

Complaint

IN THE MATTER OF

BILLY & RUTH PROMOTION, INC., ET AL.

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

Docket 8240. Complaint, Dec. 28, 1960—Decision, Apr. 3, 1964

Order requiring a Philadelphia association of toy wholesalers and its subsidiary which published and distributed to retail outlets at cost an annual toy catalog, to cease inducing and receiving from suppliers payments for advertising in a toy catalog or other publication in connection with the sale of the suppliers' products, when respondents knew, or should have known, that proportionally equal payments were not available to all the suppliers' other customers competing with respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Billy & Ruth Promotion, Inc., is a corporation organized and doing business under the laws of the State of Pennsylvania, with its principal office and place of business located at 5th and Bristol Streets, Philadelphia, Pennsylvania. The stock of this corporate respondent is owned by Supplee-Biddle-Steltz Company, a wholesaler of toy products named as a respondent in the caption hereof.

Individual respondents William George Steltz, Jr., J. Wilson Vandergrift, Floyd F. Trader, Roy G. Geppinger and Lawrence S. Adams are the officers of respondent Billy & Ruth Promotions, Inc. The address of these individual respondents is the same as corporate respondent Billy & Ruth Promotion, Inc. They direct, formulate and control the acts, practices and policies of Billy & Ruth Promotion, Inc.

Respondent Supplee-Biddle-Steltz Company is a corporation organized and doing business under the laws of the State of Pennsylvania, with its principal office and place of business located at 5th and Bristol Streets, Philadelphia, Pennsylvania.

Respondent Albany Hardware & Iron Co., Inc., is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at Broadway & Arch Streets, Albany 2, New York.

Respondent Chapman-Harkey Co. is a corporation organized and doing business under the laws of the State of North Carolina, with its principal office and place of business located at 1401 South Mint Street, Charlotte, North Carolina.

Respondent Cullum & Boren Company is a corporation organized and doing business under the laws of the State of Texas, with its principal office and place of business located at 1509-11 Elm Street, Dallas 1, Texas.

Respondent Farwell, Ozmun, Kirk & Co. is a corporation organized and doing business under the laws of the State of Minnesota, with its principal office and place of business located at St. Paul 1, Minnesota.

Respondent Faucette Co., Inc., is a corporation organized and doing business under the laws of the State of Tennessee, with its principal office and place of business located at 806-12 State Street, Bristol, Tennessee.

Respondent Frankfurth Hdw. Co. is a corporation organized and doing business under the laws of the State of Wisconsin, with its principal office and place of business located at 521 North Plankinton Avenue, Milwaukee 1, Wisconsin.

Respondent House Hasson Hardware Co. is a corporation organized and doing business under the laws of the State of Tennessee, with its principal office and place of business located at 759-61 Western Avenue, Knoxville, Tennessee.

Respondents Leon Levin, A. K. Levin, Harry Levin, J. K. Levin, Robert K. Levin, and Samuel Chernin are co-partners doing business as Kipp Brothers, with their principal office and place of business located at 240-242 South Meridian Street, Indianapolis 25, Indiana.

Respondent Morley Brothers is a corporation organized and doing business under the laws of the State of Michigan, with its principal office and place of business located at 708 North Washington Avenue, Saginaw, Michigan.

Respondent Ohio Valley Hardware Co., Inc., is a corporation organized and doing business under the laws of the State of Indiana, with its principal office and place of business located at 1300 Pennsylvania Expressway, West, Evansville 2, Indiana.

Respondent Orgill Brothers & Co. is a corporation organized and doing business under the laws of the State of Tennessee, with its principal office and place of business located at Post Office Box 2547, Memphis 2, Tennessee.

Respondent The Thomson-Diggs Company is a corporation organized and doing business under the laws of the State of California, with its principal office and place of business located at 1801 Second Street, Sacramento, California.

Respondent J. A. Williams Company is a corporation organized and doing business under the laws of the State of Pennsylvania, with its principal office and place of business located at 401 Anderson Avenue, Pittsburgh 6, Pennsylvania.

Respondent Wyeth Company is a corporation organized and doing business under the laws of the State of Missouri, with its principal office and place of business located at St. Joseph 1, Missouri.

Respondent John J. Getreu and Son Inc., is a corporation organized and doing business under the laws of the State of Ohio, with its principal office and place of business located at 212-226 N. Fourth Street, Columbus 15, Ohio.

All of the foregoing corporate and partnership respondents have been, and are now members of respondent Billy & Ruth Promotion, Inc.

PAR. 2. Billy & Ruth Promotion, Inc., is an association composed of toy wholesale distributors or jobbers, named herein as corporate and partnership respondents, who sell and distribute their toy products to retail outlets located in various States of the United States. Respondent Billy & Ruth Promotion, Inc., has been engaged, and is presently engaged, in the business of publishing and distributing annually, on behalf of the wholesaler members, catalogs illustrating toys. The catalogs are published and distributed under the title "Billy and Ruth." Various manufacturers of toys have been, and are now, advertising their toys in said catalogs. Respondent members of respondent Billy & Ruth Promotion, Inc., have sold and distributed, and presently sell and distribute, their catalogs to retail outlets located throughout the United States.

The wholesaler members of corporate respondent Billy & Ruth Promotion, Inc., acting through committees, select both the advertisers and the toy products that are to be illustrated in the catalogs published by said corporate respondent.

PAR. 3. Respondents, in the course and conduct of their businesses, have engaged, and are presently engaged, in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondents purchase their products from many toy suppliers located throughout the various States of the United States and cause such products to be transported from various States in the United States to other States for distribution and sale by respondents to retail outlets. There is now, and has been, a constant current of trade in commerce of said products between and among the various States of the United States.

In addition, respondents publish, or cause to be published, toy catalogs which they sell and distribute to retail outlets located in various States of the United States.

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PAR. 4. In the course and conduct of their businesses in commerce, said respondents have been, and are now, in competition with other corporations, partnerships and individuals in the sale and distribution of toy catalogs to retail outlets, and in the sale and distribution of toy products to said retail outlets.

PAR. 5. Respondents, in the course and conduct of their businesses in commerce, knowingly induced or received, or contracted for the payment of, promotional payments or allowances from various toy suppliers which were not offered or made available on proportionally equal terms to all other customers of such suppliers competing with respondents in the distribution of said suppliers' toy products.

Respondents, as publishers and distributors of toy catalogs, induced or received payments or allowances from the aforesaid suppliers in connection with the promotion and advertising of their products in respondents' catalogs. Respondents knew, or should have known, that said payments or allowances which they induced or received were not granted or offered on proportionally equal terms to all others of said suppliers' customers competing with respondents in the distribution of said suppliers' products. The payments to said association for 1959 exceeded \$129,000. Among the toy suppliers granting promotional payments or allowances to respondents in 1959 were:

Toy suppliers:	<i>Approximate payments granted to respondents</i>
Wen-Mac Corp.....	\$1,170
Fisher-Price Toys, Inc.....	2,930
Tonka Toys, Inc.....	2,640
Radio Steel & Mfg. Co.....	1,170

PAR. 6. The acts and practices of respondents, as hereinbefore alleged, of knowingly inducing or receiving special promotional payments or allowances from their suppliers which were not made available by said suppliers on proportionally equal terms to respondents' competitors, are all to the prejudice and injury of competitors of respondents and of the public; have the tendency and effect of obstructing, injuring and preventing competition in the sale and distribution of toy products, and have the tendency to obstruct and restrain and have obstructed and restrained commerce in such merchandise; and constitute unfair methods of competition in commerce and unfair acts and practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

Mr. Stanley M. Lipnick supporting the complaint.

Mr. Charles Hogg, Jr., of Clark, Ladner, Fortenbaugh & Young, Philadelphia, Pa. for respondents.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

AUGUST 13, 1963

The complaint herein, issued December 28, 1960, alleges violation of Section 5 of the Federal Trade Commission Act. It alleges, in general effect, that toy manufacturers, not named as respondents, purchased advertising in a toy catalog published by respondent "association" or catalog company (Billy & Ruth¹) for respondent toy jobbers, its "members", that such payments were not made available on proportionally equal terms to all other customers of the manufacturers competing with said jobbers, and that said respondent jobbers knowingly induced or received the same.

Summary of Holdings Herein

Facts somewhat similar to those in this case were presented to this examiner in two prior cases, in which violation was found by him.

Santa's Playthings, Inc., D. 8259 (September 28, 1962) [p. 225, 228 herein] is one of these cases. However, there all the respondent jobbers were stockholders of the catalog company, a fact which supported, or helped support, the finding of "knowing" inducement and receipt in violation of the Act.

In *ATD Catalogs, Inc.*, D. 8100 (December 19, 1962) [p. 71, 81 herein], the other of the two cases, the respondent jobbers held liable were not stockholders of the catalog corporation (the stockholder jobbers not contesting their own liability). However, respondent non-stockholder jobbers took an active part in selecting, by majority vote, the advertisements included in the catalogs—a fact again helping to support a finding of "knowing" inducement and receipt in violation of the Act.

In the present case, as in *ATD*, not all the respondent jobbers are stockholders, indeed all are non-stockholders except Supplee-Biddle-Steltz Company, the sole stockholder of the catalog company, Billy & Ruth. More importantly, however, the non-stockholders here did not vote, although they attended a two-hour annual meeting at which advertisements, and manufacturers, indicated by Billy & Ruth for selection were reviewed by them—a debatable showing, in this respect, of "knowing" inducement or receipt.

The question perhaps presented, therefore, is whether there is here a sufficient distinction in facts, particularly from *ATD*, to warrant a different result, or whether this case, *ATD*, and indeed *Santa's Play-*

¹ As used herein, refers to Billy & Ruth Promotion, Inc.

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things, are all alike in disclosing a general collaboration of jobbers to obtain, knowingly, preferential promotional payments or benefits therefrom in violation of the law—*i.e.*, on the issue of “knowing” inducement or receipt.

The present decision holds that the lesser degree of participation, in selecting advertisements, on the part of non-stockholder jobbers in the case at bar does not present a sufficient distinction from the *ATD* facts. It holds that the collaboration of jobbers working through a catalog company, actually their agent, in obtaining non-proportionate payments or the benefit thereof, can be and is sufficient on the issue of “knowing” inducement or receipt, irrespective of degree of participation in selecting advertisements.

The decision also holds, as in *ATD*, that by reason of the collaboration with other respondents, violation is proved even as against those few respondent jobbers as to whom proof is wanting as to specific unfavored competition of their own.

The view is also reiterated herein that, even if they did not know the unlawful result, respondent jobbers were in violation since they knew the operating facts of the toy catalog system, making no provision for non-participant jobbers; and it is also held that they are bound by the pertinent knowledge and acts of the catalog company, Billy & Ruth, as their agent.

The decision herein rejects the contention, also rejected in the other cases, that the advertising payments were non-discriminatory, *i.e.*, because the manufacturers advertised in quite a few other toy catalogs as well, thus serving many other jobbers. However, the situation presented in this case of a few of the respondent jobbers whose competitors actually used other catalogs, is accorded separate legal analysis, largely on the issue of burden of proof as to proportional equality.

There is also rejected the contention, likewise rejected in the other two cases, that respondents have sustained a defense of good faith meeting of competition, including, engaging in their toy catalog activities in order to meet the competition of others engaging in much the same activities with other toy catalogs.

In passing on the scope of the order herein, however, the examiner, as in the prior toy cases decided by him, has borne in mind the industry-wide prevalence of these toy catalog practices, *i.e.*, through the different catalogs serving a great many jobbers of various descriptions, although by no means all jobbers; and the fact that these practices have been going on for years openly and aboveboard, yet without any challenge whatever until fairly recently. The examiner has also considered the relatively mild part played in the catalog enterprise in this case by the respondent non-stockholder jobbers, representing all but

one of respondent jobbers. (See Scope of Order, *infra*, particularly p. 201.)

The above is merely a cryptic summary of the holdings herein which are set forth, in full detail, below.

Proceedings Herein

This case was assigned to the present examiner on June 24, 1961. An initial hearing for the return of subpoena duces tecum was held in New York City on September 22, 1961. Prehearing conferences were held, both formal and informal, at which both sides fully and commendably cooperated. The main prehearing conference was held on April 6, 1962. Appropriate prehearing orders of directions were issued.

Counsel engaged, over some months, in attempts to stipulate the facts by three or four sets of stipulations as to proposed testimony (or facts) from suppliers, respondent jobbers, and other sources. Despite valiant efforts negotiations broke down and in October 1962 complaint counsel formally requested that the hearing proceed in various cities throughout the country, including Sacramento, and that subpoenae issue for 40 witnesses.

The examiner declined to authorize such widespread hearings, with so many witnesses, and ruled that there would be a hearing in one city, Philadelphia, the catalog company's (and Supplee's²) headquarters, at which he would expect to hear the facts as to the exact participating connection of respondent non-stockholder jobbers to the toy catalog company, as well as other pertinent facts—after which the examiner would pass on the question of possible hearings in other cities.

Accordingly, hearings were held in Philadelphia on November 26, 27, 28 and 29, *i.e.*, in 1962. Respondent Steltz and his associate Trader gave a full picture of the connection or non-connection of non-stockholder respondents with the catalog. Respondent Faucette, subpoenaed by complaint counsel, from Tennessee, added to the picture. Other matters were also covered.

The hearings cleared up the atmosphere, for stipulation purposes, as to the relationship of respondent non-stockholder jobbers to the catalog. However, there was still the question of unfavored jobbers—*i.e.*, whether there was competition between a particular jobber respondent and an unfavored jobber. Attempts, never to succeed, were made to resolve this by sampling procedure technique.

However, in December 1962, counsel announced that they thought they would be able to agree on all categories of proposed stipulations, although respondents' counsel would have to go through a lengthy

² Referring herein to Supplee-Biddle-Steltz.

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process of consulting his clients in different regions throughout the country, each of them a respondent in virtually a separate case.

In March 1963 the stipulations duly executed were received and submitted, following which the record was closed for reception of evidence on March 26, 1963.

Proposed Findings and Conclusions, together with briefs were submitted in due time by counsel for both sides. Subsequently answers to these findings and briefs were also submitted by both sides. These answers have been most helpful in correlating facts and arguments submitted by them.

During the hearings in Philadelphia respondents' counsel disclosed that respondent Billy & Ruth had assigned the catalog enterprise to *Distributors' Promotions, Inc.*, also wholly owned by respondent Supplee.

