

Complaint

IN THE MATTER OF
WALCO TOY COMPANY, INC., ET AL.
ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 8921. Complaint, March 13, 1973—Decision, June 25, 1974

Order requiring a New York, N.Y., seller and distributor of toy, gift and hobby products to jobbers and retailers, among other things to cease packaging its products in oversized boxes or other containers; packaging its products in boxes or other containers which misrepresent the size, amount of quantity of products contained in such boxes or containers; and providing wholesalers, retailers or other distributors of its products with means with which to deceive the purchasing public.

Appearances

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

For the respondents: *Daniel Diamond of Lindemann & Diamond, New York City, 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 Walco Toy Company, Inc., a corporation, and Samuel S. Wallach, individually and as an officer of said corporation, 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 Walco Toy Company, 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 38 West 37th Street, New York, N.Y.

PAR. 2. Respondent Samuel S. Wallach 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 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' product 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 ERNEST G. BARNES, ADMINISTRATIVE
LAW JUDGE

JANUARY 9, 1974

PRELIMINARY STATEMENT

Respondents Walco Toy Company, Inc., a corporation, and Samuel S. Wallach, individually and as an officer of said corporation, are charged with violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45). The complaint, issued by the Commission on March 13, 1973, alleges that respondents, in connection with the sale and distribution of toy, gift and hobby products to jobbers and retailers for resale to the public, 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 respondents' toy, gift and hobby products, as depicted or otherwise described on the exterior of packages, corresponded, in 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 in which they were presented for sale.

In truth and in fact, the complaint alleges, respondents' 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 products 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 above practices are alleged to have the capacity and tendency to mislead members of the purchasing public into the mistaken and erroneous belief that the quantum or amount of the product being sold 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. Such practices are alleged to be unfair, false, misleading and deceptive, were and are all to the prejudice and injury of the public and respondents' competitors, and therefore constitute unfair and deceptive acts and practices and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

Respondents' Amended Answer filed June 4, 1973 consisted of a general denial of the aforesaid allegations of unlawful conduct. Respondents' amended answer also interposed several affirmative de-

fenses. Respondents alleged by way of answer that the course and conduct of the corporate respondent's business was in competition with that of other firms within the United States shipping interstate toys and hobby products and respondents' methods of packaging their products was similar to that of their competitors as to the exteriors of packages, their lengths, widths, thicknesses and contents; and that the products do not have the capacity and tendency to mislead members of the purchasing public as to quantity or amount of product being sold.

Respondents also alleged that, prior to the issuance of the complaint herein, the respondents caused toy and hobby products advertised and offered for sale to be packaged so that there is no deception or any possibility of deception as to the length, width or thicknesses or contents of the boxes in which the products are contained.

Finally, respondents alleged that the packages are not larger in size or capacity than is necessary for the efficient packaging of the merchandise contained in said packages; that the respondents have made all reasonable efforts to prevent any misleading appearances or impressions from being created by such packages; and that the retail purchaser, at the time of sale, is fully aware of any disparity, if any exists, between the size or capacity of the package or container and the physical dimensions of the contents thereof as they would be if the container and merchandise were displayed side by side.

Prehearing conferences were held in New York City on May 24 and July 12, 1973. Evidentiary hearing were held in New York City on Sept. 24-26, and Oct. 2 and 3, 1973. The record for the reception of evidence was closed on October 3, 1973.

Complaint counsel's case-in-chief consisted primarily of the introduction into evidence of eighteen (18) of respondents' products in their containers as packaged for sale to consumers. Complaint counsel requested the administrative law judge to observe and visually examine said packages and to determine if such packages have the tendency and capacity to deceive a substantial number of the purchasing public. Complaint counsel also called individual respondent Samuel Wallach, president of corporate respondent Walco, and Alfred Wallach, vice president of corporate respondent Walco, to give testimony as part of the case-in-chief.

Respondents' defense consisted of the testimony of the aforesaid Alfred Wallach, and the testimony of George Reiner, offered by respondents as a packaging expert. No exhibits were offered into evidence by respondents. In rebuttal, Donald Doran testified as a packaging expert for complaint counsel. Respondents offered no surrebuttal.

The parties to this proceeding have submitted proposed findings, conclusions and supporting memoranda. Respondents have also submit-

ted a document entitled "Respondents' Objections To The Commission's Proposed Findings." This latter document was filed December 6, 1973. On Dec. 20, 1973, the Commission extended the date for the filing of this initial decision to and including Jan. 9, 1974.

This proceeding is before the undersigned upon the complaint, answer, testimony and other evidence, proposed findings of fact and conclusions and briefs filed by counsel supporting the complaint and by counsel for respondents. These submissions by the parties have been given careful consideration and, to the extent not adopted by this decision in the form proposed or in substance, are rejected as not supported by the record or as immaterial. Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this decision are hereby denied. The findings of fact made herein are based on a review of the entire record and upon a consideration of the demeanor of the witnesses who gave testimony in this proceeding.

For the convenience of the Commission and the parties, the findings of fact include references to the principal supporting evidentiary items in the record. Such references are intended to serve as convenient guides to the testimony and exhibits supporting the recommended findings of fact, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings.

References to the record are made in parentheses, and certain abbreviations, as hereinafter set forth, are used:

CX—Commission's Exhibits

CPF—Proposed Findings, Conclusions of Law, Arguments In Support Thereof, and Order of Counsel Supporting the Complaint.

RPF—Respondents' Proposed Findings of Fact and Conclusions of Law

RB—Respondents' Post-Trial Memorandum

RO—Respondents' Objections To The Commission's Proposed Findings

The transcript of the testimony is referred to with the abbreviation Tr. and the page number or numbers upon which the testimony appears and the last name of the witness whose testimony is being cited. P. Tr. refers to the transcript of the prehearing conferences.

Having heard and observed the witnesses and after having carefully reviewed the entire record in this proceeding, together with the proposed findings, conclusions and briefs submitted by the parties, as well as replies, the administrative law judge makes the following:

FINDINGS OF FACT

Identity And Business Of Respondents

1. Respondent Walco Toy Company, Inc., hereinafter sometimes referred to as "Walco," 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 38 West 37th Street, New York, N.Y. (Admitted by Respondents' Amended Answer, Par. 1; S. Wallach, Tr. 132).

2. Respondent Samuel Wallach, incorrectly designated in the complaint as "Samuel S. Wallach," is president and chairman of the board of directors of corporate respondent Walco (respondents' amended answer, Par. 2; S. Wallach, Tr. 134-135). His address is the same as that of the corporate respondent (respondents' answer, Par. 1). Respondent Samuel Wallach now owns, and since its inception has owned, one hundred percent (100%) of the stock of respondent Walco (S. Wallach, Tr. 134-135).

3. Respondent Samuel Wallach formulates, directs and controls the acts and practices of corporate respondent Walco, including the acts and practices of the corporate respondent alleged in the complaint to be in violation of Section 5 of the Federal Trade Commission Act. (Respondents' amended answer, Par. 2; P. Tr 4-5, 79-80; S. Wallach, Tr. 133-135, 137, 187-189; A. Wallach, Tr. 202-203).

4. Respondent Samuel Wallach is seventy-two years of age (S. Wallach, Tr. 146, 187), and has been president of respondent Walco and its sole stockholder since its inception in 1958. Prior to 1958, Samuel Wallach was president and owned fifty percent (50%) of the stock of a predecessor company by the name of Walco Bead Company (S. Wallach, Tr. 133-135).

5. 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' amended answer, Par. 3; S. Wallach, Tr. 133, 160-166; A. Wallach, Tr. 198-200, 222-223, 230; CXs 28a, 28c, 28d, 37).

6. 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 herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act (respondents' amended answer, Par. 3; S. Wallach, Tr. 135, 161, 162, 165, 185; A. Wallach, Tr. 198, 199, 222, 223; CXs 28a, 28c, 28d, 37).

Respondents' annual net sales of such products are in excess of one million dollars (\$1,000,000) per year. (Respondents' amended answer, Par. 3; A. Wallach, Tr. 198-200, 222-223; CXs 28a, 28c, 37).

7. In the course and 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 (respondents' amended answer, Par. 4 and 5; CX 37; S. Wallach, Tr. 139, 141-142, 154-158, 166-168; A. Wallach, Tr. 333-334).

Respondents' Products

8. Respondents market a line of toy products which are craft items; that is, the products contain individual parts which the purchaser must assemble to make a completed item (CX 29; P. Tr. 3). Respondents' products involve the concept of selling an art, a craft, and thus have some educational value (A. Wallach, Tr. 203, 205). The craft nature of the product is emphasized by respondents' packages so that a customer can comprehend just what the product is designed to do or make (A. Wallach, Tr. 205, 221, 229, 238). The completed items assembled from respondents' products can be useful, decorative, or simply entertaining; for example, some of respondents' products contain parts to be made into toys for children (CX 6, 9, 11, 12, 13, 15, 19, 20), others can be made into small jewelry items (CX 2, 4, 5, 7, 10, 11, 14, 16, 18), or various ornamental items (CX 4, 5, 11, 15, 17), or useful household items (CX 8, 9, 18).

Most of respondents' products contain parts which can be made into a completed item, then disassembled and made into a different completed item (A. Wallach, Tr. 221-222, 240). Some of the products, however, cannot be disassembled once they are made into a completed item, and problems may develop in attempting to disassemble other items (Doran, Tr. 527-528).

Such craft toys are traditionally gift items, purchased by grandparents, parents and relatives, for children (A. Wallach, Tr. 229). Children, however, often influence the purchase of respondents' products (A. Wallach, Tr. 329).

9. Respondents' products are sold to consumers through department stores, chain stores, discount houses, hobby craft stores and toy stores. (A. Wallach, Tr. 222; S. Wallach, Tr. 160-161). The products are usually displayed on a special shelf or other location within the retail outlet along with other craft items (A. Wallach, Tr. 222-223, 229). They are usually placed on a shelf in a stack of a dozen of each item (A. Wallach, Tr. 224-225).

10. All of respondents' products are completely enclosed in clear

plastic wrapping, which is termed "shrink-wrap" (S. Wallach, Tr. 196). Shrink-wrapping of the packages prevents damage to the product and it also prevents pilferage. Shrink-wrap is now insisted upon by industry members (A. Wallach, Tr. 228-229). Another effect of the shrink-wrap is to prevent purchasers from opening the product and examining the contents of the package prior to purchase (Tr. 40).

11. Complaint counsel placed the following eighteen (18) products sold and distributed by respondents into evidence in their containers as packaged for sale to the consumer. Complaint counsel requested the undersigned to examine and visually observe each of these products. At the time each such package was offered into evidence, complaint counsel stated on the record the contents of the package and his allegations as to the deceptive nature of each such package.

The undersigned personally examined each package as it was received in evidence. Additionally, the undersigned has examined first hand each such package since receipt of the proposed findings and briefs of the parties. Examination of each such product reveals the following characteristics:

CX NO. 2—"SWING . A . LINKS"
(Box Dimensions: 15¼" x 11" x 1½")

This box contains a platform ¾" high.

Contents of the box consist of two plastic packs of assorted colored snap links, two medallions and a set of instructions. All items are fastened to the platform.

This box has a window through which the most substantial portion of the snap links can be viewed by a prospective purchaser.

