judge failed to require certain showings is belied by the pleadings submitted by complaint counsel and the judge's orders. These documents indicate that he has given ample consideration to respondents' objections and that he has not abused his discretion in rejecting them or in refusing to make a determination under Section 3.23 (b). Accordingly,

It is ordered, That the aforesaid applications for review, along with the requests for oral argument, be, and they hereby are, denied.

IN THE MATTER OF

BRITISH OXYGEN COMPANY, LIMITED, ET AL.

Docket 8955. Interlocutory Order, May 29, 1974

Order placing on Commission's docket for review and upholding the administrative law judge's order of April 23, 1974, which grants four respondents' motion for production of certain documents obtained in Commission investigation of industrial gas industry; and directing administrative law judge to accord confidential treatment to sensitive portions of documents in question as set out in Commission's order.

Appearances

For the Commission: *K. Keith Thurman.*

For the respondents: *Paul, Weiss, Rifkind, Wharton & Garrison,* New York, N.Y.

ORDER GRANTING APPLICATIONS FOR REVIEW

By order dated April 23, 1974, the administrative law judge granted a motion by respondents, British Oxygen Company, Limited, BOC Financial Corporation, BOC Holdings, Limited, and British Oxygen Investments, Limited (hereinafter BOC), for production, pursuant to Section 3.36 of the Commission's Rules of Practice, of certain documents obtained in a Commission investigation of the industrial gas industry. Pursuant to Section 3.23 (a) (1) of the rules, complaint counsel request that the Commission review this order on the grounds that BOC failed to make certain showings required by Section 3.36. Review is also sought by five companies who voluntarily submitted documents in connection with said investigation, and who are not parties to this matter but are participating with the permission of the administrative law judge.

The rulings of an administrative law judge on issues of this kind are entitled to great weight and will be reviewed only upon a showing that he has abused his discretion. *Warner Lambert Co.*, Dkt. 8891 (September 18, 1973) [p.485 herein]. We find no such abuse of discretion in the law judge's ruling on the instant motion to produce and it will be affirmed. We are concerned, however, that the maximum protection

consistent with a just determination of the issues be afforded to the more sensitive portions of the material in question and will accordingly direct that the law judge accord sensitive information the so-called "Mississippi River" type treatment, *i.e.*, submittal to an independent accounting firm for analysis and aggregation so as to avoid the disclosure of individual firm data of great competitive sensitivity. Accordingly,

It is ordered, That the order of the administrative law judge, dated April 23, 1974, be, and it hereby is, placed on the Commission's docket for review;

It is further ordered, That the administrative law judge's order of April 23, 1974, be, and it hereby is, upheld;

It is further ordered, That the administrative law judge accord the above-described confidential treatment to the sensitive portions of the documents whose production is required by his order of April 23, 1974.

IN THE MATTER OF

EXXON CORPORATION, ET AL.

Docket 8934. Interlocutory Order, June 4, 1974

Order denying respondents' motions for reconsideration of Commission's prior denial of respondents' motions to dismiss complaint.

Appearances

For the Commission: *Robert E. Liedquist.*

For the respondents: *William Simon,* Wash., D.C., *J. Wallace Adair,* Wash., D.C., *William Weitzel,* New York, N.Y. *Jesse P. Luton,* Houston, Texas, *John H. Chiles,* Houston, Texas, *Wickes, Riddell, Bloomer, Jacobi & McGuire,* New York, N.Y., *Oliver L. Stone,* Houston, Texas, *Frank R. O'Hara,* Pittsburgh, Pa., *Benjamin T. Richards,* New York N.Y., *Kaye, Scholer, Fierman, Hays & Handler,* New York N.Y.

ORDER DENYING RECONSIDERATION

By order dated February 1, 1974, the administrative law judge properly certified to the Commission certain oral and written motions to dismiss the complaint in this matter on the grounds that (1) the Commission lacked reason to believe respondents had violated the law at the time it issued the complaint and (2) the proceeding is not in the public interest. The Commission denied these motions by order of February 12, 1974, and respondents now urge reconsideration on those same grounds and, in addition, on an alleged denial of due process and the fact that complaint counsel are pursuing additional post-complaint investiga-

tion. Complaint counsel urge the Commission to grant the request for reconsideration and clarify its policy in the area of post-complaint investigations.

Respondents' argument that Congressional interest rather than the public interest prompted the issuance of this complaint is misplaced. None of the communications received by this agency from any member of Congress is even remotely of the character deemed improper by the courts. *Pillsbury* v. *FTC*, 354 F. 2d 952 (5th Cir. 1966); *D.C. Federation of Civic Associations* v. *Volpe*, 459 F. 2d 1231 (D.C. Cir. 1971). And it has long been settled that the adequacy of the Commission's "reason to believe" a violation of law has occurred and its belief that a proceeding to stop it would be in the "public interest" are matters that go to the mental processes of the Commissioners and will not be reviewed by the courts. Once the Commission has resolved these questions and issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred. That is the posture of the instant matter.

Nor is there any merit in respondents' argument on the issue of post-complaint investigation. As we have said many times before and reiterated most recently in *Food Fair Stores, Inc.*, Docket 8935, Order of April 23, 1974 [p. 1578 herein], the division of the Commission's total investigative effort between the pre-complaint and post-complaint stages is entirely a housekeeping matter between the Commission and its staff, not one that can be used to challenge a post-complaint subpoena or the sufficiency of the Commission's pre-complaint investigation and hence of its "reason to believe" a violation has occurred. Post-complaint discovery by complaint counsel is entirely proper and the sole limits on its proper scope are the requirements of due process that govern in any judicial proceeding, *e.g.*, definiteness of the demand, relevance of the data sought to the issues raised in the pleadings, etc. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 641 (1950). Nothing in the papers before us suggest that complaint counsel in this proceeding have exceeded these bounds in their discovery efforts.

The Commission finds no grounds here for reconsidering its prior denial of respondents' motions to dismiss the complaint in this matter. Accordingly,

It is ordered, That respondents' motions for reconsideration be, and they hereby are, denied.

Commissioner Nye did not participate.

IN THE MATTER OF

BEAUTY-STYLE MODERNIZERS, INC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATIONS OF THE TRUTH IN LENDING AND FEDERAL TRADE COMMISSION ACTS

Docket 8898. Complaint, Sept. 18, 1972 — Decision, June 11, 1974

Order requiring a Newark, N.J., seller of home improvement materials, supplies and installation services, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *James Manos.*

For the respondents: *Martin Gelber*, Newark, N.J.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Beauty-Style Modernizers, Inc., a corporation, and Morris Jakel and Saul Jakel, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and regulations, 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 Beauty-Style Modernizers, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 432 Central Avenue, Newark, N.J.

Respondents Morris Jakel and Saul Jakel are the president and general manager respectively, of said corporation. They formulate, direct and control the consumer credit policies, acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the sale of home improvement materials, supplies and installation services to the public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly arrange for the extension of consumer credit, as "consumer credit" and "arrange for the extension of consumer

credit" are defined in Regulation Z. the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, in the ordinary course of their business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in Regulation Z, respondents have caused and are causing their customers to enter into contracts for the sale of respondents' goods and services. On these contracts, hereinafter referred to as "the contract," respondents provide certain consumer credit cost information. Respondents provide these customers with no evidence of or information concerning the credit transaction, other than on the contract and the right of rescission form.

PAR. 5. By and through the use of the contract set forth in Paragraph Four respondents have:

1. Failed to obtain new contract forms or to alter their existing stock of contract forms prior to, during and subsequent to the period beginning July 1, 1969 and ending December 31, 1969, as required by Section 226.6 (k) of Regulation Z.

2. Failed to use the term "cash downpayment" to disclose and describe the amount of the downpayment in money made in connection with the credit sale, as required by Section 226.8 (c) (2) of Regulation Z.

3. Failed to use the term "unpaid balance of cash price" to disclose and describe the difference between the cash price and the cash downpayment, trade-in or total downpayment, as required by Section 226.8 (c) (3) of Regulation Z.

4. Failed to use the term "amount financed" to disclose and describe the amount of credit which the customer had the actual use of, as required by Section 226.8 (c) (7) of Regulation Z.

5. Failed to use the term "total of payments" to disclose and describe the sum of the payments scheduled to repay the indebtedness, as required by Section 226.8 (b) (3) of Regulation Z.

PAR. 6. In the ordinary course of their business as aforesaid, and subsequent to July 1, 1969, respondents caused newspaper advertisements to be published as "advertisement" is defined in Regulation Z. These advertisements aided, promoted or assisted directly or indirectly in extensions of consumer credit in connection with the sale of respondents' goods and services. By and through the use of the advertisements, respondents:

Stated that "1st Payment in 6 months—Call or Write Now!" and "NO DOWN PAYMENT—3 YEARS TO PAY"; thereby implying and stating that no downpayment was required in connection with consumer credit transactions, without also stating all of the following items in

terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10 (d) (2) thereof:

(i) The cash price;

(ii) The number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(iii) The amount of the finance charge expressed as an annual percentage rate; and

(iv) The deferred payment price.

PAR. 7. Pursuant to Section 103 (q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

INITIAL DECISION BY HARRY R. HINKES, ADMINISTRATIVE LAW JUDGE

AUGUST 31, 1973

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint in this proceeding on Sept. 18, 1972, charging the respondents with failure to comply with the provisions of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System and, pursuant to Section 108 of said Act, with having violated the Federal Trade Commission Act. By answer duly filed respondents admitted only that they are and were engaged in the sale of home improvement materials, supplies and installation services to the public. Otherwise, respondents' answer either denied, or neither admitted nor denied, all of the other allegations of the complaint. Respondents also interposed "substantial compliance" as a special defense. By order dated January 17, 1973, the undersigned ruled that Paragraphs I and III of the complaint be deemed admitted because of the respondents' failure to conform to the requirements of Section 3.12(b)(1)(ii) of the Rules of Practice of the Commission by neither admitting nor denying the allegations contained in those paragraphs. In addition, respondents' special defense of "substantial compliance" with the requirements of Regulation Z of the Truth in Lending Act was stricken as insufficient at law or as failing to state a legal defense. On April 5, 1973, counsel to the parties in this proceeding executed an "Agreed Upon Statement of Relevant Facts and Documentary Evidence." This was supplemented by another statement executed by counsel to the parties on April 10, 1973. At around the same time

counsel to the parties also executed a stipulation specifying the contested issues of fact and law in this proceeding:

1. Whether respondents failed to obtain new contract forms prior to, during or subsequent to the period beginning July 1, 1969 and terminating December 31, 1969, which were in compliance with the requirements of Regulation Z.

2. Whether the retail installment contract forms as altered for the period July 1, 1969 to December 31, 1969, complied with the requirements of Regulation Z.

3. Whether respondents authorized, approved or ratified, expressly or impliedly, the publication of the various advertisements identified as Commission Exhibits 9(a), 9(b), and 9(c).

Evidentiary hearings were held at the New York Regional Office of the Federal Trade Commission on June 5, 6, and 7, 1973. Briefs have been submitted by the parties and have been given careful consideration. Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this initial decision are hereby denied. To the extent the proposed findings, conclusions and briefs submitted by the parties have not been adopted by this decision in the form proposed or in substance, they are rejected as not supported by the evidence or immaterial.

References to the record are made in parentheses using the following abbreviations:

CX—Commission's Exhibit
RX—Respondents' Exhibit
RAC—Respondents' Answer to Complaint
Stip—Agreed upon statement of fact and evidence
Tr.—Transcript of testimony

Having reviewed the record in this proceeding with care and having considered the demeanor of the witnesses as they testified, together with the proposed findings, conclusions and briefs submitted by the parties, I make the following:

FINDINGS OF FACT

1. Respondent Beauty-Style Modernizers, 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 432 Central Avenue, Newark, N.J. (Order of Jan. 17, 1973 and Stip. 1).

2. Respondent Morris Jakel is an individual who is president of the corporate respondent. He formulates, directs and controls the consumer credit policies, acts and practices of the corporate respondent, including

the acts and practices of the corporate respondent (Order of Jan. 17, 1973).

3. Respondent Saul Jakel is an individual and the general manager of the corporate respondent. He formulates, directs and controls the consumer credit policies, acts and practices of the corporate respondent, including the acts and practices set forth in the complaint. His address is the same as that of the corporate respondent (Order of Jan. 17, 1973 and Stip. 2).

4. Respondents are now, and for sometime last past have been, engaged in the sale of home improvement materials, supplies and installation services to the public (Stip. 3; RAC).

5. In the ordinary course and conduct of their business as aforesaid, respondents regularly arrange for the extension of consumer credit, as "consumer credit" and "arrange for the extension of consumer credit" are defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System (Stip. 4; Order of Jan. 17, 1973).

6. Subsequent to July 1, 1969, in the ordinary course of their business as aforesaid, and in connection with their credit sales as "credit sales" is defined in Regulation Z, respondents have caused and are causing their customers to enter into contracts for the sale of respondents' goods and services (Stip. 5; CX 6(a)–6(iii)).