After closing of the record it appears that respondent Supplee divested itself of its stockholding and other interests in the wholesale toy jobber business, changing its name to *SDM & R Inc.*, and retaining only the interest in the catalog enterprise.

On July 18, 1963, the hearing examiner reopened the record to receive an affidavit on this submitted on July 10, 1963, and a copy of the lengthy sales contract. Memoranda were also received from both sides.

FINDINGS OF FACT

The following are the examiner's Findings of Fact herein. All proposed facts not therein found are disallowed, except as otherwise found by this decision.

For convenience, the findings follow the numbering and paragraph subject matter of complaint counsel's proposed findings.

However, although much of complaint counsel's proposals are adopted, changes and additions reflecting respondents' proposed findings (referred to as R1 or R followed by the pertinent number), as well as respondents' answers to complaint counsel's proposed findings, are made as follows:

First, there are changes in the language and content of a paragraph as proposed by complaint counsel.

Second, additional matter is added by the examiner at the end of a paragraph finding, *i.e.*, as proposed by complaint counsel and adopted or changed by the examiner.

Third, paragraphs additional to those proposed by complaint counsel are inserted at the end of all the paragraphs, as contained in the examiner's findings, and designated by additional paragraph numbers.

The examiner also has, immediately after his Findings of Fact, set forth certain Conclusions of Fact, again following complaint counsel's numbering and paragraph content, and also reflecting respondents' answers to the proposed conclusions.

1. Respondent Billy & Ruth Promotion, Inc. (hereinafter referred to as Billy & Ruth) is a corporation organized and doing business under the laws of the State of Pennsylvania, with its principal office and place of business located at 5th and Bristol Streets, Philadelphia, Pennsylvania. (CX 163 A, 164 A; Answer; R1³).

During the years 1959 and 1960, Billy & Ruth, among other things, was engaged in the business of publishing and distributing catalogs devoted exclusively to the illustration and listing of toy, game and hobby products. (Answer, Par. 2; TR 23-27; CX 163 B, D-E).

Respondents William George Steltz, Jr., J. Wilson Vandergrift, Floyd F. Trader, Roy G. Geppinger and Lawrence S. Adams are the officers of respondent Billy & Ruth, and their address is the same as that of Billy & Ruth. Said individuals direct, formulate and control the acts, practices and policies of Billy & Ruth. (Answer; CX 163 A-B, 164 B).

2. Respondent Supplee-Biddle-Steltz Company (sometimes herein referred to as Supplee or SBS) has, directly or indirectly, been the publisher and distributor of the Billy & Ruth toy catalogs for many years. It has also been in the wholesale toy business (and other businesses), at least until early 1963, when it changed its name to SDM & R, Inc.,⁴ and apparently sold all but its toy catalog interests, i.e., to International Fastener Research Corporation. (Affidavit, RX 4)

Up to 1950 respondent Supplee directly conducted the Billy & Ruth catalog business itself (TR 131-2). In 1950 respondent Billy & Ruth was incorporated and took over the business, Supplee owning all its outstanding shares of stock (Answer, CX 164 A). In 1962, Billy & Ruth was merged with Distributors' Promotions, Inc., the stock of which is also owned by Supplee (now under its new name), and which conducts the catalog business (TR 22-23, 144-146).

In the merger, Distributors' Promotions, Inc., is successor in interest to Billy & Ruth (RX 4, p. 1). Its directors and principal officers are the same persons who were formerly directors and principal officers of Billy & Ruth. Its stock is owned by the same corporation, under the new name SDM & R Inc., owning the stock of Billy & Ruth.

Respondent Steltz is a director and president of Distributors' Promotion, Inc., as he has been of respondent Billy & Ruth. He is a direc-

³ I.e., Respondents' Proposed Finding 1.

⁴ Perhaps more properly, S D M & R, Inc.

tor and president of SDM & R Inc., the same corporation as respondent Supplee-Biddle-Steltz Company but under a new name (RX 4).

* * * * *
Dispositions of corporate funds of Billy & Ruth have been made solely to its parent corporation, the respondent Supplee. None of the other corporate or partnership respondents have received or will receive, directly or indirectly, any patronage dividends, rebates or payments of any nature from Billy & Ruth or Supplee (CX 164 B, Stipulation 163 A; R6).

3. The following respondents have been engaged in the business of selling and distributing toy products at wholesale to retail outlets located in various States of the United States (R22):

a. Respondent Supplee-Biddle-Steltz Company, a corporation organized and doing business under the laws of the State of Pennsylvania, with its principal office and place of business located at 5th and Bristol Streets, Philadelphia, Pennsylvania (Answer; CX 163 A, 164 A; R3);

b. Respondent Albany Hardware & Iron Co., Inc., a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at Broadway and Arch Streets, Albany 2, New York (R7);

c. Respondent Chapman-Harkey Co., a corporation organized and doing business under the laws of the State of North Carolina, with its principal office and place of business located at 1401 South Mint Street, Charlotte, North Carolina (R8);

d. Respondent Cullum & Boren Company, a corporation organized and doing business under the laws of the State of Texas, with its principal office and place of business located at 1509-11 Elm Street, Dallas 1, Texas (R9);

e. Respondent Farwell, Ozmun, Kirk & Co., a corporation organized and doing business under the laws of the State of Minnesota, with its principal office and place of business located at St. Paul 1, Minnesota (R10);

f. Respondent Faucette Co., Inc., a corporation organized and doing business under the laws of the State of Tennessee, with its principal office and place of business located at 806-12 State Street, Bristol, Tennessee (R11);

g. Respondent Frankfurth Hdw. Co., a corporation organized and doing business under the laws of the State of Wisconsin, with its principal office and place of business located at 521 North Plankinton Avenue, Milwaukee 1, Wisconsin (R12);

h. Respondent House Hasson Hardware Co., a corporation organized and doing business under the laws of the State of Tennessee,

with its principal office and place of business located at 759-61 Western Avenue, Knoxville, Tennessee (R13) ;

i. Respondents Leon Levin, A. K. Levin, Harry Levin, J. K. Levin, Robert K. Levin, and Samuel Chernin, co-partners doing business as Kipp Brothers, with their principal office and place of business located at 240-242 South Meridian Street, Indianapolis 25, Indiana (R14) ;

j. Respondent Morley Brothers, a corporation organized and doing business under the laws of the State of Michigan, with its principal office and place of business located at 708 North Washington Avenue, Saginaw, Michigan (R15) ;

k. Respondent Ohio Valley Hardware Co., Inc., a corporation organized and doing business under the laws of the State of Indiana, with its principal office and place of business located at 1300 Pennsylvania Expressway, West, Evansville 2, Indiana (R16) ;

l. Respondent Orgill Brothers & Co., a corporation organized and doing business under the laws of the State of Tennessee, with its principal office and place of business located at Post Office Box 2547, Memphis 2, Tennessee (R17) ;

m. Respondent The Thomson-Diggs Company, a corporation organized and doing business under the laws of the State of California, with its principal office and place of business located at 1801 Second Street, Sacramento, California (R18) ;

n. Respondent J. A. Williams Company, a corporation organized and doing business under the laws of the State of Pennsylvania, with its principal office and place of business located at 401 Anderson Avenue, Pittsburgh 6, Pennsylvania (R19) ;

o. Respondent Wyeth Company, a corporation organized and doing business under the laws of the State of Missouri, with its principal office and place of business located at St. Joseph 1, Missouri (R20) ;

p. Respondent John J. Getreu and Son, Inc., a corporation organized and doing business under the laws of the State of Ohio, with its principal office and place of business located at 212-226 N. Fourth Street, Columbus 15, Ohio (Answer; CX 163, 164; R21).

The respondents listed in Finding 3 above will sometimes be referred to hereinafter collectively as the respondent jobbers. The respondent jobbers, with the exception of Supplee, will sometimes be referred to hereinafter collectively as the non-stockholder respondents.

4. The respondent jobbers purchase their products from many toy suppliers located throughout the various States of the United States and cause such products to be transported from various States in the United States to other States for distribution and sale by respondents to retail outlets. There is now, and has been, a constant current of trade

in commerce in said products between and among the various States of the United States (Answer; CX 163 A, 164 E-F).

Respondent Billy & Ruth maintains frequent and continuous contact with numerous toy suppliers, including many located in States other than that in which said respondent is located, and said respondent sells and distributes its catalogs to all of the respondent jobbers herein, many of which are located in States other than that in which respondent Billy & Ruth is located (TR 25-27, 61-66, 125-127; CX 118 A-161).

* * * * *

Respondents, in the course and conduct of their business, have engaged, and are presently engaged, in commerce, as "commerce" is defined in the Federal Trade Commission Act (R26).

The Operations of Billy & Ruth

5. In the years 1959 and 1960, Billy & Ruth published catalogs devoted exclusively to the illustration and listing of toy, game and hobby products. In those years, two types of catalogs were published, a consumer catalog listing approximately 250 different toy items, and a so-called "tabloid" or leaflet listing fewer items. The "tabloid" was circulated during the normally slow toy seasons, spring and summer (Answer; TR 23-27, 42, 189, 194-195; CX 1, 2; R23).

6. The catalogs published by Billy & Ruth in 1959 and 1960 were sold and distributed by it to the respondent jobbers (CX 163, 164). All references herein to activities of Billy & Ruth in conjunction with the respondent jobbers in 1959 and 1960 should be construed to include only 1959 insofar as such references apply to respondent Farwell, Ozmun, Kirk & Co. (TR 225; CX 91).

The respondent jobbers distributed the catalogs to their respective retailer customers (TR 111-113, 275-276; CX 176). Each retailer who purchased such catalogs, received them with his name and address imprinted on the front cover together with any other brief message he wished, such as a concise statement of his discount policy (TR 27-28, 108-110, 189; CX 1). The respondent jobbers' catalog distribution activities, considered in isolation from their toy sales activities, were generally conducted on a breakeven basis, their objective not being to earn profits from the resale of catalogs as such (TR 123-125, 275-276; CX 176). The retailers who purchased the Billy & Ruth catalogs distributed such catalogs free of charge to the public by various means including direct mailing, door-to-door canvassing and hand-outs in the schools (TR 277-278). Consumer catalog distribution by retailers was done principally in the fall and early winter since the prime

selling season for toys is shortly before Christmas (TR 36-42; CX 56, 76, 78 A-B, 79, 81-83).

Only one jobber was permitted to distribute the catalogs in a territory (TR 114-119; CX 24 A-B, 25, 28 A-B, 53, 54, 58-64). Despite the contentions (R32) of respondents' counsel (alluding to TR 117-118) this is true, by Billy & Ruth plan (TR 118; 7-10) and actual implementation, although there may be jurisdictional disputes (TR 117) as to territory. Most of the respondent jobbers have been "members" (TR 117: 10⁵) of Billy & Ruth for many years (R32).

* * * * *

The catalogs were sold and distributed by Billy & Ruth to respondent jobbers at uniform prices. They were not sold by Billy & Ruth to retailers (CX 164 E, Stipulation CX 163 A; R25). The name of the jobber did not appear on the catalog, only the name of the retailer (TR 27-8; R24), which customarily did so appear.

No dues, initiation fees, or moneys other than the cost of the catalog were sought or collected by Billy & Ruth from respondent jobbers (TR 222, 306; R32). No application blanks or contractual writings of any kind were sought or obtained by it from them (TR 226, 306; R32).

Respondent jobbers sell and distribute the Billy & Ruth catalogs to retail outlets located throughout the United States (CX 164 E, Stipulation CX 163 A).

7. Billy & Ruth engaged in many other activities of a promotional nature, all of which were conducted with the main purpose and effect of increasing the effectiveness of the Billy & Ruth catalogs as an advertising medium. Among those promotional activities were:

- a. The availability, through the catalogs, to children reading the catalogs of various premiums at nominal cost, including books, maps and initials for sweaters.
- b. The availability, through the catalogs, to children reading the catalogs of subscriptions to a children's magazine which was published by Billy & Ruth and which contained advertising material designed to stimulate purchases of toys through retail outlets distributing Billy & Ruth catalogs.
- c. The offering, through the catalogs, to children reading the catalogs of personal letters from Santa Claus mailed from Santa Claus Land, an amusement park located in Santa Claus, Indiana.
- d. The offering, through the catalogs, to children reading the catalogs of membership in the Billy & Ruth Pen Pal Club, an organization operated by Billy & Ruth which engaged in correspondence with members of the club, such correspondence being carried on under the names

⁵ I.e., page 117, line 10.

"Billy and Ruth"; "Billy" and "Ruth" are mythical children identified by Billy & Ruth with its catalogs (TR 41-42).

e. Conducting, each year, national contests in which elaborate prizes are awarded to children and to their parents, the details of such contests being announced in the Billy & Ruth catalogs (TR 28-35, 36-42; CX 1, 2, 68-73, 84, 154-161, CX 163 A, 164 E).

These promotional activities were not intended to be profitable in themselves, their basic purpose being stimulation of interest in the catalogs (TR 31, 33-34, 37-39, 40, 122-123).

8. Billy & Ruth also provided merchandising services to the respondent jobbers and to their retailer customers. Bulletins were sent to the respondent jobbers containing information as to new products on the market, price changes and revised ordering procedures. Display kits were furnished to the respondent jobbers who transmitted them to their retailer customers for use in store decoration and window trimming. Billy & Ruth also performed the function of a clearing house in exchanging lists of items which the various respondent jobbers had overstocked, thus enabling the respondent jobbers to eliminate their excess inventory by purchasing their requirements from overstocked jobbers rather than from regular suppliers (TR 122-123, Mr. Steltz; CX 19; 102-117).

9. All of the promotional and merchandising activities of Billy & Ruth, described in Findings 7-8 above, were considered to be a part of a single overall program (TR 201-212, Mr. Trader). The fundamental purpose of that program was to assist and promote the sales activities of small retailers in the marketing of toys (TR 111-113). The respondent jobbers were vitally interested in contributing to the success of small retailers because the respondent jobbers "owe their existence to the continued survival of the smaller merchant" (TR 113, Mr. Steltz).

10. In participating in the overall program maintained by Billy & Ruth, the respondent jobbers considered themselves to be members of the Billy & Ruth "group", working together toward the common end of selling toys (TR 276-277; CX 176). Billy & Ruth, in its dealings with manufacturers and in its dealings with the respondent jobbers, referred to the respondent jobbers as members of the Billy & Ruth "group" (TR 227).