The outside of the box depicts two girls, one wearing a necklace and one wearing a necklace and a bracelet. There are many snap links lying on a table in front of the girls.

The box contains the following wording:

Hundreds of easy-snap links with ma[sic]dallion plaques plus everything to make: Necklaces, Bracelets, & Belts in any length and color combination.

This box states hundreds of easy-snap links. It does not specify how many hundreds. It also states that one can make necklaces, bracelets, and belts. It does not specify how many of each item or the lengths of the items that can be made.

This toy is for ages 4 and up.

An examination of the box reveals that the contents could be packaged in a box twenty-five percent (25%) of the size of the present container.

CX NO. 4—"DELUXE INDIAN BEAD CRAFT"

(Box Dimensions: 12¼" x 11¼" x 3")

This box contains a platform approximately two (2) inches high.

The box contains three small blister packs of beads, one pack containing several beads of a little larger size along with a spool of wire thread, needles, a needle threader, thread, and a wire frame bead loom. The box also contains a piece of cardboard approximately 6" x 6" square, and a set of instructions.

The outside of the box depicts a boy and girl using the bead loom to make what appears to be an indian belt. Each child is also wearing an Indian necklace made from the beads.

The box also contains the following wording:

Makes genuine Indian belts, wrist straps, headbands, bracelets, necklaces, bead rings, round medallions and other decorative bead work items.

The box states that the set includes:

Wire Frame Bead Loom, Real Indian Beads, Bead Needles, Needle Threader, Thread, Ring Wire, and Complete Illustrated Instructions.

The beads are very tiny and could be compressed into a very small area; they do not have to be spread out over the entire box. The box does not specify how many belts, headbands, etc., can be made from the contents, nor the lengths of any such items.

This toy is for children 7 years and up.

An examination of this package indicates that the contents could be packaged in a box fifty percent (50%) of the size of the present container.

CX NO. 5—"LOVE BEAD CRAFT"

(Box Dimensions: 15¼" x 11" x 1½")

This box contains a platform which comes to within ¼" of the top of the box.

The contents of the box consists of one package of small assorted Love beads and three small blister packs of tiny Indian beads; a 6" x 6" felt pad, a blister pack containing thread, needles, threading needle, and some jewelry findings, and instructions.

The outside of the box depicts a boy and a girl each wearing a necklace and a headband. The background photo is enlarged six times to show details of bead work.

The outside of the box states as follows:

The NOW look of authentic Indian design necklaces, rings, medallions, wrist straps. Complete simplified illustrated instructions. All parts included.

There is a small inset photograph showing the beads at approximately their actual size.

The length and depth of the box is necessary to accommodate the loom.

The enlarged photograph on the outside of the box is of the larger beads contained in the box. The box contains only a few larger beads; the most substantial number of beads in the box are the tiny beads. The box does not specify the number of necklaces that can be made from the contents of the package, nor the length thereof.

The contents of this package could easily be packaged in a box twenty-five percent (25%) of the size of the present container.

CX NO. 6 - "PIXIE PUPPETS"
(Box Dimensions: 15¼" x 11" x 1½")

This box contains a platform approximately ¾" high with instructions printed on the platform.

The box also contains a package of small body parts, a package of larger body parts, some pipe stems, puppet heads and puppet stands. There are apparently sufficient parts to make eight (8) completed puppets.

The box itself contains a window which shows parts of six puppet heads, but the window is designed to make it appear that many more puppets are inside. The box states as follows:

A Delightful Craft/Fun for All. Easy to make your own personal Pixie Puppets. Pose them, play them. Put on your own Puppet show!

The box includes:

Pixie heads, bodies, puppet stands and all other parts—plus easy to follow illustrated instructions.

The box depicts a boy and a girl playing with puppets. There appears to be eight puppets, but the design of the photograph with all the parts scattered about makes it appear more puppets are present. There are nine (9) puppet stands depicted, but only eight (8) puppet stands in the container. The box does not specify the number of puppets which can be constructed from the contents of the box.

This craft is for girls and boys, ages 5 to 9.

The material in the box could easily be placed in a container fifty percent (50%) of the size of the present container.

CX NO. 7 - "BEAD n' BAUBLE JEWELRY CRAFT"
(Box Dimensions: 15¼" x 11" x 1½")

This box has a platform which is approximately 1¼" high.

This box contains a packet of charm plaques, a small blister pack of Mix 'N' Match beads, and a small package of small yellow beads. It also contains cord, needles, jewelry findings and instructions.

The box has a window which displays the majority of the charm plaques. The picture on the box illustrates two girls making jewelry, and a substantial number of parts are displayed in front of them.

The box states as follows:

MAKE YOUR OWN PLAY JEWELRY. Beautiful stretch bracelets, necklaces, clasp bracelets. Dress-up fun for every girl. Great for gifts!

The box states that it includes:

Heart and fashion charm plaques, mix 'n' match beads, bracelet stretch cord, bead stringing cord, clasps, wire plus easy to follow illustrated instructions.

The box does not specify the number of bracelets, necklaces, etc., which can be made from the contents of the box, nor the length or size of such items.

The toy is for girls ages 7 and up.

The items contained in this box could easily be packaged in a box approximately twenty-five percent (25%) of the size of the present container.

CX NO. 8—"TILE BEAD CRAFT"

(Box Dimensions: 15¼" x 11" x 1½")

This box contains a platform which is approximately 1" high, with some instructions printed on the platform.

The contents of the box consists of a blister pack of tile beads and a spool of cord. Apparently a needle is included in the blister pack of tile beads. There is also a separate sheet of instructions.

The box depicts a boy and a girl working with the tile beads. It has a super-imposed picture of a completed hot plate mat in the foreground, which appears unusually large in relation to the children. The box also shows two completed coasters and another hot plate mat, plus numerous loose tile beads. It is apparent that all of these depicted items cannot be made at one time from the tile beads included in the box.

The box itself states as follows:

Creative fun with bright, colorful ceramic beads. Designs come alive before your eyes! Easy to make BUTTERFLY HOT PLATE MAT, or 2 FLOWER TREE COASTERS, or other projects.

The box also states:

Over 600 porcelain ceramic tile beads, safe blunt point needles, easy working heavy craft cord, plus simplified illustrated instructions & self-design sheet.

The box discloses that one can "make BUTTERFLY HOT PLATE MAT, or 2 FLOWER TREE COASTERS." It does not disclose the size of these items if completed.

For ages 7 and up.

The contents of this box could be packaged in a box twenty-five percent (25%) of the size of the present container.

CX NO. 9—"CRAFT STICK ART"

(Box Dimensions: 15¼" x 11" x 1½")

This box contains a platform 1" high.

The box contains three packages of wooden sticks, one package of colored beads, one package of plaques, plus a tube of glue and a set of instructions.

The outside of the box depicts a boy and a girl in two different poses working with the craft sticks. Because of the super-imposition of some of the finished items, the box gives the appearance of containing a substantial amount of product.

The box states:

Everything you need to make: A Fruit Basket, Napkin Holder, Note Holder, Toy Bridge, or your own special creation.

Includes over 250 parts: Craft Sticks, Colored Craft Beads, Decorative Plaques, Safe Glue, plus easy to follow illustrated instructions.

Most of the 250 parts are craft sticks; the other items are very limited in number.

The toy is for boys and girls, ages 7 and up.

These items could easily be packaged in a box one-third (⅓) the size of the present container.

CX NO. 10—"SEA SHELL JEWELRY"

(Box Dimensions: 14⅝" x 11⅝" x 1½")

This box has a platform approximately ¾" high which has some instructions printed on it.

The box contains two blister packs of assorted beads and sea-shell items, and a package which contains wire cord, nylon cord and jewelry findings.

The box has a window which displays the most substantial part of the more attractive sea-shell items. The box depicts a girl wearing two bracelets, a necklace and a headband. There is a small inset photograph of a girl playing with a jewelry item and there are a substantial number of sea-shells and beads in front of her.

The box states:

Includes all materials necessary to make: Sea-shell and bead combination jewelry of colorful, color-proof, safe, simulated sea-shells. Complete illustrated instructions included.

The box does not show how many items can be made, nor the length of any such items. The box does not specify whether all depicted items can be made at one time from the contents of the package. The picture illustration shows items of jewelry made with the *large* beads. There are a limited number of large beads in the package.

For girls ages 6 to 10.

The contents of this box could easily be packaged in a container one-fourth to one-third the size of the present box.

CX NO. 11—"JAC-O-BEADS"
(Box Dimensions: 15¼" x 11" x 1½")

This box has a platform approximately ¾" high.

The box contains a plastic pack of assorted beads, two small blister packs of larger assorted beads, a key ring, pipe stems, a small package containing nylon cord, jewelry findings, and a sheet of instructions.

The outside of the box depicts a girl playing with a number of jewelry items. She is wearing a necklace and earrings. The box contains a window which displays the most substantial part of the smaller and more numerous beads.

The box states that the contents of the package makes:

Charms, Puppets, Necklaces, Bracelets, Pendants, Keychain, Earrings, etc.

The box also states:

HUNDREDS OF GLISTENING JEWEL TONE INTERLOCKING BEADS. Set includes: Key ring, ear wires, necklace clasps, decorative accessory beads, chenille wires, nylon necklace cord. Easy to follow illustrated instructions. No needle necessary. Safe non-toxic permanent colors.

The box states hundreds of beads; it does not say how many hundreds. Also, it does not specify how many items can be made from the contents of the package, nor the lengths of any such items.

The large picture on the box showing a girl with completed jewelry items before her gives the impression that the box contains much more than it actually does.

For ages 4 to 12.

The contents of this box could be packaged in a box one-fourth (¼) to one-third (⅓) the size of the present box.

CX NO. 12—"FUN WITH FELT"
(Box Dimensions: 15¼" x 11" x 1½")

This box contains a platform which is approximately 1¼" high with instructions printed thereon.

The box contains numerous pre-cut felt items.

The picture on the box shows a boy and a girl playing with numerous felt items. The picture gives the impression that the box contains a substantial number of items.

The box states:

Includes: Over 200 colorful pre-cut parts. Letters, Numbers, Animals, Fruit, Circles, Squares, Oblongs, velour picture board, plus easy to follow illustrated instructions.

Spell names, Do'Rithmatic, Make pictures, Easy and safe: No cutting, No pasting, No mistakes. PRESS TO STICK, LIFT TO REMOVE WITH EASY STICK VELOUR BOARD.

For ages pre-school to 9, boys and girls.

The items in this box are flat and they could be packaged in a box twenty-five percent (25%) of the size of the present container.

CX NO. 13—"WAFFLE BLOCKS"
(Box Dimensions: 15¼" x 11" x 1½")

This box has a platform 1" high, with various designs on the platform which can be made from the contents of the package.

The contents of this box consists of a small carton of waffle blocks.

The box contains a window which shows the most substantial part of the waffle blocks. The outside of the box depicts a boy and a girl playing with waffle blocks and making various designs.

The box states:

Build and rebuild with pliable, non-toxic durable blocks. Build: Skyscrapers, bridges, houses, miniature furniture, a train, boats, planes, fortresses, castles, wall plaques, coasters, and whatever you imagine. Suggested projects and illustrated instructions included.

There is no indication whatsoever as to how many waffle blocks are included. From looking at the depictions on this package, and the size of the depicted completed items, it could be anticipated that there are substantially more blocks than there actually are.