7. The contracts described in Finding 6 above were signed by respondents, their employees, agents or authorized representatives and the customers identified thereon (CX 6(a)–6(iii); Stip. 13; CX 11(a), (b)).

8. Prior to, during the subsequent to the period beginning July 1, 1969 and ending Dec. 31, 1969, in the normal course of their business activities, respondents utilized in the completion of customer agreements a printed contract form identified as CX 2, to which respondents had made additions by means of a rubber stamp in an attempt to alter the contract's format to the requirements of Regulation Z (Stip. 8; CX 2, 6(fff 1, 2), 6(hhh, 1, 2), 6(iii), 11(a), (b)).

9. Respondents continued the use of CX 2 as altered at least up to Feb. 1970 (Stip. 9; CX 6(a), (b), (c),; Stip. 13).

10. Subsequent to Feb. 7, 1970, respondents used in the normal course of their business a new printed contract form identified as CX 3(a), (b), in connection with their consumer sales agreements (Stip. 9; CX 6(d)–6(aaa–1).

11. Beginning July 1, 1969 and continuing to at least July 1972, the respondents on their contracts:

(a) Did not use the specific term "cash downpayment" to disclose and describe the amount of the downpayment in money made in connection with the credit sale, but used the language "deposit herewith;"

(b) Did not use the specific term "unpaid balance of cash price" to disclose the difference between the "cash price" and the "cash downpayment," trade-in, or total downpayment but used the language "cash balance;"

(c) Did not use the specific term "amount financed" to disclose and describe the amount of credit which the customer had actual use of, but used the language "cash balance;" and

(d) Did not use the specific term "total of payments" to disclose and describe the sum of the payments scheduled to repay the indebtedness, but used the langauage "time balance" (Stip. 10; CX 2, 3, 6).

12. Respondents were advised that their contract did not conform with the requirements of Regulation Z. Thus, respondent Saul Jakel was asked:

Q. Now, was anything told to you by anyone as to the use or in the industry as to the use of contract number 2 after the date of July 1?
A. Yes.
Q. What was that?
A. There was a six month grace period allowed to contractors from July 1, 1969.
Q. To do what?
A. To January 1, 1970.
Q. To do what?
A. To use up their old contracts, provided that they put a stamp on the contract.
Q. Did you?
A. Yes I did.
Q. What was that stamp?
A. The stamp showed the deferred payment price the annual percentage rate (Tr. 176).

Similarly, Mr. Jakel was visited by a representative of the Federal Trade Commission in April or May of 1970 and described the visit as follows:

A. She told me that the contracts were in violation.
Q. Of what sir, do you know?
A. The terminology used in the financing portion of the contract were not as required by law.
Q. What happened next?
A. I then went over this with her.
Q. How did you do this sir?
A. Well she showed me the wording that was required (Tr. 145).

* * * * * * *

Q. (By Judge Hinkes) Now did she show you a written document containing those—containing that language?
A. Yes.
Q. Or did she just simply tell you?
A. She showed me a document, your honor.
Q. Now do you remember what the document was entitled?
A. I—
Q. Or what it looked like?

A. Can I have that book please?
Mr. Gelber: The witness is requesting Regulation Z.
A. She showed me this terminology here that should have been in place of the—
Judge Hinkes: Well, the witness is referring to a form marked Exhibit C in Regulation Z on page 22 which includes typical formats of disclosures under the Regulation (Tr. 147).

Mr. Jakel continued:

A. The second time she visited me she told me what the violations were. We went over them. The violations seemed very minor—
Q. To you?
A. Yes. Since the essence of the law was in the contract as I had it. The important parts.
Q. What was wrong with your contract?
A. Ok. On number 2 under the Heading of "Time Payment" in my contract, I used the expression "Deposit herewith" next to which I have the words "Check and Cash" with a box to be checked, you know, depending upon what the salesman received from the customer.
Q. Did she say there was anything deficient or defective about that?
A. Yes.
Q. What?
A. She said that should "Cash Downpayment."
Q. What else?
A. Where I have on here number 3 where I have "Balance, Amount Financed," she said that the law required it to read "Unpaid Balance of Cash Price." Under item number 5 where I have "Time Balance" she said it had to read "Total Payments."

* * * * * * *

A. Well I pointed out to her that in essence I was complying with the law, that everything the law required was in here, although the phraseology was slightly different * * * and she agreed * * * she said "I agree with you that the differences are slight but the law is specific as to what is required."

* * * * * * *

Q. Well, was anything said about the further use of your contracts by her?
A. Yes.
Q. What?
A. She indicated to me that I could use up my contracts.
Q. And how did she convey that to you?
A. She said "Well, you can use these contracts unless you hear further from us." (Tr. 154–159).

Mr. Jakel also testified that this representative of the Federal Trade Commission visited him another time in May 1970 and again spoke to him about the improper language in the respondents' contracts that were in use (Tr. 178). Shortly thereafter Mr. Jakel received a letter from the Federal Trade Commission (RX 1) dated May 18, 1970. In it the respondents were informed:

Although you recently printed new retail installment contracts, we still must require your immediate compliance with the above requirements. Willful and knowing failure to comply

with Truth in Lending may result in criminal liability * * * failure to respond to the above requests within 10 days will result in formal administrative action.

Sometime during the summer of 1970, Mr. Jakel received a telephone call from a different representative of the Federal Trade Commission who also advised him that the contract in use was in violation of the Truth in Lending Act (Tr. 346). Mr. Jakel said that he would like to continue to use the contract until the stock was depleted but the Commission representative told him "I don't know who could authorize you to continue to use a contract in violation of a Federal law" (Tr. 347). Mr. Jakel was later visited by this representative and, according to Mr. Jakel, was told that the representative would go back to the office to find out if he couldn't get Mr. Jakel an extension of time to use up his contracts. Mr. Jakel admitted, however, that:

He said that he couldn't get me any more delays on the use of the contract and that if I didn't change the contract and sign the affidavit or sign the consent order * * * that they were going to start proceedings against me.

Q. And what was your response?

A. My response was that I would change the contracts but I would not sign any affidavit.

Q. And did you do so?

A. No.

Q. You did not do what?

A. I did not print the new contracts (Tr. 199).

13. It does not appear that the respondents took *bona fide* steps prior to July 1, 1969 to order contract forms which would satisfy the requirements of Regulation Z.

Mr. Jakel was asked:

Q. Were you told by anybody including the bank that you were required under the law to make efforts to obtain new printed forms to be used prior to January 1, 1970 during the period from July 1, 1969 through December 31 1969? Were you told by anyone?

A. Not that I recall.

Q. Did you have knowledge that this was required?

A. No sir.

* * * * * * *

Judge Hinkes: Mr. Jakel did you take any steps before July 1, 1969?

A. I don't remember. I don't think so, because my understanding of the law was that it wasn't necessary to have the new contracts before 1970.

* * * * * * *

Q. And you said three months before December 31, [1969] approximately, you did in any event order new contracts for the purpose of complying?

A. Yes. I mean I say that I believe that that's probably when I took the step to order it. I would have allowed myself that much time (Tr. 247Z–31–Z–37).

14. The respondents' newspaper advertisements directly or

indirectly aid, promote or assist in extensions of consumer credit in connection with the sale of respondents' goods and services (Step. 15).

15. The following is language excerpted from an advertisement placed by the respondents in the New York Sunday News, Passaic-Bergen edition, on Dec. 7, 1969:

Easy Payments Arranged * * * First payment in 6 months * * * Beauty-Style Modernizers, Inc. 432 Central Avenue, Newark (CX 7).

16. In placing advertisements in the New York Sunday News, Passaic-Bergen edition, the respondents deal and have dealt directly with the advertising department of that newspaper. Respondents do not employ any agency or intermediary. Copies of the advertising contracts covering the period beginning Jan. 1, 1968 through Jan. 11, 1971 are identified as Commission Exhibits 8(a), (b), (c). (Stip. 17).

17. Following the publication of the Dec. 1969 ad in the Sunday News, respondents were informed by the Federal Trade Commission that the advertising in that issue was in violation of Regulation Z. Mr. Jakel was asked:

Q. And will you explain to the court what about that ad was brought to your attention by the Federal Trade Commission letter which you then acted upon?

A. May I take a moment to read the letter?

Q. Of course.

A. The first payment in six months was objected to.

Q. Anything else?

A. I believe the easy payments arranged phrase also was objected to (Tr. 134–135; see also RX 3).

18. Advertisements appeared in the Sunday Star Ledger on the dates indicated below and employed the quoted language as indicated:

(a) Aluminum Combination Windows and One Door * * * No Downpayment * * * Three years to pay * * * Beauty-Style Modernizers, Inc., 432 Central Avenue, Newark. This ad appeared on June 14, 21, and July 5, 1970 (CX 9(a), (b), and (c).

19. The advertisements described in Paragraph 18 above which appeared in the Sunday Star Ledger were prepared and placed by P & G Advertising Agency, 33 Evergreen Place, East Orange, N.J., for and in behalf of respondents (Stip. 20). According to respondents' clerk, Saul Jakel and P & G Advertising Agency prepared the copy for the ads jointly (Tr. 107).

20. The advertisements described in Paragraph 15 and 18, appearing in the Sunday Star Ledger and Sunday News failed to state:

(a) The cash price;

(b) The number, amount and due dates or period of payments, scheduled to repay the indebtedness if the credit is extended;

(c) The amount of the finance charge expressed as an annual percentage rate; and

(d) The deferred payment price (Stip. 21).

CONTENTIONS AND CONCLUSIONS

Counsel for the respondents contend that the respondents have not violated Regulation Z in either their contracts for the sale of their goods and services or in their advertising of their goods and services.

The Contracts

In this connection three specific time periods are involved: The period prior to July 1, 1969 when the Truth in Lending Act became effective, the period beginning July 1, 1969 and ending Dec. 31, 1969, and the period subsequent to Dec. 31, 1969.

Section 226.6(k) of Regulation Z is particularly pertinent to both the period preceding July 1, 1969 and the period between July 1, 1969 and Dec. 31, 1969. It states:

(k) Transition period. Any creditor who can demonstrate that he has taken bona fide steps, prior to July 1, 1969, to obtain printed forms which are necessary to comply with the requirements of this Part may, until such forms are received but in no event later than December 31, 1969, utilize existing supplies of printed forms for the purpose of complying with the disclosure requirements of this Part, other than the requirements of paragraph (b) of Section 226.9:
Provided, That such forms are altered or supplemented as necessary to assure that all of the items of information the creditor is required to disclose to the customer are set forth clearly and conspicuously.

The meaning of this section is obvious. It simply permits a creditor to continue using his existing supplies of printed forms after July 1, 1969, provided he can demonstrate that he took bona fide steps *before July 1, 1969* to obtain printed forms complying with requirements of Regulation Z and provided further that such forms are amended as necessary to convey all of the information the creditor is required to disclose to the customer. There is no doubt that here respondents continued to use their existing supply of forms after July 1, 1969 and indeed at least until Feb. 1970. Their use of such forms, assuming that they were altered to convey the required information, was proper only if the respondents had taken bona fide steps before July 1, 1969 to obtain printed forms which did comply. This the respondents did not do. Indeed, Saul Jakel admitted that he thought it wasn't necessary to have the new contracts before 1970 and ordered new contracts around Sept. 1969. He could not remember taking any such steps before July 1, 1969 nor could he recall any instructions to make such effforts (See Finding 13 above). Respondents' continued use of their old contract forms was therefore improper and illegal after July 1, 1969, unless, of course, such contract forms contained the disclosures required by Regulation Z. This was also true of the new contract forms adopted by the respondents in 1970.

Section 226.8(c) of Regulation Z requires the disclosure of certain specified items among which are:

(1) The cash price of the property or service purchased, using the term "cash price."
(2) The amount of the downpayment itemized, as applicable, as downpayment in money, using the term "cash downpayment," * * *
(3) The difference between the amount described in subparagraphs (1) and (2) of this paragraph, using the term "unpaid balance of cash price."
(4) All other charges * * *
(5) The sum of the amount determined under subparagraphs (3) and (4) of this paragraph.
(6) Any amounts required to be deducted under paragraph (e) of this Section * * *
(7) The difference between the amount determined under subparagraphs (5) and (6) of this paragraph, using the term "amount financed."

Section 226.8(b) (3) of Regulation Z requires the disclosure of scheduled repayments:

(3) The number, amount, and due dates or periods of payments scheduled to repay the indebtedness and * * * the sum of such payments using the term, "total of payments."

It has been stipulated that respondents' contracts did not use the specific terms "cash downpayment," "unpaid balance of cash price," "amount financed" or "total of payments." Instead, respondents' contracts used other language. Respondent contends, however, that the quoted language that was not used in their forms is not required by the terms of Regulation Z and that their use of different language was sufficient to disclose all of the credit terms to the customer. Counsel for the respondents cites Section 122(a) of the Truth in Lending Act:

(a) Regulations of the Board need not require that disclosures pursuant to this chapter be made in the order set forth in this chapter, and may permit the use of terminology different from that employed in this chapter if it conveys substantially the same meaning.