The Mechanics of Publishing the Billy & Ruth Catalogs

11. The catalogs published by Billy & Ruth in 1959 and 1960 listed and illustrated approximately 250 products in each year (TR 297-298; CX 1, 2). The manufacturer of each product included in the Billy & Ruth catalogs in those years made a payment to Billy & Ruth in

consideration for such advertising (TR 61-66, 236). All payments made in those years were made at rates which were uniformly adhered to by Billy & Ruth and which had been fixed and determined unilaterally by Billy & Ruth (CX 163 B-C). Those rates were:

Number of items:	Total cost
one -----	\$540. 00
two -----	975. 00
three -----	1, 350. 00
four -----	1, 610. 00
five -----	1, 975. 00
six -----	2, 200. 00
seven -----	2, 400. 00
eight -----	2, 600. 00

These rates were subject to a twenty percent surcharge for art and color work (CX 163 C).

Payment for such illustration was made by the manufacturers whose products were advertised pursuant to agreements to make such payments. Such agreements were usually made orally and then later confirmed by letter from Billy & Ruth (TR 127, 231-232).

* * * * *

During 1961, the respondent Billy & Ruth received payments: (a) from toy manufacturers for space purchased in the catalog either (i) at such respondent's regular and uniform schedule of rates if the manufacturer had no published cooperative advertising program, or (ii) on the basis of the particular manufacturer's published cooperative advertising policy or the uniform rate schedule above set forth, whichever was lower; and, (b) from wholesalers for catalogs sold in bulk (Stipulation CX 163 B; see R36).

12. In March of each year, for one to two weeks, all major domestic manufacturers of toys display their lines simultaneously in New York City; that simultaneous display is held in the Sheraton-McAlpin and New Yorker Hotels, in the 200 Fifth Avenue Building and in individual sales offices, and is known as the annual Toy Show. Buyers of toys come to New York from throughout the United States to attend the Toy Show for the purpose of viewing the various items on the market (TR 244-248). Respondent Floyd F. Trader, an officer of Billy & Ruth and the toy buyer for SBS, spent several weeks in New York immediately prior to the Toy Show each year, contacting manufacturers with respect to advertising their products in the Billy & Ruth catalogs. During those several weeks, Mr. Trader obtained oral understandings from various manufacturers to pay for advertising of their products in the Billy & Ruth catalogs and, at the same time, was given an advance showing of many manufacturers' lines (TR 239-240).

13. Respondent Trader then prepared a list of toys for which advertising payments were available, which list included well over 400 toy items (TR 61-66, 156-157). Mr. Trader also prepared a list of those items which he recommended for inclusion in the Billy & Ruth catalog (TR 61-66). These lists were presented to the respondent jobbers at the annual Billy & Ruth meeting which was held every year in New York City on the Sunday immediately preceding the opening of the Toy Show (TR 57-66). In 1959 and 1960 the Billy & Ruth meetings were attended by each of the respondent jobbers (or their representatives), with the single exception of one absentee in one year (TR 150-151).

Sometimes, instead of two lists, the larger list and the recommended list, there would be simply one comprehensive list with asterisks designating the recommended items (TR 66).

Respondents Trader and Steltz and other representatives of Billy & Ruth would inform other corporate and partnership respondents named above which items had been selected for inclusion in that year's Billy & Ruth catalog, and comment upon such selections would be invited from the other corporate and partnership respondents (TR 66-68; R28).

14. The respondent jobbers considered the lists of available and recommended toys prepared by respondent Trader for approximately two hours during each annual Billy & Ruth meeting (TR 156-157). During that period members were given the opportunity to voice negative reactions to the recommendations of Mr. Trader, which negative reactions were freely and frequently expressed (TR 67-71). That two hour period was considered adequate by the non-stockholder respondents to express their views on Mr. Trader's recommendations (TR 289-291), but only bearing in mind that they relied on Mr. Trader's recommendations, generally, in the first place (TR 289-291). Although reserving to itself the right to make the final decision as to which items would be included in the catalogs, Billy & Ruth naturally was receptive to the views of respondent jobbers who would buy and sell the merchandise items (TR 67-71). And the final selection as made by Billy & Ruth was regarded as satisfactory by the respondent jobbers generally (CX 176), as testified to by Mr. Faucette for his firm (TR 291).

* * * * *

While it occasionally happened that an item was included in or deleted from the final catalog because of discussion at the meeting (TR 67, 84, 235), no vote was ever taken as to any item (TR 71, 209, 302), and there was no other meeting of Billy & Ruth for any such discussion (R28).

There is no doubt whatever that Billy & Ruth, through respondent Trader principally, invariably made the ultimate decision as to the selection of items to appear in the catalogs, and respondent jobbers clearly understood this (TR 66, 80, 170-177, 240, 285, 291; R29). This was also true of doll items, despite the so called "doll committee," the members of which were selected by Billy & Ruth, with Trader as chairman (TR 175-178, 180; R30).

15. In 1959 and 1960 in particular respondent Trader's selections were in isolated instances changed in response to negative views of respondent jobbers expressed at the meeting (TR 241-243). There was further opportunity after the meeting each year, during the Toy Show, for such jobbers to meet with Mr. Trader informally and give him their views (TR 241-243). As already indicated, Billy & Ruth was receptive to these views—additional reasons being that respondent jobbers were experts in merchandising toys and would purchase the catalogs only so long as they contained advertisements of toys deemed saleable by them to their retail customers (TR 67-71, 83-84, 171-172, 197-200).

After the annual meeting of the respondents, Billy & Ruth Promotion, Inc. mailed bulletins and other memoranda to other corporate and partnership respondents, some of which communications informed them of changes made by Billy & Ruth representatives in the list of selections which had been presented to the respondents at the annual meeting (TR 71, 76, 99). There were 36 such changes in 1959 (CX 169 A, 169 D) and more than 23 in 1960 (CX 170 A-B) all made without consultation with other respondents as to any such changes (TR 161). Billy & Ruth Promotion, Inc., through respondent Floyd F. Trader and other officers, invariably made the ultimate decisions as to what was to be contained in the Billy & Ruth publications, and the other respondents clearly understood this to be the situation (TR 66, 80, 170-177, 240, 285, 291).

16. It was also a practice of Billy & Ruth to solicit the opinion of the non-stockholder respondents as to other matters such as quality of paper to be used in the catalogs or accepting advertisements from manufacturers who refused to sell to some of said respondents (CX 13-15 B, 18 A-19, 20 A-L, 21, 29-32, 45-49, 67, 75, 78 A-B, 81-83, 85 A-B, 95, 100-101). But this does not mean that Billy & Ruth's policy was in any compelling sense to "rely heavily on the judgment" of said respondents, as contended by complaint counsel, since there is clear indication that Billy & Ruth solicited opinion, at least in large measure, so "each one of them would feel they are part" (CX 82) of decision making. It may be true that Billy & Ruth was willing to follow the wishes of said respondents to the extent practicable (TR

69-71), but it definitely retained and exercised the prerogative of making decisions, even in the face of opposition (CX 21, 93, 95; see R28, 29, 31).

17. As already stated, respondent Trader each year made changes in the list of toys selected for inclusion in the catalog—the changes being made after the annual meeting and without consultation with the non-stockholder respondents. These changes were caused by numerous factors including:

- a. Mr. Trader believed a different item by the same manufacturer was more salesworthy;
- b. Mr. Trader believed a similar item by a different manufacturer was more salesworthy;
- c. The manufacturer requested that an item be deleted or changed;
- d. Shipping costs were more favorable to the jobbers if the catalog advertised five items by the same manufacturer than if the catalog advertised two items by one manufacturer and three items by another manufacturer;
- e. An item was deleted because of duplication among the items originally selected;
- f. An item originally selected was replaced with a new item which had not been seen by Mr. Trader prior to the meeting;
- g. Certain changes were necessary in order to “balance” the book, that is to have a balance between the number of toys in various price ranges, between the number of girls’ and boys’ toys, between the number of toys for various age groups (TR 71-72, 239-243).

As a general rule, changes in selections made at the meetings were made because respondent jobbers, or some of them, did not believe a selected item would sell in their respective territories, while subsequent changes were made for various other reasons, some of which are enumerated above (TR 241-243).

The non-stockholder respondents did not object to changes made by Mr. Trader subsequent to the meeting because they realized that he had long experience in the business, they recognized the various factors necessitating such changes, and they had confidence in his judgment (TR 230-231, 289-291, 303-305), and, no doubt, also because they felt that, due to the unilateral method of selection, objection would have been futile (TR 291, 304-5).

Relationships and Transactions Between Billy & Ruth, The Respondent Jobbers, and Suppliers of the Respondent Jobbers

18. In 1959 and 1960, Transogram Company, Inc., paid to Billy & Ruth \$4,290 and \$6,240 respectively, in consideration for the illustra-

tion and listing of Transogram products in catalogs published by Billy & Ruth.

In 1959 and 1960, Emenee Industries, Inc., paid to Billy & Ruth \$2,640 and \$2,370, respectively, in consideration for the illustration and listing of Emenee products in catalogs published by Billy & Ruth.

In 1959 and 1960, Ideal Toy Corporation paid to Billy & Ruth \$2,370 and \$1,620, respectively, in consideration for the illustration and listing of Ideal products in catalogs published by Billy & Ruth.

In both 1959 and 1960, Remco Industries, Inc., paid to Billy & Ruth \$1,620 in consideration for the illustration and listing of Remco products in catalogs published by Billy & Ruth (CX 164 G).

Other manufacturers also made payments to Billy & Ruth in 1959 and 1960, for the same purpose. The total of such payments in 1959 was approximately \$124,000, and the corresponding total in 1960 was approximately \$132,000 (CX 164 F). All of such payments were computed on the basis of the rate schedule set forth above in Finding 11 (CX 164 H-I).

There is set forth below the date and amount of each payment received by Billy & Ruth Promotion, Inc., from the manufacturers listed below during the period January 1, 1959 to July 31, 1961. No payments were received from Bilnor Corp. during such period.

Transogram Company, Inc.

9/29/59 -----	\$4,290
11/3/60 -----	6,240

Emenee Industries, Inc.

10/15/59 -----	2,640
12/23/60 -----	2,370

Ideal Toy Corporation

11/9/59 -----	2,370
10/31/60 -----	1,620

The A. C. Gilbert Company

11/23/59 -----	3,768
10/12/60 -----	2,640

Knickerbocker Toy Co., Inc.

12/20/60 -----	1,620
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Alexander Miner Sales Corp.

8/12/59 -----	1,620
10/3/60 -----	1,620

Remco Industries, Inc.

2/4/60 -----	1,620
8/30/60 -----	1,620

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<i>Parker Brothers, Inc.</i>		
9/6/60 -----		3,120
5/15/61 -----		780
<i>Wolverine Supply and Manufacturing Co.</i>		
8/13/59 -----		1,620
9/9/60 -----		1,932
<i>American Machine & Foundry Company</i>		
10/12/60 -----		648
8/10/59 -----		648
<i>Wen-Mac Corp.</i>		
8/7/59 -----		1,170
6/27/61 -----		162
<i>Fisher-Price Toys, Inc.</i>		
7/24/59 -----		1,560
1/25/60 -----		1,370
8/15/60 -----		1,560
2/7/61 -----		590
5/24/61 -----		942
<i>Tonka Toys, Inc.</i>		
8/17/59 -----		2,640
9/13/60 -----		3,120
5/22/61 -----		660
<i>Radio Street & Mfg. Co.</i>		
7/22/59 -----		1,170
8/15/60 -----		1,170

(CX 164 G-H, Stipulation 163 A)

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19. During the years 1959 and 1960, it was common knowledge throughout the toy industry that manufacturers were required to make payments to catalog publishers in return for advertising of their products in the publications of such publishers (TR 212, 252-257, 300-302). All of the respondent jobbers knew that manufacturers were required to pay for advertising in the Billy & Ruth catalogs (TR 300-302; CX 176), particularly since they knew that the Billy & Ruth catalogs cost substantially more to publish than the respondent jobbers were paying for such catalogs (TR 211-213, 252-257).

However, to be sure, Billy & Ruth never specifically discussed these payments with the non-stockholder respondent jobbers. More importantly, such respondents were not aware of space rates, billing proceeds, or whether any profit was realized on the publication of the catalogs (TR 164-5, 211, 255, 266, 303; R27).

20. Transogram Company, Inc., Ideal Toy Corporation, Remco Industries, Inc., and Emenee Industries, Inc., have each paid sums of money to publishers of other catalogs, substantially similar to the catalogs published by Billy & Ruth, in consideration for the illustration and listing of their respective products in such other catalogs (CX 163 D). The evidence indicates that the respondent jobbers herein would know that the rates charged by the various catalog companies varied, but they did not know what the rates were or the basis on which they varied, nor did they inquire as to this (TR 252-257, 300-302; CX 176).

Certain facts as to these other catalogs will be set forth below under the subcaption Other Catalogs, commencing with Finding 39.

21. Transogram Company, Inc., Emenee Industries, Inc., Remco Industries, Inc., and Ideal Toy Corporation never gave the respondent jobbers any reason to believe that any of those companies had a program in effect in 1959 or 1960 pursuant to which payments were made to jobbers for advertising or promoting their respective products by any means other than distribution of catalogs. Neither the respondent jobbers nor Billy & Ruth and its officials ever made any inquiry of these four manufacturers to determine whether payments for advertising and promotion were made available on proportionally equal terms to all the manufacturers' jobber customers competing with the respondent jobbers. None of these four manufacturers ever volunteered any such information to Billy & Ruth, its officials or the respondent jobbers (CX 171-174).

22. The respondent jobbers considered themselves, and were considered by Billy & Ruth and their suppliers, to be members of the Billy & Ruth group, joining together to achieve a common purpose, increasing their sales of toys (TR 28, 111-113, 183-186, 209, 226-227, 276-277; CX 171 B, 172 B, 173 A, 174 A, 176). The Billy & Ruth group attempted to achieve its members' common objective through the formulation and utilization of a promotional and advertising program which was designed to stimulate the sales of the members' most important class of customers, small retailers (TR 111-113, 201-202). While retailers may not be absolutely required to buy toys from a respondent jobber in order to obtain catalogs, the respondent jobbers definitely anticipate that the availability and effectiveness of the catalog advertising program will stimulate retailers using that program to buy their toy requirements from the jobber who sells them their catalogs (TR 111-113, 122-125, 275-276; CX 176).