This toy is recommended for the entire family from 4 and up.

The contents of this box could easily be placed in a box twenty-five percent (25%) of the size of the present container.

CX NO. 14—"PEARL JEWELRY CRAFT"
(Box Dimensions: 14⅝" x 11⅝" x 1½")

This box contains a platform approximately ¾" high.

The box also contains two blister packs of assorted pearls and as-

The box contains a window which displays the most substantial part of the pearls, as well as some of the beads. The outside of the box depicts two girls wearing various completed jewelry items. One girl is wearing earrings, a necklace, and a cameo butterfly clasp. The larger girl is wearing a necklace, a bracelet, a cameo ring, and a cameo butterfly clasp. There is also a small inset picture which shows a completed necklace, a completed cameo butterfly clasp, a pair of earrings and a cameo ring.

The box contains the following statements:

Includes all materials necessary to make your own: Artful pearl earrings, necklaces or bracelets, cameo rings and cameo butterfly clasp. Complete illustrated instructions included.

It is noted that the box states that a "cameo butterfly clasp" can be made. It is further observed that each girl is wearing a cameo butterfly clasp and there is also a completed cameo butterfly clasp in the small inset picture.

This toy is for girls ages 6 to 10.

The contents of this box could easily be packaged in a box twenty-five percent (25%) the size of the present box.

CX NO. 15— "BEAD GARDENS"

(Box Dimensions: 14 $\frac{5}{8}$ " x 11 $\frac{5}{8}$ " x 1 $\frac{1}{2}$ ")

This box has a platform approximately $\frac{1}{2}$ " high which has some instructions on it.

The box contains six small blister packs of assorted small beads, four flower pots, a spool of wire thread, some wire links, a plastic flower basket, a piece of plastic foam, and some floral tape. A set of instructions is also included.

The outside of the box depicts two girls playing with the various items, which include four flower pots, a flower basket, several packets of beads, many loose beads and many completed flower items. The depicted items are placed in the foreground of the picture and, in comparison to the two girls, the completed items are much larger than the items which could be made from the contents enclosed in the package. This is particularly noticeable with the flower pot and the flower basket which appear to be much larger than they actually are when compared to the depicted girls. The box does not state the number of flower pots, or the number of any of the other items contained in the box.

The box states as follows:

Easy to make your own beautiful bead flowers and arrangements. All required materials include: A generous assortment of bright colorful flower beads, flower pots and basket, flower craft wire, Green stem coverings and complete illustrated instructions.

This box would have to be the depth it is because of the depth of the flower pots. The flower pots could be stacked one inside another and thus conserve space.

For girls 8 years and up.

The contents of this box could be packaged in a box approximately fifty percent (50%) of the size of the present container.

CX NO. 16— "FUN FRUIT JEWELRY"

(Box Dimensions: 11½" x 9" x 1¾")

This box contains a platform which is 1¼" high with diagrams printed on it.

The box also contains five blister packs of assorted beads and fruit beads, a small packet of nylon thread, and jewelry findings.

The outside of the box depicts three girls, each girl wearing a completed necklace; two of the girls are each wearing a single bracelet; and a third girl is wearing two bracelets. Also, one of the girls is wearing what appears to be a brooch.

The box states:

FUN TO CREATE NECKLACES, BRACELETS, BROOCHES AND ELASTIC CHOKER.

SET CONTAINS: Over 150 fruit beads, faceted jewelry beads, findings, elastic & nylon cord, blunt point needle and complete illustrated instructions.

The contents of this box could easily be packaged in a box twenty-five percent (25%) of the size of the present container.

CX NO. 17— "INDIAN BEAD POINT"

(Box Dimensions: 11½" x 9" x 3¼")

This box contains a platform approximately two (2) inches high with instructions printed on the platform.

The box contains a piece of plastic foam, 6 small packets of very small beads, bead-point tool, pre-punched bead-point bases, cord, and some safety pins.

This is a particularly deceptive item because of the depth of this box.

The box would apparently have to be as deep as it is because of the bead-point base, however, there is no necessity for the length and width of the present container.

The picture on the outside of the box depicts a boy and two girls; the boy is wearing two Indian bead rings; one girl is wearing a headband and a medallion; and the other girl is wearing a medallion, a bracelet and a ring.

For ages 6 and up.

The material could easily be packaged in a box twenty-five percent (25%) the size of the present container.

CX NO. 18— "PETER MAX BEAD CRAFT"

(Box Dimensions: 15¼" x 11" x 1½")

This box has a platform which lies flat in the box, to which the contents are fastened.

The box contains six packets of various colored beads, cord and needles.

The box depicts a girl with a complete large mat in front of her. The picture also shows two other large mats, one small mat, three napkin rings, a completed necklace (whose length cannot be determined since it extends out of the picture), and a substantial pile of beads. The girl is also wearing a completed bracelet.

The box states:

BRILLIANT BEADS ARE EASILY WOVEN INTO MATS, NECKLACES, BRACELETS, NAPKIN RINGS, SCARF SLIDES, ETC.

The box also states:

OVER 2000 COLORFUL BEADS. MAKE 2 LARGE MATS OR SMALLER MATS WITH JEWELRY, RINGS, ETC. INCLUDES:

ILLUSTRATED INSTRUCTIONS WITH PETER MAX DESIGNS, SELECTED BEAD CRAFT CORD, SAFETY BLUNT-POINT NEEDLES AND SELF-DESIGN SHEET.

The instructions on the box state that the contents can make two large mats or smaller mats. It appears that in no way can all of the items depicted be made at one time from the contents of this box.

For ages 7 and up.

The contents of the box could easily be packaged in a box twenty-five percent (25%) of the size of the present container.

CX NO. 19— "FUN WITH DOLLS"

(Box Dimensions: 15¼" x 11" x 1½")

This box contains a platform approximately ¾" high with instructions on the platform.

The box contains six doll heads, six doll bodies, pipe stems, and two packets of body parts. The box contains a window which shows five doll heads with an indication that more doll heads are in the box.

The box also shows two girls playing with dolls. It depicts seven doll heads, but there are only six doll heads in the container.

The box states:

Make fun-dolls you will love. Exciting, easy to put together parts. Easy to change around. Hours of fun!

How to have Fun with Dolls: Plan a doll party, Play nursery school, Play dancing lesson, have a doll picnic.

Includes: Adorable hand painted wooden heads, colorful spool bodies, flexible arms, legs, hats, plus easy to follow illustrated instructions.

For ages 4 to 9.

The contents of this box could easily be packaged in a container fifty percent (50%) of the size of the present container.

CX NO.20— "SNAP-ON FASHION DESIGNER CRAFT"
(Box Dimensions: 14 $\frac{5}{8}$ " x 11 $\frac{5}{8}$ " x 1 $\frac{1}{2}$ ")

This box contains a platform which is approximately $\frac{3}{4}$ " high.

The box contains a piece of cloth material which has snaps already attached.

The box states on the front:.

For all 11 $\frac{1}{2}$ " dolls, such as Barbie, Francie, P.J. Stacey, Maddie Mod, Julia, Christie, Maxi-Mod, etc. No sewing is necessary to create your choice of: dress, gown, peignoir, cape, hats, etc. from pre-patterned fabric. Snaps are already attached. Just cut pattern with scissors (not included). Contents include: Pre-patterned and flocked Sateen panel with pre-mounted snaps and complete illustrated instructions and ideas.

The box contains a small window which depicts the color of the fabric contained within the box. The box also depicts on the outside eight dolls which are dressed in various outfits of different colors. The box also states: "DOLLS NOT INCLUDED."

In looking at this picture, one could assume there may be enough material to clothe the eight dolls as depicted, which, of course, is not true.

The contents of this box could easily be packaged in a box one-fourth the size of the present container.

* * * * *

12. Box dimensions reported hereinabove for each package are confirmed by CX 43, an exhibit prepared by respondents at the request of complaint counsel (Tr. 200-201). As noted above, most of these toy products are packaged in containers with identical dimensions; *i.e.*, 15 $\frac{1}{4}$ " x 11" x 1 $\frac{1}{2}$ " (CX 2, 5, 6, 7, 8, 9, 11, 12, 13, 18, 19). Four other items are packaged in containers with dimensions of 14 $\frac{5}{8}$ " x 11 $\frac{5}{8}$ " x 1 $\frac{1}{2}$ " (CX 10, 14, 15, 20).

13. Respondents contend that purchasers of their products can gain an indication of the contents of the packages by feeling the weight of the box (RPF, p. 3). The administrative law judge, through firsthand examination of the above exhibits—CX 2, 4-20, and through lifting the packages and observing the heft of each package, was unable to make any knowledgeable determination as to the contents thereof. As was

observed by complaint counsel's expert witness, Donald Doran, the weight of the package of an item not customarily sold according to weight means very little to a consumer unfamiliar with the contents of the package. On direct examination he stated:

Q. What is your opinion?

A. There is no way of telling what is in this package. The description of hundreds, the weight, the illustration, it assumes that the package has a relative relationship of size to contents and there is no way really of telling how many are in here. It is a Swing-A-Links. It is not a pound of butter. It is not familiar to the consuming public, how deep is this, how far do they go.

There is a tremendous area that you do not know. There is no aid whatsoever in this package. (Tr. 373)

On cross-examination Mr. Doran testified:

Q. * * * And the people could tell by the weight how much the weight of the components are generally?

A. No.

Q. In other words, if you held this box in your hand, you wouldn't expect any ten-pound weights in there, would you?

A. If this box were filled with feathers, it would be one situation, a few pieces in the corner is something else entirely different within that lead (sic).

If they were filled with lead it would be entirely different. (Tr. 594)

* * * * *

Q. And by holding the box they have a pretty good idea of the weight of what's inside, am I correct?

A. You have an idea of the weight of what is inside, but you don't know what the weight relates to.

Q. But the over-all weight of the box, correct?

A. The weight of the box is apparent. But there is no relationship to what it is. (Tr. 606)

14. As has been found hereinabove, each of respondents' products, CX 2, 4-20, is packaged in substantially oversized containers. Each of these products could be adequately packaged in containers one-half ($\frac{1}{2}$) the size of the present containers. Most of the products could be packaged in containers one-fourth ($\frac{1}{4}$) the size of the present containers (CX 2, 5, 7, 8, 12, 13, 14, 16, 17, 18, 20).

15. Observation of respondents' product packages reveals that the graphics and depictions contained thereon are designed to appeal to children, since most of the toys are recommended for children of the age of some comprehension (CX 4, 7, 8, 9, 11, 13, 15, 18). Children are likely to purchase respondents' products or influence their purchase by others (A. Wallach, Tr. 329).

16. The graphics on the outside of the containers are vague, indefinite and lacking in specificity; in many respects they are misleading. On some of the packages, the graphics state that the packages contain beads, pearls, tile ceramics, blocks, heads, etc.; the graphics do not

specify *how many* of each item is contained in the packages (CX 4, 6, 7, 10, 13, 14, 15, 19). Some of the packages state hundreds of beads are contained therein, without specifying how many hundreds (CX 2, 11). Other boxes merely state all necessary materials are included (CX 5, 9, 10, 14, 15), or "a generous assortment" is included (CX 15). The graphics on some of the packages state that the contents of the package will make necklaces, bracelets, brooches, earrings, etc.; nowhere is it stated *how many* of each item can be made nor the *length* or *size* of each item that can be made (CX 2, 4, 5, 7, 10, 11, 14, 16). CX 2 says the items can be made "in any length." Similarly, the graphics on some of the packages do not specify the *size* of the beads, pearls or other items in the packages (CX 4, 7, 15, 16, 17, 18).