Counsel for the respondents argues that respondents' use of language differing from that quoted in Regulation Z but conveying the same meaning should therefore be considered compliance with Regulation Z. I do not agree.

A close reading of Section 122 of the Truth in Lending Act makes it clear that the Board is empowered to permit different terminology than that used in the Truth in Lending Act. The Board, however, in its issuance of Regulation Z specified exactly what language was permissible. Here, too, a close reading of 226.8 of that regulation makes it obvious that the Board required the specific language stated therein. I note, for example, that the Board requires the disclosure of certain "terms" and encloses such "terms" in quotation marks. If the Board had intended the use of language conveying a similar meaning it would have been simple to have said so or at least to have omitted the quotation

marks around the language which was to be used. Moreover, Section 226.6 of Regulation Z requires the "terminology prescribed:"

(a) Disclosure: General Rule. The disclosures required to be given by this part shall be made clearly, conspicuously, in meaningful sequence, in accordance with the further requirements of this Section, and at the time and in the *terminology prescribed* in applicable sections. (Emphasis supplied)

Nor can such a requirement be deemed arbitrary and unreasonable. Uniform disclosure language is less apt to be subject to varying interpretations and impressions which would lessen the intended effectiveness of the Truth in Lending Act.

The case of *Richardson* v. *Time Premium Co.* reported in CCH Consumer Credit Guide, Par. 99, 273 is particularly apposite. There, as here, a defendant's form statement failed to use the quoted terminology of Regulation Z at Section 226.8 and it was argued that the use of the specific terms was not mandatory. The court disagreed:

It is, first of all, clear that the Regulations do make the use of specific terminology mandatory. 12 CFR 226.2(a) [226.6(a)] reads in part, "The disclosures required to be given by this part shall be made * * * in the terminology prescribed in applicable sections." 12 CFR 226.8 in describing what disclosure is required repeatedly uses the format "shall be disclosed: * * * using the term [with applicable term stated in quotation marks]." (Bracketed portion in original)

There, too, it was argued that Section 122 of the Truth in Lending Act contradicted any interpretation requiring the use of specific terminology. The Court held, however:

The following language of 15 USC 1632 is cited to support that position. "Regulations of the Board [* * *] may permit the use of terminology different from that employed in this part if it conveys substantially the same meaning." We do not read this language as a limitation upon the broad power to prescribe regulations as contained in 15 USC 1604 but as a limitation upon the discretion which the Board may allow creditors, which discretion it is not required to "permit" at all.

The conclusion is inescapable that respondents' failure to use the specific terms required by Regulation Z as set forth in the Findings above violated the provisions of that Regulation and of the Truth in Lending Act.

The Advertisements

Counsel for the respondents concedes that "the ads did appear as alleged in the complaint." He defends, however, on the ground that "respondent did not cause these ads to be so placed." He cites the fact that the Dec. 1969 ad appearing in the News was corrected after the Federal Trade Commission representative called its irregularities to the attention of the respondents. He goes on, however, to argue that "thereafter the ad reappeared inadvertently in format used before the

change. This was obviously an inadvertent placement of the ad * * * and not through the action of respondent." The record, however, does not support this argument.

The Dec. 1969 ad appearing in the News spoke of "Easy payments arranged—First payment in 6 months." The ads which appeared in June and July 1970 in the Star Ledger used different language stating "No downpayment—3 years to pay." The format was obviously not that of the old ad.

Nor can the respondents escape responsibility for the 1970 ads simply because they were placed through their advertising agency, P & G Advertising Agency. It has been stipulated that the ads were placed by that advertising agency *"for and on behalf of the respondents."* Moreover, the testimony of respondents' clerk makes it quite clear that the copy for ads was created by both Saul Jakel and a representative from P & G. The relationship of principal and agent is, therefore, conclusively established (See *Libby-Ownes-Ford Glass Co.* 63 FTC 746, 772).

That the ads violated Regulation Z is also incontrovertible. Section 226.10(d) of that Regulation provides:

> No advertisement to aid, promote, or assist directly or indirectly any credit sale * * * shall state * * * (2) the amount of the downpayment required or that no downpayment is required, the amount of any installment payment, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless it states all the following items in terminology prescribed under Section 226.8:
>
> (i) the cash price or the amount of the loan, as applicable;
>
> (ii) the amount of the downpayment required or that no downpayment is required, as applicable;
>
> (iii) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;
>
> (iv) the amount of the finance charge expressed as an annual percentage rate.

The advertisements itemized in the findings above, while speaking of downpayments and the period of repayment, were deficient in one or more of the required disclosures and were, therefore, violative of Regulation Z.

THE REMEDY

Having found that the respondents have violated the Federal Trade Commission Act by failing to comply with the provisions of Regulation Z, the implementing regulation of the Truth in Lending Act, I shall order that they cease and desist from engaging in such illegal activities.

Complaint counsel have proposed an order similar to that proposed by the Commission in its complaint. In addition, complaint counsel suggest additional provisions. One would require the furnishing of specific information to the Commission in the event the named individual re-

spondents discontinue their present business. This additional provision appears to be appropriate and consistent with the established practice of the Commission. Complaint counsel also propose a provision in the order requiring respondents to file a compliance report within 60 days. This, however, appears superfluous as the requirement is already spelled out in Section 3.61 of the Commission's Rules of Practice, reference to which is hereby made.

Complaint counsel have also proposed an addition to the order as follows:

> It is further understood that nothing contained in this order shall be construed to imply that any past or future conduct of respondents is subject to and complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission.

Complaint counsel seek the inclusion of the above paragraph because of the "proclivity of the respondent Saul Jakel demonstrated during the evidentiary hearing of deliberately misconstruing the plain meaning of both oral and written communications from the Commission." I do not think such a provision in the order to be issued is necessary or appropriate. It is difficult to perceive how such a hortatory admonition could prevent misunderstanding or misconstruction on the part of a respondent. The order to be entered herein is, in the opinion of the undersigned, specific and concise and is not subject to the implications feared by complaint counsel. Even if it were so subject, a statement to the effect that it is not to be construed as implying that the respondents have complied with the Federal Trade Commission's Regulations and Statutes, would not, in my opinion, add anything to the force and effect of the order. The omission of the proposed paragraph could not relieve the respondents from the consequences of any other wrongful acts.

ORDER

It is ordered, That respondents, Beauty-Style Modernizers, Inc., a corporation, its successors and assigns, Morris Jakel, individually, and as an officer of said corporation, and Saul Jakel, individually, and as general manager of said corporation, and respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with any consumer credit sale or any advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. § 226) of the Truth in Lending Act (Pub. L. 90–321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

1. Failing, in any consumer credit transaction or advertisement, to make all disclosures determined in accordance with Sections

226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.7, 226.8, 226.9 and 226.10 of Regulation Z.

2. Failing to use the term "cash downpayment" to disclose and describe the amount of the downpayment in money made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

3. Failing to use the term "unpaid balance of cash price" to disclose and describe the difference between the cash price and the cash downpayment, trade-in or total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

4. Failing to use the term "amount financed" to disclose and describe the amount of credit which the customer has the actual use of, as required by Section 226.8(c)(7) of Regulation Z.

5. Failing to use the term "total of payments" to disclose and describe the sum of the payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

6. Representing, directly or by implication, in any advertisement as "advertisement" is defined in Regulation Z the amount of the downpayment required or that no downpayment is required, the amount of any installment payment, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless all of the following items are stated in terminology prescribed under Section 226.8 of Regulation Z:

(i) The cash price;

(ii) The amount of the downpayment required or that no downpayment is required, as applicable;

(iii) The number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(iv) The amount of the finance charge expressed as an annual percentage rate; and

(v) The deferred payment price.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the consummation of any extension of consumer credit or in any aspect of preparation, creation or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That each 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 respondents' 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 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 corporation which may affect compliance obligations arising out of the order.

OPINION OF THE COMMISSION

BY THOMPSON, *Commissioner:*

This matter is before the Commission on appeal from an initial decision of an administrative law judge in which it was found that respondents have violated the Truth in Lending Act (15 U.S.C. §§1601, *et seq.*) and the Federal Trade Commission Act (15 U.S.C. §45(a)) in failing to disclose certain consumer credit information in connection with their advertising and sale of various home-improvement materials, supplies and installation services. The order issued by the law judge would require respondents to disclose certain credit terms and information in accord with the specific requirements of the Truth in Lending Act and the Federal Reserve Board of Governors' Regulation Z implementing said Act (12 C.F.R. §266, *et seq.*).

The law judge found that respondents had failed to make the required disclosures (a) in their printed contract forms and (b) in certain newspaper advertisements placed, in part, by an advertising agency. In the former, respondents omitted the required terms "cash downpayment," "unpaid balance of cash price." "amount financed," and "total of payments," *substituting* therefor the terms "deposit herewith," "cash balance" (twice), and "time balance." CX 1 (c)(d). In certain of its newspaper advertisements, respondent Beauty-Style advertised that no downpayment was required under its credit plan but failed to disclose, as required by Regulation Z, (a) the cash price, (b) the number, amount, and due dates or periods of payments scheduled to repay the indebtedness where such credit is extended, (c) the finance charge expressed as an annual percentage rate, and (d) the deferred payment price. CX 1(j).

Respondents' major contentions on this appeal are (1) that the terms they used in their printed forms were in fact more informative than those required by the regulation in question; (a) that the efforts they made to comply with the statute after its effective date of July 1, 1969 fully satisfied the "transition period" duties specified in the regulation;

(3) that Federal Trade Commission personnel approved the use of the printed forms found unlawful here; (4) that complaint counsel failed to prove a principal-agent relationship between Beauty-Style and the advertising agency that caused the publication of the advertisements in question; and (5) that the Federal Reserve Board exceeded the authority delegated to it by Congress in issuing the regulation they are charged with violating (Regulation Z).

The parties agreed prior to trial that the issues to be resolved were as follows: [1]

1. Whether respondents failed to obtain new contract forms prior to, during or subsequent to the period beginning July 1, 1969 (effective date of the statute) and terminating December 31, 1969 which were in compliance with the requirements of Regulation Z.

2. Whether the retail installment contract forms as altered for the period July 1, 1969 to December 31, 1969 complied with the requirements of Regulation Z.

3. Whether respondents authorized, approved or ratified, expressly or impliedly, the publication of the various advertisements identified as Commission Exhibits 9(a), 9(b), and 9(c).

The parties also agreed upon most of the facts of the case prior to trial (CX 1(a–l)),[2] and it was essentially on an evaluation of these pretrial agreements that the law judge based his decision.[3]

With regard to the first of the issues, the law judge noted that Section 226.6(k) of Regulation Z provided a "transition period" on the following terms:

> *Transition period.* Any creditor who can demonstrate that he has taken *bona fide steps, prior to July 1, 1969,* to obtain printed forms which are necessary to comply with the requirement of this Part may, until such forms are received but in no event later than December 31, 1969, utilize existing supplies of printed forms for the purpose of complying with the disclosure requirements of this Part, other than the requirements of paragraph (b) of §226.9: *Provided,* That such forms are altered or supplemented as necessary to assure that all of the items of information the creditor is required to disclose to the customer are set forth clearly and conspicuously. (Emphasis supplied.)

The law judge interpreted this provision as requiring that respondents undertake to *order* new conforming printed contracts *prior* to July 1, 1969, the effective date of the Truth in Lending Act, in order to

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[1] "Agreed Upon Contested Issues of Fact and Law." This document appears in the exhibit binder unnumbered, but was made part of the record of the proceeding in this case by Judge Hinkes' "Order on Results of Prehearing Conference," dated April 12, 1973.

[2] Abbreviations:
CX—Commission Exhibit
RAB–Respondents' Appeal Brief
RX—Respondents' Exhibit
Tr.—Transcript

[3] Complaint counsel rested their case upon the judge's acceptance of these two agreements (tr. 5).

qualify themselves for the special dispensation afforded by that "transition" language. (Tr. 247z–33, 34.)

On the second of these stipulated issues, the law judge ruled that the altered forms utilized by respondents subsequent to July 1, 1969 were not in conformance with the specific disclosure requirements of the Act, which he held mandatory. The language of Section 226.6 permits, in his view, no deviation from the terms prescribed:

> (a) *Disclosures; general rule.* The disclosures required to be given by this Part shall be made clearly, conspicuously, in meaningful sequence, in accordance with the further requirements of this section, and at the time and in the *terminology prescribed* in applicable sections. * * * (Emphasis supplied.)

The law judge also ruled against respondents on the third of those three stipulated factual issues, respondents' approval or ratification of the published advertisements. Two local newspapers were used, the Sunday News and the Sunday Star Ledger. Respondents dealt with the former directly and hence could hardly deny responsibility for the ad in question.[4] While an advertising agent acted as intermediary in the placement of the two challenged ads in the second of these publications,[5] the law judge concluded that there was a principal-agent relationship involved and hence that the legal responsibility for their content rested with respondents.

