

shall, on the 18th day of January, 1964, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Comrich, Ltd., a corporation, and Richard Weinstein, individually and as an officer of said corporation, 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 the order to cease and desist contained in the adopted initial decision.

IN THE MATTER OF
EXQUISITE FORM BRASSIERE, INC.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SECS. 2(d) AND 2(e) OF THE CLAYTON ACT

Docket 6966. Complaint, Nov. 29, 1957—Decision, Jan. 20, 1964*

Order—following remand by the court, 301 F. 2d 499, and reconsideration by the Commission, as directed, of previously rejected evidence in support of Section 2(b), Clayton Act, defense—reinstating the desist order of Oct. 31, 1960, 57 F.T.C. 1036, which required an industry leader in the manufacture and sale of brassieres, with principal office in New York City, to cease discriminating in price between competing customers in violation of Secs. 2(d) and 2(e) of the Clayton Act by paying advertising allowances and furnishing “stylists” to certain large retailer customers while not making either available on proportionally equal terms to competing smaller customers.

Mr. Peter J. Dias and *Mr. Francis A. O'Brien* for the Commission.
Mr. Peyton Ford of Washington, D.C., for respondent.

REVISED INITIAL DECISION AFTER REMAND BY ROBERT L. PIPER,
HEARING EXAMINER

MARCH 15, 1963

PRELIMINARY STATEMENT

On October 31, 1960, the Commission issued its decision, affirming the undersigned, finding respondent in violation of subsections (d) and (e) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, also finding that the services in violation of Section

* Amended and supplemental complaint issued August 1, 1958.

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2(e) had not been furnished in good faith to meet services furnished by a competitor, and further finding as a matter of law that the good faith meeting of competition defense set forth in Section 2(b) was not applicable to Section 2(d). On November 22, 1961, upon appeal, the United States Court of Appeals for the District of Columbia affirmed the findings of violation of Sections 2(d) and (e) and the finding that respondent's services in violation of Section 2(e) had not been furnished in good faith to meet those of a competitor, but reversing the holding that the good faith meeting of competition defense under Section 2(b) was not applicable to Section 2(d).¹

The Court remanded the case to the Commission for the reception of respondent's proof, which had been rejected, that its discriminatory payments for services or facilities to some customers had been "in good faith to meet the services or facilities furnished by a competitor." In all other respects, the findings, conclusions and order of the Commission were affirmed.

On May 21, 1962, the Commission's petition for certiorari was denied by the Supreme Court.² On June 6, 1962, the Commission remanded the proceeding to the undersigned for the reception of respondent's evidence in support of its Section 2(b) defense to Section 2(d) and such rebuttal evidence as counsel supporting the complaint might offer. Thereafter, additional hearings were held for the reception of such evidence. Both parties filed additional proposed findings of fact, conclusions of law, and briefs. All such findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded are herewith specifically rejected.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following additional:

FINDINGS OF FACT

I. The Issue

The sole issue on this remand is whether respondent's discriminatory payments for services or facilities furnished by or through certain customers were made in good faith to meet services or facilities so furnished by a competitor.

¹ *Exquisite Form Brassiere, Inc. v. FTC* 301 F. 2d 499 (D.C. Cir. 1961).

² 369 U.S. 888 (1962).

II. Good Faith Meeting of Competition

Respondent's legal theory with respect to the Section 2(b) defense of meeting competition as applied to Section 2(d) is that, in addition to meeting specific payments or offers of its competitors to its customers, respondent was entitled to grant promotional allowances, not made available on proportionally equal terms to all competing customers, in response to general systems of promotional allowances prevailing among its competitors. While the undersigned does not agree with this concept of the meaning or construction of the Section 2(b) defense as applied to Section 2(d), in the interest of allowing respondent full and adequate opportunity to present such defense all of respondent's evidence in support thereof was received and has been considered, inasmuch as neither the Commission nor any court has ruled directly on the point.

To begin with, it has been found and affirmed by the Court of Appeals that respondent paid for certain services, primarily newspaper advertising featuring respondent's products, furnished by or through certain customers, without making such payments available on proportionally equal terms to other competing customers, in violation of Section 2(d). This was accomplished by means of a cooperative advertising program under which respondent paid to such customers certain percentages of the cost of their advertising, in the amounts and during the relevant periods as found in the original decision herein.

Respondent established that all, or substantially all, of its competitors, *i.e.*, other brassiere manufacturers, had varied cooperative advertising programs in effect under which they paid all or certain customers a percentage of the cost of their newspaper advertising featuring such competitors' respective products. However, none of these plans or offers was the same as respondent's program. In certain important respects respondent's promotional allowances exceeded those of all competitors. The following chart sets forth the terms of the cooperative advertising programs of respondent and its competitors as found in the record:

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COOPERATIVE ADVERTISING OFFERS

Company	Years	Percent paid	Other features	Limitation on advtg. (based on purchases)	Re-quired lineage	Required No. of ads	Time period
<i>Exquisite</i> ¹	1955	60		No limit	400	Any number	Annual
		70		No limit	400	5 in 6 mos.	
		80		No limit	400	8 in 6 mos.	
	1956 to 7/1/57	50		No limit	200	Any number	Annual
		50		No limit	200	Any number	
		60		No limit	200	2 in 3 mos.	
		70		No limit	200	3 in 3 mos.	
		80		No limit	200	4 in 3 mos.	
	After 7/1/57	50		No limit	200	Any number	Annual
	1955	50		1 1/2%	None	Any number	Annual
	1956 to 1957	50	On accounts over \$2,500, also gave cash refunds of 2, 2 1/2 and 3% for any promotional purpose.	1 1/2%	None	Any number	Annual
<i>Loveable</i> ⁴		50		5%	None	Any number	Annual
<i>Balt</i> ⁵	'55-'57	50		9%	None	Any number	Annual
<i>Warner</i> ⁶	'55-'57	50		12%	None	Any number	Quarterly
<i>Playtex</i> ⁷	1955 to 1957	50	Also gave 6% cash refund on purchases, if customer's ads totaled at least 6% of purchases.		None	Any number	
<i>Formfit</i> ⁸	'55-'57	50		3%	None	Any number	Annual
<i>Maidenform</i> ⁹	1-6/55	50		3%	None	Any number	6 months
	6/55 to 12/55	50		3%	None	Any number	6 months
		75		3%	400	4 in 6 mos.	6 months
	1/56-6/57	50		3%	None	Any number	6 months
	After 6/57	50		5%	None	Any number	6 months
<i>Jantzen</i> ¹⁰		75		5%	400	4 in 6 mos.	6 months
	1/55-6/55	50	Only if bought at least \$500	5%	None	Any number	6 months
	7/55-6/56	50	Only if bought at least \$750	5%	None	Any number	6 months
	6/56-6/57	50	No required minimum	5%	None	Any number	6 months
	After 6/57	50	Only if bought at least \$1,000	5%	None	Any number	6 months
<i>Lilly</i> ¹¹	'55-'57	50		5%	None	Any number	Annual
<i>Stem</i> ¹² (Perma-lift)	'55-'57	50		5%	None	Any number	Annual
<i>Peter Pan</i> ¹³	'55-'57	50		5%	None	Any number	Annual
<i>Sarong</i> ¹⁴	'55-'56	None	Plus 100% of any "color" costs	5%	None	Any number	Annual
	'57	75		n.a.	n.a.	n.a.	

Source of Data

- ¹ Admitted in answer, and found in original decision.
² RX-2, Transcript 457-462.
³ Transcript 375-7, 986; RX-29.
⁴ Transcript 392-3.
⁵ Transcript 496-498, 1051.
⁶ Transcript 515.
⁷ Transcript 331-3.
⁸ RX-23 third RX-28; Transcript 475-6, 963-4.
⁹ Transcript 447-8.
¹⁰ RX-3.
¹¹ Transcript 489.
¹² Transcript 471.

The foregoing chart establishes that while respondent's competitors were generally engaging in cooperative newspaper advertising, respondent was not in fact meeting their competitive offers, but was allowing greater amounts of cooperative advertising and larger payments therefor than any of its competitors, and hence was beating rather than meeting such competition. During the relevant years respondent paid 80% of certain customers' costs of advertising, under the circumstances set forth above, more than any other competitor. The increased amounts paid for a multiplicity of advertisements during a given period *at the option of the customer* also negates any possibility that they were in fact to meet competition. In addition, respondent granted an unlimited amount of cooperative advertising, whereas all of its competitors limited the amount of their cooperative advertising to a percentage of the amount of the customers' purchases, most commonly 5%.¹⁵ Furthermore, as shown above, respondent required for payment of its minimum percentage of cooperative advertising costs either 400 or 200 line advertisements, whereas none of its competitors had any lineage requirement for their minimum cooperative advertising payment, and only Maidenform, during a portion of the relevant period, had any lineage requirement for a higher percentage of payments, which percentage was not the same as that granted by respondent.

While the Commission and the courts have not construed the Section 2(b) meeting-of-competition defense as applied specifically to Section 2(d), it is well settled that such a defense is limited to meeting a competitor's offer and does not encompass granting more favorable terms, *i.e.*, beating those offered by a competitor. Section 2(b) provides that a seller may rebut the prima facie case by showing that his "furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet * * * the services of facilities furnished by a competitor." As the Supreme Court observed in the Standard Oil case:¹⁶

The defense in subsection (b), now before us, is limited to a price reduction made to meet in good faith an equally low price of a competitor. It thus eliminates certain difficulties which arose under the original Clayton Act. For example, it omits reference to discriminations in price "in the same or different communities * * *" and it thus restricts the proviso to price differentials occurring in actual competition. It also *excludes reductions which undercut the "lower price" of a competitor.* * * * (Emphasis supplied.)

¹⁵ In addition to the evidence set forth in the chart above, respondent's Exhibit 6 admits that it was the first manufacturer after January 1, 1956 to pay cooperative advertising allowances for "production" costs, and that "it has always granted the most generous cooperative advertising allowances in the industry."

¹⁶ *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951).

The Supreme Court also has held that the question of whether a respondent's discriminatory prices (promotional allowances) were made to in fact meet competition is a question of fact for the determination by the Commission. As the Court stated in *Staley*:¹⁷

Congress has left to the Commission the determination of fact in each case whether the person, charged with making discriminatory prices, acted in good faith to meet a competitor's equally low prices. The determination of this fact from the evidence is for the Commission.

The Court further stated therein:

* * * We agree with the Commission that the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would *in fact meet* the equally low price of a competitor. Nor was the Commission wrong in holding that respondents failed to meet this burden. (Emphasis supplied.)

This latter statement was quoted with approval by the Court in *Standard Oil*.¹⁸

Assuming *arguendo* that respondent's cooperative advertising program did in fact meet the terms of one or some of its competitors' advertising programs, as distinguished from individual offers to a customer or customers of respondent, it is well settled that the good faith meeting of competition defense is restricted to individual competitive situations and does not apply to the meeting of a competitor's discriminatory plan or system. In the original decision herein such a holding with respect to the meeting-of-competition defense as applied to Section 2(e) was affirmed by the Commission and the Court of Appeals. As the Commission stated:

In his consideration of the respondent's defense that it was meeting competition in the furnishing of the services of the stylists [the 2(e) count] the hearing examiner applied substantially the same tests which have been applied by the Commission and the courts in cases where the meeting competition defense has been raised to justify a price discrimination under Section 2(a) of the Act. * * * he concluded that the stylists' plan was designed and used by respondent as a general method of sales promotion and not for the purpose of meeting similar services furnished by other brassiere manufacturers in *individual competitive situations*. We are convinced that the hearing examiner's appraisal and evaluation of the evidence was correct and that his holding that respondent had not furnished the services of stylists in good faith to meet competition is fully supported by the record. (Emphasis supplied.)

With regard to this conclusion, the Court of Appeals stated:

We think the Commission's finding is sufficiently supported. The same observation applies to the defense proffered by Exquisite to the effect that the stylists were used only to meet competition.