17. The depictions on the outside of the containers are also misleading. For example, some of the packages depict children wearing items made from the contents of the packages. In some instances, all of the depicted items cannot be made from the contents of the package (CX 6, 14, 16, 19, 20; A. Wallach, Tr. 281). In some instances, all of the depicted items can be made from the contents of the package; however, it would require that items be disassembled in order to make other items. The graphics on the packages do not disclose this material fact (CX 8, 10, 18, for example).

On some packages the depictions of completed items are given an appearance of size which is not truly an accurate reflection of the actual size of the completed items. This is accomplished through the use of foreground placement shots of the completed items with pictures of children in the background (CX 8, 9, 13, 15; Doran, Tr. 595-597). In other instances depicted completed items are made from the largest beads inside the package, without disclosing that the package contains much smaller beads and only a few of the depicted larger beads (CX 5, 10).

Some of the packages contain windows which enable the purchaser to visually observe a portion of the contents of the package. In some instances the beads which are packaged so as to be visible through the windows are the largest beads in the package (CX 7, 10). In other instances, substantially all of the beads in the package are visible through the window. The remainder of the package, which is unexposed to visual examination by the purchaser, is substantially empty (CX 2, 6, 7, 8, 11, 13, 14, 19).

18. The following testimony by respondents' officials support the above findings of fact concerning the depictions and graphics on respondents' boxes. Mr. Samuel Wallach, president of respondent Walco testified as follows about CX 14:

Q. The statement is: artful pearl earrings, without saying how many, Mr. Wallach, artful pearl earrings.

A. The instructions inside or the back of the box,—there are instructions inside that tell them exactly what it makes.

Q. Then, Mr. Wallach, the consumer would not realize how many earrings he or she could make until opening the box?

A. Evidently.

Q. And reading the instructions?

A. If you want to put it that way. (Tr.192)

He gave the following testimony about CX 11:

Q. Mr. Wallach, you couldn't tell from inspecting the beads themselves how many there were just by seeing how much space they occupied?

A. I couldn't tell.

Q. Could you tell by just inspecting the amount of space the beads occupied, could you tell how many beads there were?

A. I couldn't, no.

Q. How long have you been selling beads, Mr. Wallach?

A. Fifty years. (Tr. 193-194)

Samuel Wallach also testified that the consumer is not familiar with the items contained in respondents' products. He stated:

Most people are unfamiliar with the type of bead. (Tr. 172)

In regard to the depictions and graphics on CX 14, Alfred Wallach, vice president of respondent Walco, stated that the information was "vaguely instead of exactly" and that such information "should be more detailed" (A. Wallach, Tr. 323).

19. Respondents use two basic types of boxes, a folding box and a setup box. A folding box comes flat and the picture is printed on the box. CX 2 is an example of a folding box (A. Wallach, Tr. 223). A setup box is rigid in all four corners and it cannot be folded flat. The picture on a setup box is printed on a separate piece of paper which is glued on the box top (A. Wallach, Tr. 223-224). CX 10 is an example of a setup box (Doran, Tr. 453). The setup box is more expensive and takes up more room in shipping. The folding box requires a platform inside to keep the box rigid (A. Wallach, Tr. 223-224, 240).

Respondents' products are basically packaged in containers made from paperboard of poor quality; the paperboard does not have high tear strength and has little durability (Doran, Tr. 390). Respondents' packages, therefore, are not suitable as work areas for children using respondents' products, as they cannot withstand abuse. At best, respondents' packages serve only as receptacles (A. Wallach, Tr. 243-244; Doran, Tr. 390, 397, 407-408, 413, 417, 423, 428, 446, 465, 475); although the setup boxes are of sufficient strength to be satisfactory storage containers for the toys (Doran, Tr. 453, 457, 470, 475). In this connection, it is noted that the depictions on respondents' products do not show

the children utilizing the containers as work areas; rather, the depictions are of children working on other areas such as the surface of table tops.

Testimony By Respondents' Officials

20. Respondent Samuel Wallach, president of respondent Walco, was questioned by complaint counsel about the packaging of respondents' craft toys (S. Wallach, Tr. 140-196). He testified that the size of the package utilized by respondents to package their craft toys is determined by the size that the industry will accept—the jobber, the retailer and the consumer (Wallach, Tr. 153, 175-181, 183, 186-187). According to Samuel Wallach, if a box is too small, the jobber will not buy it, the retailer will not buy it and the consumer will not buy it (S. Wallach, Tr. 153). He testified that the consumer prefers a larger box for a gift item, regardless of the contents of the box (S. Wallach, Tr. 152-154, 177, 178; CX 28(b)), and that a retailer will not accept a smaller box if a competitor offers a similar product in a larger box (S. Wallach, Tr. 155-156).

Samuel Wallach also testified that respondents' products are packaged in certain size containers to fit into price categories (S. Wallach, Tr. 143, 169, 172, 176; CX 28(b)). He emphasized that the box has to be large enough to adequately demonstrate to the purchaser the story of the product (S. Wallach, Tr. 169-170, 172, 173, 175, 178, 181).

Some of this testimony by Samuel Wallach is exemplified by the following in regard to CX 2:

Furthermore, this size box is one that's acceptable by the jobber, the retailer, and would be considered, in our opinion, and by the consumer as a nice size gift box for the price she pays for this kind of a craft. (Tr. 183)

As to CX 14, Samuel Wallach testified:

Well, as I mentioned before, we want to sell the story in pictorial fashion as best we can, and we want to have a size that's acceptable to the jobber, the retailer and the size a consumer will consider adequate for the price she pays for a nice size gift box. (Tr. 186)

21. Alfred Wallach, vice president of respondent Walco, was called as a witness by complaint counsel as part of the case-in-chief. He also testified as part of respondents' defense (A. Wallach, Tr. 197-334). Alfred Wallach emphasized that craft toys had to be packaged to tell the story of the craft; the consumer has to understand what can be made with the toy (A. Wallach, Tr. 203, 205). He stated that in the toy industry there is a box size, or gift size, for certain price structures—there is a traditional size for certain price ranges (A. Wallach, Tr. 208; CX 43(b)). He also stated that in the type boxes used by respondents, the box manufacturers cannot make a box of a height less than one and one-quarter inches (A. Wallach, Tr. 206, 210).

Alfred Wallach testified in defense on direct examination that respondents' products are reasonably packaged as to size (A. Wallach, Tr. 226, 236, 237, 242, 244, 245, 249, 251, 253, 258, 262, 263-264, 267, 270, 271, 272, 274), but that CX 16 should have been packaged in a *larger* box (A. Wallach, Tr. 268, 294-295). He also testified that smaller boxes are cheaper; that smaller boxes take up less shelf space; and that smaller boxes are more efficient in terms of storage (A. Wallach, Tr. 296).

Testimony of Expert Witnesses

22. George Reiner, sole proprietor of George Reiner Associates, Inc., was called as an expert witness by respondents. Mr. Reiner is a graduate of Pratt Institute and has been engaged in the packaging business for forty (40) years. He has had considerable experience in packaging work for major business concerns in this country. He has a number of packaging inventions (Reiner, Tr. 334-336).

Mr. Reiner testified that respondents' products are properly packaged as to size, and that the packages are not deceptive. He also testified that the boxes serve as a workbench for the children while utilizing the craft toys (Reiner, Tr. 339-355; but see Finding of Fact No. 19).

Mr. Reiner's testimony was noticeably lacking in details as to his basis or reasoning for concluding that respondents' products are fairly packaged as to size and are not deceptive to consumers. Illustrative of his testimony is the following:

Q. With the same question, so we don't have to repeat it all, would you examine Exhibit No. 5, the outside, of course, and the inside.

A. I would not consider this package deceptive in any way.

Q. Is it reasonably packaged?

A. Yes.

Q. As to size, information and as a craft gift package?

A. Yes, I would say yes.

Q. And you say the size is proper?

A. A reasonable size, yes.

Q. I show you Exhibit 6. Would you examine it likewise.

A. This I find is well packaged.

Q. All right. In your opinion as to size, information and as a craft gift, is it reasonably packaged as I said as to size and the information furnished?

A. Yes, it is.

Q. Is that a good package as far as—

A. I would say yes.

Q. In your opinion. All right.

I show you Exhibit 7. Would you examine it with the same thought in mind as to whether it's proper and not deceptive?

I don't know if I asked you with reference to the item, is there anything deceptive about that package as to size or the contents or anything about it?

A. I find nothing deceptive about it at all.

Q. Does it tend to deceive anybody even, or any that I've mentioned?

A. I would not think so.

MR. FORSMITH: I didn't hear the answer. Pardon me?

THE WITNESS: I said I would not think.

A. I find this to be well packaged.

Q. Do you find that the size of the box is proper for the contents?

A. Yes, I do, for the contents.

Q. And for the information?

A. Yes.

Q. And do you find in your opinion that there is no deception to any purchaser in connection with—

MR. FORSMITH: Your Honor, that's an objectionable question.

Q. (continuing)—in connection with the packaging of this item?

JUDGE BARNES: I think you should rephrase that, Mr. Diamond.

MR. DIAMOND: All right.

JUDGE BARNES: Do you find this package to be deceptive in any manner?

THE WITNESS: No, I do not. (Reiner, Tr. 342-343).

On cross-examination Mr. Reiner was asked for his definition of deceptive packaging. He stated:

Deceptive packaging would be packaging that does not in any way inform the consumer of the contents. (Tr. 355)

Mr. Reiner further indicated during cross-examination that his view of deceptive packaging was a very narrow one indeed. He testified that he considers deceptive packaging to be limited to packaging which displays merchandise not in the package, or to packages that are "far too large for the contents" (Tr. 356), or to packages which claim performance for the product that can not be fulfilled, or to packages which are designed to appear identical to a higher priced item, or identical to an item packaged in a larger package size, or identical to a popular item (Reiner, Tr. 356-358), a type of "palming off" (Reiner, Tr. 358).

Mr. Reiner's view of oversized packaging is further revealed by the following testimony on cross-examination:

Q. Earlier, a moment ago, you mentioned that some boxes might be so large that they would misrepresent as to size and quantity of contents.

A. There have been.

Q. How large would that have to be in relation to the size or count of contents until they would be deceptive?

A. That would be ridiculously large. (Tr. 357)

Q. If one of the packages you have been asked today to evaluate were twice the size it is now and had half the amount of merchandise that it contains now, would you then consider such package to be deceptive as to quantity or size?

* * * * *

Do you understand the question?

THE WITNESS: Yes.

A. If they were twice the size?

Q. If one of those packages were twice the size it is now and had half as much merchandise in it, would you consider it deceptive?

A. I would say yes. (Tr. 358-359)

23. Complaint counsel called in rebuttal Donald Doran, an expert witness on packaging. Mr. Doran has been engaged in the packaging industry for approximately twenty-five (25) years. For about ten years his work has been in the areas of structural packaging, or protective packaging. He has worked for several large corporations during his career and at the present time is a senior packaging engineer with Avon Products Corporation, New York City. His duties are primarily concerned with the development of packaging concepts into marketable items. Mr. Doran has no college degree; however, for the past six (6) years he has been an assistant professor at Pratt Institute teaching packaging technology in the graduate program (Doran, Tr. 364-366, 510-511).