RESPONDENTS' APPEAL

There is little in the way of a significant dispute on the facts before us and the various legal arguments raised by respondents turn largely on the quite specific and unambiguous language of the Truth in Lending Act and its implementing Regulation Z. The law judge was plainly correct in holding that the terms prescribed by the latter are mandatory, *i.e.*, it is not open to a creditor to substitute terms that, in his view, are "superior" to those laid down in that Regulation.[6] In *Zale Corp., et al.*, 78 FTC 1195 (1971), for example, the respondents urged that while their disclosures were not in the specific language of the Act as implemented in Regulation Z, the phraseology used accomplished the same purpose. We disagreed: "Clearly such specificity is authorized under the broad statutory authority granted." *Ibid.*, p. 1223. See also

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[4] CX 7. This ad appeared in the News on December 7, 1969 and contained the language "Easy Payments arranged * * * 1st Payment in 6 months."

[5] CX 9(a–c). These ads appeared in the Ledger on June 14, June 21, and July 5, 1970 and offered: "No downpayment * * * 3 years to pay." CX 1(i), (j); CX 9(a–c).

[6] Respondents raise (RAB, p. 9) the point that Section 122 of the Act (15 U.S.C. §1632) *allows* the Federal Reserve Board's Governors to promulgate, by regulation, forms of credit disclosure couched in words other than those spelled out in the statute, so long as such substitute terms convey substantially the same meaning. We need only point out, however, that the regulation which the Board *did* promulgate requires the exact language which had originally been set out in the Act. Whatever regulation the Board *might* have adopted, the one actually before us is unambiguous.

Richardson v. *The Time Premium Co.*, CCH Consumer Credit Guide Par. 99273 at p. 89, 240 (S.D. Fla. 1971).[7]

Nor is there any dispute in this record on the point that respondents were repeatedly advised by the Commission's staff that their contract forms failed to make consumer-credit disclosures in the precise language required and therefore that the use of those forms violated the Act. (Tr. 144, 145, 154, 157, 178, 183, 199, 247z–11 and 12, 272, 311, 316, 346, 347; RX 1.) [8] Indeed, respondents' counsel conceded in argument before the law judge that his clients had not used the prescribed language in making the disclosures required by the regulation in question. (Tr. 376.) His argument, rather, was to the effect that they were nonetheless in "substantial" complaince with the statute.

There is no such thing as "substantial" compliance with the Truth in Lending Act and the regulation that implements it. Either you are or you aren't. The purpose of that statute is to permit the ordinary consumer, without regard to the degree of his commercial sophistication, to receive the kind of credit information that will allow him effectively to compare the credit terms being offered in the marketplace and thus to "shop" for the most favorable terms available. (15 U.S.C. §1601.) Only uniform terms, universally used, would allow the kind of credit comparison mandated by the Act. (See *Zale Corp., et al.*, 78 FTC 1195, 1223 (1971); H.R. Rep. No. 1040, 90th Cong., 1st Sess. 13 (1967).) The Act was concerned not only with the *substance* of disclosure but, for purposes of consumer comparison shopping, was concerned as well with the *form* of that disclosure. We agree with the administrative law judge, therefore, that respondents' contracts were in violation of the Truth in Lending Act and Regulation Z in the particulars set out in the stipulated facts (CX 1(c), (d)).

Nor do we find any error in the law judge's ruling on the deficiencies in respondents' newspaper advertisements. According to respondents, the allegedly illegal advertisement in the News (CX 7) was placed "inadvertently" (RAB, p. 11), and once respondents' attention was called to it, was withdrawn and never again appeared. With regard to the June 14, June 21 and July 5, 1970 advertisements in the Ledger (CX 9(a–c), respondents deny liability because the ads were placed by an advertising agency after the agency had been instructed to correct the

[7] This view is also underscored in the Federal Reserve Board's own publication, "What You Ought to Know About Federal Reserve Regulation Z" 7 (1969), of which respondents' counsel caused the judge to take official notice (tr. 116).

[8] Respondents contend that staff members of the Federal Trade Commission *approved* the use of their altered sales contract forms through 1969 (tr. 159, 195). The record itself indicates, however, only that one staff member promised to make inquiry of his superiors regarding the physical arrangement on the forms of some particular terms of credit information (tr. 313, 317). Direct testimony of two staff members as well as documentary evidence amply supports complaint counsel's argument that respondents were repeatedly informed of the non-conformance of their contracts to the requirements of the law and were never, at any time, given permission to continue use of the altered but non-conforming forms. (Tr. 274, 292, 298, 311, 316, 346, 347, 372.) In fact, one staff member testified that he informed Mr. Jakel, "[W]e can't authorize you to continue to use a contract in violation of a federal law." (Tr. 347.)

advertisements by Beauty-Style's office clerk (tr. 94, 101, 130, 169, 170, 223, 247z–22, 43, 379).

The same general legal principles which govern the consumer credit disclosures on written contracts also govern in situations where advertising of credit terms is undertaken. As we observed in *Zale*:

> * * * The advertising provision of the Truth in Lending Act and Regulation Z are directly parallel to the other substantive sections which require disclosures. Wherever applicable, the same terminology mandated in the contract forms is mandated in the advertising. Given the purpose of the statute, to enhance competition among financial institutions and other firms extending consumer credit and to increase the informed use of credit by consumers (§102, Title I), and the structure of the regulation, the advertising provisions of the Act are clearly part and parcel of the general disclosure scheme. (78 FTC 1242.)

It is undisputed that the December 7, 1969 advertisement in the News and the June 14, June 21 and July 5, 1970 advertisements in the Ledger failed to make certain credit term disclosures (tr. 128, 134, 135, 247–z–42, 43; RX 3). Nor is it disputed that these violations were brought to the attention of the respondents, both orally and in writing, including personal visitation by Commission staff members (tr. 93, 94, 127, 134, 135, 164, 168, 169, 247z–22, 279, 308; RX 3). Respondent Jakel, who was generally in charge of Beauty-Style's advertising, conceded that he did not check the Ledger to determine whether the agency had, in fact, altered the suspect advertising. Nor did respondents' clerk check the Ledger (tr. 97, 247–z–19–22, 25). Respondents' advertising agency was stipulated to have acted "for and on behalf of the respondents" in its placing of advertising generally (CX 1(j)). Respondent Jakel and representatives of the agency were joint draftsmen of the advertising copy in question (tr. 107, 108). When the nonconforming advertisements were run, respondents became liable by virtue of their principal-agent relationship (see *Libby-Owens-Ford Glass Co.*, 63 FTC 746, 772 (1963)). We therefore agree with the administrative law judge's conclusion that all the respondents' advertisements in question violate Section 226.10(d) of Regulation Z.

The time-frame issue runs throughout this case and has to do with three crucial deadlines for respondents' compliance with the several aspects of Truth in Lending. The Federal Reserve Board's own pamphlet, explaining the requirements of Section 226.6(k) of Regulation Z, sets forth these basic time obligations under the Act:

> If you have taken the proper steps to get any new credit forms before July 1, 1969, and find they cannot be delivered to you by that date, then you may be able to use your existing forms. But they must show clearly the information a customer must be given under Regulation Z. You may do this by adding to or altering your forms. However, after December 31, 1969, you may no longer do this. ("What You Ought to Know About Federal Reserve Regulation Z" 4 (1969).)

It is uncontested that respondents undertook no steps to secure new contract forms until late in 1969 (tr. 247z–31–37). They were therefore in violation of the statute from the first day of its effectiveness (see *Kroll* v. *Cities Service Oil Company*, CCH Consumer Credit Guide Par. 99102 at 88,794–95 (N.D. Ill. 1972)). Further, the respondents continued to be in violation of the statute throughout 1969 because the altered forms they used did not, as noted, make the required disclosures in the form prescribed by law (CX 1(c), CX 2). New printed forms were not available for use until February 1970 (CX 1 (c), CX 3(a)(b)). And the precise disclosures required by the Act did not appear in them until at least July 1972 (CX 1(c)(d)).

Finally, respondent have raised for the first time on appeal the question of the validity of the delegation to the Board of Governors of the Federal Reserve Board the power to formulate regulations administering the Act (RAB, pp. 7–11). In respondents' view, the Federal Reserve Board, in requiring the specific disclosure language set out in Regulation Z, has exceeded the congressional mandate of its delegated power as spelled out in the Act.

Section 104 of Truth in Lending provides:

> The Board shall prescribe regulations to carry out the purposes of this chapter. These regulations may contain such classification, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter to prevent circumvention or evasion thereof, or to facilitate compliance therewith. (15 U.S.C. §1604.)

Congress is free to delegate legislative authority provided it has exercised "the essentials of the legislative function—of determining the basic legislative policy and formulating a rule of conduct" (*Yakus* v. *United States*, 311 U.S. 414, 424 (1944)). A delegation of legislative power is proper "if Congress shall lay down by legislative act an intelligible principle" to which the official or agency must conform (*Hampton* v. *United States*, 276 U.S. 394, 409 (1928)).

One seeking to challenge the legality of a delegation of legislative authority to an agency bears the burden of showing in the delegation such an absence of standards for agency conduct as to frustrate the ability of Congress to determine if its policy is being effectuated (*Amalgamated Meat Cutters* v. *Connally*, 337 F. Supp. 737, 746, 747 (D.D.C. 1971)).[9] In *Zale Corp., et al., infra*, and *Charnita, Inc., et al.*, 80 FTC 892 (1972), the Commission recognized the validity of the particular

[9] This case involved a challenge to the President's authority to freeze wages and prices under the Economic Stabilization Act of 1970, where the delegation of power was couched in terms of the President's power "to issue such orders and regulations as he may deem appropriate to stabilize rents, wages, and salaries." The delegation in question there was upheld (337 F. Supp. 744).

delegation of power in issue here. In *Zale*, for example, the law judge found that the Board, "in the valid exercise of its expert discretion," could "very properly require" specific phraseology it "regards as important," and "since the words (required by Regulation Z) are reasonably adopted to the enforcement of the Act and their use does not contravene some other requirement of the law, the regulation must be followed" (*ibid.*).

Respondents' counsel advised us during oral argument that, if "every creditor must use these 'X' words and 'B' words, then we simply will fold our tents and go to whatever forum is available * * * ." [10] Believing as we do that the statute before us is of the *malum prohibitum* character and therefore leaves no room for the substituting of Y words for X words, we can only hope that respondents will strike their legal tents in an appropriately poetic spirit:

"And the night shall be filled with music,
And the cares that infest the day,
Shall fold their tents like the Arabs,
And as silently steal away."*

The decision of the administrative law judge will be affirmed and adopted as the decision of the Commission.

Commissioner Nye did not participate.

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, Beauty-Style Modernizers, Inc., Morris Jakel and Saul Jakel 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 thy have complied with the order to cease and desist.

Commissioner Nye not participating.

[10] Transcript of Oral Argument before the Commission (March 6, 1974), p. 26.

* Henry Wadsworth Longfellow, "The Day Is Done," stanza 2.

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 packges; 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 dimesions 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 parites, 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 maitained, 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" x1½")

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 beards.

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 comeo 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: 14⅝" x 11⅝" x 1½")

This box has a platform approximately ½" 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 actuallly 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"³ 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: 14⅝" x 11⅝" x 1½")

This box contains a platform which is approximately ¾" high.

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

The box states on the front:.

For all 11½" 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.*, 15¼" x 11" x 1½" (CX 2, 5, 6, 7, 8, 9, 11, 12, 13, 18, 19). Four other items are packaged in containers with dimensions of 14⅝" x 11⅝" x 1½" (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 (½) the size of the present containers. Most of the products could be packaged in containers one-fourth (¼) 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 purchser, 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 recepticles (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 demonstarte 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 deceiptive?
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 minumum 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?

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, sculping, 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); *Burry 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]

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[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 Commision 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 *Burry 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 Contintental 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 decepetive 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 toys [1], 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.

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[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 wrapping [2] 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 decison 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.

in detail the manner and form in which they have complied with the order to cease and desist.

Commissioner Nye not participating.

IN THE MATTERS OF

WHIRLPOOL CORPORATION—Docket C–2515
DOYLE DANE BERNBACH, INC.—Docket C–2516

CONSENT ORDERS, ETC., IN REGARD TO ALLEGED VIOLATIONS OF THE FEDERAL TRADE COMMISSION ACT

Complaint, June 25, 1974—Decisions, June 25, 1974

Consent orders requiring a Benton Harbor, Mich., seller and distributor of air conditioners and its advertising agency in New York City, among other things to cease misrepresenting air cooling products as having unique features, and the cooling, circulation or dehumidification capabilities of such products as well as the amount of electric power used by such products. The seller and distributor is further required to cease failing to maintain and produce records in support of claims for its air cooling products.

Appearances

For the Commission: *Patrick E. Power.*

For the respondents: *Arnstein, Gluck, Weitzenfeld & Minow,* Chicago, Ill., for Whirlpool Corporation. *Davis, Gilbert, Levine & Schwartz,* New York City for Doyle Dane Bernbach, Inc.