¹⁷ *Federal Trade Commission v. A.E. Staley Mfg. Co.*, 324 U.S. 746 (1945).

¹⁸ Footnote 16, *supra*.

In its consideration of the applicability of Section 2(b) to Section 2(d), the Court of Appeals pointed out the similarity between Sections 2(e) and 2(d), one prohibiting the discriminatory furnishing of services and facilities, and the other prohibiting the discriminatory payment for such, which led the Court to conclude that Section 2(b) applied to Section 2(d) in the same manner as it had been held to apply to Section 2(e).¹⁹ For the same reasons, it seems apparent that the construction of the defense of meeting competition in good faith with respect to Section 2(d) must be the same as that applied to Section 2(e).

The Supreme Court in a number of decisions has made it clear that the meeting of competition defense is limited to individual competitive situations and does not apply to meeting a competitor's like discriminatory system. The following decisions and quotations appear pertinent:

Federal Trade Commission v. A. E. Staley Mfg. Co., 324 U.S. 746 (1945).

* * * Thus it is the contention that a seller may justify a basing point delivered price system, which is otherwise outlawed by § 2, because other competitors are in part violating the law by maintaining a like system. If respondents' argument is sound it would seem to follow that even if the competitor's pricing system were wholly in violation of § 2 of the Clayton Act, respondents could adopt and follow it with impunity.

This startling conclusion is inadmissible only upon the assumption that the statute permits a seller to maintain an otherwise unlawful system of discriminatory prices, merely because he had adopted it in its entirety, as a means of securing the benefits of a like unlawful system maintained by his competitors. But § 2(b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's "lower" price and of that only to the extent that it is made "in good faith to meet an equally low price of a competitor." The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition. Respondents are here seeking to justify delivered prices which discriminate in favor of buyers in Chicago and at points nearer, freightwise, to Chicago than to Decatur, by a pricing system involving phantom freight and freight absorption. We think the conclusion is inadmissible, in view of the clear Congressional purpose not to sanction by § 2(b) the excuse that the person charged with a violation of the law was merely adopting a similarly unlawful practice of another.

Federal Trade Commission v. Cement Institute, et al., 333 U.S. 683 (1948).

Section 2(b) permits a single company to sell one customer at a "lower" price and of that only to the extent that it is made "in good faith to meet an equally low price of a competitor." But this does not mean that § 2(b) permits

¹⁹ In a recent decision, the Commission conceded the applicability of the Section 2(b) defense to Section 2(d) *J. A. Folger & Co.*, 61 F.T.C. 1166, Docket 8094 (1962).

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a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others. We held to the contrary in the *Staley* case. There we said that the Act "speaks only of the seller's 'lower' price and of that only to the extent that it made 'in good faith to meet an equally low price of a competitor.' The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition."

Standard Oil Co. v. FTC, 340 U.S. 231 (1951).

* * * None of these changes, however [in the original Clayton Act] cut into the actual core of the defense. That still consists of the provision that whenever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price. Actual competition, at least in this elemental form, is thus preserved.

Federal Trade Commission v. National Lead Company, et al., 352 U.S. 419 (1957).

Respondents contend that the cease and desist order, as written, exclude the benefits of § 2(b) of the Clayton Act. While §2(b) "does not concern itself with pricing systems * * * [but] only [with] the seller's 'lower' price and [with] that only to the extent that it is made 'in good faith to meet an equally low price of a competitor,' *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 753 (1945), this section is read into every Commission order. *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 476 * * *. This is not to say that a seller may plead this section in defense of the use of an entire pricing system. The section is designed to protect competitors in individual transactions.

Federal Trade Comm'n v. Standard Oil Co., 355 U.S. 396 (1958).

Both parties acknowledge that discrimination pursuant to a price system would preclude a finding of "good faith." *Federal Trade Comm'n v. A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945); *Federal Trade Comm'n v. Cement Institute*, 333 U.S. 683 (1948); *Federal Trade Comm'n v. National Lead Co.*, 352 U.S. 419 (1957).

The dissenting opinion also observed:

The Court concedes Standard did not meet the burden of proving its good faith if its discriminatory prices were made pursuant to a pricing "system" within the meaning given that term by *Federal Trade Comm'n v. Staley Co.*, 324 U.S. 746; *Federal Trade Comm'n v. National Lead Co.*, 325 U.S. 419.

Respondent contended, and in fact offered evidence to attempt to establish, that it granted promotional allowances to some customers and not to other competing customers, because its competitors were granting such allowances to some customers and not to such others, arguing that this tended to establish respondent's "good faith" in meeting competition. Actually this establishes the contrary. It amounts to arguing that good faith requires one to discriminate because one's competitors are discriminating. If respondent, as it

here concedes, was making such payments to some customers and not to other competing customers in order to meet competition of the same kind, then respondent knew that its competitors' promotional allowances, like its own, were not available to competing customers upon proportionally equal terms and hence were unlawful. In both *Staley* and *Standard Oil, supra*, the Supreme Court held that a good faith meeting of competition entails the meeting of a lawful price or offer of a competitor. As the Court stated in *Standard Oil*:²⁰

In the *Staley* case, *supra*, most of the Court's opinion is devoted to the consideration of the evidence introduced in support of the seller's defense under § 2(b). The discussion proceeds upon the assumption, applicable here, that if a competitor's "lower price" is a lawful individual price offered to any of the seller's customers, then the seller is protected, under § 2(b), in making a counteroffer provided the seller proves that its counteroffer is made to meet in good faith its competitor's equally low price.

Further, in footnote 14, the Court stated:

* * * The Chairman of the House Conferees also received permission to print in the Record an explanation of the proviso. 80 Cong. Rec. 9418. This explanation emphasizes the same interpretation as that put on the proviso in the *Staley* case to the effect that the lower price which lawfully may be met by a seller must be a *lawful price*. (Emphasis supplied.)

In *Staley*, hereinabove quoted, the Court found that it was "the clear Congressional purpose not to sanction by Section 2(b) the excuse that the person charged with a violation of the law was merely adopting a similarly unlawful practice of another."

Either respondent did or did not know what the cooperative advertising offers of its competitors were. If it knew and was in fact meeting them, then it had reason to believe and in fact knew that such systems were discriminatory and hence unlawful. Thus meeting them could not be a good faith meeting of competition, as pointed out by the Supreme Court. On the other hand, if it did not know the terms which its competitors in fact were offering, then it did not in good faith have reason to believe that its discriminatory allowances were in fact meeting competition. As the Supreme Court further pointed out in *Staley*, while a seller is not required "to justify price discrimination by showing that in fact they met a competitive price, * * * the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor."

²⁰ *Standard Oil Co., v. FTC*, 340 U.S. 231 (1951).

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Thus the barrenness of respondent's contention that it is entitled to meet a generally prevailing system of promotional allowances, as distinguished from individual competitive offers, is demonstrated.

In addition to its broad contention concerning the applicability of the Section 2(b) defense to a meeting of general systems of competitors, considered above, respondent also offered evidence in an attempt to establish that its specific promotional allowances proven in the case-in-chief in fact met specific allowances granted to the same customers by its competitors.²¹ In this connection, respondent had a search conducted during the remand hearings to ascertain whether any such customers had received any cooperative advertising allowances from its competitors either shortly before or after receiving the proven cooperative advertising allowance from respondent. Thus respondent did not know whether any specific customer had been granted an allowance by any competitor at the time respondent granted an allowance to such customer, and, as the record demonstrates, did not in fact make any attempt to actually meet any such specific allowances. It has been found hereinabove that respondent did not in fact meet any prevailing promotional allowances but granted greater amounts and larger payments than any of its competitors.

Patently, competitors' allowances granted after an allowance by respondent could have no bearing upon a good faith meeting of competition by respondent. For the same reasons, *ex post facto* information that a competitor coincidentally had granted a customer of respondent a cooperative advertising allowance could not have given respondent any reason to believe at the time of its granting of a cooperative advertising allowance that it in fact met the offer of a competitor.²² In its *Corn Products*²³ and *Staley*²⁴ decisions, the Supreme Court held that hearsay evidence of a competitor's offers, believed by the respondents therein, was not sufficient "to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price [promotional allowance] would in fact meet the equally low price of a competitor."

In addition to such legal deficiencies, no proof of any competitive allowance was offered with respect to a number of the promotional allowances granted by respondent, and hence as to them the contention cannot even be advanced. Likewise, the finding of violation

²¹ Respondent's Exhibits 30 thru 123, inclusive.

²² Forster Mfg. Co., Inc. 62 F.T.C. 852, Docket 7207 (1963).

²³ *Corn Products Refining Co. v. FTC*, 324 U.S. 726 (1945).

²⁴ Footnote 17, *supra*.

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of Section 2(d) affirmed by the Court of Appeals also was based upon the granting by respondent of "push" or "prize" money to sales personnel of a customer. Respondent offered no evidence that this was granted in good faith to meet competition.

CONCLUSION

It is concluded and found that respondent's promotional allowances in violation of Section 2(d) were not made in good faith to meet promotional allowances furnished by a competitor.

ORDER

It is ordered, That the Order heretofore entered by the undersigned and adopted and issued by the Commission be and hereby is reinstated.

OPINION

By Dixon, *Commissioner*:

On November 22, 1961, the United States Court of Appeals for the District of Columbia remanded this case to the Commission and ordered that the respondent, Exquisite Form Brassiere, Inc., hereinafter referred to as Exquisite, be given the opportunity to respond to complaint counsel's prima facie case of discrimination in the payment of promotional allowances prohibited by Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, by presenting the good faith meeting competition defense permitted by Section 2(b) of that Act.¹ In all other respects, the findings of the Commission were affirmed.² The matter is presently before the Commission on Exquisite's appeal from the Revised Initial Decision After Remand, issued March 15, 1963, in which the examiner concluded that Exquisite had failed to establish the meeting competition defense. To place the issues now before us in the proper perspective, a review of the proceedings prior to the hearing on remand is necessary.

I

The Commission issued its complaint against Exquisite, which is engaged in the design, manufacture, and sale of brassieres in commerce to department stores, women's specialty shops, and dress shops for resale to the purchasing public, on November 29, 1957, charging a violation of Section 2(d) of the Clayton Act. Specifically, the

¹ 49 Stat. 1526 (1936), 15 U.S.C. 13(b), (d) (1958).

² *Exquisite Form Brassiere, Inc. v. Federal Trade Commission*, 301 F. 2d 499 (D.C. Cir. 1961), cert. denied, 369 U.S. 888 (1962) [7 S.&D. 259].

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complaint alleged that Exquisite offered and paid cooperative advertising allowances to some, but not to all, of the retail customers competing in the distribution of its products. It further charged that the plan under which said allowances were paid was designed so as to be inapplicable to some of Exquisite's retail customers. An amended and supplemental complaint was issued by the Commission on August 1, 1958, containing a second count charging discrimination in the furnishing of services of "stylists" in violation of Section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act.³

In his initial decision of January 27, 1960, the hearing examiner found that the cooperative advertising plan used by respondent from August 30, 1954, to January 25, 1956 provided for payment of sixty percent of the cost of advertisements pertaining solely to Exquisite's products placed by a retailer in certain recognized newspapers, provided that the advertisements were not less than four hundred lines.⁴ If five such advertisements were placed within a six-month interval, payment of seventy percent of the cost of each was provided. Eight advertisements within a similar interval resulted in the payment of eighty percent of the cost of each. On January 26, 1956, the lineage requirement of four hundred lines was reduced to two hundred. Thereafter, Exquisite paid fifty percent of the cost of one advertisement. For successive advertisements within a three-month period, Exquisite paid sixty percent of the cost for two, seventy percent for three, and eighty percent for four. After July 1, 1957, Exquisite agreed to pay only fifty percent of the cost of all advertisements, regardless of the number placed. No minimum purchase was necessary to qualify for an advertising allowance, nor was a limit imposed on the number of advertisements for which allowances would be granted. In most instances, the allowances took the form of credit on future purchases of Exquisite products. No provisions were made at any time for advertisements of less than two hundred lines or in media other than certain recognized newspapers.