Mr. Doran was shown respondents' products which have been received in the record in this proceeding - CX 2, 4-20. He testified that most of these products could be packaged in boxes fifty percent (50%) of the size of the present containers (Doran, Tr. 574; see also, CX 11-Tr. 395; CX 8-Tr. 406-407; CX 5-Tr. 412; CX 13-Tr. 416; CX 9-Tr. 419, 421; CX 6-Tr. 424, 425; CX 12-Tr. 440; CX 10-Tr. 452; CX 14-Tr. 454, 455; CX 15-Tr. 458; CX 4-Tr. 468). In Mr. Doran's opinion, some of the products could be packaged in boxes twenty-five percent (25%) of the size of the present containers (CX 7-Tr. 401; CX 18-Tr. 462; CX 17-Tr. 472-474). He testified that CX 16 and CX 19 could be packaged in smaller boxes; however, the record does not reveal the size of box which he believes could be utilized for these items (Doran, Tr. 431, 465). CX 20, in the witness's opinion, does not have the capacity to deceive purchasers (Doran, Tr. 460).

Mr. Doran testified in detail about the depictions and graphics on each of respondents' products. He stated that with the majority of respondents' products the graphics "are not specific and quite often were vague" (Doran, Tr. 506). As to CX 2, Mr. Doran testified:

There is no way of telling what is in this package. The description of hundreds, the weight, the illustration, it assumes that the package has a relative relationship of size to contents and there is no way really of telling how many are in here. It is a Swing-A-Links. It is not a pound of butter. It is not familiar to the consuming public, how deep is this, how far do they go.

There is a tremendous area that you do not know. There is no aid whatsoever in this package. (Tr. 373)

They leave open ends in reference to any length of necklaces, bracelets, belts, any lengths. It assumes an awful lot of material is in here. How many hundreds are there: It is not clear. (Tr. 375)

As to CX 4, Mr. Doran testified:

It is a self-evident thing.

I'm concerned about the actual illustration. It shows a belt, part of a brooch or perhaps—or a necklace, I should say, one, two, three—four elements shown.

And there is no reference to their size.

Can all of these things be made from the contents of this package, it really does not describe that clearly at all.

It talks of making genuine Indian belts, plural, wrist straps, plural, head bands, plural, bracelets, plural, necklaces, bead rings, round medallions, and other decorative bead work items.

So it purports to give you many, many things.

And I question whether or not the content of this package would give you genuine Indian belts even because there are only three bags of beads in there and a few larger beads on one side.

I rather doubt you could do all of those things from what is contained in this package, sir.

If the credibility were based on the copy, and in combination with this size, I would say there would be a great deal of disappointment in opening this package. (Tr. 469)

Mr. Doran observed that CX 6 depicts nine Pixie Puppet platforms on the outside of the container, whereas there were parts inside the box for only eight Pixie Puppets (Doran, Tr. 423, 591). In this regard it is noted that Mr. Reiner, respondents' expert, failed to find anything deceptive about this exhibit—CX 6 (Reiner, Tr. 342), although one of Mr. Reiner's basic premises as to deceptiveness was stated to be packages that display merchandise not contained within the package (Reiner, Tr. 356).

Mr. Doran was particularly critical of respondents' failure to disclose the size of items inside the packages and the number and sizes of items that could be made from the contents of the packages (Doran, Tr. 373-375, 393-395, 400, 410-411, 420, 424, 431, 448, 461, 506, 520).

Mr. Doran stressed that in packaging there is a basic premise that a relationship exists between size of a package and its contents (Doran, Tr. 448-449, 464; see also, 376, 385, 395, 399, 403, 406, 419, 431, 454); that the public is educated to the fact that the contents of the package is relative to the cube of the package (Doran, Tr. 450). On cross-examination, Mr. Doran was asked:

Q. You are very much interested in cubage area, am I right?

A. Yes, sir. It costs a fortune today.

Q. Are you a storage man? Do you store items in a storage house?

A. No.

Every package I do, I have to justify the cubage and I've always done that. (Tr. 542)

Mr. Doran emphasized that cubage is expensive and that he always worked with minimum cubage. He stated:

Well, essentially, I have formed the following opinion. If the function is to sell as a gift, then you so decorate it as a gift. But, cubage, warehousing the item is very expensive, so in the planning of the product and marketing of the product—I also work on minimum cubage where practical. Now, taking into consideration the decorative aspect, this box could be made very, very decorative via printing details so the gift could be ribbon packed, but the basic content need not be this size. (Doran, Tr. 378).

* * * * *

This is a particular area of craft toys packed this way. It is oversized for the contents that it contains. If you are trying to save money on cubage or freight or anything, it is wrong. (Tr. 535)

Mr. Doran also stressed the fact that the consumer is not familiar with the contents of respondents' packages. He stated that love beads, or sea shell jewelry, or fun fruit jewelry are not familiar to the consumer as would be, for example, a pound of butter or a dozen eggs (Doran, Tr. 373, 400, 410-411, 459).

Respondents' Defenses

24. Respondents maintained through their answer and at various times during the hearings that their methods of packaging their products were similar to that of their competitors as to the length, width, and thicknesses of the exterior of their packages (respondents' amended answer, para. 5; RB, p. 2, RO, p. 4). Respondents cite in support of this contention the testimony of Commission counsel's expert witness, Donald Doran, at pages 589 and 620 of the official transcript.

While not cited by respondents in their proposed findings and briefs, some testimony by respondents' officials is pertinent to this issue of competitors' packaging practices. Samuel Wallach testified that respondents consider what competition is doing but "that's not our guide," "that doesn't determine what we finally decide upon" (S. Wallach, Tr. 157). Both Samuel and Alfred Wallach testified that their toy packages fit into a price category, that the packages had to be acceptable to the jobber, the retailer and consumer as a gift item (S. Wallach, Tr. 153-154; 109, 172, 177, 178, 181, 183; A. Wallach, Tr. 208-209, 286, 296; CX 28 (b)). Samuel Wallach testified that if a competitor offered the product in a larger box, the consumer will select the larger box (S. Wallach, Tr. 154), and that a consumer would not buy respondents' products if a competitor offered a similar product in a larger container (S. Wallach, Tr. 155-156).

Samuel Wallach testified that in the toy industry there is a "certain relationship of gift size to the price structure" (S. Wallach, Tr. 208). Alfred Wallach testified that in the toy industry "worldwide" there is a certain relationship of gift size to price structure (A. Wallach, Tr. 208).

Donald Doran, complaint counsel's expert witness, was asked on

cross-examination if he was aware that there was a "traditional size" in the craft toy industry. He answered:

Generally speaking, they all tend to fall in the same ballpark (Tr. 534).

All of above testimony is of a very general nature. Specific evidence of industry packaging practices could have been adduced by respondents by calling knowledgeable industry witnesses; for example, by calling jobbers who handle craft toy products of many manufacturers. There are numerous other ways respondents could have adduced specific evidence of industry practices had they believed such evidence material to their defense. This they did not do. Thus, based on the evidence of record, no finding can be made as to specific packaging practices of respondents' competitors.

25. Respondents contended in their answer that prior to the issuance of the complaint herein, respondents had caused their products to be packaged so that there is no deception or possibility of deception as to the size of the containers and the contents thereof (respondents' amended answer, p. 2). At the trial respondents' counsel objected to introduction of respondents' products as Commission exhibits on the grounds that certain items had been discontinued prior to the issuance of the complaint (Tr. 47-48). The administrative law judge ruled that any evidence on this issue should be presented through witnesses, not by statements of counsel (Tr. 47-48).

Respondents failed to offer substantial, probative evidence of discontinuance. Mr. Samuel Wallach testified that respondents "have a list of which we are running and which we are not" (S. Wallach, Tr. 165), but no such list was offered in evidence. Alfred Wallach testified that CX 12 was discontinued "about a year and a half ago." (A. Wallach, Tr. 263). CX 43 shows the word "discontinued" opposite several items which were offered in evidence by complaint counsel; however, the record does not reflect when these items were discontinued. CX 29(a) and (b), a recent catalog and price list of respondents' products, list at least fourteen (14) of the eighteen (18) packages relied upon by complaint counsel, indicating these items are being currently marketed.

Evidence of actual date of discontinuance—prior to issuance of complaint, prior to initiation of investigation, etc.—would have been readily available to respondents. No such evidence was ever presented. Therefore, the record does not contain substantial, reliable evidence of discontinuance by respondents of the challenged acts and practices.

26. Respondents alleged that the boxes in which their products were packaged are no larger in size or capacity than is necessary for the efficient packaging of the merchandise contained in the packages (respondents' amended answer, p. 2).

Respondents offered no evidence that the size of their packages were based on the technological requirements of packaging. Instead, testimony of Walco officials Samuel and Alfred Wallach makes it clear that the size of respondents' containers for their products was not based upon technological necessities in any manner but was based upon the following considerations; the size fits into a price category; it is acceptable to the jobber, retailer and consumer as a gift item; it is large enough to tell the story of the craft to the prospective purchaser; and the size of the boxes realize economies in packaging. The following testimony by respondents' officials establishes these considerations.

* * * * *

A. In the first place, when an individual—first of all, you deal with a jobber. The jobber deals with a retailer. The retailer deals with the consumer.

If a box is too small, the jobber won't buy it, the store won't buy it, and the consumer, will give him the same item—and I'm not discussing oversize boxes. I'm discussing ordinary size boxes that represent value that a consumer considers worthwhile—worthwhile.

If you give him the same item, he knows what's in the box or he doesn't know what's in the box. Give them a small box and give them a large box, if they want to buy it as a gift, they will pick the larger box. (Tr. 153)

* * * * *

A. Well, the main reason is to show it, to show—I mean the illustration on top is to be interesting, to be convincing, to tell the story. And we put it in a size that the artist recommends and which we accept, and we think it's proper to do it.

Another reason is it falls into a price category. And the reason we had two size boxes was for economical purposes, and that way you could buy the same box, get better value; in other words, have two types of boxes which we can pack, overwrap economically, package economically in the same cartons. Give people better value, and that's the reason we do it. (Tr. 169)

* * * * *

A. Well, we tried one time to fit it in two categories, what was a two-dollar box or three-dollar box, for a simple reason I mentioned before, for economical reasons, and that benefited the customer in the end. (Tr. 172)

* * * * *

A. Well, I explained, first of all, we wanted to show, tell the story adequately in picture form on the box. (Tr. 173)

* * * * *

A. You have to have a box that's large enough to sell the story in picture form. (Tr. 176)

* * * * *

A. If we would take this box and put it in this size (indicating), they wouldn't buy it for this price.

Q. Why not?

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A. It cannot tell the story, it cannot tell the story adequately. It's not convincing enough an item for the retailer to pick up and buy for that price (Tr. 181).

* * * * *

Furthermore, this size box is one that's acceptable by the jobber, the retailer, and would be considered, in our opinion, and by the consumer, as a nice size gift box for the price she pays for this kind of a craft.

Q. Acceptable to the retailer and jobber because of the size it is and the price that is charged for it?

A. Price and appearance, the story it tells, all the attributes this box has. It has illustrations on the side, interesting illustrations. All these things are necessary to sell an item.