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23. The following table shows, for the fiscal years ended June 30, 1959 and 1960, revenue earned by Billy & Ruth by selling advertising space to manufacturers and by selling catalogs to the respondent jobbers, as well as the cost to Billy & Ruth of publishing the catalogs and all other costs incurred (which were in the nature of general administrative and selling expenses) :

	1959	1960
Sales of catalogs to respondent jobbers-----	\$107,326.99	\$97,919.95
Sales of advertising to manufacturers-----	106,937.43	129,722.00
Cost of publishing catalogs-----	121,255.89	120,168.39
General administrative and selling expenses-----	40,867.52	40,936.02
Net income before taxes-----	52,285.92	67,217.07

(These figures were not contested by respondents in their submissions or answering submissions. See Mr. Steltz's testimony and exhibits referring to these items, which were identified by him, commencing CX 9.)

24. The manufacturers who advertised their products in the Billy & Ruth catalogs believed that Billy & Ruth was a group, the members of which were the respondent jobbers (CX 171-174). This belief was deliberately and purposefully created by Billy & Ruth (TR 183-188, 250-251; CX 129 A-B, 138 A-B, 139, 146 A-B). It may be that Billy & Ruth fostered this belief for the purpose, at least in part, of creating the impression that the Billy & Ruth catalog was no longer a Supplee-dominated publication and of thus increasing manufacturer acceptance (TR 183-188, 250-251), but Billy & Ruth could not have been unaware of the full effects of fostering the belief. Moreover, in creating or fostering this belief, Billy & Ruth was acting as the agent of respondent jobbers, who themselves independently believed that the manufacturers understood that they participated in making decisions (TR 292-293; CX 176), and said jobbers, so far as the record shows, never told them to the contrary.

Stipulated Facts Regarding Competitive Situations Throughout the Country

25. *Dallas, Texas*: G. K. Harris Company, Higginbotham-Bailey Company and respondent *Cullum & Boren Company* are all located in Dallas, Texas. Each of these companies is engaged in the business of selling toy, game and hobby products at wholesale to many types of retailers, including toy stores, variety stores, general stores and department stores, and the trading area of each of these companies includes the city of Dallas. G. K. Harris Company, in 1959 and 1960, purchased

directly from Emenee Industries, Remco Industries, Ideal Toy Corporation and Transogram Company, and Higginbotham-Bailey Company purchased directly from Remco Industries in 1960. Those purchases were made for resale. Neither G. K. Harris Company nor Higginbotham-Bailey Company distributed catalogs in 1959 or 1960, and neither company received any offer or notice in those years from any of the suppliers named above that those suppliers would pay sums of money for advertising or promoting the suppliers' products (CX 171-174, 175).

26. *Knoxville, Tennessee*: Deaver Dry Goods Company and *respondent House Hasson Hardware Company* are both located in Knoxville, Tennessee. Both of these companies are engaged in the business of selling toy, game and hobby products at wholesale to many types of retailers, including toy stores, variety stores, general stores and department stores, and the trading area of both companies includes the city of Knoxville. In 1959 and 1960, Deaver Dry Goods Company purchased directly from Emenee Industries, Remco Industries and Ideal Toy Corporation for resale. Deaver Dry Goods Company did not distribute catalogs in 1959 or 1960, and received no offer or notice in those years from any of the suppliers named that those suppliers would pay sums of money for advertising or promoting the suppliers' products (CX 171-173, 175).

27. *Memphis, Tennessee*: W. R. Moore Dry Goods Company, Memphis Tobacco Company, Leader Specialty Company, A. & B. Variety Company, National Druggist Sundry and *respondent Orgill Brothers & Co.* are all located in Memphis, Tennessee. Each of these companies is engaged in the business of selling toy, game and hobby products at wholesale to many types of retailers, including toy stores, variety stores, general stores and department stores, and the trading area of each company includes the city of Memphis. In 1959 and 1960, W. R. Moore Dry Goods Company purchased directly from Emenee Industries, Remco Industries, Ideal Toy Corporation and Transogram Company; in 1959 and 1960, Memphis Tobacco Company purchased directly from Emenee Industries and Ideal Toy Corporation; in 1959 and 1960, Leader Specialty Company purchased directly from Ideal Toy Corporation; in 1959 and 1960, A. & B. Variety Company and National Druggist Sundry each purchased directly from Transogram Company. These purchases were all made for resale. In 1959 and 1960, W. R. Moore Dry Goods Company distributed I. Lodge catalogs. None of the other non-respondent companies listed above distributed cata-

logs in those years, and none of the companies listed above received any offer or notice from any of the suppliers listed above that those suppliers would pay sums of money for advertising or promoting the suppliers' products (CX 171-174, 175).

28. *Milwaukee, Wisconsin*: Smith Supply Company and *respondent Frankfurth Hdw. Co.* are both located in Milwaukee, Wisconsin. Both of these companies are engaged in the business of selling toy, game and hobby products at wholesale to many types of retailers, including toy stores, variety stores, general stores and department stores, and the trading area of each company includes the city of Milwaukee. In 1959 and 1960, Smith Supply Company purchased directly from Emenee Industries, Remco Industries and Ideal Toy Corporation, all of which purchases were made for resale. Smith Supply Company did not distribute catalogs in 1959 or 1960, and received no offer or notice in those years from any of its named suppliers that those suppliers would pay sums of money for advertising or promoting the suppliers' products (CX 172-174, 175).

29. *Pittsburgh, Pennsylvania*: Shrager Brothers Company, Shaffer, Inc., A. H. Rapport Company, J. Spokane Company, Keystone Merchandise Company, S. J. Seltzer and *respondent J. A. Williams Company* are all located in Pittsburgh, Pennsylvania. Each of these companies is engaged in the business of selling toy, game and hobby products at wholesale to many types of retailers, including toy stores, variety stores, general stores and department stores, and the trading area of each company includes the city of Pittsburgh. In 1959 and 1960, Shrager Brothers purchased directly from Emenee Industries, Remco Industries and Transogram Company; in 1959 and 1960, Shaffer, Inc. purchased directly from Emenee Industries and Transogram Company; in 1959 and 1960, A. H. Rapport Company and J. Spokane Company each purchased directly from Remco Industries and Ideal Toy Corporation; in 1960, Keystone Merchandise Company and S. J. Seltzer each purchased directly from Transogram Company. These purchases were all made for resale. In 1959 and 1960, S. J. Seltzer distributed Santa's Playland catalogs. None of the other non-respondent companies listed above distributed catalogs in those years, and none of the companies listed above received any offer or notice from any of the suppliers listed above that those suppliers would pay sums of money for advertising or promoting the suppliers' products (CX 171-174, 175).

30. *Albany, New York*: E & S Merchandising Company, Miller Merchandising Company and *respondent Albany Hardware & Iron*

Co., Inc. are all located in Albany, New York. Each of these companies is engaged in the business of selling toy, game and hobby products at wholesale to many types of retailers, including toy stores, variety stores, general stores and department stores, and the trading area of each company includes the city of Albany. In 1959 and 1960, E & S Merchandising Company and Miller Merchandising Company each purchased directly from Ideal Toy Corporation for resale. In 1959 and 1960, E & S Merchandising Company distributed the Toy Pre-View catalogs, and Miller Merchandising Company distributed the Toyfun catalogs in the same years. Ideal Toy Corporation sent no direct offer or notice to either company in those years offering to pay sums of money for advertising or promoting Ideal products (CX 173, 175).

31. *Bristol, Tennessee:* The Profit Store and respondent *Faucette Company* are both located in Bristol, Tennessee. Both of these companies are engaged in the business of selling toy, game and hobby products at wholesale to many types of retailers, including toy stores, variety stores, general stores and department stores, and the trading area of both companies includes the city of Bristol. In 1959 and 1960, The Profit Store purchased directly from Ideal Toy Corporation for resale. The Profit Store did not distribute catalogs in 1959 or 1960 and did not receive any offer or notice in those years from Ideal Toy Corporation that sums of money would be paid for advertising or promoting Ideal products (CX 173, 175).

32. *Indianapolis, Indiana:* Vonnegut Hardware Company and the respondent partners doing business as *Kipp Brothers* are both located in Indianapolis, Indiana. These companies are both engaged in the business of selling toy, game and hobby products at wholesale to many types of retailers, including toy stores, variety stores, general stores and department stores, and the trading area of both companies includes the city of Indianapolis. In 1959 and 1960, Vonnegut Hardware Company purchased directly from Ideal Toy Corporation for resale. Vonnegut Hardware Company did not distribute catalogs in 1959 or 1960 and did not receive any offer or notice from Ideal Toy Corporation that sums of money would be paid for advertising or promoting Ideal products (CX 173, 175).

33. *Saginaw, Michigan:* Saginaw Specialties Company and respondent *Morley Brothers* are both located in Saginaw, Michigan. Both of these companies are engaged in the business of selling toy, game and hobby products at wholesale to many types of retailers, including toy stores, variety stores, general stores and department stores, and the trading area of both companies includes the city of

Saginaw. In 1959 and 1960, Saginaw Specialties Company purchased directly from Ideal Toy Corporation for resale. Saginaw Specialties Company distributed the Santa's Playland catalogs in 1959 and 1960 but did not receive any direct offer or notice from Ideal Toy Corporation that sums of money would be paid for advertising or promoting Ideal products (CX 173, 175).

34. *Sacramento, California*: Ora Howard Company, J. B. Specialty Sales, Inc., Orman & Wyant and *respondent The Thomson-Diggs Company* are all located in Sacramento, California. Each of these companies is engaged in the business of selling toy, game and hobby products at wholesale to many types of retailers, including toy stores, variety stores, general stores and department stores, and the trading area of each company includes the city of Sacramento. In 1959 and 1960, Ora Howard Company purchased directly from Ideal Toy Corporation and Transogram Company; in 1959 and 1960, J. B. Specialty Sales, Inc. purchased directly from Transogram Company. These purchases were all made for resale. None of the non-respondent companies listed above distributed catalogs in 1959 or 1960, and none of these companies received any offer or notice in 1959 or 1960 from any of the named suppliers that sums or money would be paid for advertising or promoting such suppliers' products (CX 173-174, 175).

35. *Columbus, Ohio*: Armor Sales Company, Forcheimer Company and *respondent John J. Getreu and Son, Inc.* are all located in Columbus, Ohio. Each of these companies is engaged in the business of selling toy, game and hobby products at wholesale to many types of retailers, including toy stores, variety stores, general stores and department stores, and the trading area of each of these companies includes the city of Columbus. In 1959 and 1960 Armor Sales Company and Forcheimer Company each purchased directly from Ideal Toy Corporation, such purchases having been made for resale. In 1959 and 1960, Forcheimer Company distributed the Santa's Playland Catalog. In 1959, Armor Sales Company distributed the Toyfun catalog. Neither of these non-respondent companies received any direct offer or notice in 1959 or 1960 from Ideal Toy Corporation that sums of money would be paid for advertising or promoting Ideal products (CX 173, 175).

36. With respect to the operations of the respondent jobbers and of the other companies listed in Findings 25-35, the following facts are also true:

a. For all practical purposes, on the proof in this case, all of the respondent jobbers (whether listed above or not) purchased all the

items which were advertised in the Billy & Ruth catalogs published in 1959 and 1960 (TR 133-134, 278-279). A respondent jobber might, to be sure, refrain from purchasing as many as five of the 200 or more items in the catalog in a given year, perhaps because certain items carried over in inventory from the previous year (TR 278-279; CX 176). It was definitely anticipated and desired, as a general matter, that all respondent jobbers would carry all items advertised in the catalog (TR 134).

b. Purchases of the non-respondent jobbers listed in Findings 25-35 from the manufacturers indicated, in 1959 and 1960, were, in some cases all, in some cases a few, and in some cases many of the products of such manufacturers which were advertised in the Billy & Ruth catalogs published in those years (CX 175 B).

c. Purchases of advertised products by all the jobbers listed in Findings 25-35 and by all the other respondent jobbers, in 1959 and 1960, were made from Transogram Company, Ideal Toy Corporation, Emenee Industries and Remco Industries, as the case may be, at approximately the same time that those manufacturers made payments in those years to Billy & Ruth in consideration for advertising their respective products in the Billy & Ruth catalogs (CX 171-174).

d. None of the non-respondent jobbers listed in Findings 25-35 as having distributed a catalog in 1959 or 1960, or both, owned any stock interest in the company publishing the particular catalog (CX 175 B).

e. Each of the companies listed in Findings 25-35 as not having distributed catalogs in 1959 and 1960, refrained from participating in such distribution for one or more of the following reasons (not necessarily stated below in order of importance or frequency) :

i. The jobber believed that effective utilization of catalogs as a sales device requires that substantially all of the items included in the catalog be carried in the jobber's inventory; normal inventory would have to be increased significantly to permit stocking of substantially all the items included in any of the existing catalogs (CX 175 C; see also TR 133-134, 297-298).

ii. The jobber believed that effective utilization of catalogs as a sales device requires that the jobber be able to fill retailers' orders for advertised items throughout the Christmas season; in order to carry the items in the catalog in sufficient quantity to do this, it would be necessary to increase normal inventory significantly (CX 175 C; see also TR 297-298).

iii. The jobber believed that effective utilization of catalogs as a sales device requires that substantially all of the items included in

the catalog be carried in the jobber's inventory; in many instances this would require a cessation of purchases of similar items from other suppliers with whom particularly cordial and satisfactory relations have been developed over a period of years in favor of purchasing from new suppliers whose policies and practices are unknown (CX 175 C; see also CX 45-49).

iv. The jobber once tried to join a catalog group, but was unable to join any of the desired groups because of the policy of those groups of restricting their membership to one wholesaler in each territory (CX 175 C; see also TR 114-119, 357-358).

v. The jobber knows that it can join certain catalog groups if it chooses, but the catalogs published by those groups include many items considered by the jobber to be generally unsaleable in its business (CX 175 C; see also TR 325-326).

vi. The jobber believed that effective utilization of catalogs as a sales device requires that the jobber carry substantially all of the items included in the catalog used; since several of the manufacturers whose products are included in catalogs have refused to accept the jobber as a customer, the jobber would be unable to carry substantially all of the items included in the catalog (CX 175 C; see also CX 67, 93-95).

vii. The major portion of the jobber's business consists of sales to small retailers, and the jobber believes that the quotation of prices in catalogs is injurious to small retailers using catalogs in that discount houses are given a target to make their own advertising more effective (CX 175 D; see also TR 326, 341, 357-358).

viii. The jobber never considered catalogs necessary or desirable (CX 175 D; see also TR 375-376).

ix. The jobber's retailer customers are not interested in using catalogs as a form of advertising in their business (CX 175 D).