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 Whirlpool Corporation, a corporation and Doyle Dane Bernbach, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Whirlpool Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at Benton Harbor, Mich.

Respondent Doyle Dane Bernbach, 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 20 W. 43rd Street, New York, N.Y.

The aforementioned respondents cooperate and act together in carrying out the acts and practices herein set forth.

PAR. 2. Respondent Whirlpool Corporation Inc. is now and has been engaged in the advertising, offering for sale, sale and distribution of Whirlpool air conditioners.

PAR. 3. Respondent Doyle Dane Bernbach, Inc. is now and has been an advertising agency for Whirlpool Corporation; it has prepared and now prepares and places advertising, including but not limited to the advertising referred to herein, for the purpose of promoting the sale of the products of respondent Whirlpool Corporation.

PAR. 4. In the course and conduct of its aforesaid business, respondent Whirlpool Corporation now causes and has caused its air conditioners, when sold, to be transported from its place of business in the State of Michigan to purchasers thereof located in various States of the United States, and in the District of Columbia. Respondent Whirlpool Corporation therefore maintains, and at all times mentioned herein has maintained, a substantial course of trade in said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of its business as aforesaid, and at all times mentioned herein, respondent Whirlpool Corporation has been, and is now, in substantial competition in commerce with corporations, firms and individuals engaged in the sale of air conditioners of the same general type as that sold by respondent.

In the course and conduct of its business as aforesaid, and at all times mentioned herein, respondent Doyle Dane Bernbach, Inc., has been, and is now, in substantial competition in commerce with corporations, firms and individuals in the advertising business.

PAR. 6. In the course and conduct of their business as aforesaid, and for the purpose of inducing the sale of the said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondents have disseminated, and caused to be disseminated, certain advertisments of said air conditioners, including but not limited to, advertisements printed in magazines and newspapers, and advertisements transmitted by television stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across state lines.

PAR. 7. Typical of the statements and representations contained in said advertisements, but not all inclusive thereof, is the following segment of the audio portion of a network television commercial for Whirlpool air conditioners:

On one of those particularly hot days, when its a real struggle just moving around and you have all you can do to keep going, it's nice to come home to a Whirlpool air conditioner.

*You see only Whirlpool has the special Panic Button to cool you off extra fast * * *.* (Emphasis supplied)

PAR. 8. By and through the use of the aforesaid statements and representations, respondents have represented, directly or by implication, that the "Panic Button" is a unique feature of Whirlpool air conditioners, not found on other air conditioners.

PAR. 9. In truth and in fact the "Panic Button" is not a unique feature of Whirlpool air conditioners. In fact, the "Panic Button" is merely a control which activates the highest of the three fan speeds on said air conditioners, and in that respect is substantially similar to controls on comparable air conditioners made by other companies.

Therefore, the statements and representations referred to in Paragraphs Seven and Eight were and are false, misleading, and deceptive, and the advertisements referred to in Paragraphs Six, Seven and Eight were and are unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 10. By and through the use of the aforesaid statements and representations, respondents have also represented, directly or by implication, that at the time the aforesaid statements and representations were made, respondents had a reasonable basis from which to conclude that Whirlpool air conditioners, operating at the fan speed activated by the "Panic Button," had an initial cooling capability which was substantially greater than that of comparable air conditioners made by other companies.

PAR. 11. In truth and in fact, at the time the aforesaid statements and representations were made, respondents had no reasonable basis from which to conclude that Whirlpool air conditioners, operating at the fan speed activated by the "Panic Button," had an initial cooling capability which was substantially greater than that of comparable air conditioners made by other companies.

Therefore, the statements and representations referred to in Paragraphs Seven, Ten and Eleven were and are false, misleading and deceptive, and the advertisements referred to in Paragraphs Six and Seven were and are unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 12. By and through the use of the aforesaid statements and representations, respondents have also represented, directly or by implication, that Whirlpool air conditioners, operating at the fan speed activated by the "Panic Button," have an initial cooling capability which is substantially greater than that of comparable air conditioners made by other companies. At the time said statements and representations were made, respondents had no reasonable basis from which to conclude that such was the fact.

Therefore, the statements and representations referred to in Paragraphs Seven and Twelve were and are false, misleading and deceptive, and the advertisements referred to in Paragraphs Six and Seven were and are unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 13. The use by respondents of the aforesaid unfair or deceptive acts or practices has had, and now has, the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of said products by reason of said erroneous and mistaken belief.

PAR. 14. The aforesaid acts or practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Docket C-2515—WHIRLPOOL CORPORATION
DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Whirlpool Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State

of Delaware with its principal office and place of business located at Benton Harbor, Mich.

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

ORDER

I

It is ordered, That respondent Whirlpool Corporation, its successors and assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale, sale or distribution of Whirlpool brand room air cooling products or Whirlpool brand central air cooling systems, hereafter referred to as "such products," in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. representing, directly or by implication, that the button which activates the highest fan speed on any of Whirlpool brand room air cooling products is a unique feature of such room air cooling products;

2. representing, directly or by implication, that any such products have a button, control, device or other feature which is unique, unless such is the fact;

3. representing, directly or by implication, that any such products are unique in any other material respect unless such is the fact;

4. representing, directly or by implication, that any such Whirlpool brand room air cooling products have an initial cooling capability which is substantially greater than that of comparable room air conditioners made by other companies, unless, at the time such representation is made, respondent has a reasonable basis for such representation, which shall consist of competent scientific, engineering, or other similar objective material (For the purposes of this paragraph, the term "initial cooling capability" shall refer to the speed with which a room air conditioner, upon initial activation of the unit, is able to lower the temperature to a given temperature in the area being cooled);

5. making, directly or by implication, any other statements or representations as to:

(a) the air cooling, circulation, or dehumidification capabilities of such products, unless, at the time such representation is made, respondent has a reasonable basis for such

representation, which shall consist of competent scientific, engineering or other similar objective material; and

(b) the efficiency of use of electric power of such products, unless, at the time such representation is made, respondent has a reasonable basis for such representation, which shall consist of competent scientific tests, or industrywide standards based on such tests established by the Association of Home Appliance Manufacturers, the Air Conditioning and Refrigeration Institute, or a similar organization, or by an agency of the Government of the United States.

II

It is ordered, That respondent Whirlpool Corporation do forthwith cease and desist from failing to maintain and produce accurate records which may be inspected by duly authorized representatives of the Federal Trade Commission upon reasonable written notice by the Commission:

1. which consist of documentation in support of any claims covered under any paragraph of Section I of this order which are included in advertising or sales promotional material for any such products;

2. which provided the basis upon which respondent relied as of the time those claims were made;

3. which shall be maintained by respondent for a period of three years from the date such advertising or sales promotional material was last disseminated by Whirlpool Corporation.

It is further ordered, That the provisions of this Section II shall expire ten years from the date this order becomes final.

III

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the respondent corporation notify the Commission at least thirty (30) days prior to the effective date of any proposed change in corporate identity, such as dissolution, transfer or sale of assets or merger or consolidation resulting in the emergence of a successor corporation or the creation or dissolution of subsidiaries, if such proposed change may affect compliance obligations arising out of this order.

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

DOCKET C-2516—DOYLE DANE BERNBACH, INC.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Doyle Dane Bernbach, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 20 W. 43rd Street, City of New York, State of New York.

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

ORDER

I

It is ordered, That respondent Doyle Dane Bernbach, Inc., its successors and assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any room air cooling product or central air cooling system, hereinafter referred to as "such products," in commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. representing, directly or by implication, that the button which activates the highest fan speed on any room air cooling product is a unique feature of such room air cooling product;

2. representing, directly or by implication, that any such products have a button, control, device or other feature which is unique, unless such is the fact;

3. representing, directly or by implication, that any such products are unique in any other material respect, unless such is the fact;

4. representing, directly or by implication, that any such room air cooling products have an initial cooling capability which is substantially greater than that of comparable room air conditioners made by other companies, unless, at the time such representation is made, respondent has a reasonable basis for such representation, which shall consist of competent scientific, engineering, or other similar objective material. (For the purposes of this paragraph the term "initial cooling capability" shall refer to the speed with which a room air conditioner, upon initial activation of the unit, is able to lower the temperature to a given temperature in the area being cooled);

5. making, directly or by implication, any other statements or representations as to:

(a) the air cooling, circulation, or dehumidification capabilities of such products, unless, at the time such representation is made, respondent has a reasonable basis for such representation, which shall consist of competent scientific, engineering or other similar objective material; and

(b) the efficiency of use of electric power of such products, unless, at the time such representation is made, respondent has a reasonable basis for such representation, which shall consist of competent scientific tests, or industrywide standards based on such tests established by the Association of Home Appliance Manufacturers, the Air Conditioning and Refrigeration Institute, or a similar organization, or by an agency of the Government of the United States.

Provided, however, That it shall be a defense under Paragraphs (1), (2) and (3) of this part that respondent can establish that it neither knew nor had reason to know of the falsity of the representation of uniqueness.

II

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in it 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 corporation which may affect compliance obligations arising out of the order.

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

ADVISORY OPINIONS

Rescission of Advisory Opinions

The Commission has reconsidered and rescinded and/or revoked the following opinions for the reason that the advice given in these matters no longer conforms to the Commission's view of the law as expressed in the recently amended Guides for Advertising Allowances and Other Merchandising Payments and Services (specifically Guide 9 and/or Guide 11): Sept. 11, 1973.

Digest No.	File No.	Volume	Digest No.	File No.	Volume
103	673 7012	70 F.T.C. 1886.	379	703 7033	76 F.T.C. 1112*.
195	683 7082	73 F.T.C. 1310.	418	703 7083	77 F.T.C. 1709.
346	693 7077	75 F.T.C. 1123.	423	703 7097	77 F.T.C. 1713.
356	693 7077	76 F.T.C. 1098.	438	703 7106	77 F.T.C. 1743.
367	693 7077	76 F.T.C. 1104.	442	703 7109	77 F.T.C. 1762.
354	693 7122	76 F.T.C. 1096.	460	713 7022	78 F.T.C. 1649.
387	703 7031	76 F.T.C. 1116.	470	713 7027	79 F.T.C. 1040.

*The file numbers for Digests 378 and 379 were erroneously reversed and are as follows: Digest 378, File No. 703 7020; Digest 379, File No. 703 7033.

IN THE MATTER OF

Legality of domestic corporation, owned or otherwise controlled by foreign interests, being a member of an export association, Webb-Pomerene Act. (Digest 484, File No. 743 7001)

Opinion Letter

December 6, 1973

Dear Mr. Augur:

This is in response to your request for an advisory opinion which was contained in a letter to the Bureau of Competition dated July 20, 1973.

The Commission is of the opinion that membership in an export (Webb-Pomerene) association by a United States corporation, which is owned or controlled by foreign interests, in and of itself, would not violate the laws administered by the Commission.

By direction of the Commission.

Letter of Request

July 20, 1973

Dear Sirs:

We represent a client interested in forming an export association as provided for in the Export Trade Act of 1918 (16 U.S.C. §61–65).

In discussing the qualifications for membership in the association, a possible question has arisen for which we seek your advice in the form of an advisory opinion. The question is as follows:

> It is a violation of the antitrust laws of the United States for an export association to include as a member of that association a corporation, incorporated in one of the states of the United States, which is owned or otherwise controlled by foreign interests.

We appreciate your willingness to review this matter.

Very truly yours,

/s/ Harrison H. Augur

Proposal of Debt Collectors, Inc. to locate its offices on or adjacent to the premises of its clients. (File No. 743 7002, released January 4, 1974, Digest 485)

Letter of Opinion

December 19, 1973

Dear Mr. Russell:

This is in response to your letter dated October 1, 1973, in which you requested an advisory opinion regarding a proposal of Debt Collectors, Inc. (DCI) to locate its offices on or adjacent to the premises of its clients.

It is the Commission's understanding that DCI is a debt collection agency as that term is defined in the Commission's Guides Against Debt Collection Deception (16 C.F.R. 237). It performs routine debt collection services for its clients such as serving notices, collecting payments and transmitting the funds to the client.

DCI proposes to locate its offices on or adjacent to premises of some of its clients but will make every effort to affirmatively disclose the fact that DCI is independent of them by doing such things as placing its corporate name on the entrances to the office, on the notices to debtors and on the stationery it uses.

Based on its understanding as outlined above, the Commission is of the view that debtors probably would not be deceived as to the true nature of the DCI offices on or adjacent to the client's premises. Accordingly, it is the Commission's opinion that implementation of the plan would not be violative of laws administered by the Commission, provided no evidence comes to light that debtors may be deceived.

By direction of the Commission.

Letter of Request

October 1, 1973

Dear Mr. Tobin:

We hereby request the Federal Trade Commission for an Advisory Opinion stating that, assuming the propriety of all other aspects of our client's debt collection activities, the fact that it locates its offices on or adjacent to the offices of its clients would not in itself result in a violation of the Guides Against Debt Collection Deception, 16 C.F.R. §237, or Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45.