Q. Are they all essential to sell the item?

A. We think it's important to show this—tell this story and help sell it. (Tr. 183)

See also testimony of Samuel Wallach at Tr. 142-143, 147-148, 152, 154, 156, 175, 177, 181, 187.

Alfred Wallach testified "intangibles" are important:

A. Artistic value, selling a concept, selling an art, a craft, the educational value, things of that nature. (Tr. 203)

* * * * *

A. Well, first of all, the product has to be shown. The printing has to be legible. It has to be understood what can be made. Its educational value has to be emphasized. What is shown should be as much full size as possible so a person has a gut feeling for what's being made and what they are learning to do.

The craft itself, whatever the nature of it, sewing, weaving, knitting, sculpting, has to be emphasized and comprehended by a customer who just picks this up at random. (Tr. 205)

* * * * *

A. Well, in the toy industry worldwide, not only in the United States, there is a certain relationship of gift size to the price structure, and usually in the dollar and two and three-dollar range, it applies to a box of about that size.

* * * * *

A. When a person gives a gift to a child, it is our opinion, it should be attractively packaged, it should be reasonably substantial.

They could buy these beads in bulk and give them a little poly bag full of loose beads as well, for instance. But they don't. They choose to buy them gift boxed.

Q. Who is "they"?

A. The public at large. Otherwise, everyone would package them much more cheaply and save ourselves the expense of packaging and all the artwork and so on and so forth. (Tr. 209)

* * * * *

A. There is a cost relationship between the packaging cost and the contents. The lower the packaging cost, in other words, the cheaper the cost of your box and your wrapping, and the faster you can manufacture the item, the more contents you can give.

We try to cut the cost of our packaging to a minimum, and if we unitize the size of the box, we can give more product.

Therefore, we try to get the economies of mass production by getting the boxes of the same size which puts them in the same price relationship, which even enables us to sell them as a mixed unit instead of as a single item, which means we use the same size carton packing them in dozens, which means we can stack them on skids fully square so they don't topple over, being the various sizes, which means that we can use the same blank bottom for many different covers that are printed and make those in large quantities. (Tr. 210-211)

See also testimony of Alfred Wallach at Tr. 263, 286, 288-289, 296.

27. Respondents also contend by way of defense that the consumer has a preference for the size of package utilized by respondents, and that the consumer is fully aware of any disparity, if any exists, between the size of the package and the contents thereof (respondents' amended answer, p. 2). Evidence on these two alleged defenses consisted solely of testimony by respondents' officials. Samuel Wallach testified that the consumer preferred a larger box as a gift item (S. Wallach, Tr. 153-156). Such testimony leaves open the question as to whether this consumer preference, if it does exist, is based upon need by the consumer for a larger package, or whether the preference is based on expectation that the larger box contains more product. The record certainly does not establish that the consumer has need for a larger container, leaving the latter alternative as the most probable reason for any consumer preference for a larger container. There was no evidence adduced to demonstrate the consumer's knowledge of disparity between the size of respondents' product containers and the contents thereof. In fact, the record supports the conclusion that consumers are generally unfamiliar with respondents' products (S. Wallach, Tr. 172; Doran, Tr. 373, 400, 410-411, 459).

28. Respondents' contention that the size of their packages is dictated in part by economies of packaging is without record support, and is contrary to common logic. Respondents would realize savings if they utilized smaller containers for their products. Savings would be realized in packaging, warehousing, shipping and in display space. These rather obvious facts were admitted by respondents' officials in their testimony during the case-in-chief and in defense. Alfred Wallach testified that both respondent Walco tries to "cut the cost of our packaging to a minimum, and if we unitize the size of the box, we can give them more product." (A. Wallach, Tr. 210-211). He testified:

A. There is a cost relationship between the packaging cost and the contents. The lower the packaging cost, in other words, the cheaper the cost of your box and your wrapping, and the faster you can manufacture the item, the more contents you can give.

We try to cut the cost of our packaging to a minimum, and if we unitize the size of the box, we can give more product.

Therefore, we try to get the economies of mass production by getting the boxes of the same size which puts them in the same price relationship, which even enables us to sell them as a mixed unit instead of as a single item, which means we use the same size carton

packing them in dozens, which means we can stack them on skids fully square so they don't topple over, being the various sizes, which means that we can use the same blank bottom for many different covers that are printed and make those in large quantities. (Tr. 210-211)

Alfred Wallach also testified:

We would prefer to package in smaller boxes, and we think we've got it down to a reasonable minimum. Smaller boxes are cheaper for us. They fit more on the shelf. They are more efficient in terms of storage in the room. In every way they are better if they are acceptable. * * * (Tr. 296)

As to shelf space costs, Alfred Wallach testified:

A. The room costs money. The return per square foot of shelf space is what they calculate as their income and if they put a square foot into showing what's inside that box, it doesn't return as much as putting product on it. It is strictly a profit motive. (Tr. 284)

See also testimony of Alfred Wallach at Tr. 263, 285, 288-289, 316.

Commission expert witness Donald Doran also emphasized that savings could be realized if respondents utilized smaller packages for their products. While observing that standardization of package sizes is a common practice (Doran, Tr. 557), he emphasized that "cubage" is very expensive, and that trying to save money by using oversized packages is very wrong. He testified:

If the function is to sell as a gift, then you so decorate it as a gift. But, cubage, warehousing the item is very expensive, so in the planning of the product and marketing of the product—I also work on minimum cubage where practical.

* * * * *

It is oversized for the contents that it contains. If you are trying to save money on cubage or freight or anything, it is wrong.

That savings are realized through standardization of package sizes is no justification for the size of respondents' products, since standardization of package sizes would, of course, be equally applicable to standardization at a smaller, and more economical, size.

CONCLUSIONS

Respondents' Packaging Practices

The complaint charges that respondents' methods of packaging convey to purchasers the mistaken impression that they are receiving a larger product or a product of greater volume than is actually the fact. It is alleged that this mistaken impression is created by the size of the containers in which the products are packaged and by the depictions and descriptions on the exteriors of the packages. The question for determination, therefore, is, do the containers of respondents' products, by their size, depictions and descriptions, misrepresent to the purchaser

the quantity of the contents of such packages? If such misrepresentation occurs, it is alleged to be an unfair or deceptive act or practice and an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

The administrative law judge concludes, on the basis of a firsthand examination and evaluation of respondents' products, that the containers in which such products are packaged are of a size and capacity greatly in excess of that required to package the quantities and sizes of products actually contained therein. The contents of all of respondents' product packages offered by complaint counsel as examples of deceptive packaging, and received in evidence as CX 2, CX 4-20, could be adequately packaged in containers approximately one-half the size of the containers in which the products are packaged. The contents of most of respondents' packages could be adequately packaged in containers one-fourth the size of the present containers.

While the above conclusion that respondents' packages are substantially oversized has been reached on the basis of a firsthand examination and evaluation of the actual products, this conclusion is in accord with testimony by Donald Doran, an expert witness on packaging, called by complaint counsel. Mr. Doran concluded that respondents' packages were substantially oversized; that respondents' products could be packaged in containers approximately one-half the size of the present containers (Tr. 574). He stated that this opinion was based upon his packaging experience or expertise (Tr. 542):

My reaction on deception on the content cube ratio is from my corporate background, my manufacturing background, [it] has nothing to do with personal feelings.

It is also concluded from a firsthand examination and evaluation of CX 2, 4-20 that the depictions and graphics on the outside of the product containers are vague, indefinite and misleading, and that the windows in the containers of some of respondents' products are misleading in the context in which they are used. The depictions, graphics and other characteristics of respondents' product containers, such as windows and foreground placement photographs of completed items, in the context of the oversized containers, enhance the expectations of prospective purchasers as to the contents or quantum of product contained in the packages.

The administrative law judge also concludes that most prospective purchasers are not familiar with toy, gift and hobby products, such as those manufactured and distributed by respondents, and are therefore not well-acquainted with the physical characteristics of such products, such as the size and weight of product components, the space they could be expected to occupy, or the manner in which they are packaged.

Additionally, respondents' products, through the depictions and graphics on the outside of the packages, appeal directly to children, a particularly susceptible group of people. While children may not constitute the most substantial segment of actual purchasers of respondents' products, they undoubtedly do purchase some of the products and influence the purchase of a significant amount of such products.

Respondents' officials have admitted that the graphics and depictions on the outside of their product containers do not inform the prospective purchaser of the specific contents of the packages (S. Wallach, Tr. 191, 194), that the information on the boxes is "vaguely instead of exactly" and "should be more detailed" (A. Wallach, Tr. 323). Additionally, Donald Doran, complaint counsel's expert witness, testified that the graphics on the outside of respondents' packages "are not specific and quite often were vague" (Tr. 506).

The Commission has ruled in a number of matters over the years that the utilization of oversized containers, or "slack filling," has the tendency and capacity to mislead and deceive the purchasing public. In *The Papercraft Corp.*, Docket No. 8489, 63 F.T.C. 1965, 1992 (Dec. 24, 1963), it was held:

"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, 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.

See also, *Baltimore Paint & Color Works, Inc.*, Docket No. 1265, 9 F.T.C. 242, 247 (June 30, 1925); *Export Petroleum Company of California, Ltd.*, Docket No. 1969, 17 F.T.C. 119, 123 (Nov. 14, 1932); *Trade Laboratories, Inc., et al.*, Docket No. 3064, 25 F.T.C. 937, 944 (August 28, 1937); *Marlborough Laboratories, Inc., et al.*, Docket No. 3732, 32 F.T.C. 1014, 1027 (March 20, 1941); *Burrry Biscuit Corp., et al.*, Docket No. 4374, 33 F.T.C. 89 (June 11, 1941); *United Drug Co.*, Docket No. 3729, 35 F.T.C. 643, 647 (Oct. 26, 1942); *Harry Greenberg, T/A Pioneer Specialty Co. and Candyland Co.*, Docket No. 5128, 39 F.T.C. 188, 190 (Sept. 14, 1944).¹

¹ The Report of the Committee on Interstate and Foreign Commerce in the House of Representatives recommending the passage of The Fair Packaging and Labeling Act, 80 Stat. 1296, 15 U.S.C. 1451, made unmistakable the intent of the Congress in enacting this legislation, stating in part:

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. * * * nonfunctional slack fill which involves, for example, the use of false bottoms and/or unnecessary bulky packaging is not justified. The bill would allow the Department of Health, Education and Welfare and the Federal Trade Commission to prevent abuses of that kind * * *. H.R. Rep. No. 2076, 89th Cong. 2d Sess. 8 (1966).

In *Marlborough Laboratories, Inc., supra*, at 1027, the Commission stated that "slack filling" misleads and deceives purchasers into the belief that they are securing a greater quantity of such product than they would receive in the ordinary package or container.

In *Burrry Biscuit Corp., et al., supra* at 93, the Commission stated:

The practice of using over-size containers is known in the trade and generally as "slack filling" and has the force and effect of misleading or deceiving members of the purchasing public with respect to the quantity of product contained in such packages.

In *United Drug Co., supra*, at 647, the Commission held that the use of oversized containers to package face powder "has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to the quantity of powder contained within respondent's packages, and to cause such portion of the public to purchase substantial quantities of respondent's product as a result of the erroneous and mistaken belief so engendered."