Those customers who did not participate in cooperative advertising were offered a "premium plan." Such customers accumulated one point each time they purchased \$10 worth of Exquisite products. When a customer had accumulated thirty points, he became eligible

³ 49 Stat. 1526 (1936), 15 U.S.C. 13(e) (1958). Respondent was permitted to present a Section 2(b) defense to this charge. The hearing examiner's holding that respondent had failed to establish the defense was adopted by the Commission and affirmed by the United States Court of Appeals.

⁴ An Exquisite executive defined the lineage requirement as follows: "In figuring newspaper advertising space there are fourteen agate lines to an inch. That is a unit of measurement to a column inch. That is one inch by one column is fourteen inches."

for certain "premiums" or "prizes." The examiner rejected Exquisite's contention that this plan was a reasonable alternative to the cooperative advertising plan, because " * * * no one could seriously argue that an ice bucket, a pressure cooker, an iron, a percolator, a carving set or a bridge set were reasonable alternatives of proportional equality with hundreds of dollars worth of promotional advertising * * *." ⁵ Since this plan was discontinued in January 1955, renewed in June 1955, and finally permanently discontinued in January 1956, it was patently not a reasonable alternative. Exquisite's additional contention that its furnishing of display materials constituted a reasonable alternative was also correctly rejected, since these materials were offered and could be obtained by any customer irrespective of his participation in cooperative advertising.

The examiner found that the terms of the above cooperative advertising plan had not been offered or made known to some of Exquisite's retail customers competing with those to whom payments had been made.⁶ Others who at one time had been offered the plan were not informed of the subsequent liberalization of the terms.⁷ On several occasions, Exquisite failed to abide by the terms of the plan in making its payments. Some retailers received payments computed at greater percentages of the cost of each advertisement than authorized by the plan, while others received payments computed at lesser percentages.⁸ The examiner also found that the plan itself was not designed or intended for the use of Exquisite's smaller accounts and, in this additional sense, was not available to all on proportionally equal terms.⁹ Finally, there was a finding that Exquisite awarded "push" or "prize" money to a single retailer for

⁵ *Exquisite Form Brassiere, Inc.*, 57 F.T.C. 1036, 1042 (1960).

⁶ The Jenart Shop, The Corset Bar, and Jacob's in Paterson, New Jersey, and Sobel's and The Plainfield Lace Store in Plainfield, New Jersey, were not offered and did not receive allowances. Lady Rose, Quackenbush's, The Caroline Shop, The Mart, Goldberg's and Jay Ann's in Paterson, and Tepper's and Rosenbaum's in Plainfield received allowances.

⁷ Don Roberts in Plainfield, New Jersey, and Slosberg's, Ann M. Selby, and Mae's Dress Shop in Trenton, New Jersey, were not informed of the subsequent changes. Lit Brothers, Yards, and Nervius Voorhees of Trenton were offered and received allowances under the plan's subsequent alterations.

⁸ The examiner stated: " * * * Some customers were paid 80 percent of the cost of ads when they were only entitled to 50 percent under the terms of the plan; some were paid percentages not even set forth in the plan, such as 75 and 77 percent; and some were paid only 50 percent when they were entitled to a larger amount * * *." *Exquisite Form Brassiere, Inc.*, 57 F.T.C. 1036, 1042 (1960).

⁹ An Exquisite executive testified that a retailer who purchased only a small amount of Exquisite products would not be able to participate in cooperative advertising under their plan because the cost of the advertisement to him would exceed his profits from the sale of the products. Ann M. Selby, the owner of a small shop, testified that she did little newspaper advertising because the cost was prohibitive and under no circumstances would place an advertisement as large as 200 lines. The owner of Mae's, another small shop in Trenton, testified that an advertisement in a newspaper would be of little promotional value because the shop was located away from the center of town.

payment to its sales personnel in reward for each Exquisite product sold by them during a limited period of time. This award was not available to competing retailers.

On October 31, 1960, the Commission issued its own opinion in which it adopted the initial decision of the examiner. The ruling that Section 2(b) did not provide a defense to a charge under Section 2(d) culminated in the remand by the court of appeals on November 22, 1961, with instructions to accord to respondent the opportunity of presenting such a defense. We reopened and remanded the matter to the examiner on June 6, 1962, with instructions to comply fully with the mandate of the court of appeals. At the hearing on remand, respondent was accorded the opportunity of presenting its Section 2(b) defense. As previously stated, the matter is now before us on respondent's appeal from the examiner's Revised Initial Decision After Remand, issued March 15, 1963, in which he concluded that respondent's promotional allowances were not made in good faith to meet the competition of similar promotional allowances furnished by competitors.

II

In the present appeal, Exquisite places great stress upon its proposition that the individual discriminatory payments may be excused under the meeting competition defense by proof that these payments were made pursuant to its cooperative advertising plan and that the plan was adopted in good faith to meet the competitive challenge of similar plans utilized by the majority of other brassiere manufacturers. Before reaching this question it should be noted that the instant case has been primarily concerned with individual instances of discrimination. The thrust of complaint counsel's prima facie case was discrimination in specific instances by the furnishing of allowances to some customers while concurrently failing to inform particular competing customers of the terms of the plan. On the basis of such specific evidence, the examiner found discrimination in regard to "various customers" and "some customers" readily identifiable from the evidence. In adopting the examiner's initial decision, we held that a violation of Section 2(d) was sustained "by the showing that the cooperative advertising allowance was granted to some customers but was not offered to other customers competing in the distribution of respondent's products."¹⁰ The court of appeals, in affirming the Commission's finding of a prima facie violation of the statute, referred to these individual instances of discrimina-

¹⁰ *Exquisite Form Brassiere, Inc.*, 57 F.T.C. 1036, 1050 (1960).

tion. Obviously, proof that the plan had been adopted in response to other plans would not excuse the failure on the part of respondent to offer or make known the terms of the plan or its subsequent liberalizations to some customers, while at the same time granting payments under the plan to others competing with those kept in ignorance. Further, such proof would not excuse those particular instances in which Exquisite disregarded the terms of the plan in furnishing allowances. Thus, evidence that respondent's plan was adopted in a general response to other plans, if a defense at all, could only excuse the finding that the plan itself was not designed for the use of smaller retailers and hence was inherently discriminatory. In the present posture of the case, therefore, the first issue to which we address ourselves is whether respondent has rebutted the above-mentioned specific instances of discrimination—the granting of allowances to certain favored retailers while withholding information on the plan's terms from competing retailers, and the failure to abide by the terms of the plan—by showing that the particular allowances granted to the favored retailers in these instances were good faith attempts to counter specific allowances furnished to the same retailers by competing brassiere manufacturers.

An essential element in the establishment of a meeting competition defense is that of "good faith." Implicit within the element of good faith is evidence that the respondent was genuinely responding to some particular action on the part of a competitor. Patently, an awareness of the competitor's allowance prior to the attempt to meet it is an integral aspect of a showing of good faith responsiveness. Examination of the legislative history of this section lends strong support to the requirement of actual awareness of the acts purportedly met. There it was stated:

This proviso represents a contraction of an exemption now contained in section 2 of the Clayton Act which permits discriminations without limit where made in good faith to meet competition. It should be noted that while the seller is permitted to meet local competition, it does not permit him to cut local prices *until his competitor has first offered lower prices*, * * * In other words, the proviso permits the seller to meet the price *actually previously offered* by a local competitor * * *." H.R. Rep. 2287, 74th Cong., 2d Sess., p. 16. (Emphasis supplied.)

In commenting on the Section 2(b) defense, Mr. Chief Justice Stone, in *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945) stated:

* * * The good faith of the discrimination must be shown in the face of the fact that the seller is aware that his discrimination is unlawful, unless good faith is shown, and in circumstances which are peculiarly favorable to price discrimination abuses. We agree with the Commission that the statute

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at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor * * *. 324 U.S. at 759-760.

In a case where a proponent of the Section 2(b) defense wholly fails to show any prior knowledge of the acts of his competitor which he purports to be meeting, we conclude that the element of good faith is lacking. The meeting competition defense does not sanction the fortuitous meeting of competition which occurs when the manufacturer discriminates and then in hindsight points to the previously unknown fact that another was granting similar allowances at the same time. The absence of even a scintilla of evidence showing that the proponent of the defense was in some manner aware of its competitors' acts, which it was supposedly meeting, clearly precludes a finding of the good faith responsiveness required by this defense.

In the instant case, several witnesses testified that the practice of cooperative advertising was prevalent throughout the brassiere industry. Many brassiere manufacturers utilized plans similar in some of their terms to respondent's and some had furnished allowances to the stores receiving allowances from Exquisite. Through a search conducted in 1962 by a newspaper clipping service, Exquisite determined the dates on which seven retailers receiving its allowances heretofore determined to be discriminatory had placed newspaper advertisements during the years 1955, 1956 and 1957, featuring the products of other brassiere manufacturers.¹¹ Although the evidence does not clearly so establish, it appears that these advertisements, which comprise the bulk of respondent's exhibits pertaining to the meeting competition defense, were cooperative in nature, and we will so assume for the purposes of this opinion. Respondent's counsel has incorporated these advertisements into a table, attached hereto as an appendix [page 295, 296 herein], and arranged them so that each Exquisite advertisement placed by these seven retailers is antedated by one of the above advertisements featuring the products of other manufacturers. Respondent urges that said table, admittedly the result of an *ex post facto* search, establishes

¹¹ The seven retailers were Lady Rose and Quackenbush's in Paterson, Tepper's and Rosenbaum's in Plainfield, and Lit Brothers, Nevius Voorhees, and Yards in Trenton. The clipping service was instructed to " * * * look for ads for Quackenbush, Lady Rose, Tepper's, Rosenbaum, and Lit Brothers that contained brassiere advertisements promoting competitive brands as close as possible in date to specific dates of Exquisite Form ads"

* * * * *

"If there was an Exquisite Form ad in the record for Quackenbush on May 5, 1957, * * * start in with the May 5, 1957 newspaper in Paterson and work forward and backward from that date until he came to a Quackenbush brassiere ad that was either Maidenform or Playtex or these other manufacturers."

that its own advertisements were furnished to meet the specified advertisements of its competitors, and requests us to so find.

We are unable to accept this contention. In the first place, there is considerable doubt as to whether respondent was actually in competition with some of the manufacturers whose advertisements it was purportedly meeting. The president of Lily of France, Inc., testified that his company, a producer of quality products, was in competition with Exquisite, which marketed less expensive products, only in the "broad sense of the word." The president of Warner Brothers stated that his company competed with Exquisite only in Warner's lower priced line. A vice president of Peter Pan Foundations testified that his company specialized in preshaped, padded brassieres, a type not marketed extensively by respondent, and thus sold to a different class of customers. Further, there was no evidence at all indicating the extent of competition between Exquisite and Carnival, Do-All, Goddess, Surprise, Breathin Bra, and Lilyette, all of which placed cooperative advertisements purportedly met by Exquisite.

Even if we assume that Exquisite is generally in competition with all brassiere manufacturers, irrespective of the diverse types and prices of brassieres produced, we are unable to accept the contention that there was a meeting of the listed competitors' advertisements. A search of the entire record fails to reveal either pertinent evidence or an offer of such evidence indicating that respondent was in any manner aware of these particular advertisements of its competitors when its own allowances were granted. Exquisite contends that there was an offer of such proof when, after the record had been closed at the conclusion of the hearing on remand, it moved to reopen to permit it to " * * * adduce direct evidence of Respondent's foreknowledge of the various competing cooperative advertising plans in response to which Respondent's own plans and programs were administered * * *." In support of this motion, Exquisite contended that the element of foreknowledge had been added to the Section 2(b) defense subsequent to the closing of the record by our opinion in *Forster Mfg. Co.*, Docket No. 7207, 62 F.T.C. 852, 888, January 3, 1963. In correctly denying this motion, the examiner held that *Forster*, rather than establishing a new element, merely reiterated and clarified existing elements. Significantly, this motion was limited to evidence of foreknowledge of competitors' "cooperative advertising plans" and did not encompass the production of evidence showing an awareness of the *individual* promotional advertisements incorporated into the table currently under consideration.