37. The four manufacturers specifically involved herein, made payments, in 1959 and 1960, for advertising of their products in catalogs other than the Billy & Ruth catalog. The amount paid for advertising in various catalogs and the number of items advertised in such catalogs are set forth, for the years 1959 and 1960, in Tables A and B. As for other details see below under subcaption Other Catalogs, commencing Finding 39.

TABLE A.—1959

	Billy & Ruth		Toy Pre-Vue		Toysfun		Santa's Playland		Santa's Playthings		I. Lodge	
	Items	Amount	Items	Amount	Items	Amount	Items	Amount	Items	Amount	Items	Amount
Emencee.....	5	\$2,640	3	\$825	4	\$1,600	2	\$800	4	\$2,750	2	\$1,100
Remco.....	3	1,620	4	1,100	3	1,500	3	1,000	3	8,000	3	1,350
Transogram.....	10	4,290	3	825	5	2,500	0	0	7	2,800	7	2,887
Ideal.....	5	2,370	7	1,925	3	750	0	0	11	4,400	3	1,025

TABLE B.—1960

Emencee.....	5	2,370	3	925	4	1,600	2	900	5	3,000	0	0
Remco.....	3	1,620	4	1,100	4	1,500	1	300	4	450	3	2,000
Transogram.....	16	6,240	2	550	6	3,000	0	0	5	2,500	5	2,500
Ideal.....	3	1,620	4	1,100	3	750	2	600	10	4,500	5	2,150

NOTE: (See CX 4 A, 5 A-D).

Facts Regarding Competition in Philadelphia, Proved by Actual Testimony

38. Respondent Supplee-Biddle-Steltz Company, located in Philadelphia, Pennsylvania, is engaged in the business of selling a wide variety of items including toys (TR 23) at wholesale to all types of retail outlets including toy stores, variety stores and department stores (TR 132-133). The trading area of this company includes the city of Philadelphia (Tr. 132-133). In 1959 and 1960, Supplee-Biddle-Steltz Company purchased every item which was advertised in the Billy & Ruth catalogs published in those years (TR 133-134).

Milton Wiseman Company, located in Philadelphia, Pennsylvania, is engaged in the business of selling toys at wholesale to all types of retailers handling toys, including department stores, drug stores, and other retailers. The trading area of Milton Wiseman Company includes the city of Philadelphia (TR 314-315). It is the opinion of a principal operating officer of this company that Milton Wiseman Company is in competition with respondent Supplee-Biddle-Steltz Company (TR 316-317). In 1959, this company purchased, directly from Transogram Company, six of the ten Transogram items which were advertised in the Billy & Ruth catalog published in that year (TR 318-319; Table A, *supra*). In 1959, this company purchased, directly from Emenee Industries, three of the five Emenee items which were advertised in the Billy & Ruth catalog published in that year; and, in 1960, this company purchased, from the same supplier, one of the three Emenee items included in the Billy & Ruth catalog published in that year (TR 319-320; Tables A, B, *supra*). In 1959, this company purchased, directly from Ideal Toy Corporation, four of the five Ideal items which were advertised in the Billy & Ruth catalog published in that year (TR 320; Table A, *supra*). In 1959, this company purchased, directly from Remco Industries, all three Remco products which were advertised in the Billy & Ruth catalog published in that year (TR 320-321; Table A, *supra*). The purchases from Ideal were made at approximately the same time that Ideal made payments to Billy & Ruth for advertising Ideal products in 1959 (CX 173 E-F).

In 1959 and 1960, Milton Wiseman Company neither received nor was offered any payments by any of the four suppliers named above for advertising, promoting or displaying their respective products (TR 322). This company has not distributed a catalog since 1956 (TR 322). The catalog then distributed was dropped because the items included were not suitable for resale by Milton Wiseman Company, since they were generally too low-priced (TR 325-326). The company had not resumed catalog distribution in recent years because the effectiveness of catalogs has been diminished by discounting (TR

326). This company derives 97% of its business from the sale of toys and carried over one thousand different items in inventory (TR 324-325).

M. Gerber, Inc., located in Philadelphia, Pennsylvania, is engaged in the business of selling toys and general merchandise at wholesale to retail outlets, including toy stores, variety stores and juvenile furniture stores (TR 331-333). The trading area of this company includes the city of Philadelphia (TR 333). It is the opinion of a principal operating officer of this company that *M. Gerber, Inc.* is in competition with respondent Supplee-Biddle-Steltz Company; this opinion is based, in part, on that witness' knowledge that his company and that respondent each sells to the same type of customer in the same area (TR 333).

In 1959, this company purchased, directly from the Transogram Company, four of the ten Transogram items which were advertised in the Billy & Ruth catalog published in that year (TR 335-336; Table A, *supra*). In 1960, this company purchased, directly from Transogram Company, four of the sixteen Transogram items which were advertised in the Billy & Ruth catalogs in that year (TR 337-339). The officer of this company who appeared also testified that his company had purchased directly from Remco Industries in 1959 and 1960 and stated that his company had purchased two of the three Remco items advertised in the 1959 Billy & Ruth catalog and all three of the Remco items advertised in the 1960 Billy & Ruth catalog, although he did not remember the year in which such purchases were made (TR 336-337, 339-340). This witness stated that his company had purchased two additional Transogram items advertised in the 1960 Billy & Ruth catalog, but he did not remember the year in which such items had been purchased (TR 337-339).

In 1959 and 1960, *M. Gerber, Inc.*, neither received nor was offered any payments by either of the suppliers named above for advertising, promoting or displaying their respective products (TR 340). This company has never used a catalog because of the problems which might be caused by competitive discount advertising (TR 341). The witness from this company who testified stated that he did not remember the size of his company's inventory but that *M. Gerber, Inc.* purchased from "practically all of the leading game and toy people" (TR 342).

Harry Toub and Son, located in Philadelphia, Pennsylvania, is engaged in the business of selling toys, medicines and stationery at wholesale throughout its trading area which includes the city of Philadelphia (TR 350-351). It is the opinion of a principal of this company that *Harry Toub and Son* competes with Supplee-Biddle-

Steltz Company; this opinion is based in part on the fact that the two companies have some common customers (TR 351-352).

In 1959, this company purchased, directly from Transogram Company, three of the ten Transogram items which were advertised in the 1959 Billy & Ruth catalog (TR 353; Table A, *supra*). In 1960, this company purchased, directly from Transogram Company, six of the sixteen Transogram items which were advertised in the 1960 Billy & Ruth catalog (TR 354-355; Table B, *supra*). In 1959, this company purchased, directly from Emenee Industries, three of the five Emenee items which were advertised in the 1959 Billy & Ruth catalog (TR 353-354; Table A, *supra*). In 1959 and 1960, this company also purchased, directly from Ideal Toy Corporation, some of the Ideal products which were advertised in the catalogs published in those years by Billy & Ruth; such purchases from Ideal Toy Corporation were made at approximately the same time that Ideal Toy Corporation made payments in those years to Billy & Ruth in consideration for inclusion of its products in the Billy & Ruth catalogs (CX 173, 175).

In 1959 and 1960, Harry Toub and Son neither received nor was offered any payments by either of the suppliers named above for advertising, promoting or displaying their respective products (TR 355-356, CX 173). The company once attempted to distribute a catalog, but the catalog it tried to obtain was restricted to another Philadelphia jobber, and the company is no longer interested in catalogs because of prevalent advertising of discount prices (TR 357-358). The principal of this company who testified stated that his company's customers might engage in cooperative advertising if they were paid to do it (TR 362-363). Twenty-five percent of the business of this company is derived from sales of toys (TR 356-357).

L. Rieber & Co., located in Philadelphia, Pennsylvania, is engaged in the business of selling toys and furniture at wholesale to retail outlets including furniture stores, juvenile furniture stores and toy stores (TR 367-368). The trading area of this company includes the city of Philadelphia (TR 367-368). It is the opinion of a principal operating official of this company that *L. Rieber & Co.* competes with *Supplee-Biddle-Steltz*; this opinion is based in part on the fact that *L. Rieber* on many occasions has sold toys to customers of *Supplee-Biddle-Steltz Company* (TR 368-369, 379-380, 382-383).

In 1959, this company purchased, directly from Transogram Company, four of the ten Transogram items which were advertised in the 1959 Billy & Ruth Catalog (TR 370-371; Table A, *supra*). In 1960, this company purchased, directly from Transogram Company, six of the sixteen Transogram items which were advertised in the 1960 Billy

& Ruth catalog (TR 372-373; Table B, *supra*). In 1959, this company purchased, directly from Emenee Industries, all of the Emenee items which were advertised in the 1959 Billy & Ruth catalog (TR 371; Table A, *supra*). In 1960, this company purchased, directly from Emenee Industries, two of the five Emenee items which were advertised in the 1960 Billy & Ruth catalog (TR 371-372; Table B, *supra*).

In 1959 and 1960, L. Rieber & Co. neither received nor was offered any payments by either of the suppliers named above for advertising, promoting or displaying their respective products (TR 373). The company was never interested in distributing catalogs because of the trouble involved (TR 376) and because it was satisfied to make sales to customers of Supplee-Biddle-Steltz of items advertised in the Billy & Ruth catalogs when those customers were unable to obtain such items from Supplee-Biddle-Steltz, either because they had exceeded their credit limits or because their other supplier had exhausted its inventory (TR 376, 379-380, 382-383).

Twenty percent of L. Rieber's volume is derived from sales of toys. Toy volume was once \$1,000,000, but the company has cut its toy volume by half because it depends on small retailers who are being forced out of business by discount house competition (TR 374-375).

The four non-respondent jobbers listed above made the purchases mentioned for resale (TR 321, 340, 355, 373).

Other Catalogs

39. In the course and conduct of their businesses in commerce, certain of the said respondents have been, and are now, in competition with other corporations, partnerships and individuals in the sale and distribution of toy catalogs to retail outlets and in the sale and distribution of toy products to said retail outlets (CX 164 F, Stipulation 163 A; R33).

40. During 1959 and 1960 there were, according to the evidence in this case, 14 toy catalogs being distributed by toy wholesalers in the United States, all of which were substantially similar (CX 163 D)—i.e., as to their general form and purpose (TR 147-148)—to those published by Billy & Ruth. There were 15 such catalogs in 1961. A few, at least, of the catalog companies solicited jobbers to distribute their catalogs (TR 307, 325-327, 341-343, 375-376; R38).

41. Transogram Company, Inc., Ideal Toy Corporation, Remco Industries, Inc., and Emenee Industries, Inc., have each paid sums of money to publishers of other catalogs devoted exclusively to the illustration and listing of toy, game and hobby products in consideration for illustration and listing of their respective products in such other catalogs.

It is impossible to find that space rates paid to such other catalogs are "comparable to, competitive with, and proportionately equal to" space rates paid to Billy & Ruth, as proposed by respondents (R39). See Finding of Fact 37, Conclusion of Fact 6, and legal discussion below.

42. The publishers of six catalogs devoted exclusively to the listing of toy, game and hobby products, including respondent Billy & Ruth Promotion, Inc., have been named as respondents in Commission complaints involving charges similar to those made in this proceeding. Eighty-eight wholesalers who purchase and distribute catalogs devoted exclusively to the illustration and listing of toy, game and hobby products, including those named as respondents in this proceeding, have been named as respondents in Commission complaints involving charges similar to those made in this proceeding (Stipulation, CX 163 D and E; R40).

43. Over 300 wholesalers, located throughout the United States, at all times herein material, purchased and distributed catalogs devoted exclusively to the illustration of toy, game and hobby products (Stipulation CX 163 E; R41).

44. Practices substantially similar to those charged as violations of law in this proceeding have been engaged in by several publishers of catalogs devoted exclusively to the illustration and listing of toy, game and hobby products for approximately 30 years. Payments to such companies by manufacturers such as those charged as violations of Section 2(d) of the amended Clayton Act *In the Matter of Transogram Company, Inc.*, Docket No. 7978 [61 F.T.C. 629], have been made by several manufacturers of toy, game and hobby products for approximately 30 years. The practices and payments described in this Paragraph had never been challenged as unlawful by any agency of the United States Government prior to the issuance by the Commission approximately three years ago of a number of complaints naming as respondents certain catalog publishers, wholesalers and manufacturers (Stipulation CX 163 E; R42).

45. The acts and practices charged in the complaint are prevalent throughout the toy industry and are common industry practices participated in in some manner by nearly all the manufacturers of toys purchasing advertising space in the Billy & Ruth catalogs. The examiner takes official notice of this, to support respondents' proposed finding (R43).

Respondent Jobbers With Special Claims

46. The only competitors of respondent *Albany Hardware & Iron Co., Inc.*, as to which there is any evidence are E & S Merchandising

Co. and Miller Merchandising Co., both of Albany, New York (Stipulation CX 173 E). E & S Merchandising Co. purchased the Toy-Prevue catalog and Miller Merchandising Co. purchased the Toyfun catalog in the years 1959 and 1960 (Stipulation CX 175 B; R46).

47. The only competitor of respondent *Morley Brothers* as to which there is any evidence is Saginaw Specialties Co. located in Saginaw, Michigan (Stipulation CX 173 E). Saginaw Specialties Company purchased the Santa's Playland catalog in the years 1959 and 1960 (Stipulation CX 175 B; R47).

48. The only competitors of respondent *John J. Getreu and Son, Inc.* as to which there is any evidence are Armor Sales Co. and Forcheimer Company, both of Columbus, Ohio (Stipulation CX 173 E). Armor Sales Co. purchased the Toy-Prevue catalog in 1959 and the Toyfun publication in 1960. Forcheimer Company purchased the Santa's Playland catalog in 1959 and 1960 (Stipulation CX 175 B; R48).

49. There is no proof in this case that manufacturers who advertised their products in the Billy & Ruth catalog did not make available or offer promotional allowances on proportionally equal terms to wholesaler competitors of respondent *Chapman Harkey-Co.*, respondent *Farwell, Ozmun, Kirk & Co.*, respondent *Ohio Valley Hardware Co., Inc.*, or respondent *Wyeth Company*, in their respective areas (Stipulation CX 171 A-I, 172 A-H, 173 A-G, 174 A-G, which place into evidence the names of those competitors of respondents to whom manufacturers sold products advertised in the Billy & Ruth catalog; R44).

50. However, the examiner disallows respondents' proposed findings (R24, 45) that respondent Chapman-Harkey Co. did not distribute Billy & Ruth catalogs in 1959 or thereafter (Answer, par. 3; stipulation CX 164 E; Mr. Steltz, TR 96, 150-151, 225, merely "not certain").