(a). Present Activities

We represent Debt Collectors, Inc., ("DCI") which is a debt collection agency incorporated in Delaware and qualified to do business in Illinois and Florida. Its numerous clients are completely independent of and unaffiliated with DCI, its officers, directors, stockholders and employees.

DCI performs routine debt collection services that have never been challenged by the Federal Trade Commission, and are clearly permitted under the Commission's Guides Against Debt Collection Deception. DCI's services include serving notices, either in writing or by telephone, on slow or delinquent accounts submitted for collection by its clients, collecting funds remitted by such debtors and transmitting such funds to its clients. Delinquent accounts which are not collected by DCI are referred by DCI to DCI's local agents in the debtors community for further collection efforts.

DCI employs a full-time staff of clerical and supervisory personnel who are unconnected with DCI's clients. DCI also independently incurs telephone, postage, rent, printing and related business expenses. DCI performs its services on a fee-plus-cost basis, with fees generally based on a fixed amount per month or per account submitted for collection, and with all other expenses incurred by DCI being billed at cost.

(b) Proposed Activities

Our client now proposes the sole change of placing its personnel performing such lawful debt collection services for a particular client on or adjacent to the premises of the client. The office space required would be leased by DCI from its client or the owner of the building. In nearly all cases the public would have direct access to DCI's proposed offices.

Closer physical proximity will not in any way affect DCI's independence, or the pattern of services described above. DCI will retain complete control of and be wholly responsible for the debt collection services as an independent contractor of the client. In fact, in appropriate circumstances, DCI may, and most likely will, perform services for other clients from its offices on the premises of a particular client.

DCI will retain its total independence from its clients. DCI's officers, directors and shareholders will remain independent of the clients. All clients will be required to agree not to hire the employees of DCI. No activities of DCI will in any way suggest that the collection activities are those of the client. DCI will make every effort to present clearly the fact that DCI is independent of its clients and DCI will place on the doors to its offices and on all notices and stationery its corporate name and the phrase "An independent collection agency."

(c) Business Rationale

The proposed change in office locations to gain physical proximity between DCI and its clients rests on five legitimate business reasons. The change would:

(1) Facilitate better and more rapid communication between DCI and its clients. Convenient and immediate access to files and needed information would result. DCI's staff would be better able to become familiar with the peculiar needs of specific clients, their industries and applicable government regulation.

(2) Foster economy and efficiency.

(3) Permit DCI to readily demonstrate to its clients the proper manner with which it deals with debtors.

(4) Permit the receipt by DCI's clients of daily collections on the day of receipt by DCI thus speeding up the cash flow of DCI's client.

(5) Facilitate faster adjustments of accounts where debtors claim such adjustments are warranted.

To date, our client has not engaged in the proposed activity on the premises of any of its clients and we know of no pending investigation or litigation concerning the proposed activity by either the Federal Trade Commission or by any other governmental agency.

As our client has several outstanding proposals to service its clients on their premises, the Commission's prompt consideration of this request would be greatly appreciated.

Very truly yours,
/s/ Tomas M. Russell

Digest 483. "Backhaul" Allowances advisory opinion affirmed. (File No. 683 7026, released December 26, 1973)

The Commission has completed reconsideration of its advisory opinion on "backhaul" allowances [Digest 147, 72 F.T.C. 1050] and concluded that it should not be rescinded.

The Commission announced that:

(1) It intends to scrutinize delivered price systems in the food products industry in order to determine whether such systems are unfair to customers or to ultimate consumers, in violation of Section 5 of the Federal Trade Commission Act.

(2) It intends to develop empirical information on the impact on food prices of delivered pricing systems which will enable it to make this determination.

(3) It is taking this action in view of representations made by interested parties, including the Cost of Living Council.

(4) It is of the view that questions probably would not arise under the laws it administers if sellers, using valid uniform, zone delivered pricing systems, offer to all customers, on a nondiscrimatory basis, in lieu of a delivered price, the option of purchasing at a true f.o.b. shipping point price.

Financial format plan for companies in the wood industry (picture frames and moldings). (File No. 743 7003 Digest 486)

Opinion Letter

February 22, 1974

Dear Mr. Levine:

This letter is in response to your request for an advisory opinion concerning a proposed financial format plan to be undertaken by you as accountant for approximately fifteen companies in the wood industry (picture frames and moldings).

It is the Commission's understanding that you propose to compile an average profit and loss statement for the fifteen companies. That statement would then be available to each of the companies to allow it to determine its status in regard to each category of the statement.

The Commission would not initiate proceedings against the companies you represent if such a program were adopted providing the reporting data was kept strictly confidential and that the information provided by each company is not disclosed to any other company except through the average figures. You are advised, however, that the plan must not be used to secure adherence to prices, quotas of production, quotas of sales, or to create other unlawful trade restraint.

By direction of the Commission.

Letter of Request

[undated]

Gentlemen:

As a private accountant who works with approximately 15 companies in the wood industry (picture frames and moldings), I am seeking counsel concerning a plan I wish to implement.

Using each company's latest Profit and Loss Statement, I would combine and average the Gross Sales for the 15 companies. A similar procedure would apply to the other expenses, and as a final result, we would have an average P & L statement for the 15 companies.

At a subsequent meeting the combined statement would be discussed where upon each company could compare their statement to an Industry

figure and determine their status in regard to each category of expense.

For example, materials used might represent 40% of Sales; Officers Salaries may be 20% of Sales, etc.

Before proceeding with such a proposal it is, of course, necessary to determine if this plan is in violation of any FTC Guidelines and would be permissible.

A copy of the financial format is enclosed.

Any assistance you can render will be greatly appreciated.

Yours very truly,

James B. Levine

GROSS SALES	$_____
Less Returns & Allowances	_____
Less Freight Allowances	_____
Net Sales	_____
COST OF SALES	
a. Total Materials Used	_____
b. Direct & Indirect Labor	_____
c. Fringe Benefits	_____
d. Manufacturing Expenses	_____
e. Inventory Adjustment	_____
Total Cost of Sales	_____
GROSS PROFIT ON SALES	_____
ADMINISTRATIVE EXPENSES	
Officers Salaries	_____
Office Salaries	_____
All Other Administrative Expenses	_____
Total Administrative Expenses	_____
SELLING EXPENSES	
Salesmens' Salaries	_____
Commissions	_____
Travel and Entertainment	_____
All Other Selling Expenses	_____
Total Selling Expenses	_____
NET PROFIT FROM OPERATIONS	_____
Other Income and Expense	_____
NET PROFIT BEFORE TAXES	_____

Option of refund or substitute publication to subscribers to a magazine that has never been published. (File No. 743 7006, Digest 489)

Opinion Letter

March 4, 1974

Dear Ms. Claffey:

This letter is in response to your letter of January 23, 1974, request-

ing an advisory opinion from the Commission.

It is the Commission's understanding that North American Publishing Company, publishers of "Media and Methods," will send the attached letter to all subscribers of "Involvement." By virtue of the letter, you propose to offer all subscribers of "Involvement" the choice of one year of "Media and Methods" (or one year extension of a present subscription to "Media and Methods") or a refund to be obtained from the publishers of "Involvement."

The Commission would not initiate proceedings against North American Publishing Company if each subscriber is given the opportunity to communicate directly to you his choice between a refund and a subscription to "Media and Methods." All subscribers should have a reasonable time in which to make an election (at least three weeks); those subscribers who make no election within the required time should be deemed to have elected to receive a refund.

By direction of the Commission.

Letter of Request

January 23, 1974

Dear Sir:

We have an urgent request that requires your immediate attention.

A reading of the enclosed letter will essentially familiarize you with the problem. Specifically, our question is: may we substitute our own publication for another, since we give the reader full option to say "NO" should he desire his money back. Both publications are similar in content and scope.

The original subscription "Involvement" was sold at $5.00; our own rate is $7.00 (to rise to $9.00 March 1st). We are willing however, to fulfill all committments made at the lesser rate.

We feel confident that this is a proper procedure, but would appreciate a confirmation from you as quickly as possible.

Sincerely,

Mary Claffey
Circulation Director

January 18, 1974

Dear Subscriber:

Several months ago you subscribed to a brand new magazine "Involvement" dedicated to more effective education through open classrooms, schools without failure, high motivation environment, self-motivated learning experiences.

You and the few thousand other concerned committed educators, regrettably not a

sufficient number of produce a periodical in these days of sky rocketing paper, printing and postage costs.

Dr. Glasser and the "Involvement" people contacted us at Media and Methods since we are so close in educational philosophy and journalistic style. Would we agree to fullfill these subscriptions, to send one year of Media and Methods ($7.00 pr. year now $9.00 beginning March 1, 1974) to the original "involvement" subscribers. Yes we would and if you are already subscribing to Media and Methods we will extend your subscription one year (at no additional cost of course).

A sampling of "Involvement" subscribers were reached by phone and readily agreed to this exchange. We offer this same arrangement to you. On February 15 we shall add your name to Media and Methods subscription roster or extend your present subscription to Media and Methods.

If for any reason this exchange is not satisfactory you may apply to the publisher of "Involvement" for a refund. . . . before February 15.

Dr. Glasser's article on discipline will appear in the early issue of Media and Methods. Other "Involvement" manuscripts are on the way. We hope "Involvement" subscribers will find Media and Methods a most pleasing and most helpful experience.

Enthusiastically,

Roger Damio

Statistical reporting program by manufacturers of tricot knit fabrics. (File No. 743 7004, Digest 487)

Opinion Letter

March 7, 1974

Dear Mr. Korzenik:

This letter is in response to your request for an advisory opinion concerning a proposed statistical reporting program to be undertaken by a subdivision of the Knitted Textile Association (Association), comprised of manufacturers of tricot knit fabrics.

It is the Commission's understanding that the reporting program involves the collection from manufacturers of data on production, purchases, shipments, inventory, and unfilled or open orders. The collected data will be held in confidence and reported to the Association's attorney or an outside accounting firm which will collate them and issue aggregate figures only. No individual firm's figures will be disclosed to any other participant; nor will data on prices, future projections or estimates be collected.

The Commission would not initiate proceedings against the Association if such a program were adopted providing the reported data was collected only by an independent accounting firm. You are advised, however, that the program must not be used to secure adherence to prices, quotas of production, qoutas of sales or to create other unlawful trade restraints.

By direction of the Commission.

Letter of Request

July 26, 1973

Dear Sir:

Request is here made in behalf of the Knitted Textile Association for an advisory opinion of the Federal Trade Commission with respect to the following:

The Knitted Textile Association is an unincorporated association of knitted fabric manufacturers. Among its activities is the gathering of statistical information on the industry's operations. Pursuant to this purpose it has contracted with the Bureau of Census of the United States Department of Commerce for the publication of statistical data on a quarterly basis on the shipments of knitted fabrics and, by reason of the Association's support, such reports have been regularly published (Series MQ–22K of the Bureau of Census, United States Department of Commerce). However, these reports sometimes suffer delay and consequently are less valuable than they might be. Moreover, it would be more valuable if statistical data could be made available not only more promptly, but on a monthly basis.

By reason of these considerations, therefore, one subdivision of the industry, namely manufacturers of tricot knit fabric, proposes to embark upon a statistical program which will report regularly at intervals of four and five weeks (three times each quarter) statistical data on:

(1) Production
(2) Purchases
(3) Shipments
(4) Inventory
(5) Unfilled or open orders.

These data will be reported and compiled by types on the tricot fabric according to fiber and yarn and in classifications common in the market.

Each individual participant's statistics will be held in confidence. For this purpose they will be reported to the Association's attorney or to an outside firm of certified public accountants who will collate them and issue aggregate figures reflecting only totals for each class of data. A copy of the form on which statistics are to be reported by the individual firm participants is enclosed and submitted herewith. The reports consisting of totals will be issued in substantially the same form.

No individual firm's figures will be disclosed to any other participant. No data on prices or even value of shipments are called for, and none is contemplated. No future projections or estimates are to be issued orally or in writing.

No statistics have yet been gathered. The program is now at its threshold.

This program and this request are virtually identical to one which we filed with your office dated November 10, 1969, requesting an advisory opinion with respect to a statistical program then being prepared for another component group of manufacturers, namely those producing industrial circular knit jersey (for coating and laminating). In response to that request we were informed that the Commission would not object to our implementation program. It has been functioning on that basis since then.

The program referred to herein is similar and would provide the same kind of statistical data for another group of our members.

Your advisory opinion on the propriety of this program is requested. Your prompt consideration and action will be appreciated.

Yours very truly,

/s/ Sidney S. Korzenik
Counsel

Provisions regarding admission to and dismissal from membership in modeling association. (File No. 743 7005, Digest 488)

Opinion Letter

March 8, 1974

Dear Ms. Callas:

This is in response to your letter of October 1, 1973, in which you requested an advisory opinion regarding the revised draft of the Constitution and Bylaws of the Modeling Association of America, International.