Without connecting evidence showing an awareness of the enumerated competitors' advertisements and a genuine responsiveness

to them, respondent's table is inconclusive and might be rearranged to show that the majority of the competitors' advertisements were placed in response to those featuring respondent's products. For example, respondent contends that its cooperative advertisements placed by Lady Rose on October 16, 1956, and November 18, 1956, were responsive to those featuring Playtex products placed by Lady Rose on July 18, 1956, and August 16, 1956. However, with nothing more than the bare advertisements to support this contention, it could just as validly be argued that Playtex's advertisement of August 16, 1956, was placed in response to the advertisement featuring Exquisite products which appeared on May 30, 1956, and that Playtex's advertisement of July 18, 1956, appeared in response to Exquisite's of May 10, 1956. A similar rearrangement could be made with the remainder of the table. A finding, therefore, that Exquisite's allowances were furnished to meet the competitive challenge of the competitors' advertisements specified by respondent in the table would, of necessity, be predicated upon sheer speculation. Accordingly, we conclude that respondent's exhibits, as summarized in its table, fall far short of establishing that the discriminatory allowances furnished to the seven named retailers were granted in a good faith response to the enumerated competitors' advertisements.

Moreover, the record is devoid of evidence indicating that the respondent, as a matter of practice and policy, regularly made itself aware of competitors' specific cooperative advertisements and attempted, through allowances, to place similar advertisements of its own in response. At the second hearing, an Exquisite salesman testified that *if* he saw a customer engaging in cooperative advertising with a competitor, he attempted to persuade such customer to advertise Exquisite's products in a similar manner. However, this salesman dealt only with small accounts and was unable to recall any specific instance in the relevant area wherein he had persuaded or attempted to persuade a customer to engage in advertising with respondent. It was stipulated that a second salesman, if called, would testify in a similar manner. No further evidence of this nature was adduced.

In addition, respondent offered nothing to show that the individual discriminatory allowances furnished The Caroline Shop, The Mart, Goldberg's, and Jay Ann's in Paterson, New Jersey, were good faith attempts to meet competition.¹² Accordingly, we do not feel that respondent has shown in this record that those individual instances of discrimination in which the cooperative advertising allowance

¹² See n. 6, *supra*.

was granted to some customers but not to their competitors and in which there were deviations from the cooperative plan in computing payments were in fact genuinely responsive to any particular competitor's advertisements or were made in good faith to meet the services or facilities furnished by a competitor. The prima facie case relating to these individual instances of discrimination, heretofore affirmed by the Commission and the court of appeals, stands un rebutted. Our conclusion on this point is independent of our reconsideration of the propriety of adopting an intrinsically discriminatory plan in its totality in an attempt to meet other plans in the industry and is unaffected by our decision on this latter question.

We turn now to the question of whether the examiner's finding that respondent's cooperative advertising plan was inherently discriminatory may be excused by proof that the plan as a whole was adopted in a good faith attempt to meet the competitive challenge imposed by other plans prevailing in the industry. The courts have consistently emphasized that the meeting competition defense does not provide a defense to general systems of competition and is applicable only in individual competitive situations. In *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945), Mr. Chief Justice Stone commented:

* * * § 2(b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's "lower" price and of that only to the extent that it is made "in good faith to meet an equally low price of a competitor." *The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition.* 324 U.S. at 753. (Emphasis supplied.)

Accord, *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419 (1957), and *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948). This Commission has consistently held that a system of price discrimination adopted as a general competitive measure to secure a larger share of the market and unrelated to a particular competitive situation is not within the protection of the Section 2(b) defense. In *E. Edelman & Company*, 51 F.T.C. 978 (1955), the Commission stated:

* * * Furthermore, as found in the initial decision, respondent's pricing system is a continuing one related not to existing competition but to future competition. It is not geared to individual competitive offers or localized price cutting, but instead represents a nationwide system designed to come close enough to its two principal competitors' pricing systems to allow it to retain most of its customers and gain perhaps a few more. The exemption provided under Section 2(b) places emphasis, however, on individual competitive situations rather than upon a general system of competition. *F.T.C. v. A. E. Staley*

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Mfg. Co., 324 U.S. 746. * * * 51 F.T.C. at 1006, 1007. *Aff'd*, *E. Edelman & Company v. Federal Trade Commission*, 239 F. 2d 152 (2d Cir. 1956), *cert. denied*, 355 U.S. 941 (1958).

In *C. E. Niehoff & Co.*, 51 F.T.C. 1114 (1955), the Commission commented in like manner.

* * * The initial decision correctly found that respondent's price differentials are a part of a nationwide pricing system formulated to meet competition generally and not designed to meet exactly any competitor's prices.

* * * We do find, however, that a pricing program which provides for an inherent pattern of discrimination among competing customers and is geared generally to competing for business and not specifically for meeting competing prices is not within contemplation of this defense. Respondent has not shown by substantial, reliable and probative evidence on this record that its lower price or prices were made to meet an equally low price or prices of a competitor or competitors. 51 F.T.C. at 1146, 1147. Commission's order modified, *C. E. Niehoff & Co. v. Federal Trade Commission*, 241 F. 2d 37 (7th Cir. 1957); Commission's order affirmed in entirety, *Federal Trade Commission v. C. E. Niehoff & Co.*, 355 U.S. 411 (1958).

Moreover, in instances where a respondent's attempts to meet competition undercut or go beyond those of his competitors and are more discriminatory toward a certain class or more favorable toward another class, they cannot be excused under the meeting competition defense. *Cf. Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951).

In the instant case, the respondent, in support of its contention that its cooperative advertising plan was adopted in response to other plans, placed in evidence the terms of the plans of seven other brassiere manufacturers.¹³ As previously noted, there is some question as to the degree of competition between respondent and some of these manufacturers. However, for the purposes of this opinion, we assume that Exquisite competed with all of these manufacturers. We further assume, in view of the respondent's motion to reopen the record to allow it to adduce direct evidence of its foreknowledge of its competitors' cooperative advertising plans, that it possessed such knowledge of the particular terms of these various plans during the years relevant to this case.

The vice in respondent's cooperative advertising plan was its pronounced favoritism of larger retailers and its affirmative exclusion of smaller ones. This tendency was manifested in three of its features. First, the requirement that the advertisements be of a certain minimum size—four hundred lines prior to January 26, 1956, and two hundred lines thereafter—operated effectively to prevent the

¹³ For a chart summarizing the terms of these plans, see the Revised Initial Decision After Remand, p. 274.

small retailer unable to advertise on such a grandiose scale from receiving allowances. Secondly, the graduated increases in the percent paid for each advertisement as a result of numerous successive advertisements favored the large retailer able to advertise frequently, and discriminated against the medium-sized and smaller retailers who were not able to advertise with the same degree of frequency. For example, a retailer able to place four or more two-hundred-line advertisements within a three-month span early in 1957 would have received payment for eighty percent of the cost of each. A smaller retailer financially able to place only two such advertisements during the same period would have received payment for only sixty percent of the cost of each. Finally, respondent placed no limit on the maximum amount it would pay any retailer during a given interval, while all other plans provided that the maximum amount granted was a fixed percentage of the retailer's purchases. Respondent's plan is thus obviously weighted in favor of the larger retailer and operates affirmatively to exclude from its benefits small retailers.

Some of respondent's competitors' plans utilized minimum participation requirements which had the capacity to exclude small retailers, while others possessed features which favored the larger retailer able to advertise extensively. However, none of these plans employed as many discriminatory features simultaneously as did respondent's. For example, although Jantzen did not require that the advertisements placed be of a specified size, qualification for participation in Jantzen's plan during the relevant years was limited to those merchants who purchased a specified dollar value of Jantzen products. This amount was \$500 in 1955, \$750 during part of 1956, and \$1,000 during 1957. Although this feature doubtless operated to exclude some small retailers, Jantzen did not at the same time favor the larger retailers by increasing the percentage paid for each advertisement when successive advertisements were placed. Regardless of the number placed, Jantzen never paid more than fifty percent of the cost of each advertisement. Further, the maximum amount paid to any single merchant was limited to five percent of that merchant's purchases over a six-month period.

Maidenform's regular plan provided for payment of fifty percent of all advertisements regardless of the size of the advertisement or the previous purchases of the retailer. In June of 1955, Maidenform put into effect a supplemental plan, which functioned concurrently with the regular plan, providing for the payment of seventy-five percent of all advertisements if at least four, four-hundred-line advertisements were placed within a six-month span. The supplemental plan was discontinued in December of 1955 and reinstated

in June of 1957. Exquisite's similar lineage requirement and its offer to pay increasing percentages of the cost of each advertisement when a specified number of supplemental advertisements were placed were operational in August of 1954. Accordingly, there can be no contention that these features of Exquisite's plan were adopted to meet Maidenform's supplemental plan, which, as previously stated, became effective in June of 1955.

Two other plans utilized features with a capacity to favor larger retailers. On accounts over \$2,500, Lovable awarded certain cash refunds for any promotional purpose, while Playtex gave a six percent cash refund on purchases if the retailer's advertisements totaled at least six percent of the purchases. However, these plans did not simultaneously exclude the small retailer from all benefits by the adoption of requirements that the advertisements be of a minimum size or that the advertising retailer purchase a minimum amount of products. Further, each imposed a ceiling on the amount which would be paid any single merchant.

Considered in its entirety, therefore, respondent's plan went further than any of the plans of its competitors in its discriminatory aspects. The comprehensive effect of respondent's plan was that of greater favoritism toward large retailers and greater exclusion of small retailers than the plan of any other single competitor. Respondent offered no evidence showing the necessity for adopting a plan of such discriminatory proportions. By exceeding the plans of its competitors in total discriminatory effects, therefore, respondent in essence "beat" rather than met those plans. This is a factor which must be considered in determining whether the plan was adopted in good faith to meet the plans of competitors. *Cf. Standard Oil Co. v. Federal Trade Commission, supra.*

Moreover, respondent's plan was not in any sense of the word responsive to an individual competitive situation. It was operative on a nationwide scale, and was permanent and continuing in nature. Respondent did not make the plan available on an individual basis by offering its benefits solely in particular instances where liberal benefits had been awarded retailers as the result of competitors' plans. It is obvious that the terms of the plan were not formulated to meet the particular terms of another brassiere manufacturer's plan. Respondent's alterations of its terms were not related to changes in other plans. In short, irrespective of the definition of the term, Exquisite's plan was not a response to an individual competitive situation.

Finally, there is every indication that respondent's discriminatory plan, rather than being an effort to retain existing business by meeting competitive offers, was instead an aggressive, competitive measure designed to attract additional business and enhance respondent's position in the market. Factors previously discussed, such as the terms of the plan and its total discriminatory effect, support this conclusion. Further, an Exquisite executive used language in a press release, offered by respondent "for what it was worth", indicating that the company prided itself on being a leader in the cooperative advertising field. There it was said:

Exquisite Form, with the largest national magazine and cooperative local newspaper advertising program in the industry, seeks to expand its newspaper advertising, not to cut it. To this end, it has always granted the most generous cooperative advertising allowances in the industry.

* * * * *

The traditional position of Exquisite Form since the founding of the company, has been to participate in the full cost of cooperative advertising with its customers * * *

Accordingly, Exquisite Form is now pleased to announce its return to policies which have enabled it, and its retailers to flourish.

In addition, there was evidence that Exquisite was the first to employ the innovation of paying production costs when a retailer elected to design his own advertising formats rather than using those provided for him.

We conclude, therefore, that respondent's plan was not adopted in good faith to meet the services or facilities furnished by a competitor, and thus was not excusable under Section 2(b). This conclusion is not predicated upon any single factor, but is the result of a consideration of the entire record and all of the above-mentioned factors. Where our findings in support of this conclusion differ from those of the examiner, his findings are not adopted. Specifically, we find it unnecessary to reach the question of whether the plans of respondent's competitors were themselves intrinsically discriminatory and hence could not be lawfully emulated. Accordingly, we do not adopt the examiner's findings and conclusions relating thereto.