The Commission, in *Papercraft Corp., supra*, at 1992, in connection with written disclosures on the outside of oversized packages, observed:

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 * * * of the goods, any more than an explicit false statement of quantity would be cured by use of a non-deceptive container.

Here the facts are that not only do respondents utilize oversized containers, but disclosures on the containers are vague, indefinite and misleading. Thus, the disclosures serve to compound, instead of lessen, the deception created by the containers.

It is therefore concluded that respondents' methods of packaging their toy, gift and hobby products have the tendency and capacity to mislead and deceive a substantial portion of the buying public into believing that the sizes or quantities of merchandise contained in the boxes of respondents' products are much greater than is the fact, and have the tendency and capacity to cause a substantial portion of the buying public to purchase substantial quantities of the respondents' products by reason of such mistaken and erroneous belief.

It is well settled that the Commission can decide for itself, unassisted by testimony of members of the public, whether a particular practice or representation is deceptive. In *Papercraft Corp., supra*, at 1991, Commissioner Elman, speaking for the majority, stated that the Commission's finding of deception was based 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.

(See also the recent *Opinion of The Commission in ITT Continental Baking Co., Inc.*, Docket No. 8860 (Oct. 19, 1973), at page 10) [p. 954 herein].) Thus, in *Papercraft*, the Commission's finding of deception was not based upon the analysis in the initial decision, but upon its own examination of the boxes in question. This is not to say, however, that it is inappropriate for the administrative law judge to evaluate the means of deception and make a finding based upon such analysis. As the trier of fact in the first instance, the administrative law judge may make a finding of deception based on visual and other analyses of the means of deception. The Commission may thereafter make its own decision based upon the findings in the initial decision or upon its own analysis. In its recent decision in *The Coca-Cola Company, et al.*, Docket No. 8839, *Opinion of The Commission* (October 5, 1973) [p. 806 herein], the Commission expressly recognized that the administrative law judge possessed the expertise to find deception "merely from an examination of the advertisements, without recourse to extrinsic materials" (Slip Opinion, p. 7) [p. 809 herein]. The Commission's review of the administrative law judge's analysis of the advertising challenged in that matter was found to be " * * * helpful to the Commission in reaching its decision" (Slip Opinion, p. 8) [p. 810 herein]. Therefore, it is appropriate for the undersigned to analyze and evaluate respondents' products and to make the findings of deception which are set forth in the initial decision.

Respondents have raised several issues in defense which have been discussed in the preceding findings of fact. Respondents' main contention appears to be that there is an industry practice to package craft toys in a "gift size box," and that it is necessary to package craft toys in containers of the size which respondents use in order to tell the story of the craft and to "sell" the product to the jobber, the retailer and the consumer (see findings of fact numbered 20, 21, 24, 26). Even considering these contentions, respondents' boxes are still substantially oversized, as previously concluded.² Further, respondents have not established a business justification for such oversized containers, nor have respondents demonstrated that they have taken all reasonable steps to prevent deception by such containers (see *Papercraft, supra*, at 1993, and *United States v. 174 Cases, More or Less, Delson Thin Mints*, 287 F.2d 246 (3rd Cir. 1961)). As previously found, respondents' use of

² The Commission, in *United Drug Co.*, Docket No. 3729, 35 F.T.C. 643, 645 (Oct. 26, 1942), was faced with a somewhat similar argument by respondent in that case. It was urged that the custom and practice of the trade was to package cosmetic products in attractive containers, and that such practice frequently involves the use of containers which do not accurately indicate the exact quantity of the product enclosed within the packages. The Commission, after making due allowance for these factors, found respondent's containers substantially in excess of that reasonably necessary for packaging the quantity of powder contained therein.

depictions, graphics and other characteristics serves to enhance, not lessen, the deception created by the oversized containers.

Respondents' other alleged defenses of discontinuance, industry practice, and economy in packaging have not been established by the evidence of record. Respondents failed to adduce substantial, reliable evidence of discontinuance of the challenged packaging practices. Even if competitors are engaged in similar practices, which the record does not establish, such fact would not constitute justification for continuation of an unlawful practice. *Exposition Press, Inc., et al. v. Federal Trade Commission*, 295 F. 2d 869, 873 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962); *International Art Co., et al. v. Federal Trade Commission*, 109 F.2d 393, 397 (7th Cir. 1940), *cert. denied*, 310 U.S. 632 (1940). Further, the Commission alone is empowered to determine whether to proceed against one or many violators in an industry. *Federal Trade Commission v. Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967); *Moog Industries v. Federal Trade Commission*, 355 U.S. 411, 413 (1958). Respondents' alleged defense that the size of their containers is based on economies of packaging fails, since respondents would realize additional economies if smaller boxes were utilized.

Individual Respondent Samuel Wallach

The form of order served with the complaint prohibits Samuel Wallach in his individual capacity from engaging in the challenged practices. Complaint counsel also urge that an order issue against Samuel Wallach in his individual capacity (CPF, pp. 66-67).

Respondent Samuel Wallach has admitted that he is president and chairman of the board of corporate respondent Walco, and that he has owned one hundred percent (100%) of the stock of said corporation since its inception in 1958. It is further admitted that Samuel Wallach formulates, directs and controls the acts and practices of corporate respondent Walco, including the acts and practices found to be deceptive and therefore unlawful. Thus, Samuel Wallach's complete dominion and control over corporate respondent Walco is fully established.

Because of the above undisputed facts, it is believed necessary to subject Samuel Wallach personally to the order. It is not necessary to demonstrate an intent to evade the order, or even a probability of evasion of the order, to hold an individual respondent personally liable. As the Commission stated in *Coran Bros. Corp., et al.*, Docket No. 8697, 72 F.T.C. 1, 25 (July 11, 1967):

The public interest requires that the Commission take such precautionary measures as may be necessary to close off any wide "loophole" through which the effectiveness of its orders may be circumvented. Such a "loophole" is obvious in a case such as this, where the owning and controlling party of an organization may, if he later desires, defeat the purposes of the Commission's action by simply surrendering his corporate charter and

forming a new corporation, or continuing the business under a partnership agreement or as an individual proprietorship with complete disregard for the Commission's action against the predecessor organization.

The undersigned is entirely in accord with the above reasoning. Although the individual respondent Samuel Wallach is now seventy-three (73) years of age, he is still very active in the business and is the owner of one hundred percent (100%) of the stock of corporate respondent Walco. By simply surrendering his present corporate charter, any Commission order issued solely against the corporation could be evaded. As a simple precautionary measure, such an obvious "loophole" should be closed. It is well settled that the choice of the remedial order is committed to the discretion of the Commission. *Federal Trade Commission v. Mandel Bros.*, 359 U.S. 385, 392-93 (1959); *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied*, 364 U.S. 883 (1960); *L. G. Balfour Company v. Federal Trade Commission*, 442 F.2d 1 (7th Cir. 1971). Moreover, " * * * once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." *United States v. E. I. du Pont de Nemours & Co., et al.*, 366 U.S. 316, 334 (1961).

The Remedy

The order contained in this initial decision differs from the form of order served with the complaint and proposed by complaint counsel (CPF, pp. 91-93). Some changes have been made to Paragraph 1 of the form of order served with the complaint, and, as amended, are included in the order issued herein as Paragraph 1. The language changes, in the opinion of the undersigned, do not represent substantive alterations, but serve to clarify the prohibitions of the paragraph.

Paragraph 2 of the order issued herein prohibits the use of pictorial and written materials and box designs to misrepresent the dimensions or quantity of product contained in respondents' product containers. Such a provision was not included in the form of order served with the complaint and has not been recommended by complaint counsel. The evidence of record establishes that respondents' use of pictorial and written material on the containers of their products and the use of windows in such containers have played a significant part in the total deception created by respondents' product containers. Merely prohibiting the use of oversized containers would not remedy the violations of law found herein, and could leave open an avenue for evasion of the order. Accordingly, Paragraph 2 has been included in the order.

The form of order served with the complaint would require respondents to distribute a copy of any order entered herein to, among

alleged, were and are all to the prejudice and injury of the public and of respondents' competitors, and constitute unfair or deceptive acts and practices and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

ORDER

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

1. Packaging said products in oversized boxes or other containers so as to create the appearance or impression that the length, width, thickness and other dimensions of products contained in such boxes or containers are appreciably greater than is the fact, or that the amount or quantity of products contained in such boxes or containers is appreciably greater than is the fact; *Provided*, That nothing in this order shall be construed as prohibiting respondents from using oversized containers if respondents advise the Commission of the use of such containers and justify such usage 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 the use of such containers;

2. Packaging said products in boxes or other containers which have pictorial and written matter, and box design, which misrepresent in any respect the length, width, thickness or other dimensions of products contained in such boxes or containers or which misrepresent in any respect the amount or quantity of products contained in such boxes or containers; and

3. Providing wholesalers, retailers or other distributors of said products with any means or instrumentality with which to deceive the purchasing public in the manner described in Paragraphs 1 and 2 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.

directs and controls its acts and practices, including the acts and practices set forth in the complaint. His address is the same as that of the corporate respondent.

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.

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, as amended (15 U.S.C. 45).

5. 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.

6. 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, widths and thicknesses, with the boxes in which they were contained, and that such products were offered in quantities reasonably related to the size of the containers in which they were presented for sale.

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

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.

9. The aforesaid acts and practices of the respondents, as herein

others, all firms and individuals involved in the formulation or implementation of respondents' business policies, and to all firms and individuals engaged in the advertising, marketing, or sale of respondents' products. This provision appears entirely too sweeping in scope to be practical, and its aid in securing compliance with any order issued herein is doubtful.

First, firms and individuals involved in the formulation or implementation of respondents' business policies might well include firms that are concerned with business policies entirely removed from the manufacture, packaging, sale and distribution of respondents' products, or at best only peripherally involved in such activities, such as banks which loan money to respondents, or suppliers which sell to respondents, or newspapers or trade journals which advertise respondents' products. In fact, *implementation* of respondents' business policies could conceivably involve anyone who does business with respondents.

Further, firms or individuals engaged in advertising, marketing or sale of respondents' products would cover hundreds of retailers located all across this country, who happen to sell any of respondents' products. Such concerns have had no part in the formulation of respondents' unlawful packaging practices. In the future, such concerns can have little or no part in actual compliance with any order which may become final in this proceeding. They are in no position to determine with any degree of certainty which, if any, of respondents' products are or might be in violation of any order provision. In sum, such a broad order provision might create more confusion than anything else, and it is not needed to insure compliance with any final Commission order.

It does appear appropriate, however, to require respondents to furnish a copy of any final Commission order to all firms and individuals engaged in the design of respondents' product packages, and to all managerial, supervisory and sales personnel of corporate respondent Walco.

Accordingly, the form of order served with the complaint has been amended to conform with the views expressed above, and an appropriate order follows herein.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the respondents and the subject matter of this proceeding.
2. Respondent Walco Toy Company, 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 38 West 37th Street, New York, N.Y. Respondent Samuel Wallach is an individual, is president of corporate respondent Walco, and formulates,

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 respondents distribute a copy of this order to all firms, and to all individuals not associated with such firms, engaged in the design of respondents' product packages, and to all managerial, supervisory and sales personnel of corporate respondent Walco Toy Company, Inc.