CONCLUSIONS OF FACT

Inasmuch as complaint counsel proposes Conclusions of Fact, and respondents answer them as such by number, the examiner hereby makes Conclusions of Fact, adopting and following the numbering used by counsel on both sides.

These Conclusions may in part contain matter verging on findings of fact, *i.e.*, insofar as complaint counsel's proposed conclusions with supporting argument, and respondents' answers thereto, may verge on proposals of fact.

Furthermore, these Conclusions of Fact may at certain portions verge on conclusions of law or general legal considerations. However, any formal legal discussion or citation of cases is reserved to the en-

suing legal discussion, which uses the same numbering as these Conclusions of Fact.

1. The Billy & Ruth "program", as described in Finding 5-9, in reality constituted a cooperative advertising venture embracing the efforts of Billy & Ruth, the respondent jobbers, the respondent jobbers' customers and the respondent jobbers' suppliers. The respondent jobbers' suppliers participated in this program by making payments to Billy & Ruth; suppliers agreed to make those payments because sales of their products were promoted. The respondent jobbers' retailer customers participated in this program by distributing the catalogs and other related material to the public without charge, and by purchasing catalogs thereby incurring an expense not directly reimbursed; the respondent jobbers' customers agreed to so participate because the catalogs, with their respective names printed on the cover, constituted valuable advertising of their respective businesses and promoted their sales. The respondent jobbers participated in the program by taking a vital part in the over-all group activity of performing all the functions necessary to the program and by distributing the catalogs to retail outlets; the respondent jobbers so participated because the catalogs promoted their sales of the advertised items to the retailers to whom the catalogs were distributed.

Respondent jobbers also participated in the program by attending the annual meeting held by Billy & Ruth at the time of the Toy Show. All of the jobbers, through their representatives, attended the meeting except for one absentee in one of the two years here involved. By attending the meeting, and participating, they fully acted out, at least, their part as "members" of Billy & Ruth, which represented them to manufacturers as voting members or as fully participating in the selection of advertisements.

Actually, also, there was at the meeting active discussion, objections, and suggestions, on the part of respondent jobbers, in respect to selections of advertisements—all of which was given serious consideration, although the final selection was made by Billy & Ruth, largely, it seems, through respondent Trader, in whom the jobbers (*i.e.*, without considering Supplee) had great confidence, and with whom they might be in contact in the days immediately prior to, as well as after, the meeting proper.

* * * * *

Billy & Ruth was the agent, and collaborator, of respondent jobbers in obtaining moneys from suppliers for advertisements in the catalogs and in its general activities in the Billy & Ruth program. The examiner rejects respondents' contention, in its answer to Proposed Conclusion 1 and elsewhere, that respondent jobbers were "mere cus-

tomers" of Billy & Ruth. The arrangement whereby there was only one jobber to a territory is one fact casting doubt on the "mere customers" theory.

The testimony of both Mr. Steltz and Mr. Faucette, both of them very candid witnesses, establishes a cooperative advertising venture.

2. The manufacturers who paid sums of money to Billy & Ruth in consideration for illustration and listing of their products in the Billy & Ruth catalogs did so for the purpose and presumably with the effect of increasing their sales to the respondent jobbers of the items so illustrated and so listed.

3. Each manufacturer who paid sums of money to Billy & Ruth in consideration for illustration and listing of his products in the catalogs published by Billy & Ruth was induced to do so by Billy & Ruth and by all of the respondent jobbers, acting singly, in conjunction with each other, and in conjunction with Billy & Ruth.

That Billy & Ruth "induced" in the strongest, if not the first, sense of the word, is very clear. Since Billy & Ruth is here found to be the agent and collaborator of respondent jobbers they also "induced" in much the same sense, *i.e.*, the non-stockholder jobbers, as well as Supplee, the sole stockholder of the outright subsidiary.

Moreover, in the very first meaning of the word, "To lead on; to influence * * *" (Webster's New International), respondent jobbers, that is, the non-stockholder jobbers in particular, all definitely "induced" the advertising payments. Even if they did not directly instigate the payments their acts and omissions to act seem to have been almost designed "to lead on" the suppliers to make the payments directly instigated by Billy & Ruth, and certainly "to influence" them to make the payments.

4. The sums of money paid by various manufacturers to Billy & Ruth in consideration for illustration and listing of their respective products in the catalogs published by Billy & Ruth inured to the benefit of respondent Supplee-Biddle-Steltz Company. Such sums of money also inured to the benefit of each and every non-stockholder respondent.

Secondly, and parenthetically, the moneys were "received" within the alternative, and dominant alternative, indicated in the complaint ("induced or received", FIVE) and in the Clayton Act (Sec. 2(f) by analogy). Billy & Ruth directly received the moneys, and as agent and collaborator received them for all the respondent jobbers, to be used by it to get up the catalogs and for the cooperative program generally—with any profit going in effect to Supplee.

These payments were thus "to or for the benefit" of the respondent jobbers, within the meaning of Section 2(d) of the Clayton Act, which,

like Section 2(e), is for practical purposes impliedly read into Section 5 of the Federal Trade Commission Act, under which this proceeding is brought.

They were payments to the respondent jobbers, since Billy & Ruth received them as their agent. They also, perhaps, were payments for another reason to Supplee, Billy & Ruth's sole stockholder, in that Supplee derived money profits from this distinctively cooperative advertising enterprise, in which it was joined with the other jobbers.

They were at least payments "for the benefit" of all respondent jobbers since they got exactly what they wanted, to wit, a cooperative advertising mechanism, principally the catalog setup—including catalogs at cost, and, as for Supplee, a money profit.

5. Each jobber listed in Findings 25-35 and 38 competed, in 1959 and 1960, with each other jobber listed as located in the same city, in the sale of some or all of the toy products of Ideal Toy Corporation, Transogram Company, Emenee Industries, Inc. and Remco Industries, Inc., which were advertised in the 1959 and 1960 Billy & Ruth catalogs.

(This Conclusion of Fact, apparently unchallenged, relates to all respondent jobbers and their competitors, except four respondent jobbers: *Chapman-Harkey*, *Farwell*, *Ozmun*, *Kirk & Co.*, *Ohio Valley Hardware Co.* and *Wyeth Company*. It thus relates to 12 of the 16 respondent jobbers—11, non-stockholders, covered by Findings of Fact 25-35 and 1, Supplee, by Finding of Fact 38.)⁶

6. Ideal Toy Corporation, Transogram Company, Emenee Industries and Remco Industries, in 1959 and 1960, did not make any payments for any services or facilities available *directly* to any of the non-respondent jobbers listed in Findings 25-35 and 38, *i.e.*, to any of the jobbers competing with the 12 respondent jobbers referred to in Conclusion of Fact 5.

The said manufacturers did not make their payments herein available except as payments to Billy & Ruth, *i.e.*, in behalf of respondent jobbers herein, and they make no provision for jobbers unable for economic reasons to participate profitably in a catalog program, or otherwise ill-adapted to such a "tailored" project. There are a number of valid reasons why many jobbers, particularly small ones, will not fit into a catalog program (Finding of Fact 36(e)). Respondents were certainly acquainted with these reasons (see citations, Finding 36(e); also TR 133-134, 297-298), and with the virtual exclusion of other jobbers. These reasons applied also to jobbers competing with respondent Supplee (Finding 38), including the inability to obtain

⁶ Kipp Brothers, the only unincorporated jobber, is counted as one respondent jobber, although named through six individuals doing business under that name.

a desired catalog because of territorial restrictions (TR 357-358) and unsaleability of items advertised in available catalogs (TR 325-326).

Similarly, in making their payments for advertisements in *other toy catalogs*, no payments were made other than to the catalog company, nor any payments made available directly to non-participating jobbers, nor provision made for any jobbers economically or otherwise unable to fit into such a "tailored" program (see also Finding of Fact 40). Respondents here, and in particular the respondent non-stockholder jobbers, must be deemed to have known of the exclusive nature of the toy catalog system, catering only to those jobbers able to benefit by the use of catalogs, and even then serving only those actually participating in a catalog group, after satisfying any regional or other membership restrictions, varying, no doubt, with the standing and quality of different catalogs.

* * * * *

In the cases of 3 of these 12 respondent jobbers—*Albany Hardware & Iron Co., Inc.*, *Morley Brothers*, and *John J. Getreu and Son, Inc.*—their respective competitors purchased (CX 175 B) and presumably distributed toy catalogs, in 1959 and 1960, other than the Billy & Ruth catalogs, to which these manufacturers also made advertising payments, and presumably these competitors derived therefrom a benefit of the same general nature or kind—a toy catalog advertising facility—as the non-stockholder respondents derived from the Billy & Ruth catalogs. However, each of the four manufacturers made larger payments to Billy & Ruth than to the other five catalog organizations here involved, except to Santa's Playthings in various instances (Finding of Fact 37, Tables A and B), whatever significance attaches to the fact of larger payments. Moreover, in some instances no payment was made by any of the four manufacturers to one or more of these other catalog organizations; *i.e.*, Ideal Toy did not advertise in 1959 in Santa's Playland, distributed by its customer Forcheimer Co., one of the two competitors of respondent John J. Getreu & Son, Inc. (Finding 37, Table A), the other examples apparently not involving any respondent jobber here. It does not appear whether the other catalog companies distributed the catalogs to the jobbers at cost, as with Billy & Ruth, or at a profit; nor what was the quality of the catalogs in respect to paper, makeup, and the like; nor whether the catalogs were available to jobbers without territorial or comparable restrictions except that a "few" catalog companies solicited jobbers to distribute catalogs (Finding 40); nor whether the catalogs were generally comparable in any of a number of other respects, there being little specific evidence on the subject by way of

testimony or stipulation. It does appear that the advertising rates of the other catalogs were fixed, as with Billy & Ruth, by the organizations themselves, without consultation with the manufacturer (see CX 172 C, 174 C⁷).

(The question of proportionality will be passed on below as one of law. The further question of whether, even if non-proportionality is not proved, the three respondents here participating in other catalog programs can be held to be in violation for collaborating with the other respondents, will also be passed on below.)

7. Each of the respondents named herein, in 1959 and 1960, knew or should have known that there were many jobbers in competition with the respondent jobbers who were not receiving payments, or the benefit of payments, on terms which were proportionally equal to the terms on which payments were being made to Billy & Ruth from which payments the respondent jobbers derived benefit.

Said respondents knew the operating facts of toy catalogs, those of Billy & Ruth and others, and that they represented a system for making promotional payments to or for the benefit only of jobbers participating in a catalog group to the exclusion of jobbers not participating, or unable to participate.

Respondent Billy & Ruth had the immediate knowledge found herein, and its knowledge is most clearly chargeable to respondent Supplee, its parent corporation with common officers, and also chargeable to non-stockholder respondent jobbers herein for whom it acted as agent. Moreover, Supplee in particular, and non-stockholder jobbers as well, knew, or should have known on their own these operating facts of toy catalogs.

Respondent jobbers, referring more particularly to non-stockholder jobbers, never satisfied their duty to inquire as to whether manufacturers herein did make available proportional equal payments or the benefit thereof to other customers who were competitors of these jobbers and who did not participate in a catalog group; nor did they make any attempt to ascertain whether discrimination existed by virtue of the payments to the Billy & Ruth catalog or the extent of any such discrimination.

DISCUSSION

As heretofore indicated, this Discussion will follow the numbering and paragraph content of the Conclusions of Fact, *i.e.*, 1 through 7. In addition, there will be certain additional numbering with special topics, commencing with 8.

⁷ Stipulations referring to Toy Pre-Vue, Toyfun, Santa's Playland, Santa's Playthings, and Lodge, *i.e.*, catalogs used by the three respondent jobbers—Albany, Morley, Getreu—referred to above.

1, 2. *Cooperative Advertising Venture*

The examiner has adopted complaint counsel's Proposed Conclusion of Fact 1 and elaborated on it. The same kind of cooperative advertising venture is found as found by him in *ATD Catalogs, Inc.*, *supra*, even though respondent jobbers at the annual meeting did not select advertisements by majority vote and actually Billy & Ruth did the selecting. However, Billy & Ruth is found to be the agent and collaborator of the respondent jobbers, and the jobbers not "mere customers" of Billy & Ruth.

Complaint counsel's Proposed Conclusion of Fact 2 is also adopted by the examiner, with a slight change suggested by respondents' counsel.

3. *Inducement*

The examiner adopts Proposed Conclusion of Fact 3 and has indicated that his grounds are that Billy & Ruth, in inducing, was the agent of all the respondent jobbers, and that even non-stockholder jobbers directly induced since they did "lead on" (Webster's) the manufacturers even if they did not directly instigate them.

In his answer to Proposed Conclusion 3 respondents' counsel contends that complaint counsel makes two unsupported assumptions. One is that respondent jobbers "participated in the selection of toys"; however, they definitely did participate to a substantial degree. The other is that they deliberately and affirmatively held themselves out to the manufacturers as playing a greater role in the selection than they did; however, they at least in effect so held themselves out, as the examiner has found, namely, as members of Billy & Ruth, indeed, voting members (Conclusion of Fact 1).

Respondents' counsel covers the question of inducement in his main brief (pp. 3-8). He argues, as elsewhere, that non-stockholder jobbers were "mere customers" of Billy & Ruth (Brief, 3-4), because the catalog was regarded in the trade as a pure Supplee affair anyway (but see Finding of Fact 10), and because their part in selecting advertisements was, in his opinion, minimal (but see Findings of Fact 14-16). He argues that Billy & Ruth, not they, created the impression that they were "members", but the examiner holds them liable for the impression (see also Findings of Fact 22, 24). Respondents' counsel recites no cases in this portion of his brief, so none will be discussed here.

4. *Benefit of Payments—Receipt of Payments*

The examiner adopts complaint counsel's proposal that the payments to Billy & Ruth were for the benefit of the respondent jobbers.

Secondly, a paragraph is added to the effect that the payments were "received" by them, through Billy & Ruth, as agent and collaborator, thus satisfying the alternative to inducement indicated by "induced or received."

The essential benefit was the cooperative advertising facility of the catalog, including catalogs at cost (see Finding of Fact 23).

Supplee, as sole stockholder of Billy & Ruth, which engaged in the cooperative advertising venture proper, definitely "received" the payments in question, and certainly the benefit thereof. *State Wholesale Grocers v. Great Atlantic & Pacific Tea Co.*, 258 F. 2d 831 (7th Cir. 1958), *cert. denied*, 358 U.S. 947 (1959).