Respondent asserts that it was denied due process of law in several particulars. Essentially, this objection is predicated upon an allegation that the length of time between the two hearings made the production of evidence difficult and upon the examiner's refusal to re-call at Commission expense all of complaint counsel's witnesses

whose testimony supported the Section 2(d) charge so that respondent could cross-examine them to establish in part the meeting competition defense. Contrary to respondent's contention, we are not of the opinion that the interval between the two hearings is grounds for dismissal of the charges. Further, without deciding whether a respondent has the right to develop an affirmative defense, such as the meeting competition defense, through cross-examination of complaint counsel's witnesses, we do not believe that the instant respondent could have supplied the missing elements of its defense by a cross-examination of these particular witnesses. Accordingly, we reject respondent's contention of procedural unfairness. Respondent also asserts that the push money charge must be dismissed because the amount paid was small and when considered in isolation would seem to be *de minimis*. This payment was part and parcel of sales transactions and other advertising grants to this favored retailer which were clearly not *de minimis*. When considered thusly, we conclude that jurisdiction was established and that this incident was amenable to a charge under Section 2(d).

In conclusion, we desire to state that this opinion must not be interpreted as a condemnation of cooperative advertising nor as the placing of an impossible burden of proof upon the proponent of a Section 2(b) defense. Instead, we emphasize that the manufacturer engaging in advertising must do so through a comprehensive, non-discriminatory program containing reasonable alternatives for those small retailers unable to participate in cooperative newspaper advertising. Such a program must not favor the large retailer and should provide for the small retailer some sort of financial aid in methods of advertising economically available to him. Further, the plan, with its alternatives, must be uniformly offered in its entirety to all competing retail customers. Once such a comprehensive program has been established, deviations from it in the form of more generous allowances may be excused in individual instances shown to be good faith attempts to meet promotional allowances furnished by competitors. Considered in its entirety, the evidence of record herein utterly failed to indicate that such was the case with respondent.

For the aforementioned reasons, an order will issue adopting the examiner's Revised Initial Decision After Remand, except as herein modified, and reinstating the order to cease and desist contained in the original initial decision adopted by the Commission on October 31, 1960. Rules of Practice, § 3.24(b), 28 F. R. 7080, 7091 (July 11, 1963).

Commissioners Anderson and Elman concurred in the results.

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APPENDIX

RESPONDENT'S TABLE OF INDIVIDUAL COOPERATIVE ADVERTISEMENTS

Exquisite Form ads			Prior competitors' ads		
Name of store	Source	Date	Date	Brand	Source
Lady Rose.....	Tr. 72.....	4/ 6/55	3/10/55	Peter Pan.....	Ex. 62.
"	Tr. 72.....	4/ 7/55	3/10/55	Lilyette.....	Ex. 63.
"	Tr. 72.....	11/17/55	10/13/55	Maidenform.....	Ex. 64.
"	Ex. 14C.....	3/29/56	10/19/55	Playtex.....	Ex. 37.
"	Ex. 14C.....	4/18/56	12/ 5/55	Playtex.....	Ex. 36.
"	Ex. 14C.....	5/10/56	12/13/55	Peter Pan.....	Ex. 65.
"	Ex. 14C.....	5/30/56	12/29/55	Carnival.....	Ex. 66.
"	Ex. 14C.....	8/23/56	3/15/56	Carnival.....	Ex. 67.
"	Ex. 14C.....	8/30/56	4/ 5/56	Do-All.....	Ex. 68.
"	Ex. 14C.....	9/13/56	4/24/56	Peter Pan.....	Ex. 69.
"	Ex. 14C.....	9/27/56	5/17/56	Carnival.....	Ex. 70.
"	Ex. 14C.....	10/16/56	7/18/56	Playtex.....	Ex. 71.
"	Ex. 14C.....	11/18/56	8/16/56	Playtex.....	Ex. 72.
"	Ex. 14C.....	11/29/56	9/20/56	Carnival.....	Ex. 73.
"	Ex. 14C.....	12/12/56	12/ 5/56	Playtex.....	Ex. 74.
"	Ex. 14C.....	1/16/57	12/ 6/56	Playtex.....	Ex. 39.
"	Ex. 14C.....	1/ 3/57	12/13/56	Carnival.....	Ex. 75.
"	Ex. 14C.....	3/ 4/57	12/26/56	Peter Pan.....	Ex. 76.
"	Ex. 14C.....	4/ 4/57	3/ 7/57	Playtex.....	Ex. 35.
"	Ex. 14C.....	4/17/57	3/11/57	Playtex.....	Ex. 77.
"	Ex. 14C.....	5/16/57	3/21/57	Playtex.....	Ex. 34.
"	Tr. 73.....	12/ 4/57	4/24/57	Playtex.....	Ex. 33.
"	Tr. 73.....	12/ 4/57	5/16/57	Do-All.....	Ex. 78.
Quackenbush.....	Tr. 154.....	12/12/55	11/21/55	Maidenform.....	Ex. 124.*
"	Ex. 14C.....				
"	Tr. 167.....	4/ 9/57	3/19/57	Maidenform.....	Ex. 45.
"	Tr. 167.....	6/11/57	5/13/57	Formfit.....	Ex. 46.
"	Tr. 167.....	6/18/57	5/20/57	Maidenform.....	Ex. 47.
"	Ex. 14C.....	8/16/57	5/21/57	Formfit.....	Ex. 48.
"	Ex. 14C.....	8/30/57	5/27/57	Playtex.....	Ex. 42.
"	Ex. 14C.....				
"	Tr. 166.....	9/ 4/57	6/13/57	Playtex.....	Ex. 38.
"	Tr. 166.....	9/ -/57	6/19/57	Peter Pan.....	Ex. 49.
Teppers.....	Tr. 185.....	10/ 3/55	9/21/55	Warner.....	Ex. 58.
"	Tr. 182.....	11/13/57	9/19/57	Goddess.....	Ex. 61.
Rosenbaum.....	Ex. 16B.....	11/20/56	6/ 7/56	Formfit.....	Ex. 88.
"	Ex. 16B.....	11/29/56	6/11/56	Surprise.....	Ex. 89.
"	Ex. 16B.....	12/ 4/56	6/21/56	Playtex.....	Ex. 90.
"	Ex. 16B.....	5/16/57	9/10/56	Playtex.....	Ex. 91.
"	Ex. 16B.....	6/17/57	9/18/56	Playtex.....	Ex. 92.
"	Ex. 16B.....	7/ 2/57	10/ 9/56	Formfit.....	Ex. 93.
"	Ex. 16B.....	7/ 3/57	10/23/56	Formfit.....	Ex. 94.
"	Ex. 16B.....	7/16/57	11/12/56	Formfit.....	Ex. 95.
"	Ex. 16B.....	10/8 /57	3/ 7/57	Formfit.....	Ex. 96.
"	Ex. 16B.....	10/14/57	4/16/57	Maidenform.....	Ex. 97.
"	Ex. 16B.....	10/15/57	8/27/57	Formfit.....	Ex. 98.
Lit Brothers.....	Tr. 242.....	7/21/55	5/11/55	Breathin Bra.....	Ex. 125.*
"	Tr. 242.....	9/18/55	6/15/55	Lilyette.....	Ex. 104.
"	Tr. 245.....	4/ 4/56	8/ 3/55	Peter Pan.....	Ex. 105.
"	Ex. 15D.....	4/24/57	2/28/56	Playtex.....	Ex. 105a.
"	Ex. 15D.....				
"	Tr. 245.....	5/ 5/57	3/15/56	Breathin Bra.....	Ex. 106.
"	Ex. 15D.....				
"	Tr. 245.....	6/23/57	4/10/57	Breathin Bra.....	Ex. 107.
"	Ex. 15D.....	8/ 4/57	5/22/57	Breathin Bra.....	Ex. 108.
"	Tr. 245.....	8/ 8/57	6/ 5/57	Surprise.....	Ex. 109.
"	Ex. 15D.....	9/ 8/57	8/21/57	Maidenform.....	Ex. 110.
"	Tr. 245.....	9/ 9/57	9/ 4/57	Maidenform.....	Ex. 111.
"	Tr. 245.....	11/17/57	10/ 2/57	Sarong.....	Ex. 126.*
"	Tr. 433.....	11/25/57	10/27/57	Peter Pan.....	Ex. 112.
Nevius Voorhees.....	Ex. 15C.....	3/ 4/56	2/17/56	Warner.....	Ex. 99.
"	Ex. 15C.....	4/ 9/56	3/19/56	Lilyette.....	Ex. 100.
"	Ex. 15C.....	5/14/56	4/20/56	Maidenform.....	Ex. 101.
"	Ex. 15C.....	6/25/56	5/ 8/56	Warner.....	Ex. 102.
"	Ex. 15C.....	3/22/57	1/ 6/57	Lilyette.....	Ex. 103.
"	Ex. 15C.....	4/24/57	2/21/57	Lily of France.....	Ex. 103a.
Yards.....	Ex. 15C.....	3/23/56	12/ 1/55	Bali.....	Ex. 127.*
"	Ex. 15C.....	3/18/57	2/14/56	Formfit.....	Ex. 113.
"	Ex. 15C.....	4/ 3/57	2/ 3/57	Playtex.....	Ex. 31.
"	Ex. 15C.....	5/14/57	2/14/57	Bali.....	Ex. 113a.
"	Ex. 15C.....	6/20/57	2/28/57	Jantzen.....	Ex. 113b.
"	Ex. 15C.....	8/18/57	3/ 7/57	Perma-lift.....	Ex. 114.
"	Ex. 15C.....	8/27/57	4/ 2/57	Warner.....	Ex. 115.
"	Ex. 15C.....	9/30/57	5/ 7/57	Jantzen.....	Ex. 116.

See footnote at end of table.

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APPENDIX

RESPONDENT'S TABLE OF INDIVIDUAL COOPERATIVE ADVERTISEMENTS—COL.

Exquisite Form ads			Prior competitors' ads		
Name of store	Source	Date	Date	Brand	Source
Yards	Ex. 15C.....	10/17/57	5/14/57	Perma-lift.....	Ex. 117.
"	Ex. 15C.....	11/ 7/57	8/ 8/57	Perma-lift.....	Ex. 118.
"	Ex. 15C.....	11/26/57	9/ 9/57	Perma-lift.....	Ex. 119.
"	Ex. 15C.....	11/28/57	9/17/57	Bali.....	Ex. 120.
"	Ex. 15C.....	12/ 5/57	9/23/57	Playtex.....	Ex. 32.
"	Ex. 15C.....	12/ 9/57	10/18/57	Bali.....	Ex. 121.

* Respondent's Exhibits 124, 125, 126 and 127 were offered, pursuant to a motion to reopen the record, after the official closing of the record on February 9, 1963.

FINAL ORDER

This matter having been heard by the Commission on exceptions to the hearing examiner's Revised Initial Decision After Remand, issued March 15, 1963, and upon briefs in support thereof and in opposition thereto, and the Commission having rendered its decision denying said appeal:

It is ordered, That the examiner's Revised Initial Decision After Remand, as modified in the attached opinion, be, and it hereby is, adopted as the decision of the Commission.

ORDER

It is ordered, That respondent Exquisite Form Brassiere, Inc., a corporation, its officers, directors, representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale of brassieres in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

1. Paying, or contracting to pay to or for the benefit of any customer, an advertising allowance, push money or anything of value as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of respondent's products, unless such payment or consideration is offered and otherwise made available on proportionally equal terms to all other customers competing in the distribution or resale of such products;

2. Discriminating, directly or indirectly, among competing purchasers of its products, by contracting to furnish, furnishing, or contributing to the furnishing of the services of stylists or any other services or facilities connected with the processing, handling, sale or offering for sale of respondent's products, to

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any purchaser from respondent of such products bought for resale, unless such services or facilities are offered and otherwise made available on proportionally equal terms to all purchasers competing in the distribution or resale of such products.

