures," and the *Avalon* case a similar product designated "Paint on Color Velvet." These complaints were two of ten complaints in which toy craft manufacturers were charged with misrepresenting that the volume of the net contents of packages was commensurate with the capacity of the external container. In each case, the charge was that the "capacity of the external containers [was] substantially in excess of the actual volume of the net contents, thereby creating the mistaken impression that the purchasers * * * [were] in fact receiving more than [was] actually the case." The prohibition in the consent orders was in part as follows:

Packaging said product in a retail container of a size or capacity in excess of that required solely by the physical dimensions of the merchandise itself: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted hereunder for the respondent to establish either:

(a) That retail purchasers, at the time of sale, are as fully aware of the disparity which exists between the size or capacity of the container and the physical dimensions of the merchandise as they would be if the container and the merchandise were displayed side-by-side; or

(b) That the container being employed is not larger in size or capacity than is necessary for the efficient packaging of the merchandise contained therein, and respondent has made all reasonable efforts to prevent any misleading appearance or impression from being created by such container. (71 F.T.C., at 1299)

It is true that each of these cases involved only one product, that the order was correspondingly limited, and that there has been no charge of violation thereof; nevertheless, both the corporate respondent and the individual respondent were on notice that the Commission considered illegal the packaging of a product "in a retail container of a size or capacity in excess of that required solely by the physical dimensions of the merchandise itself" unless the disparity could be justified as specified in the order. There has been no showing of any efforts on the part of these respondents to conform their packaging practices to the principles expressed in the consent orders.

Respondents urge that any order entered in this case should be restricted to toy products (RPF, pp. 39-46) because most of the challenged products were manufactured and sold by the Toyecraft Division. Only two originated from the Hobbycraft Division, and none from either the Crayon and Color Division or from the Industrial Division.

The argument is not persuasive, and the precedents cited are inapposite. The practice of slack filling is one that is not limited to any class of products. The order should apply to all products. If the other divisions

of the corporate respondent do not engage in the prohibited practices, there is no cause for concern.

As for any uncertainties that may exist as to the application of this order to any of respondents' products, they may obtain guidance from the Commission's compliance staff or, in appropriate instances, from the Commission. Moreover, it is to be noted that the Commission has under advisement the petition of the corporate respondent for the promulgation of industry guides on the subject matter of this proceeding (Order Denying Stay, etc., October 23, 1973).

Finally, it is urged that any order issued against the individual respondent be limited to him in his official capacity as corporate president, rather than citing him as an individual. This presents a fairly close question in the light of *Flotill Products v. FTC*, 358 F.2d 224, 233 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 179 (1967), *Coro, Inc. v. FTC*, 338 F.2d 149, 154 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965), and other cases cited by respondents (Respondents' Trial Brief, pp. 24-26). However, the facts tending to uphold individual liability are stronger here than in either *Flotill* or *Coro* with respect to the *alter ego* theory and personal involvement in the questioned practices. Moreover, the administrative law judge considers himself bound by *Coran Bros. Corp.*, 72 F.T.C. 1, 23-25 (1967), where, with knowledge of the *Flotill* and *Coro* decisions, the Commission found individual liability in circumstances strongly analogous to those presented on this record.

Some changes have been made in the proposed order contained in the complaint; some are substantive additions or deletions, while others are minor editorial changes.

In addition to editorial changes in the first paragraph of the proposed order, a prohibition has been added against "otherwise misrepresenting the dimensions or quantities of such products." Although the use of oversized boxes is the principal practice involved in this proceeding, there were instances in which the graphics contributed to the misrepresentation (Par. 22 (a)-(b), (f)-(h)). The order, as revised, is designed to require that products be "as depicted or otherwise described" on the packages (Complaint, Par. Five).

The final provision in the proposed order appears unduly broad in requiring that copies of the final order issued herein be distributed to all firms and individuals involved in the formulation or implementation of respondents' business policies, and all firms and individuals engaged in the advertising, marketing, or sale of respondents' products.

Such widespread distribution does not appear necessary to ensure compliance. This provision has accordingly been revised.

Although respondents utilize independent box designers and contract for the manufacture of some of their boxes (Berman 72-74; Grey 227),

the responsibility for compliance with this order rests on respondents, not on their consultants or contract manufacturer. It is respondents who must make the ultimate decision regarding packaging practices. No need has been shown for distribution of the order to others outside of the respondents' business organization, such as jobbers or retailers engaged in the marketing of respondents' products.

CONCLUSIONS OF LAW

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

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

3. Through the use of certain methods of packaging, respondents have represented, and have placed in the hands of others the means and instrumentalities through which they might represent, directly or indirectly, that certain toy, gift, and hobby products, as depicted or otherwise described on the exteriors of packages, corresponded, in their lengths and widths, or their lengths, widths, and thicknesses, with the boxes in which they were contained, and that others of such products were offered in quantities reasonably related to the size of the containers or packages in which they were presented for sale.

4. In truth and in fact, such products often have not corresponded with their container or package dimensions and are often not offered in quantities reasonably related to the size of the containers or packages in which they are presented for sale. Purchasers of such a product are thereby given the mistaken impression that they are receiving a larger product or a product of greater volume than is actually the fact.

5. The use by respondents of such unfair, false, misleading, and deceptive methods of packaging, as herein found, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the quantum or amount of the product being sold was and is greater than the true such quantum or amount, and into the purchase of substantial quantities of respondents' products by reason of such erroneous and mistaken belief.

6. The aforesaid acts and practices of the respondents, as herein found, 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 and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

7. An order prohibiting such practices is required in the public interest against both respondents.

ORDER

It is ordered, That respondent Avalon Industries, Inc., a corporation, and its officers, and Morton R. Berman, individually and as an officer of such corporation, and respondents' agents, representatives, employees, successors, and assigns, directly or through any corporation, subsidiary, division, or other device, in connection with the offering for sale, sale, or distribution of toy, gift, and hobby merchandise or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Packaging such products in oversized boxes or other containers so as to create the appearance or impression that the length, width, or thickness or other dimensions or quantity of products contained in such boxes or containers are appreciably greater than is the fact; or otherwise misrepresenting the dimensions or quantities of such products; *Provided, however,* That nothing in this order shall be construed as forbidding respondents to use oversized containers if respondents justify the use of such containers as necessary for the efficient packaging of the products contained therein and establish that respondents have 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 such products 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 respondents or their successors or assigns notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporate respondent which may affect compliance obligations arising out of this order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include such respondent's current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

It is further ordered, That the respondents distribute a copy of this order to all operating divisions and subsidiaries of the corporate respondent and to all managerial and supervisory personnel concerned with package design.

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Order

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

FINAL ORDER

The administrative law judge filed his initial decision in this matter on April 3, 1974, finding respondents to have engaged in the acts and practices as alleged in the complaint and entering a cease-and-desist order against respondents, A copy of the initial decision and order was served on the respondents on April 18, 1974. No appeal was taken from the initial decision.

The Commission having now determined that the matter should not be placed on its own docket for review, and that the initial decision should become effective as provided in Section 3.51 (a) of the Commission's Rules of Practice,

It is ordered, That the initial decision and order contained therein shall become effective on May 20, 1974.

IN THE MATTER OF

KELLOGG COMPANY, ET AL.