Moreover, the non-stockholder respondent jobbers definitely received the benefit of the payments, *i.e.*, even if not regarded as receiving the payments through their agent Billy & Ruth. *P. Lorillard Co. v. F.T.C.*, 267 F. 2d 329 (3d Cir.), *cert. denied*, 361 U.S. 923 (1959).

Respondents attempt to distinguish (Brief, p. 27) State Wholesale Grocers from the present case. But any distinction is largely only one of degree and not of substance. There distribution of the periodical was limited to A&P retail customers, here it is limited to the respondent jobbers and their retail customers. There the periodical might be marked with the name A&P, the sole distributor and retailer, here it is marked with the name of one of each of the retailers, all of them part of the cooperative advertising enterprise with the jobbers and manufacturers. Respondents also point out that the court there in handing down its decision affirmed the court below dismissing as to A&P and the publisher, but the examiner sees no controlling significance here.⁸ See also Santa's Playthings, Initial Decision, *supra*, pp. 230, 231.

Respondents also attempt, unsuccessfully, to distinguish P. Lorillard Co. from the case at bar on the ground that the benefit here is "far less formidable" than in that case and not involving "respondents who were dominant in the industry," as there.

Respondents also try to draw some comfort from *Nuarc Company v. F.T.C.* [7 S.&D. 673] 1963 C.C.H. Trade Cases, Par. 70,754 (7th Cir. 1963), setting aside the Commission's order issued pursuant to its decision of August 7, 1962, D. 7848 [61 F.T.C. 375]. Primarily the court merely did not go along with a finding of fact as to the identity of the publishing corporation and a customer corporation based on ownership of stock in each by an individual. Furthermore, the indicated rule that a Section 2(d) benefit must accrue, or be intended to accrue, to the "customer qua customer" is satisfied in the

⁸ The court stated that it was "required to affirm" because of "abandonment" of legal points involved (258 F. 2d at 833). See part 10 hereof, p. 195 of this decision.

case at bar since there is the essential benefit in any event of the co-operative advertising enterprise designed directly for the customers as customers; moreover, the payments to Billy & Ruth were intimately associated with the status of respondent jobbers as customers of the manufacturers. The Billy & Ruth catalog enterprise is in no realistic sense just another type of business engaged in by Supplee.

Respondents also attack the applicability of *In the Matter of United Cigar-Whelan Stores Corp.*, D. 6525 (1956) [53 F.T.C. 102], cited, somewhat incidentally, by complaint counsel. It is contended that the "crucial distinction" between that case and this is that here the catalog is sponsored by the retailer, whose name appears, and, far from advertising Supplee or any other respondent jobber, the catalog advertises only the manufacturers. But the finding in the case at bar is that the catalog is a cooperative enterprise of manufacturers, suppliers, and retailers, all playing their respective interrelated parts. The consumer has no interest in the jobber's name, but the jobber anticipates that the retailer who buys the catalogs from him will also buy the toys from him.

5. *Proof of Competing Jobbers Except as to Four Respondent Jobbers*

Complaint counsel's Proposed Conclusion of Fact, apparently unchallenged, has been adopted. The proof has been deemed altogether acceptable. *In the Matter of Elizabeth Arden, Inc.*, D. 3133, 39 F.T.C. 288, 301 (1944). *In the Matter of J. Weingarten, Inc.*, D. 7714, p. 7 (March 25, 1963).

As to the four respondent jobbers as to whom there is no proof of competing jobbers, the examiner holds that a Section 5 violation may nevertheless be shown in this case without such proof. This is because these four respondent jobbers, all of whom had their representatives at the Billy & Ruth annual meeting, and all of whom had their own respective territories in the catalog setup, knew, as found herein, that the system made no provision for payments or benefits to jobbers not affiliated with a catalog group.

They assisted, and knowingly assisted, in bringing about violations of Section 5 by those respondent jobbers having unfavored competitors, which would be a normal situation in a country-wide setup, and one to be reasonably anticipated.

In the examiner's opinion the acts and omissions to act on the part of the four respondent jobbers in question, joined with the other respondent jobbers, come within the purview of the general language "unfair methods of competition" used in Section 5 of the Federal Trade Commission Act.

In the perspective of Section 5 the absence of competitors as to these particular respondents seems to be a mere accident which does not negative violation in this type of situation, whatever the legal requirements to prove the existence of an unfavored competitor (of a customer) under Section 2(d) of the Clayton Act.

The examiner reached this general result in *ATD Catalogs, Inc.*, *supra*, p. 4. There the facts as to participation in selection of advertisements were, of course, stronger than here, but the underlying reasoning indicated above, permitting a finding of violation, seems to be controlling for both cases.

6. *Not Proportionally Equal*

Conclusion of Fact 6 contains facts tending to show that payments by manufacturers to Billy & Ruth were disproportional, and, secondly, that payments by them to other catalogs have also been disproportional (including other catalogs distributed by competitors of three of the respondents herein).

Complaint counsel aptly cites *State Wholesale Grocers*, *supra*, 258 F. 2d 831, 839, for the proposition that the statute will not countenance an advertising program so tailored to certain customers that as a matter of economics competing customers are unable to participate. As stated therein,

An offer to make a service available to one, the economic status of whose business renders him unable to accept the offer, is tantamount to no offer to him.

Complaint counsel also points to the reasons for nonparticipation in catalogs by unfavored jobbers herein, said reasons being here set forth in Finding of Fact 36(e).

As to payments herein to Billy & Ruth, respondents contend in their brief (p. 21) that the claimed proof of disproportionality rests solely on the fact that Billy & Ruth fixed the rates to be charged. Complaint counsel correctly answers that disproportionality is shown by the unavailability of the catalogs to jobbers unable to use them advantageously or otherwise excluded from participation for reasons heretofore indicated.

Respondents also argue in their brief (p. 22) that an inference may be drawn that advertising payments were directly commensurate with dollar volume of sales, *i.e.*, to the catalog "members." The claimed inference is based on one witness's rather general and vague testimony (TR 343-344) that at the Toy Show salesmen from the manufacturers offer to try to get unaffiliated jobbers into a catalog group. But there is evidence from at least one manufacturer, Emenee, that its "catalog advertising was never based on purchases by the customers" and that "Emenee based the amount of its participation in

each catalog on the desirability to it of reaching the consumer market * * * (CX 171 H).

Respondents also challenge the persuasiveness of the reasons listed in what is now Finding 36(e) why "unfavored" competitors herein have refrained from participating in catalog distribution. It is true that the listed reasons do not all apply to each of these unfavored competitors, but they do not purport to do so. It is also true that some of them are based on what jobbers "believed", but the belief of a toy jobber as to the value of a toy catalog may well be regarded as some proof of what the value is or is not. It is also true that some of the reasons revolve around special situations, but that does not exclude reasonable inferences. Nor is this proof rebutted by the testimony heretofore referred to (TR 343-344) as to manufacturer interest in attracting jobbers to catalog groups.

* * * * *

As for payments by manufacturers to other toy catalogs, the reasons set forth in Finding 36(e) adequately indicate the unavailability of the benefit thereof to jobbers who find it economically not feasible to participate in a catalog program—apart from unavailability because of territorial restrictions or other obstacles.

Concededly, however, there are three respondent jobbers whose competitors were members of other catalog groups.

First of all, as to these three respondents and their competitors, it is true, as shown by Tables A and B (Finding 37)—although with one exception noted in Conclusion of Fact 6—that, as complaint counsel points out, payments by manufacturers to other catalogs were substantially less than those to Billy & Ruth. From this the complaint counsel infers that payments to other catalogs were not proportionally equal, for statutory purposes, to those made to Billy & Ruth. (There are also some instances in which the manufacturers made no payments at all to other catalogs, although affecting the situation of apparently only one of the three respondents now being considered.)

Secondly, to support his contention of disproportionality, complaint counsel relies on the premise that manufacturers controlled the total amount paid to each catalog company.

Thirdly, he relies on the fact that Billy & Ruth unilaterally fixed its own rates without knowledge of the rates charged by other catalog groups.

Respondents' counsel, in his answer to Proposed Conclusion of Fact 6, contests these three approaches of complaint counsel.

First, he points out—and here the examiner agrees—that larger payments to Billy & Ruth than to other catalogs hardly prove disproportionate payments to the three respondents involved. The pay-

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ments to Billy & Ruth may be larger because its circulation may be larger, or it may have a wider area of distribution, or, less significantly, it may offer better quality printing and illustration. The payments may even be larger, it would seem, because geared, somehow or other, to the volume of sales of merchandise, which would at least suggest proportionality. However, there is actually no proof, one way or the other, as to why payments to Billy & Ruth are larger.

Secondly, respondents' counsel challenges the premise that the manufacturers control the dollar amount of total payments to each catalog company, and contends that the amount is determined by various fixed factors, such as space rates and the number of advertisements permitted a particular manufacturer by each company. On the proof in this case, particularly that space rates and allotments were determined by the catalog company, the examiner again agrees with respondents' counsel, *i.e.*, that complaint counsel has not proved his premise that the manufacturers controlled the amount of total payments to a catalog company.

Thirdly, however, respondents' counsel does not challenge the fact that Billy & Ruth unilaterally fixed its rates without knowledge of other rates, but he simply points out the inconsistency of this fact with complaint counsel's second position claiming control by the manufacturer of total amount paid to a particular catalog. The examiner must hold that this third factor of unilateral fixing of rates (and allotment of space) is itself some indication supporting complaint counsel's contention of non-proportionality, if based only on amount of money paid.

Contrariwise, the examiner must point out, the amount of money paid is not necessarily the determining criterion as to proportionality, since, as held in this decision, the essential benefit is the catalog cooperative advertising facility made available to jobber participants. From this point of view the question as to proportionality becomes whether a different catalog is just as good, or not as good, as a Billy & Ruth catalog.

Inasmuch as there is no proof in this case that the catalogs serving the competitors of the three respondents involved here were inferior to the Billy & Ruth catalogs, and there is only slight proof supporting an inference of non-proportionality of money payments, the examiner must rule that complaint counsel has failed to sustain his burden of proof in this connection.

However, the three respondent jobbers having these competitors who used other catalogs nevertheless were joined in the Billy & Ruth enterprise with the other Billy & Ruth respondent jobbers whose competitors did not use other catalogs and who were otherwise in violation.

These three jobbers attended the Billy & Ruth annual meetings in the same way as the other respondent jobbers (Finding of Fact 13). They had every reason to believe that many of the respondent jobbers might have competitors who did not use catalogs, since, as already found, they knew the operating facts whereby many toy jobbers could not use catalogs profitably.

There seems to be no valid reason why the conduct of these three respondents with competitors in other catalog groups should not be covered by the broad language of Section 5 of the Federal Trade Commission Act, in the same way as those respondents herein with no competitors at all, but held liable for being joined with the other respondents having competitors.

It may at first blush seem that it is stretching Section 5 too far to have it apply either to jobbers without favored competitors or without competitors at all. But Section 5 seems altogether broad enough to cover even non-jobbers, that is, non-sellers or non-buyers of the merchandise in question, such as toy catalog companies, who therefore also have no competitors as to the merchandise in question. And Section 5 seems altogether broad enough, as indeed does Section 2(d) or 2(e) of the Clayton Act, to cover individuals associated with buyers or sellers, but who themselves do not strictly buy or sell the merchandise in question, nor have competitors.

Accordingly, it is hereby held that the three respondents in question—Albany Hardware & Iron Co., Morley Brothers, and John J. Getreu & Son, Inc.—violated Section 5 of the Federal Trade Commission Act even though it was not proved that their competitors were “unfavored.”

7. Knowledge

As stated in Finding of Fact 7, the respondents knew the operating facts in connection with Billy & Ruth and other catalogs, *i.e.*, that they represented a system for making promotional payments to or for the benefit only of jobbers able to participate. Moreover, they never satisfied any duty to inquire as to whether the manufacturers making payments to Billy & Ruth did, somehow or other, make provision for proportionally equal payments to or for jobbers unaffiliated with any catalog.

As already indicated, and as complaint counsel points out in this connection, the respondents herein had ample reason to believe, and are chargeable with knowing, that many jobbers, particularly small ones (TR 297-298), were unable, primarily for economic reasons, to participate in any catalog program, and that respondents knew that payments were made by the manufacturers for the Billy & Ruth advertisements (TR 297-298, Mr. Steltz), obviously for the benefit

of respondent jobbers participating in this cooperative catalog enterprise. Complaint counsel also refers to other facts which, he contends, were known to the industry and should have alerted all respondent jobbers to the non-proportionality probability—although the examiner is not in full agreement with him and prefers to find knowledge on the basis, primarily, of the obvious unavailability of catalog participation to those jobbers unable to participate. In the same vein the examiner does not stress too much the failure of respondents to inquire, but relies primarily on their knowledge of the inherently discriminating feature of the catalog system in respect to those unable to participate.

Respondents in their brief strongly contend that the necessary knowledge did not exist in this case.

(1) It is contended (Brief, p. 9) that respondents did not even know that the manufacturers made payments for advertisements in the catalogs. The examiner rejects this surprising contention, running contrary to the normal knowledge of businessmen (and even to a concession, in oral argument on review, in *ATD Catalogs, Inc., supra*). Mr. Steltz, of Billy & Ruth, made it amply clear by his testimony (TR 211-212), and beyond the realm of "mere conjecture", that respondent jobbers must have known of these payments, if only because of the low price at which they were able to buy the catalogs. Correspondence between Billy & Ruth and respondent jobbers even referred to the fact that its revenue increased in relation to the number of items included in the catalog (TR 213-216; CX 42 A). Moreover, Mr. Faucette's testimony was more than "surmise", as characterized in respondents' brief; he testified that he knew because the manufacturers had told him so (TR 300-302; see CX 176).—However, it is true that respondent non-stockholder jobbers did not know the details of these payments or the advertising rates.

(2) It is also contended in respondents' brief (p. 10) that respondent non-stockholder jobbers had every reason to believe that payments, assuming they knew about them, were in fact proportional, that is, varied with the volume of merchandise sales represented by each catalog group.

First, this contention flies in the face of Mr. Faucette's testimony above referred to, which by stipulation (CX 176) may perhaps be regarded more or less as what other non-stockholder respondents would have testified to, if called. Moreover, the fact that jobbers would know that manufacturers were interested in who were the members of any particular catalog group—as respondents point out (p. 11)—could lead them to inferences of rates based on circulation or other

factors more easily, it would seem, than a proportional equality scheme.

Second, and more important, perhaps, non-proportionality is demonstrated in this case, as already fully expounded, by the exclusion of jobbers unable to participate in the benefits of any catalog group.