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

By the Commission, Commissioners Anderson and Elman concurring in the result.

IN THE MATTER OF
IDEAL TOY CORPORATION

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

Docket 8530. Complaint, Sept. 12, 1962—Decision, Jan. 20, 1964

Order requiring a distributor of toys in Hollis, N. Y., to cease representing falsely by means of television commercials that its toy "Robot Commando" would perform acts as directed by vocal commands, including moving forward, turning, firing a "missile" and firing a "rocket".

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 Ideal Toy Corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent 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 184-10 Jamaica Avenue, Jamaica, Long Island, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of toys and related products, including toys designated "Robot Commando" and "Thumbelina" doll, to distributors and retailers for resale to the public.

any purchaser from respondent of such products bought for resale, unless such services or facilities are offered and otherwise made available on proportionally equal terms to all purchasers competing in the distribution or resale of such products.

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

By the Commission, Commissioners Anderson and Elman concurring in the result.

IN THE MATTER OF
IDEAL TOY CORPORATION

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
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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 Ideal Toy Corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent 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 184-10 Jamaica Avenue, Jamaica, Long Island, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of toys and related products, including toys designated "Robot Commando" and "Thumbelina" doll, to distributors and retailers for resale to the public.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said toys and related products, including its said "Robot Commando" and "Thumbelina" doll, when sold, to be shipped from its place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

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

PAR. 5. In the course and conduct of its business and for the purpose of inducing the purchase in commerce of the said "Robot Commando" and "Thumbelina" doll respondent made certain statements, representations and pictorial presentations with respect thereto by means of commercials transmitted by television stations located in various States of the United States and in the District of Columbia having sufficient power to carry such broadcasts across State lines.

PAR. 6. Through the use of aforesaid advertisements, and others containing statements and representations of the same import not specifically set forth herein, respondent has represented, directly and by implication:*

1.(a) That "Robot Commando" will perform an act and a series of acts as directed by commands given vocally (See exhibits "A" and "B"). These acts include:

- (1) Moving forward;
- (2) Turning (See exhibits "C" and "D");
- (3) Firing a "missile" (See exhibit "E");
- (4) Firing a "rocket" (See exhibit "F"); and

(b) That "Robot Commando" as packaged and sold to the purchasing public is operable in the manner depicted in the television advertising, without additional components.

2. That "Thumbelina" doll moves from one side to the other (See exhibits "G" and "H"), and moves its arms apart while lying on its side (See exhibits "I" and "J").

PAR. 7. Enlargements of individual frames extracted from said television commercials, illustrating typical representations with re-

* Pictorial exhibits "A", "B", "C", "D", "E", "F", "G", "H", "I", and "J" are omitted in printing.

spect to the manner in which the said "Robot Commando" and "Thumbelina" doll purport to perform, as alleged in Paragraph 6 above, are attached hereto, marked exhibits "A" to "J", inclusive, and incorporated herein by reference.*

PAR. 8. In truth and in fact:

1. Each act performed by "Robot Commando" is governed by the manual setting of a control on the said toy. The toy will perform only that act for which the controlling device has been manually set. The initial action of the toy is commenced by blowing into a microphone. The sound of the voice, unless accompanied by the action of blowing into the microphone, will not commence the toy's action. Furthermore, the control must be manually changed after the performance of any one act before the toy will perform a different act and the sound of the voice itself, or as part of the action of blowing, will not cause the toy to change from one action to another.

"Robot Commando" is not, as depicted, a moving toy, and is not operable in the manner depicted in the television advertising, unless batteries, which are not included in the toy as packaged and sold to the purchasing public, are separately obtained and added thereto.

2. "Thumbelina" doll does not move from one side to the other and does not move its arms apart while lying on its side in the manner depicted.

Therefore, the statements, representations and depictions referred to in Paragraphs 5 and 6 are false, misleading and deceptive.

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

* Pictorial exhibits "A" to "J" are omitted in printing.

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

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

Mr. Berryman Davis and *Mr. Walter T. Evans* of Washington, D.C., for the Commission.

Regan, Goldfarb, Powell & Quinn of New York, N.Y., by *Mr. Sidney P. Howell, Jr.*, of counsel, for the respondent.

INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER

JANUARY 20, 1964

The respondent, Ideal Toy Corporation, is engaged in the manufacture, sale and distribution of toys. It is charged under Section 5 of the Federal Trade Commission Act with having engaged in false, misleading and deceptive representations in its television advertising of two toys:—one, a somewhat complex apparatus having, generally, the appearance of a strangely grotesque mechanical man with moving arms and opening head or turret on a rolling and legless base, called Robot Commando; the other, a doll, Thumbelina, rather life-like in texture or appearance to the touch, and in design or form like a baby.

The alleged deceptive practices as far as Robot Commando is concerned are three, (1) that the respondent represented falsely that Robot Commando would perform certain acts to which reference will be made below when instructed so to do vocally, that is to say, merely by use of the voice, (2) that the advertising deceptively made it to appear that the toy was autonomous by showing it in operation and not disclosing that batteries were necessary to provide the power necessary for its operation, and (3) by failing to disclose that the batteries had to be purchased separately from and in addition to the purchase of the package in which the toy was contained.

As to the doll, it is charged that the television presentation advertising Thumbelina made it appear that it moves from one side

to the other and moves its arms apart while lying on its side, when, in fact, Thumbelina "does not move from one side to the other and does not move its arms apart while lying on its side in the manner depicted".

Robot Commando is controlled and operated from a device which resembles a microphone connected to the toy by a flexible insulated cable. It is intended that this device be held in the hand like a microphone. The following illustration of the device is from the literature accompanying the toy.*

In addition to this manual device, batteries must be installed in the toy itself. The first step necessary to initiate any movement is to push from right to left (or from "Off" to "On") the horizontal control bar which is within the device just under the instruction, "Push Control Bar". The mere pushing of this bar from "Off" to "On" is not sufficient to cause movement because an additional electrical contact must be made. This contact is made when a blast of breath is blown in the direction of and at a diaphragm located within the device behind the ornamental grillwork. Once this contact is made, the toy will operate and perform,—turning left, moving forward, turning right, firing missiles or firing a rocket,—each performance being effectuated by moving another control, this time the button, which, by turning on a vertical ratcheted track in a slot, moves up or down to any of the indicated positions,—"Turn Left", "Forward-Forward", "Turn Right", "Fire Missile", or "Fire Rocket".

It is necessary to blow only once. Once the final contact is made, no additional blowings are necessary, provided that the horizontal slide control bar is not pushed back to the right side, on "Off".

The toy is quite attractive and striking to the imagination, particularly to that of children and possibly adults as well. The commands, when activated as related, are obeyed and executed by Robot Commando in that it will move forward, it will move to the left, it will move to the right, and it will fire missiles and a rocket (provided, of course, that the person or child using it remembers to put the missiles and rocket into the receptacles designated for them). On the other hand, the voice command has nothing at all to do with these activities. This is only "window dressing" which serves to give the child a feeling of power or control or mastery. It is a sort of play-acting or fantasy, not uncommon to children or even some if not many adults.

Missiles resembling cannon balls are caused to be propelled through the air in a sort of upward course until their apogee is reached, from which they then descend toward the floor continuing on their

* Illustration of the device is omitted in printing.

course until they hit or happen to strike something which intercepts their movement. This propulsion is caused by the jerky turning and complete revolution of each of the arms of Robot Commando. The missiles or balls are inserted in the arms at the shoulders. At the tip of each of the arms there is an open-end box or receptacle into which the missiles or balls then fall. As the arms make their complete and jerky revolution, the centrifugal force of the turning ejects the balls or missiles at about the time that the turn-arounds point the arms upward.

The rocket (provided of course, that it has been set into the head or top portion of Robot Commando) is propelled upward until it reaches its apogee and then it, too, follows the curved course started and ultimately drops to the floor, unless it strikes an article which happens to get in or is placed in its way.

Respondent has advertised this toy extensively on television. The alleged deceptive representations are contained in an audio-video transcription which was run from about September 16, 1961 until about November 20, 1961, at which time there was a change. It is possible that this particular transcription could have been used by some television stations for a fringe period after November 20, 1961. The evidence is that complete replacement would have been accomplished everywhere by December 1961 (Tr. pp. 15, 16). The entire country was pretty well covered by this broadcasting on television. About 20 or 25 major cities were the subject of concentrated coverage and it was carried on or in connection with two network programs (Tr. p. 17).

The hearing examiner viewed and heard this transcription several times during the hearing. He is of the opinion, and therefore finds, that the television script and picture definitely gave the viewer the impression that only the child's voice command is necessary to cause the toy to perform the acts mentioned and that it was offered for sale as a complete operating unit because, not only did it not make clear the need for batteries, it failed to disclose that the toy would not operate without the batteries which had to be purchased separately. These findings are made because it cannot be said that a toy is controlled merely by the voice when the real control is first the sliding of a bar from right to left to make the connection with the battery power, then the activation of the power by a fairly strong blowing or gust of breath against a diaphragm, and finally the sliding up or down of the button to the various command positions on the manual device. And, even if the viewer has caught the announcer's casual reference to Robot Commando as being "battery-operated" and thus knows that battery power is necessary, it is rea-

sonable to assume that the necessary batteries come along with the toy on purchase.¹ An advertiser is not required, as expostulated by respondent's attorney, to choose between advertising all acts or none, if the time limitation of the broadcast does not permit a complete demonstration. He is required only to refrain from depicting falsely or inadequately those acts which he chooses to show in the limited time available for the broadcast.

It seems hardly necessary to comment on the difference between a toy which can operate only on reception of a child's voice and a toy which has to be operated by a combination of electric power activated by batteries plus blowing and plus mechanical setting in the preset places for obtaining the desired action. Imagine the disappointment of both a parent or friend and the child, particularly the child who cannot read, who gets the toy either with or without the batteries and then says "Forward", "Left", "Right", "Fire" and nothing happens. Imagine the additional disappointment when it is found necessary to make another trip away from home to buy the batteries, if one had not, by the time of purchase, become aware that batteries were not included in the purchase.

Advertising such as this is deceptive. *Carter Products, Inc. v. F.T.C.*, 186 F. 2d 821. It ought not to be practiced by companies doing such a tremendous business as this respondent did all over the United States,² particularly when it was done just before Christmas, in September, October and November, November and December being the two months when 60 percent of the entire year's sales to consumers are made (Tr. p. 44).

To the credit of the respondent, it must be noted that it prepared new advertising promptly after it became aware of the deceptive

¹ The casual reference, "battery-operated to obey your command", is entirely lost to the viewer amidst the noise and vividness of the video presentation. As a matter of fact, the hearing examiner was completely unaware of it until his attention was directed to it by respondent's attorney in a post-hearing brief.

The entire audio with the changes in picture sequences indicated by the word "pause", was:

"MUSICAL SOUND EFFECTS (pause) ANNCR: (V.O.) Ideal's Robot Commando is here (to help you.) He's your one man army. (pause) No enemy can destroy him. He fights off tanks * * * (pause) hurls missiles * * * one after another * * * (pause) even a squadron of planes can't stop him. (pause) Robot Commando fires his secret weapon. (pause) He takes orders from no one except * * * (pause) you! (pause) BOY: (DIRECT) Forward! (pause) ANNCR: (V.O.) Ideal's Robot Commando is battery-operated to obey your command. (pause) Adjust the control * * * speak into the microphone. BOY: (DIRECT) Left! Fire! Fire! ANNCR: (V.O.) Ideal's Robot Commando is here (to help you.) (pause) Look for your Robot Commando. He's looking for you! (CX 1a 1b)".