It is the Commission's opinion, based on its reading of the proposed Constitution and Bylaws of MAAI, that the provisions regarding admission to and dismissal from membership in the association, if implemented, would raise questions regarding unfair methods of competition under Section 5 of the FTC Act. The law is well established that whenever membership in a trade association is a vital competitive factor for a business, then arbitrary or discriminatory refusal of membership to a qualified applicant, or arbitrary or discriminatory dismissal from membership, constitutes an unfair method of competition.

The service that is the purpose of your organization to perform for its members and the privileges of membership—such as the opportunity to participate in the contests at the annual convention—indicate that membership in your organization is indeed advantageous. Yet the proposed bylaws would allow arbitrary and discriminatory decisions regarding who may become or remain a member. The Supreme Court has

condemned similar membership provisions under the antitrust laws. *Associated Press* v. *United States*, 326 U.S. 1 (1945). The Commission has also required that membership in a trade association must be offered on a fair and nondiscriminatory basis to all qualified applicants. FTC Advisory Opinion, Digest No. 373.

The membership provisions contained in the bylaws could be made acceptable with a few revisions. For example, an active member should not be given the right to block a non-member competitor from membership. The provision in Article I, §1(B)(5), under which active members within a given area must approve new membership applicants, should be eliminated. Membership should be open on the same basis to everyone who meets the general membership criteria described in Article II, §1 of the MAAI Constitution.

The bylaw provisions regarding dismissal from membership should also be revised. Under Article I, §4 and Article 5, 1(E), a member can be dismissed or asked to resign for having engaged in unethical practices or unbecoming personal actions as determined by the Ethical Practices Committee. Article 4, §3 and Article 5, §1(D) reinforce the impression that members will be forced to conform to a certain, undefined standard of behavior in order to retain membership in the association. However innocent the intention behind these provisions may be, as written they would allow arbitrary or discriminatory determinations of what constitutes satisfactory conduct. Dismissal from membership should be allowed only for failure to comply with specific, nondiscriminatory, objective criteria that adhere closely to the requirements of the law. Once drafted, such criteria could be submitted to the Commission to determine their legality under Section 5 of the Federal Trade Commission Act.

By direction of the Commission.

Letter of Request

October 1, 1973

Dear Mr. Buck:

Following our conversation of a few days ago about the FTC giving us an advisory opinion on the proposed Constitution and By-Laws of the Modeling Association of America, International, enclosed with this letter of transmittal is a copy of the document in question.*

The proposed enclosed By-laws are not presently being used by MAAI, but are to be presented to our Executive Board and membership after we have the benefit of your advisory opinion on their contents as

*A copy of this document is available upon request to the Division of Legal and Public Records, FTC, Wash., D.C. 20580.

those contents may relate to complying with the FTC guidelines and regulations.

We appreciate your courtesy in giving us the requested advisory opinion. We will find it much more expedient to be in compliance with the FTC through your good services, than to assume the burden of revisions after publication and or membership acceptance.

The purposes and intents of MAAI are drawn forth in the Constitution.

Thank you for your interest and response.

Yours truly,
Georgette K. Callas,
Member, Parliamentary Committee
Constitution and By-Laws, MAAI

Utilization of drop shipments by Southern California Jobbers, Inc. from its suppliers to its jobber members of initial stock orders and very heavy equipment. (Docket No. 6889,* Digest 490)

Opinion Letter

April 1, 1974

Dear Mr. Hart:

This is in reference to your "Request For An Advisory Opinion Concerning Drop Shipping" filed on October 10, 1973 wherein you request on behalf of Southern California Jobbers, Inc. (SCJ) an advisory opinion from the Commission. Advice is sought whether utilization of drop shipments by SCJ from its suppliers to its jobber members involving: (1) Initial stock orders; and (2) Very heavy equipment, would not be violative of the order in the above referenced matter in which SCJ is a respondent.

The Commission has considered your submission and supporting material and based solely upon the information and representations set forth therein, has determined that the utilization of drop shipments of initial stock orders or very heavy equipment where the products are not normally stocked by a warehouse distributor would not be considered to be violative of the order herein. However, the Commission notes that the items listed in Exhibit A to your submission are normally stocked by

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*Material submitted by the requesting party (including Exhibit A) is available upon request to the Federal Trade Commission's Division of Legal and Public Records, Washington, D.C. 20580.

warehouse distributors and to that extent do not fall within the permissible circumstances.

By direction of the Commission.

Program of "individualized product catalogs" showing the name of product and manufacturer, description of product, and product number for ordering purposes. (Docket No. 5979, Digest 491)

Opinion Letter

April 5, 1974

Dear Sir:

The Commission has considered the request in your letter of October 17, 1973, together with your clarifying letter of December 14, 1973, for advice as to whether your client, American Surgical Trade Association, may engage in a proposed course of action without violating the cease and desist order issued by the Commission in the above-captioned matter on August 19, 1952.

Your October 17 letter states that ASTA is seeking permission to sponsor a program of "individualized product catalogs." The catalog would show the name of the product and manufacturer, a description of the product, and a product number for ordering purposes.

The publisher would print master negatives of pages listing the products of the various manufacturers, and the individual dealer would select those listing the products which he wished to carry. The dealer would also have the option of having individualized covers, and could have "overprints" on the inside pages which would include such information as the name, address, and phone number of the particular dealer. There would be no price information contained in the catalogs either directly or indirectly as prepared by the association and the publishers with whom the publishing of these catalogs was arranged.

It is our understanding that this catalog could be ordered by nonmember dealers as well as ASTA member dealers. We further understand that any manufacturer of surgical equipment and related products could arrange to have his products included in this catalog. It would not be necessary that he be a member of any trade association or that his products be carried by an ASTA dealer. Rather any dealer in surgical equipment and supplies could order this catalog and request that certain manufacturers' products be included. The only condition would be that those manufacturers provide the necessary pictures, negatives, or other information to the designated publisher.

Based upon the information which you have provided in your October

17, 1973 and December 14, 1973 letters, as well as the sample Karel Medical Inc. catalog sent in connection with your request and our understanding as expressed herein, it is the opinion of the Commission that sponsorship by ASTA of such a catalog would not in and of itself violate the order issued in the above matter.

By direction of the Commission.

Letter of Request

October 17, 1973

Dear Mr. Gercke:

On behalf of the American Surgical Trade Association, ("ASTA"), we hereby request a Report of Compliance, pursuant to 16 C.F.R. §3.61(c), as to whether the proposed course of action outlined in this letter will be in compliance with the order entered in Docket No. 5979 against the Association and others. The activity which is being considered by the Association has not been instituted pending the advice of the Commission.

The American Surgical Trade Association, a Delaware corporation, is a trade association whose membership is composed of surgical dealers who transact business primarily at the wholesale level. The members provide medical supplies and equipment to the medical profession, nursing homes, clinics, hospitals and others in the health care industry and to the laity. The members of the Association, for the most part, are small, independent businessmen. It is the desire of the Association to undertake a program by which its members and non-members may purchase, through the Association individualized product catalogs.

Presently, there is no efficient or economical way for many dealers, especially smaller ones, to obtain a catalog listing the various products they sell. For the most part, the only catalogs now in circulation are either very expensive or are prepared by the large dealers organizations or national chains, for use by their branch dealers with whom the typical small distributor must compete. However, it is possible to obtain, in volume, for members of the Association and others, catalogs at low cost. Under the proposed program, dealers would select precomposed catalogs pages representing those products which he presently sells. The catalog would show the name of the product and manufacturer, a description of the product, and a product number for ordering purposes. No price information would be given directly or indirectly in the catalog as prepared by the Association. The individual dealer would prepare his own price list for inclusion in the catalog.

For your information, we have enclosed a catalog which is presently used by one member of the Association. It is similar to what would be

prepared for those who desire to participate in the program. Each participant would have the option of determining the content of the cover pages (both front and back) and also whether he wants certain "overprints" included on the various catalog pages themselves. Other information could be inserted also at the desire of the dealer.

The mechanics of this program would be for the catalog publishing company to set up a master page negative for each manufacturing company with pictures and descriptions of the products. Thus, the dealer would simply select the standard pages that he wishes in his catalog and then personalize the covers and the first pages with specific information on his company, etc.

This standard page approach would reduce the cost of the catalog. Again, I would stress that under no circumstances would the catalog contain price information. Another advantage to this would be that without having price information, the catalog could be updated by periodic revision of price list information by the individual distributor without having to reprint the catalog.

In 1968 and 1971, the Commission held that similar proposed programs in which price information would have been provided, would have been in violation of the cease and desist order. However, because this catalog program would include no price information whatsoever, it is our hope that this program will be approved, and that the objection of the Commission to previous proposals would be vitiated.

Should you require any further information, please do not hesitate to contact me.

Sincerely,
Jonathan T. Howe

Use of "Saver Folders" by Sperry and Hutchinson Company. (Docket 8671)

Opinion Letter

April 19, 1974

Dear Mr. Abrams:

This is with reference to your letter of March 20, 1974, wherein you request advice for your client, The Sperry and Hutchinson Company, concerning the use of certain Saver Folders. It is our understanding that these Saver Folders were printed without the necessary legend concerning redemption for cash at the option of the holder because of an error of the printer. You suggest printing the legend as an overprint as indicated on an Exhibit submitted with your request, and are seeking

Commission advice as to whether this would occasion a violation of the instant order.

You are advised that due to the paper shortage as alleged in your request, the distribution of the Saver Folders with the overprint as indicated would not violate the order in this instance. However, you are further advised that in all future reprints of the Saver Folders the legend required by the order should appear in a more appropriate location thereon.

By direction of the Commission.

Letter of Request

March 20, 1974

Dear Mr. Ramadhan:

This is with further reference to our telephone conversations on Tuesday and today (Wednesday) relating to Saver Folders which are being issued by The Sperry and Hutchinson Company.

As I have informed you, 2,000,000 copies of the Saver Folder have been printed and are awaiting distribution. In films which went to the printer for use in printing the Saver Folders, S&H included the legend setting forth the availability of cash redemption in the language provided for in the Decision and Order Relating to Count III of the Complaint (Dkt. No. 8671). By reason of an error of the printer in using an earlier film in its possession, this language was not included in the final printed copies of the Saver Folder.

A primary problem presented by the printing already completed is the existing shortage of paper which would require a delay of about two months in reprinting if that should become necessary. Additionally, this would entail the loss of use of a substantial amount of paper at a time when that product is in extremely short supply.

I have earlier today transmitted to you one copy of the Saver Folder, which does not contain the legend relating to cash redemption, and another copy containing the legend as an overprint.

We shall appreciate being informed as quickly as practicable that S&H may proceed to use the Saver Folders, either as they are now printed or with the addition of the overprint. This is a test promotional program which S&H is now in a position to introduce and any delay will be of substantial financial detriment to the company.

Sincerely,
Samuel K. Abrams

Proposal by some members of Independent Bakers Association to include a free object with each loaf of bread. (File No. 743 7008)

Opinion Letter

April 24, 1974

Harold Greenwald, Esquire
Richard Kelly, Esquire
Independent Bakers Association
521 Fifth Avenue
New York, New York 10017

Gentlemen:

This letter is in response to your letter of February 12, 1974, requesting an advisory opinion from the Commission.

It is the Commission's understanding that some members of the Independent Bakers Association propose to include a free sticker or other object with each loaf of bread. The word "free" and a description of the enclosed sticker would be printed conspicuously on the bread wrapper. The price of a loaf of bread with the sticker would be the same as previously offered without the sticker.

Under these circumstances, the Commission would not initiate proceedings against members of the Independent Bakers Association who make the proposed offer. For your further guidance, we are enclosing a copy of the Commission's Guide Concerning Use of the Word "Free" and Similar Representations.

By direction of the Commission.

Letter of Request

February 12, 1974

Dear Secretary Tobin:

As legal counsel to the Association, we respectfully request an advisory opinion from the Commission as expeditiously as possible concerning the use of advertising and packaging by members of this Association.

These members are wholesale bakers (S.I.C. 2051) who sell white bread to grocers.

We have been advised by members that in the immediate future they plan to use advertising, labels, and packaging in the sale of white bread in response to and somewhat comparable to a program now being

utilized nationwide by a wholesale baker that is a competitor (sample bread package enclosed).

The program entails prominently printing on an end label or package end: the word *"Free"* in bright colored letters of approximately three-quarters of an inch (¾"), and below the brand name and loaf size also in the same size (approx. ¾") and color lettering. Between the word "free" and brand name in smaller lettering of a different color, approximately one-eighth inch (⅛") would be an indication of some sort of give away meant to appeal to children. The exact nature of the give away has yet to be determined.

For example:

	Language of Competitor's Loaf	*Proposed Language of Independent Bakers Loaf*
Red	Free ¾"	Color A Free at ¾"
Blue	Disney character ⅛"	Color B Give away ⅛"
Blue	Sticker inside ⅛"	Color B Give away ⅛"
Red	Wonder ¾"	Color A Brand name ¾" Red
Red	Giant ¾"	Color A Size ¾"

It is contemplated that this loaf will be sold at the same price as previously offered to the public.