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.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner*:

Complaint in this matter issued on March 13, 1973, charging respondents—a manufacturer of craft toys (parts of necklaces, puppets, doll dresses, etc., which are to be assembled by the consumer), and the individual owner of the corporate respondent—with deceptive packaging or so-called “slack filling.” Specifically, the complaint charges that “through the use of certain methods of packaging” respondents have represented that the products contained in the packages are “reasonably related to the size of the container * * * .” Because the products “often have not corresponded with their * * * package dimensions and are often not offered in quantities reasonably related to the size,” the complaint alleges that purchasers “are given the mistaken impression that they are receiving a larger product, or a product of greater volume, than is actually the fact.”

The initial decision held that the allegations of the complaint were sustained by the evidence, and the administrative law judge issued an order proscribing oversized packaging and prohibiting pictorial and written matter that misrepresents the amount or quantity of the product contained in the package.

Respondents have appealed the decision and order. They deny that the packaging is deceptive and interpose several affirmative defenses. In addition, they assert that the order is too broad insofar as it covers “all products” and reaches depictions and descriptions on the packages.

I. DECEPTION

To determine whether respondents deceptively packaged their products, the administrative law judge examined 18 packages of respondents' products. He found that "each of respondents' products is packaged in substantially over-sized containers" (Finding 14) which "children are likely to purchase * * * or influence their purchase by others" (Finding 15), and that "depictions on the outside of the containers are * * * misleading," *e.g.*, "all of the depicted items cannot be made from the contents of the package;" "the appearance of size of items is not truly an accurate reflection of the actual size of the completed items" (Finding 17); and windows on the boxes show only the largest or substantially all of the beads contained in the packages. Based on these findings, the administrative law judge concluded that purchasers of respondents' "products are thereby given the mistaken impression that they are receiving a larger product or product of greater volume than is actually the fact." (Conclusion 7)

Respondents' first contention on appeal, that a finding that a package is slack filled cannot be based solely upon an examination of the package itself, was rejected by us in *The Papercraft Corporation*, 63 FTC 1965, 1991 (1963), where we said:

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.

Respondents next argue that complaint counsel failed to prove that slack filling applies to craft toys, contending that the Commission has no expertise in this field with respect to products which are not consumable, such as craft toys, and that, in the purchase of craft toys, unlike consumables, it is not so much quantity that the buyer seeks as it is "know-how and skill." We construe this argument to mean that in the purchase of craft toys quantity does not constitute a material factor in the purchaser's decision to buy. Since we can conceive of no product, consumable or otherwise, which a purchaser would be willing to buy and yet be unconcerned with the quantity he received, we need far more than respondents' *ipse dixit* to persuade us that craft toys are the lone exception. This argument is also rejected.

The administrative law judge's findings and conclusion that respondents' slack filling and depictions have the capacity and tendency to mislead and deceive prospective purchasers of respondents' products

are fully substantiated by the record. We adopt them. We find respondents' contentions to be without merit.

II. AFFIRMATIVE DEFENSES

Respondents contend that the size of their containers is necessitated by (a) industrywide pricing, (b) economies, and (c) artistic requirements, and that 12 of the 18 packages relied upon by the administrative law judge to find deception have been discontinued.

Industrywide Pricing: Respondents assert that price and package size relate in the same way throughout the industry, and that jobbers and retailers will reject the smaller of two packages with similar contents at the same price. A preference by jobbers or retailers for slack filling or any type of packaging cannot justify deception. Our overriding concern must be with the protection of the consumer. Since the record shows the method of packaging allegedly preferred by jobbers and retailers is deceptive, we must perforce reject that preference.

Related to this defense is respondents' assertion that "ordinarily a consumer would buy a craft toy in a larger box when he has a choice between a smaller box and a larger box." This contention is worth noting only because it demonstrates that slack filling is a material deception, stating, as it does, that consumers relate the size of the package to its contents. It in no way justifies the challenged practice.

Economies: We agree with the administrative law judge that respondents' contention that slack filling was, even in part, necessitated by efficiencies, is without record support. Indeed, the record would support a finding that slack filling is inefficient. A packaging expert testified that oversized packaging is expensive, as it increases storage and freight costs. In addition, Alfred Wallach testified that "There is a cost relationship between packaging cost and the contents. The lower the packaging costs, in other words, the cheaper the cost of your box * * * the faster you can manufacture the item, the more contents you can give." (Tr. 210) Surely, the cost of a box decreases (*i.e.*, becomes "cheaper") as it decreases in size, and so it would seem that respondents, by packaging their product honestly, will not only achieve compliance with Section 5 of the Federal Trade Commission Act, but should also achieve appreciable cost savings.

Artistic Requirements: Respondents assert that package size is also determined by artistic requirements. The individually-named respondent explained it this way:

* * * the illustration on the top is to be interesting, to be convincing, to tell the story. And we put it in a size that the artist recommends and which we accept* * *. (Tr. 169)

The packages themselves refute this claim. It is clear from examining the packages that the aforesaid illustrations, if smaller, would effec-

tively "tell the story." More importantly, in several instances, smaller depictions would more accurately reflect the number and size of crafts that the contents of the package will construct.

Discontinuance: Respondents maintain that 12 of the 18 exhibits relied upon by the administrative law judge have been discontinued. However, the record does not reveal when the discontinuances occurred, and so the claim cannot support a defense of abandonment. Moreover, the packages not discontinued show the same type of slack filling as those allegedly discontinued, leading us to the conclusion that, even though some slack-filled packages may have been discontinued, the practice of slack filling has not.

III. THE ORDER

The order contained in the initial decision differs in several respects from the order included with the complaint. Several nonsubstantive language changes have been made in Paragraph 1; they require no discussion. Paragraph 2 of the order is new. It prohibits respondents from:

Packaging said products in boxes or other containers which have pictorial and written matter, and box design, which misrepresent in any respect the length, width, thickness or other dimensions of products contained in such boxes or containers or which misrepresent in any respect the amount or quantity of products contained in such boxes or containers.

This provision is based on the administrative law judge's finding that respondents misrepresented the contents of their containers through the display of deceptive depictions thereon, and the use of windows on some boxes to mislead the consumer as to their contents. Respondents challenge the order provision on the ground that the finding upon which it is based "is outside the scope of the complaint, and the respondents had no adequate opportunity to counter such claim."

An order provision may go beyond the specific issues raised by the pleadings when the issues are "reasonably within the scope of the original complaint or notice of hearing," and they "are tried by express or implied consent of the parties." In such circumstances "they shall be treated in all respects as if they had been raised in the pleading or notice of hearing," Section 3.15(2) of the Commission's Rules of Practice.

We look then to the complaint and record to determine whether the requirements of Section 3.15(2) have been met. The complaint alleges that respondents misrepresent the contents of their packages containing craft toys. A specific means of carrying out the deception, the complaint alleges, is by slack filling. Since the deceptive use of depictions on the containers is another means of deceptively describing the contents of respondents' packages—a logical extension of the practice of slack filling—it is clearly within the scope of the complaint.

Then, since the parties implicitly consented to trying the issue of misleading depictions when complaint counsel put into evidence the 18 packages of respondents' craft toys¹, we conclude that Section 3.15(2) was satisfied.

* * * * *

The administrative law judge modified the provision of the notice order that would require respondents to distribute a copy of any order to firms involved in the formulation or implementation of respondents' business policies, and to all firms and individuals engaged in the advertising, marketing or sale of respondents' products, because such distribution would reach firms "entirely removed from the manufacture, packaging, sale and distribution of respondents' products." The modified provision requires respondents to distribute one order to all firms engaged in the design of respondents' product packages and to all managerial, supervisory and sales personnel of corporate respondent Walco. There is no appeal from this change by either party.

* * * * *

Both the order issued with the complaint and the order contained in the initial decision extend product coverage beyond "toys, gifts and hobby products" to "any other products." Respondents contend that such product coverage is too broad, claiming that it would "render a hardship" upon the operation of respondents' affiliate, a wholesaler of imported beads, and, further, that it is "not justified in a proceeding which involves alleged violations by corporate respondent in an uncertain area of the law where similar packaging methods have been traditional for over 40 years." The respondents have offered no evidence in support of these contentions. Moreover, our examination of the record convinces us that respondents would be inclined to engage in similar practices in the packaging of products other than toys, and that in the circumstances shown to exist the broad order is necessary to fence them in. Respondents' request that we issue a narrow form of order is therefore rejected.

¹ In offering these exhibits, complaint counsel explicitly noted that he would explain "why each one * * * is deceptive." (Tr. 44) The administrative law judge ruled that he was "accepting his [complaint counsel's] explanation * * * to inform you [respondents' counsel] as to what he is contending." (Tr. 113) In several instances, complaint counsel's explanation as to why the exhibits were deceptive specifically extended to the depictions on the containers. Concerning CX 4, a package of Indian beads, the administrative law judge inquired of complaint counsel, "You claim this is deceptive both from the size of the package and the depiction on it?" Complaint counsel responded: "Yes, I do, the depiction and written disclosures." (Tr. 51) In describing CX 5, complaint counsel alleged that the beads pictured on the box were six times larger than those in the container, and, further, that the picture was deceptive as it led the consumer to believe that there were a greater number of larger beads than were actually contained in the box. (Tr. 64)

From the picture of children playing with beads on CX 7, complaint counsel claimed that the prospective purchaser would be led to believe that more bracelets would be made than was possible from the number in the container. (Tr. 72)

The depictions on CX 16, complaint counsel alleged, would lead "someone looking at the package to [conclude] that these [depicted] fruit are larger than they are. The banana is larger than a cherry, and that they would not be true sizes of fruit in this box." (Tr. 106)

Finally, respondents ask the Commission, in the event an order issues, to include paragraphs providing that it will be a defense if it is established:

- (i) 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 and quantity of the merchandise as they would be if the container and the merchandise were displayed side by side, or without "shrink-wrapping" or with the cover removed, or if a full sized photograph of the contents of the container was affixed or revealed on the exterior of the container; or
- (ii) 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 a misleading appearance or impression from being created by such container.

The defense encompassed in Paragraph (ii) above is, in substance, the same as the proviso in Paragraph 1 of the order issued with the complaint and the order contained in the initial decision. By Paragraph (i), which is completely new, respondents could justify the use of oversized containers by employing full-sized photographs of the contents of the containers, or by removing the shrink wrapping² covering the containers. We suppose that it is their reasoning that, in either event, the consumer could determine the contents of the package and would not be deceived by the slack filling. But, based on the record before us, we cannot conclude that a full-sized photograph, or removal of the shrink wrapping, will necessarily, or even likely, dispel the deception resulting from the use of oversized packaging. Without such a record, there is no reason for including the subject paragraph.

We find the order contained in the initial decision is necessary to prohibit the deceptive practices proved in the record and charged in the complaint. Respondents' contentions in this connection are not persuasive, and their suggested order is not warranted.

For the reasons set forth herein, the appeal of respondents is denied. The initial decision will be adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the administrative law judge's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and adopting the initial decision:

It is ordered, That respondents, Walco Toy Company, Inc., and Samuel S. Wallach shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth

² This is a skin-tight, see-through material, such as cellophane, that discloses all depictions on a container but prevents the opening of the container.

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FEDERAL TRADE COMMISSION DECISIONS

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in detail the manner and form in which they have complied with the