² This should not be read as condoning deceptive advertising by small businessmen or those operating only locally; it is to be read as a factor showing large public interest. To paraphrase and distinguish the remark in *Exposition Press, Inc. v. F.T.C.*, 295 F. 2d 869, 873, this is not a case involving a toy at which the Commission's dynamite is aimed; it is a case involving a potentially worst deception at a critical buying time.

nature of this advertising.³ This was done either simultaneously with or within days before or after the first communication from the Federal Trade Commission indicative of the Commission's interest in the practice and its probable disapproval. (The precise time cannot be fixed because the testimony is to the effect that revision of this advertising, because of complaints, was already under way but not completed at the time when the Commission's investigating attorney first came to the respondent and made known the Commission's interest [Tr. pp. 134, 135, 147].) Respondent's new audio and video transcriptions do refer to the need for blowing, manual setting and batteries but this Hearing Examiner expresses no opinion as to the adequacy of these references. It should be observed also that respondent received a negligible number of complaints about the advertising and that, according to its attorney's argument, there may be a good and universally heeded reason for not packing batteries with toys. (He argued that batteries deteriorate with shelf age and any battery operated article always ought to be operated with fresh or live batteries [Tr. pp. 61-63, 152-155].) The fact that a negligible number of complaints was received is not evidence that there was no deception. This is not the test and is not a valid argument. Many people who are deceived or disappointed do not bother to complain. If, in fact, as this Hearing Examiner believes after viewing the evidence, the advertising is deceptive, the mere fact that customers who may have been deceived do not complain is not reason to excuse or condone the advertising.

The case as to the doll, Thumbelina, is not as sharply in focus as it is for Robot Commando. During the hearing, all the lawyers, respondent's vice president and the hearing examiner had ample opportunity to observe Thumbelina's action. It is operated by some sort of spring device which is incorporated in the body and attached inside its head. The spring is wound up by a knob located in the back and made perfectly visible and clear to the viewer. The winding-up of the spring, followed by its slow unwinding, causes the head to move about on a sort of eccentric. This moving about of the head draws up the body in writhings and contortions. By the combination of movement with the normal aid given to any object by gravitational force, Thumbelina, if it happens to be lying on its side, will turn or flop over and land on its back. If the arms are

³ This is true also with respect to the doll, Thumbelina. Because her action in the particular advertising under attack was so fortuitously favorable and did raise questions as to veracity, the respondent soon and before the first visit of the Commission's investigating attorney, prepared another film, not so fortuitously striking in doll action (Tr. pp. 124, 147).

first placed together, they tend to and do move apart during the course of the turning or writhing.

The question with which we are here concerned is whether it does these things in the manner in which the television presentation showed that they were done, or, as stated in the complaint, "*in the manner depicted.*" It is the Hearing Examiner's opinion, after both having viewed and heard the television presentation several times and played with the doll that the doll does not quite perform entirely in the manner shown in the television presentation.

As far as the arm movement is concerned, when the arms were together in the television presentation, they moved apart. This is what the doll actually does during its contortions, provided they are first placed together and not locked. Consequently, this particular portion of the complaint will not be sustained.

However, when the doll was lying on its side in the television presentation, it was shown to turn over. The portion of the presentation to which the charge is directed goes like this: After Thumbelina, the doll, is placed on the princess's bed lying on its right side, the princess lies down on the bed alongside of the doll, the doll then starts to turn off the right side toward the left and, as it approaches the left, it keeps going to a point about 120 degrees on the arc, at which time the princess takes hold of it and clasps it to her body in fond affection, bringing the doll to the full cycle (Tr. pp. 79-82). The advertising is clever and the result fortuitously striking, because it leaves the viewer with the distinct impression that a full 180 degree turn is one of the doll's accomplishments. The critical and analytical viewer will not be in doubt that when the princess lay down on the bed, she created somewhat of an incline which helped along the turning-over process. This was due to the resulting force of gravity, and this is precisely what would happen if a child, playing with the doll, went through the same performance under the same very favorable and carefully arranged conditions.

It is not suggested, and the hearing examiner does not believe, that any special device or "mock-up" was used to cause the doll to do what it would not do under the precise and favorable circumstances depicted in the broadcast. This, however, brings us squarely up against the situation suggested by the Court of Appeals in *Colgate-Palmolive Company v. Federal Trade Commission*, 310 F. 2d 89 at 91, where the Court said: "But, equally, should he (the advertiser) be allowed to use his own (dairy) cream if he knows that by the normal photographic process its color would be changed so as to appear substantially better on the screen than it was? We suspect the Commission would think it clear he could not." Although the

Court asked the question, it indicated approval of the probable action which it suggested the Commission could take by saying "We suspect the Commission would think it clear he could not." In this case, we now have reached the type of screen depiction anticipated by the Court. That this sort of deception was correctly anticipated is borne out by the facts of this case to which respondent's own vice president testified after being asked how he came to approve the broadcast if the doll did not, in fact, "move from its back to its left shoulder":

When I saw this commercial—and it is a lovely commercial—I was so impressed with the charm and the appeal that I think the commercial did portray, which the doll deserved, frankly, I just fell in love with it and I thought it would be the right thing for that particular doll. *I did question the last sequence because, as I explained, it would not do that turn on the table top.* When I was told about that by all who were involved at the commercial that the doll actually did do that, I accepted it. I was told by all who were there that I trust that the doll made this additional turn because the doll was in a bed and because of no other help. That being the case, I said fine, let's go with it * * * I did approve the commercial and we showed it to many people. We showed it to the National Association of Broadcasters. We showed it to the Columbia Broadcasting System, ABC, NBC and all the networks. Everyone approved the commercial. In fact, they all loved the commercial. They loved the doll. *There were questions asked about that last scene and I explained it just as I explained it here and they accepted the explanation as being authentic.* (Tr. pp. 102-104, emphasis added.)

In fairness to the respondent, it should be repeated here that this awareness of the deceptive nature of the telecast prompted the respondent ultimately to change the telecast of its own volition. Even though, as noted above, no special device or mock-up was used to cause the doll to do what it did in the telecast, the telecast gave the false impression that the doll could make a complete 180 degree turn. The temptation to take advantage of the accidentally favorable impression proved too great for the respondent, despite its high standards. This demonstrates the need for governmental sanctions to strengthen the will not to deceive. There is just as much a duty on the part of an advertiser not to create false impressions by failing to correct them when they accidentally are caused by fortuitous circumstances in the photographing process as it is his duty to refrain from creating the special circumstances or photographic props and mock-ups in a television presentation which will result in a false representation. To the extent, therefore, that it is charged that the doll was falsely depicted as making a complete turn from one side to the other, that portion of the charge will be sustained.

Respondent argues that, in any event, even if false representations are found, no order should be entered. In support, it lays great stress on (1) its complete cooperation with the Federal Trade Commission in its investigation, (2) its prompt correction on its own

initiative of the offensive or "doubtful" portions of the broadcasts and (3) its leadership and participation in self-policing activities by a special toy review board of the National Association of Broadcasters.⁴ These should not be minimized. In another situation this hearing examiner might have felt that an order to cease and desist ought not to be entered herein in view of all the considerations just mentioned. This would be particularly so if Federal Trade Commission orders were penal, which they are not.⁵ The hearing examiner is very much concerned with the fact that the toy industry is a most "sensitive to the Christmas season" industry. It does not take more than a few days in the short period before Christmas to grab off a proportionately large amount of business by just a little bit of deceptive television broadcasting. This sort of raid on susceptible buyers at a critical gift buying time must be eliminated. The Federal Trade Commission must not take a position in a "hard" case like this that a "one-shot" deception will be tolerated. "Hard cases make good law" and this is one of them. It is for this reason that in this particular case, bearing in mind the remedial nature of the legislation under which this proceeding is brought and the corrective measure available to stop this type of "hit and run" assault upon the public's buying impulses during critical buying seasons, the Hearing Examiner will enter an order to cease and desist by reason of the practices found to have been deceptive.

For completeness, I shall refer briefly to other arguments made on behalf of respondent. It is argued that the video shows the boy first setting the manual control before every change in Robot Commando's action. This is so but can be comprehended and understood only if the video is carefully analyzed after one's attention is directed to the fact that the boy's manipulation of the control device is not just a jerky movement but an operational activity. The claim "VOICE CONTROLLED" for Robot Commando is sought to be

⁴ An association of television stations, not advertisers.

⁵ As far back as the January term, 1843, Mr. Justice Story, in *Taylor v. United States*, 3 How. 197 at 210, 11 L. Ed. 559, 565, pointing to the fact that remedial legislation should be given liberal construction to effectuate its objectives said, "In one sense, every law imposing a penalty or forfeiture may be deemed a penal law: in another sense, such laws are often deemed and truly deserve to be called remedial. The judge was therefore strictly accurate when he stated that 'It must not be understood that every law which imposes a penalty is, therefore, legally speaking, a penal law, that is, a law which is to be construed with great strictness in favor of the defendant. Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in the strict sense, penal acts, although they may inflict a penalty for violating them.' and he added, 'It is in this light * * * I would construe them so as most effectually to accomplish the intention of the legislature in passing them.' The same distinction will be found recognized in the elementary writers, as for example in Blackstone's Commentaries * * * and Bacon's Abridgment * * * and Comyns' Digest * * * and it is abundantly supported by the authorities."

Findings

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justified by the strained argument that the electrical contact is made when the diaphragm is caused by a sharp blowing of breath to make the contact and, since breath is a component of voice, "voice must include the delivery of breath" and so the toy is voice controlled! By resorting to this argument, the respondent is pressing the processes of logical illation a little too far and, by doing so, it tends to obscure another element in this case,—the necessary manual setting of the button for each operation.

Careful consideration has been given to the proposed findings and conclusions submitted by counsel supporting the complaint and arguments, both written and oral, by counsel for the respondent. Many of the proposals have not been accepted or are considered by the Examiner to be substantially the same as findings above and ultimately made herein. To the extent that any proposed finding, conclusion or argument is not adopted, either directly or in substance, the same has been rejected because of irrelevance, immateriality, lack of support in the evidence, or as contrary to law or unnecessary. Any motion, the granting of which would be inconsistent with this decision, is denied.

The following are my ultimate

FINDINGS OF FACT

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

2. The principal office and place of business of the respondent is 184-10 Jamaica Avenue, Hollis, New York.

3. Respondent is now, and for some time last past, has been, engaged in the advertising, offering for sale, sale and distribution of toys and related products to distributors and retailers for resale to the public. Among these toys are included those named "Robot Commando", a mechanical warrior, and "Thumbelina", a doll.

4. Respondent's gross sales for the year 1961 exceeded \$30,000,000, of which almost 10% were attributable to Robot Commando and more than 10% were attributable to Thumbelina. Sixty percent of respondent's total sales are made in November and December while the remaining forty percent are spread over the other ten months of the year.

5. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its toys and related products, including Robot Commando and Thumbelina, when sold, to be shipped from its place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintains, and at all

times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

6. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with other corporations, firms and individuals in the sale of toys and related products.

7. In the course and conduct of its business and for the purpose of inducing the purchase in commerce of Robot Commando and Thumbelina, respondent made certain representations and pictorial presentations with respect thereto by means of commercial advertisements transmitted by television stations located in various States of the United States and in the District of Columbia.

8. Through use, during the time hereafter mentioned, of one of the aforesaid advertisements respondent represented, directly or by implication that:

(a) Robot Commando would perform various acts when directed alone by commands given vocally. These acts included (1) moving forward, (2) turning, (3) firing a "missile", (4) firing a "rocket".

(b) Robot Commando, as packaged and sold to the purchasing public, is operable in the manner depicted in the television advertising, without components other than those shown or disclosed.

9. Through use, during the time hereafter mentioned, of one of the aforesaid advertisements respondent represented, directly or by implication that Thumbelina doll moves from one side to the other, and moves its arms apart while lying on its side.