Because the competitive nature of the situation requires a prompt decision, an immediate response is essential to the membership.

If additional information is required please advise the undersigned.

Yours very truly,
Harold Greenwald, Esq.
Richard Kelly, Esq.

Discount incentive plan proposed by Baumgold Bros., Inc., a wholesaler of diamonds and precious jewelry. (File No. 743 7007)

Opinion Letter

May 14, 1974

Dear Mr. Winard:

This is in response to your letters dated July 23 and November 6, 1973, as elaborated in a telephone conversation on January 24, 1974, requesting an advisory opinion concerning the discount incentive program of Baumgold Bros., Inc.

It is the Commission's understanding that Baumgold Bros., Inc., diamond cutters, a New York corporation, having its principal office at 580 Fifth Avenue, New York, New York 10036, is engaged in the

wholesaling of diamonds and precious jewelry in all 50 states of the United States as well as in foreign countries. Baumgold sells its merchandise on the following terms:

(a) 4% discount if merchandise is paid for in cash;

(b) 3% discount if merchandise is paid for within 30 days; and

(c) 6 months net.

Baumgold presently is borrowing money from its banks and paying 8½% per annum with a requirement for compensating balances. "Compensating balances" means that the borrower must maintain a deposit with the banks equal to a certain percent of the money loaned. Baumgold wishes to eliminate, if possible, the immediate 4% discount for cash and the term "6 months net" which is offered to all of its customers, and at the same time, wishes to increase its sales.

The new policy Baumgold proposes is to announce the following to all its customers:

> With respect to our customers who either pay cash upon delivery of merchandise or who discount their bills under the provisions of our standard invoice permitting a discount of 3% if the invoice is paid within 30 days, Baumgold Bros., Inc. has adopted a policy effective———which shall be applicable to all of its customers.

Under the policy, Baumgold customers who either pay cash for merchandise or who discount their bills within the 30 day period, under which they obtain a 3% discount, will be offered an additional discount which will be keyed into their total volume of purchases from Baumgold in the calendar year. As to such customers, Baumgold's letter would provide that:

> (a) An additional credit of 1% shall be granted as of December 31, 1974, payable within 3 months of that date, to the extent that purchases of 1974 exceeded purchases of 1973, provided, further,
>
> (b) If purchases in 1974 as above outlined exceed purchases of 1973 to the extent of 50% or more, the discount which will be granted as of December 31, 1974 shall be 2% to the extent that 1974 purchases exceed 1973 purchases.
>
> This policy shall not be applicable to customers of Baumgold Bros., Inc. who did not discount their bills in 1973. As to such customers, and new customers, the new policy shall be applicable in the year following any year in which bills are paid for in cash or bills are discounted within the thirty day period as aforesaid.

Baumgold desires to reduce the amount of interest it is presently paying to banks with respect to merchandise which is being held by its customers but not paid for within six months. In other words, "carrying" its customers who take advantage of the "six months net term offered" under its present procedure costs Baumgold in excess of 4¼%

(*i.e.*, 6 months at an annual rate of 8½%), the interest charge they are presently paying, without taking into consideration the bank's requirement that compensating balances must be maintained by Baumgold.

As outlined above, the subject incentive plan as proposed by Baumgold would result in a price discrimination cognizable under Section 2(a) of the Robinson-Patman Act. Granting a 1% rebate on increases in purchases would discriminate against a new customer who paid cash or within 30 days, but who had not been a customer during the prior year. It also would discriminate against a customer who paid cash or within 30 days but who did not increase his purchases. Such discrimination would be illegal if the effect may be substantially to lessen competition or to tend to create a monopoly.

With regard to giving a total of 2% as a discount to a customer who increases his purchases by 50%, Baumgold further discriminates against those customers who increase their sales by a significant amount which probably would not be attainable by all customers, but do not reach the 50% increase level. For example, a customer who increased his purchases by 45% would only earn 1% on his increase. Such discrimination would also be illegal if the effect may be substantially to lessen competition.

By direction of the Commission.

Propriety of the Beauty and Barber Supply Institute compiling a list of the terms of delivery offered by various suppliers to BBSI members. (File No. 743 7009)

Opinion Letter

June 5, 1974

Dear Mr. Flanagan:

This is in response to your letter requesting an advisory opinion regarding the propriety of the Beauty and Barber Supply Institute (BBSI) compiling a list of the terms of delivery offered by various suppliers to BBSI members.

It is the Commission's understanding, in essence, that the BBSI plan calls for preparation of a list of suppliers of beauty products which would include information as to whether sales are made (1) F.O.B., (2) freight prepaid—minimum required, (3) freight—deduct from invoice, (4) full freight paid—minimum required, (5) half-freight paid—minimum required, (6) merchandise given to cover the cost of freight, (7) full freight allowance—minimum required, (8) half-allowance—minimum required, (9) the number of days within which freight would be allowable, and (10) whether the supplier offers other allowances. In other words, the list

will consolidate delivery terms information which suppliers now provide to their customers on an individual basis.

Based on its understanding of the BBSI proposal as outlined above, the Commission is of the opinion that the plan itself, if implemented, would not necessarily raise antitrust questions. You are cautioned, however, that the plan should not be used in such a manner that it leads to a boycott, to the blacklisting of certain suppliers or to rigidification of prices or terms of delivery. If it does, questions under Section 5 of the Federal Trade Commission Act could arise.

Lastly, this opinion should not be construed as relating in any way to the suppliers' terms of delivery in and of themselves because those terms of delivery have not been examined in connection with rendition of this advisory opinion to the Institute.

By direction of the Commission.

Letter of Request

October 22, 1973

Gentlemen:

We represent Beauty and Barber Supply Institute, a national trade association with its office at 551 Fifth Avenue, New York City. Its membership consists of 800 wholesalers of "beauty" products.

The members of the association are concerned with the distribution of all "beauty" products. The members of the association have performed the typical "wholesaler" functions: stocking, warehousing, delivering, extending credit, travel salesmen and maintaining the inventory of their customers.

The association is desirous of providing its membership with a benefit that would insure their having knowledge and therefore the ability to take advantage of freight allowances that are due to them. It feels that a comprehensive chart showing how the wholesaler must order to accrue the benefits offered by manufacturers would be of substantial benefit.

It is proposed that a chart such as that submitted herewith would be a material aid to its members. Therefore, I request an advisory opinion as to whether or not, under existing laws and decisions, the dissemination of such a chart to its members would in any way be a violation of the law.

The proposed course of action is not currently followed by the association and is not the subject of any pending investigation or other proceedings by the Federal Trade Commission or any other governmental agency.

Very truly yours,

James F. Flanagan

Fuel reservation program proposed by National Business Aircraft Association, an association of owners of business and executive aircraft. (File No. 743 7010)

Opinion Letter

June 24, 1974

Dear Mr. Powell:

This is in response to your request of February 14, 1974, on behalf of the National Business Aircraft Association, for an advisory opinion.

Your request states that NBAA is an association of owners of business and executive aircraft.Because of the regulations imposed by the Federal Energy Office under the Emergency Petroleum Allocation Act, NBAA members and other segments of general aviation have experienced some difficulty and uncertainty in purchasing aviation fuel away from their home airports. This is because the aviation service organizations and fixed base operators (inclusively ASO's) which operate airport fueling businesses have insufficient and uncertain amounts of fuel for transients who must refuel away from their home bases. The result of this uncertainty, according to your request, is that NBAA members and other segments of general aviation cannot plan their flight itineraries properly, because they cannot know if they will be able to refuel at airports where they are unknown.

To cope with this problem, NBAA seeks to develop a call-ahead fuel reservation program for transient aircraft in general aviation. In concert with other organizations interested in general aviation, NBAA would develop and disseminate a suggested fuel reservation system for voluntary adoption by participating ASO's. Any transient pilot could call a participating ASO within a specified time of his estimated arrival, tentatively 48 hours, and reserve necessary fuel; the ASO would hold the fuel for a specified period after the reservor's estimated arrival time, tentatively 6 hours, before selling it to any other customer.

The plan, according to your request, would be voluntary and nondiscriminatory. It would be available to all segments of general aviation, and would be disseminated in all available communications channels, including an advisory circular from the Federal Energy Office.

Subsidiary to the main plan would be a recommended list of fuel amounts to be made available by an ASO when shortages forced it to curtail sales. Under the subsidiary plan, in shortage situations each ASO would limit sales to two hours cruising time for each plane serviced. This would entail selling differing amounts to each customer, depending upon the size of each particular plane.

Based on its understanding of the NBAA proposal, the Commission advises that no objection will be raised to NBAA's meeting with the other associations mentioned in your letter for the purpose of discussing and implementing a voluntary call-ahead fuel reservation program, subject to the conditions detailed below. *National Macaroni Mfrs. Assn.*, 65 FTC 583, 612 (1965), *aff'd* 345 F.2d 421 (7th Cir. 1965).

However, you are cautioned that if such meetings have any anticompetitive purpose or effect, including but not limited to the fixing of prices or a concerted refusal to deal, or if they are otherwise used to develop an anticompetitive plan, NBAA would be in violation of Section 5 of the Federal Trade Commission Act.

As to the main plan, concerning call-ahead fuel reservations, the Commission is of the view that the procedures you propose, if truly voluntary and non-discriminatory, would not raise questions under Commission administered law if the procedures do not result in any anticompetitive effects. *See, e.g.*, Advisory Opinion Digest Nos. 64, 133, 332. However, because of the potential for abuse, the Commission conditions its advice on the following:

First, in order to avoid concerted refusals to deal with nonparticipating ASO's, and to avoid the possibility of conspiracy among participating ASO's, the proposed plan must be voluntary and be limited solely to dissemination of information. Although the names of participating ASO's may be disseminated, any attempt to impose sanctions for nonparticipation would not be permissible.

Second, since the plan is premised on dislocations caused by the FEO's fuel allocation regulations, the Commission cannot extend approval beyond the life of those regulations without a re-evaluation of the program.

Third, the Commission explicitly reserves its right to proceed against NBAA and other participants, if in practice the plan proves to be anticompetitive. Because of the fast-changing conditions in the petroleum industry, the Commission requests that you submit a report in six months outlining the plan's working and effect. If you choose not to file such a report, the Commission's advice will expire.

The Commission cannot approve of the subsidiary plan for acute shortage situations, which recommends a two hour flight time limitation. The specificity of the recommended list—down to the gallon—suggests strongly that it amounts to an allocation program for an entire industry administered by the NBAA. The Commission will not accept a plan for an extra-governmental agency to undertake such a governmental function. See *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457, 465 (1941). Rather, specifics of an allocation method in time of shortage

should be left to the judgment of each ASO operator, instead of being prepared in concert by the whole industry.

The Commission offers no opinion on the applicability of the antitrust exemption contained in Section 6(c) of the Emergency Petroleum Allocation Act, P.L. 93–159, to the activities and meetings which you envision.

By direction of the Commission.

Proposal by some members of National Electronics Service Dealers Association, Inc. to offer lower repair rates to consumers who purchase appliances from them. (File No. 743 7011)

Opinion Letter

June 27, 1974

Dear Mr. Couch:

This letter is in response to your request for an advisory opinion concerning a proposal by some members of your association to offer lower repair rates to consumers who purchase appliances from them.

It is the Commission's understanding that some of your association's members propose to issue a coupon discount book to consumers who purchase an item from them. This would entitle the consumer to a discount off the dealers regular rates on repairs. The purpose of this discount is to induce consumers to purchase products from those dealers who engage in this practice.

The Commission would not initiate proceedings against any members of your association if such a program were adopted providing that members do not act in concert in adopting such a program and adoption of the program does not become a policy of the association or a condition of membership. You are further advised that the association must not suggest or prescribe a uniform discount rate to be used by its members.

Nothing in this opinion authorizes any NESDA member to discriminate in the repair or service of appliances under manufacturers' service or warranty programs or, directly or indirectly, to foreclose access to repair parts to local competitors.

By direction of the Commission.

Letter of Request

March 8, 1974

Dear Sirs:

As president of the National Electronic Service Dealers Association,

better known as NESDA, I would like to ask for guidance in behalf of some of our members.

Many of the members of NESDA both sell and service consumer products in the electronics industry. As an inducement for the consumer to purchase a product from them, they have come up with the idea of issuing a coupon discount book. This would entitle the consumer who purchases a product from them to a discount off their regular repair rates. This gives the dealer a selling point, i.e. he will repair the product sold by him at a cheaper price since he made a profit on the original sale.

This means the consumer who has *not* purchased a product from this member would pay the regular repair rate for this dealer. In this way this member would have another promotional reason why to purchase from them.

The members of NESDA are ethical, honest, and of highest integrity. In this operation, they want to make sure they are operating within the law at all times. Could you advise whether this is within the bounds of legality.

Your suggestions will be greatly appreciated by the members of NESDA.

Yours very truly,

Charles R. Couch, Jr., CET
President

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