10. The enlargements of individual film frames, copies of which are attached to the complaint as exhibits, are extracted from actual television films utilized by the respondent in its advertising, and illustrate typical representations with respect to the manner in which Robot Commando and Thumbelina doll purport to perform.*

11. Each act performed by Robot Commando is governed by the manual setting of a control on the said toy. The toy will perform only that act for which the controlling device has been manually set. The initial action of the toy is commenced by setting an "On" switch, then blowing upon a metal diaphragm set within the microphone appearing control device. The sound of the voice, unless preceded or accompanied by the action of blowing on the diaphragm, will not cause the toy's action, it being necessary for the completion of the electrical connection that a contact be effected by the depressing of the diaphragm. Furthermore, the control must be changed manually after the performance of any one act before the toy will perform

* Pictorial exhibits are omitted in printing.

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a different act and the sound of the voice itself, or as part of the action of blowing, will not cause the toy to change from one action to another.

12. Robot Commando is not, as depicted, a moving and autonomous toy, and is not operable in the manner depicted in the television advertising, unless batteries, which are not included in the toy as packaged and sold to the purchasing public, are separately obtained and inserted therein.

13. Thumbelina doll does not move from one side to the other but does move its arms apart while lying on its side in the manner depicted.

14. The film demonstrating Robot Commando, which contained the representations found, was broadcast over two nation-wide television networks and by numerous independent television stations between September 16, 1961, and November 21, 1961, and the time of the day at which and the programs in connection with which it was broadcast were calculated so that it would be seen by children and actually was so seen.

15. The film demonstrating Thumbelina, containing the representations found, was broadcast over two nation-wide television networks and numerous independent television stations between September 16, 1961, and November 7, 1961, and the time of the day at which and the programs in connection with which it was broadcast were calculated so that it would be seen by children and actually was so seen.

And the following are my

CONCLUSIONS

I. The representations and depictions set forth in Finding 8 are false, misleading and deceptive, but only the representation of movement from one side to the other set forth in Finding 9 is false, misleading and deceptive.

II. Respondent's toys, including the Robot Commando and Thumbelina doll, are designed primarily for children. False, misleading and deceptive advertising claims beamed at children tend to exploit unfairly a consumer group unqualified by age or experience to anticipate or appreciate the possibility that representations may be exaggerated or untrue. Further, the use of such advertising plays unfairly upon the affection of adults for children, especially parents and other close relatives. By subjecting such persons to importuning and demands on the part of children who have been entranced by imaginative and deceptive properties claimed for such toys, which importuning and demands can be resisted even by adults not deceived

only upon pain of having dissatisfied, unhappy, hating or rebellious children, respondent tends to create disturbed home and family relationships.

III. When such toys are purchased in the expectation that they will have characteristics or perform acts not substantiated by the facts, the purchasers are misled to their disappointment and competing advertisers who do not engage in false, misleading or deceptive advertising are unfairly prejudiced.

IV. The use by respondent of the aforesaid false, misleading and deceptive representations has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the representations were true and into the purchase of substantial quantities of the products of respondent, by reason of such erroneous and mistaken belief.

V. The aforesaid acts and practices of respondent were all to the prejudice and injury of the public and of respondent's competitors and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

VI. This proceeding is in the public interest and the Federal Trade Commission has jurisdiction of the subject matter and of the respondent.

Upon the entire record, and considering the purposes and objectives of the law, it is my further conclusion that, in order to achieve effective enforcement of the law, it is necessary and appropriate to enter the following

ORDER

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

1. Advertising any toy manufactured, sold or distributed by it by presenting a visual demonstration represented as or appearing to be but not being the manner in which the toy performs, functions or acts, when the visual demonstration is, in fact, presented under circumstances helped or induced by undisclosed attachments, aids, factors or arrangements.

2. Failing to disclose clearly and conspicuously in any advertisement that elements, attachments, aids or batteries are necessary for the performance of any such toy in the manner

depicted unless such elements, attachments, aids or batteries are packed and sold with the toy and payment therefor is included in and a part of the price charged for such toy; or, if any such element, attachment, aid or battery is not so included, failing to disclose clearly and conspicuously in such advertisement both the necessity for such attachment, aid or battery and the fact that it must be purchased and paid for separately.

OPINION OF THE COMMISSION

By *ELMAN Commissioner*:

The complaint in this matter charges respondent with false advertising of two toys made by it, "Robot Commando" and "Thumbelina", in violation of Section 5 of the Federal Trade Commission Act. The hearing examiner in his initial decision upheld the complaint and entered an order to cease and desist, and respondent has appealed. Complaint counsel has also appealed, challenging the scope of the examiner's order.

"Robot Commando" is a battery-operated toy that performs certain motions. It is controlled by a device resembling a microphone, attached to the "robot" by a cable. The "microphone" has a mouthpiece, and also a knob that can be set to any one of the following positions: "Turn Left", "Forward Forward", "Turn Right", "Fire Missile", "Fire Rocket". To make the toy perform, one must first blow into the microphone, then move the knob to one of the five positions. Although one can, if one wishes, speak the appropriate command into the mouthpiece—the expulsion of breath that occurs in speaking will activate the mechanism—the toy is not controlled by, or responsive to, vocal commands as such. Thus, if one says "Turn Left" and then does not set the knob to one of the five positions, nothing will happen, while if one says "Turn Left" and then sets the knob to "Turn Right", the robot will turn right, not left.

The examiner found that respondent had advertised "Robot Commando" as being voice-controlled, and also had failed to disclose in its advertising that the toy requires batteries and that batteries are not sold with the toy. The members of the Commission have viewed the television commercial upon which the findings are based, and on the basis of this first-hand examination we agree that respondent has misrepresented "Robot Commando" as being voice-controlled and that such misrepresentation is unlawful.

The commercial shows a child operating the toy seemingly by speaking into the microphone; the legend "voice controlled" appears on the screen; and the announcer states: "[Robot Commando] takes

orders from no one except * * * you! Ideal's Robot Commando is battery-operated to obey your command. Adjust the control * * * speak into the microphone." The net impression of the commercial—on adult viewers, let alone on the young children to whom the advertising message is primarily directed—is that "Robot Commando" obeys spoken commands;¹ whereas in fact voice or speaking as such plays no role whatever in the control of the toy.

This false impression is a material inducement to the purchase of the toy. Obviously, a toy that obeys spoken commands is more marvelous and thrilling to a child than one that responds only to a combination of mechanical controls, i.e., blowing into a mouthpiece and then moving a knob. Since the fact of voice control appears to be an important element in the desirability of a toy such as "Robot Commando" to children and to the adults who purchase toys for them, respondent's misrepresentation is an unlawful deception.

On the other hand, we do not think it necessary in this case to take corrective action with respect to respondent's failure to make clear disclosure in its advertising that "Robot Commando" is battery-operated and that batteries are not supplied by respondent with the toy. It does not appear that a substantial segment of the purchasing public to whom respondent's television advertising is directed believes, in the absence of some affirmative representation to that effect, that a toy such as "Robot Commando" is not battery-operated or that batteries, if necessary, are supplied by the manufacturer. Disclosure of these facts is made by respondent on the carton in which "Robot Commando" is sold to the consumer, and on the instruction sheet enclosed in the carton.

"Thumbelina", the other toy involved in this case, is a wind-up doll which performs writhings and contortions intended to simulate a baby's movements. The television commercial upon which the charge of false advertising of "Thumbelina" is based shows the doll, which is lying on a bed, turn over from the doll's right to its left side. This movement is possible only because the surface of the bed in the commercial is somewhat inclined, due to the weight of a child who is lying next to the doll in the bed. The doll will not perform such a movement on a level surface.

Although the commercial gives a somewhat exaggerated impression of the doll's capabilities, we do not think that an actionable deception has been established. The doll will in fact turn over under the

¹ Although in the commercial the child is shown manipulating the microphone before each new motion of the Robot, and although the announcer says, at one point, "Adjust the control", the significance of the child's hand motions and of the announcer's statement is lost on the viewer. The hand motions are jerky and appear accidental, while the announcer's remark makes no distinct impression on the viewer.

conditions depicted in the commercial, and those conditions—the weight of the child causing the incline in the bed's surface—are clearly disclosed to the viewer. At most, in the words of the hearing examiner, the performance of the doll in the commercial is “fortuitously striking”, respondent having taken “advantage of the accidentally favorable impression” created by the conditions of the telecast (initial decision, pp. 305, 306). Moreover, it is not clear that the commercial's exaggerated impression was such as to significantly enhance the desirability of the toy in the eyes of many viewers.

We turn now to the issue of relief. Respondent contends that no cease and desist order should be entered, owing to its “abandonment” of the challenged practice. Complaint counsel contends that the examiner's order is too narrow. As has been pointed out many times, the purpose of adjudicative proceedings before the Commission is not to enter broad or narrow, general or specific, affirmative or negative, or tough or easy orders, as such; it is to prevent the future occurrence of the unlawful practice. See, e.g., *All-Luminum Products, Inc.*, F.T.C. Docket 8485 (decided November 7, 1963) [63 F.T.C. 1268]. This guiding principle, not mechanical rules or formulas, should determine the form of relief appropriate in a particular case.

There are cases in which the probability of the recurrence of the unlawful practice is so remote that no cease and desist order at all is warranted. This is not such a case, however, even though respondent withdrew the “Robot Commando” commercial that is the basis of our finding of deception prior to the commencement of this action. It is not clear that the representation that the toy is voice-controlled has been completely eliminated in respondent's revised advertising. Moreover, respondent withdrew the commercial in question only after it had been broadcast repeatedly throughout the nation for more than two months in the late fall—the critical pre-Christmas buying season² of 1961, a year in which respondent's gross sales of “Robot Commando” amounted to almost \$3,000,000. Deceptive advertising on such a scale cannot be dismissed as a merely technical, insignificant, isolated or inadvertent violation of law, promptly abandoned, and not warranting entry of a formal order to cease and desist.³

We also reject respondent's argument—which is advanced obviously as a makeweight and has not been developed in any detail on

² Sixty percent of respondent's total annual sales take place in the months of November and December.

³ For these reasons, we also reject respondent's contention that the present proceeding is not in the public interest because it does not involve a substantial violation of law.

this appeal—that its advertising practices are adequately supervised and regulated by the National Association of Broadcasters, a private group, so as to obviate all need for a formal order. Respondent concedes that the Association cannot apply formal sanctions for violations of its rules, and respondent has not even shown that the Association's rules effectively preclude the kind of advertising that we have found to be deceptive and unlawful. On the contrary, respondent states that the Association approved the particular "Robot Commando" commercial involved in this case.

The order which we deem appropriate to prevent repetition of respondent's unlawful practice differs somewhat from the proposed orders submitted by the parties, and also from that contained in the initial decision. The unlawful practice is the misrepresentation of the performance of a toy, and there is no rational basis for distinguishing, in the order, among various kinds of toys, advertising media, or techniques of misrepresentation. On the other hand, the record does not justify a blanket prohibition of all false and misleading advertising by respondent. Our order neither is confined to the specific acts of deception upon which the finding of unlawfulness is based, nor extends to all possible forms of deceptive conduct in which respondent might engage. Rather, it forbids the deceptive practice in which respondent has been found to have engaged.

Commissioner Anderson did not participate for the reason he did not hear oral argument.

FINAL ORDER

Upon consideration of the cross-appeals of the parties from the initial decision of the hearing examiner, and for the reasons stated in the accompanying opinion,

It is ordered, That:

(1) The findings of fact and conclusions of law contained in the initial decision are adopted by the Commission to the extent consistent with the accompanying opinion, and rejected to the extent inconsistent therewith.

(2) The complaint is dismissed with respect to the allegations concerning the "Thumbelina" toy and the failure to disclose in respondent's advertising that the "Robot Commando" toy is battery-operated.

(3) Respondent, Ideal Toy Corporation, a corporation, and its officers, representatives, employees, successors and assigns, directly or under any name or through any corporate or other device, in con-

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nection with the offering for sale, sale and distribution of toys, in commerce, shall forthwith cease and desist from:

Stating, implying, or otherwise representing, by words, pictures, depictions, demonstrations or any combination thereof, or otherwise, that any toy performs in any manner not in accordance with fact.

(4) Respondent shall, within sixty (60) days after service of this order upon it, file with the Commission a written report setting forth in detail the manner and form of its compliance with the terms