(3) It is also contended (Brief, pp. 11-12) that, short of actual knowledge, respondents, that is, non-stockholder respondent jobbers in particular, should not be held liable on the theory that they "should have known" under the doctrine set forth in *American News Company v. Federal Trade Commission*, 300 F. 2d 104 (1962), *cert. denied*, 371 U.S. 824. Respondents distinguish the case at bar from *ATD Catalogs, Inc.*, *supra*, in that in *ATD* the respondent non-stockholder jobbers found to be chargeable with knowledge actually voted at annual meetings, divided into a number of sessions, and paid a \$300 subscription fee, all of which tended to put them on a level of equality with stockholder jobbers.

The examiner fully recognizes, of course, that the facts as to non-stockholder participation were stronger in *ATD* than the present case. But he cannot agree with respondents' contention that non-stockholder jobbers "were not participating in a joint venture with Billy & Ruth" (p. 12), and the findings herein are clearly to the contrary. Moreover, irrespective of degree of participation, and of the lack of knowledge of the internal affairs of Billy & Ruth (also stressed in respondents' brief), the factor still remains that the respondent jobbers, including the non-stockholders in particular, must be deemed to have known that many competitors unable to participate for economic and similar reasons were excluded from benefit under the Billy & Ruth setup, that no advertising payments were made available to them directly, and that many such competitors were in effect excluded from other catalog groups.

(4) Furthermore respondents point out, "perhaps most importantly", that in *ATD Catalogs, Inc.*, *supra*, advertising "contracts" with the manufacturers called for approval by the jobber members, "which itself could reasonably support a finding of 'reason to know'" (Brief, p. 13). The fact is that practically the same provision appeared in the Billy & Ruth "contracts", *i.e.*, proposed contracts sent to all manufacturers (TR 125-126, 130-131, CX 138 A-B, 139), and that compliance with the requirement was attested in confirmation letters (as also was the practice in *ATD*) to the manufacturers selected (TR 127; CX 133 A). Thus, by respondents' own estimation it might be found that the contract terms here are some basis for a finding of "reason to know" on the part of respondent jobbers, and this result

would be justified beyond any doubt if Billy & Ruth is regarded as their agent in circulating such contracts and the confirmations.

(5) In addition, respondents urge (Brief, p. 13) that the rationale of *American News Company, supra*, and *Grand Union Company*, 300 F. 2d 92 (CA2, 1962), is inapposite to the facts of this case on the issue of knowledge since those cases were directed against respondents dominant in the industry, and the purpose of the applicable law is to prevent "large buyers" from obtaining preferences over "smaller ones" by reason of greater purchasing power (*F.T.C. v. Broch*, 363 U.S. 166, 168; *Grand Union, supra*, p. 96).

However, it is the holding of the examiner herein that the toy catalog system is in effect designed to discriminate against those smaller buyers whose economic status is such that they cannot profitably participate, and that the system actually excludes many such jobber buyers. Moreover, there is, of course, no requirement that a violator of the law must be dominant in the industry.

(6) Respondents also cite (Brief, p. 15) *Grand Union*, p. 100, for the proposition that it is difficult for a buyer, even a dominant one, to appraise whether or not non-proportionality is practiced by his seller.

But there is no such difficulty where, as here, the buyer-jobbers know the operating facts whereby toy catalogs are virtually unavailable to many jobbers.

Moreover, the very fact that the payments by manufacturers to various catalog companies are not pursuant to a generally published program is some notice to jobbers of lack of proportionality. That such a published program is a practicality is shown by the fact that some manufacturers in 1961 began a generally published program of co-operative advertising policies, in connection with and supplementary to toy catalog advertising (Finding of Fact 11).

(7) Respondents also contend (Brief, p. 22), somewhat disconcertingly, that the proof is altogether insufficient to show that even Billy & Ruth is chargeable with knowledge. But this is coupled with the statement that it "is concededly the fact that anyone who wished to join a catalog group could do so", which is neither conceded nor the fact.

(8) Respondents also (Brief, p. 23) cite *American Motor Specialties Co. v. F.T.C.*, 278 F. 2d 225 (2d Cir. 1960), *cert. denied* 364 U.S. 884, to show that its facts were different from those of the present case. There it was stated as to the jobbers that "by the very fact of having combined into a group and having obtained thereby a favorable price differential they each, under *Automatic Canteen*, were charged with notice that this price differential they each enjoyed

could not be justified" (278 F. 2d at 228). The examiner agrees that the facts in the case were stronger than those here, but nevertheless believes that they definitely blow in the direction of the present facts. Incidentally, the case predicates liability on knowing receipt irrespective of knowing inducement (at 229).

It is true, as pointed out by respondents (Brief, p. 23), that the facts herein do not show that respondent nonstockholder jobbers organized to secure discriminatory promotional allowances; or that they directly instigated the manufacturers to make the allowances. But, as already pointed out, the primary meaning of induce is to "lead on" or to "influence", which definitely tends to harmonize the facts herein with those in *American Motor*.

(9) Respondents finally contend (Brief, p. 30) that charging respondent non-stockholder jobbers here with knowledge would result in an impossible burden on businessmen seeking to increase their business by advertising, namely, the duty to investigate the corporate relationship of the advertising media with any affiliated business, as well as the terms of its contracts with all other advertisers. In this connection they refer to the *Nuarc* case, both the dissenting opinion before the Commission (D. 7848) and the reversing opinion by the Court of Appeals (April 19, 1963).

No such result as prophesied by respondents would follow, nor are the facts of the case referred to comparable. Toy catalogs are not just another advertising medium but a specialized form of cooperative advertising, the general outlines of which, at least, are fully known by the participants.

* * * * *

8. Defense of Meeting Competition

In the examiner's opinion, once it is found, as it has been in this case, that the toy catalog system is by its nature and setup, as known in the trade, designed to exclude from participation jobbers unable for economic and related reasons to participate therein, then it is virtually impossible for respondents here to be absolved by a defense of meeting competition in good faith.

In the examiner's further opinion, moreover, the question of which side has the burden of going forward with the proof as to the defense is relatively unimportant, since the facts, as herein found, in relation to non-proportionality and knowledge thereof, have for all practical purposes concluded in complaint counsel's favor the questions of fact, particularly in connection with good faith, involved in the defense.

However, the examiner rules against respondents' contentions (Brief, p. 29) that the burden of going forward in the present case

was on complaint counsel, and follows the views expressed by him in *Santa's Playthings*, D. 8259 (1962, at 7-8) [pp. 233-234 herein].⁹

Automatic Canteen, 346 U.S. 61 (1953), cited by respondents, did shift to the Commission the burden of going forward on a "balance of convenience" theory. However, this was in connection with a Section 2(a) cost defense to a Section 2(f) violation, of the Clayton Act, and limited by the court to this particular defense.

In the case at bar, there is no "balance of convenience" in any event indicating that the burden of going forward should be on complaint counsel. This is because respondents knew, or certainly should have known, all the operating facts whereby toy catalogs exclude, from participation in the benefit from advertising payments, jobbers unable to participate. No detailed knowledge or subtle assessment of proportionality is required.

Moreover, of course, no manufacturer or seller who made the advertising payments herein, confronted with the circumstances shown in this proceeding, could possibly have believed in "good faith" that the payments were made to all competing customers on proportionally equal terms. And it is this seller's Clayton Act Section 2(b) defense of "good faith" meeting of competition which respondents are presenting, at least primarily.

However, respondents go further and urge a "good faith" meeting of competition of their own, *i.e.*, "doing precisely what their competitors did" (Brief, p. 30), which they in a sense read into Section 5 of the Federal Trade Commission Act. Granting, but only arguendo, that the defense is available to them as urged, they cannot possibly sustain it on the facts in this case. On the evidence here, both what they have been doing and what their competitors in other catalog groups have been doing are equally unlawful—participating in a toy catalog system which excludes from its cooperative advertising benefits such jobbers who are unable to participate. See *Standard Oil Company v. F.T.C.*, 340 U.S. 231, 246 (1951), speaking of the Section 2(b) defense as being limited to meeting "lawful" competition.

9. Applicability of Section 5

Respondents contend that Section 5 of the Federal Trade Commission Act is not applicable at all to the activities of buyers, as here, in connection with Clayton Act Section 2(d) violations by sellers. The argument is that the Clayton Act (as amended by the Robinson-Patman Act) makes no provision for such violations by buyers, as contrasted with its Section 2(f) provision for violations by buyers in connection with Section 2(a).

⁹ See similar holding of Hearing Examiner Harry R. Hinkes, *Individualized Catalogues, Inc.*, D. 1971 at 8-9 (September 26, 1962) [pp. 48, 56, 57, 58 herein].

Respondents concede that a contrary view has been enunciated in *Grand Union Company v. F.T.C.*, 300 F. 2d 92 (2d Cir., 1962), "in a remotely similar situation" (Brief, p. 25) to that presented here, but prefer to rely on the strong dissent of Judge Moore and the views of certain distinguished commentators who believe that the application of Section 5 should not reach beyond the general scope of the Robinson-Patman Act.

However, there is also *American News Company v. F.T.C.*, 300 F. 2d 104 (2d Cir.), as to which, moreover, the Supreme Court declined to grant certiorari, 371 U.S. 824 (1962), squarely holding that Section 5, in connection with buyers, is applicable to a Section 2(d) situation involving prohibited payments by sellers.

On this state of the case law and in light of the Commission views on the question the examiner does not feel that it is his prerogative to decide otherwise. Moreover, he is in general agreement with the holdings in the foregoing cases.

It is in the section of their brief attacking the applicability of Section 5 that respondents (Brief, pp. 26-27) contest the pertinency of *State Wholesale Grocers*, supra, heretofore discussed in part 4, of this Discussion, dealing with receipt of payment or benefit thereof.

The examiner does not agree with respondents as to *State Wholesale Grocers*, and furthermore agrees with complaint counsel that *P. Lorillard Co.*, also touched on in part 4, is, by its emphasis on the benefit rather than receipt of payment, even more pertinent to the case at bar, where all respondent jobbers received the benefit, if not the moneys, of the catalog enterprise, and also, in distributing the catalogs, furnished part of the necessary services in the cooperative advertising venture.

Interestingly enough respondents, in attempting to minimize *State Wholesale Grocers* in connection with Section 5, state (Brief, p. 28) that "what is perhaps most important" is that the court affirmed the lower court in dismissing as to the magazine publisher and as to A&P, the recipients themselves. But the court itself explains (258 F. 2d 833, text and footnote) that it was "required to affirm" because the plaintiffs on appeal concentrated on Sections 2(d) and 2(e), to the abandonment of Section 2(f), the recipient section; and there was no Section 5 charge, which could relate to recipients.

10. Suspension of Proceedings

In the event that it should be decided that a cease and desist order may properly issue herein respondents suggest (Brief, pp. 31-33) that the proceedings, and related proceedings in other toy catalog cases, be suspended pending an industrywide conference or other proce-

dures to lay down rules for cooperative toy catalog advertising programs.

In making this suggestion respondents set forth that the toy catalog activities involved herein have been general practice in the toy industry for some thirty years and have never been challenged by the government until about three years ago.

Although this may be an argument for a limited rather than a broad order, particularly on the facts of violation as actually proved, the examiner does not regard it as his prerogative, as distinguished from that of the Commission proper, to order a suspension of proceedings.

First, under the Rules the examiner's cease and desist order is not effective until, or unless, it is issued by the Commission. It is the Commission itself which expressly has the power to stay the effective date of the examiner's decision and order. Rules, § 3.21.

Second, when the Commission issued this complaint, and other related complaints it presumably adopted, in its discretion, the procedure of litigation, rather than industrywide conference.

Moreover, for the same reasons, the examiner is not moved by respondents' implied suggestion that any cease and desist order herein be suspended until orders are issued against all other companies engaged in similar unlawful practices.

See also *In the Matter of C. E. Niehoff & Co.*, 51 F.T.C. 1114, 1115, *aff'd sub. nom. Moog Industries, Inc. v. F.T.C.*, 355 U.S. 411, 413 (1957).

11. *Recent Change of Status of Supplee and Billy & Ruth*

Respondent Supplee-Biddle-Steltz Company in 1963 sold all but its toy catalog interests to what appears to be an entirely independent and non-connected company, and thus it parted with its business as a toy jobber.

It retained its interests, through sale stock ownership in the Billy & Ruth toy catalog, and related publications, but the catalog company is put in the status of not being owned and controlled by a toy jobber.

Accordingly, respondents' counsel argues that no cease and desist order is in any event necessary against Supplee, since it no longer, *i.e.*, indirectly as a stockholder, can be regarded as receiving payments as a jobber from manufacturers under State Wholesale Grocers, or against Billy & Ruth, since it operates a toy catalog completely independent of jobber ownership or control. As for the respondent non-stockholder jobbers, counsel simply reiterates the argument that they have no liability because they are not stockholders.

It may also be noted here (see Finding of Fact 2) that in divesting itself of its toy jobbing interests and keeping its toy catalog interests

Supplee-Biddle-Steltz Company has changed its name to SDM & R Inc. Moreover, Billy & Ruth, since 1962, has been succeeded in interest by Distributors' Promotion, Inc., entirely owned and controlled by Supplee, now under its new name.

It should also be added that respondent Steltz states in his affidavit (RX 4 C) as to new facts that Supplee, under its new name, has no intention of reentering the business of selling and distributing toys, games and hobby products.

* * * * *

Inasmuch as liability herein has been found primarily on the basis of participation and collaboration in the discriminatory catalog system, rather than on jobber stock ownership in the catalog company, the examiner is unable to find that potential liability has been obviated by eliminating stock ownership.

The respondent non-stockholder jobbers were liable before the change in the stock ownership arrangement, and they, of course, would still be liable on the same theory of catalog participation—there being no change of their status in connection with stock holdings.

The respondent catalog company, Billy & Ruth, its successor, or both, would be in the same predicament, *i.e.*, subject to liability for collaborating with jobbers in obtaining payments for the cooperative advertising project with its discriminatory feature, irrespective of there being no stock ownership by any jobber.

Supplee, under its old or new name, would still be liable on the facts of catalog participation apart from stock ownership.

The individual respondents,¹⁰ who control both Supplee under its new name and the catalog company, would, of course, continue to be liable for a continuance of present practices absent only jobber stock ownership.

* * * * *

As noted, shortly above, respondents' counsel in his argument hereon relies on State Wholesale Grocers as being predicated on receipt of advertising payments, indirectly, by the stockholder owner of the magazine. But even that case, as complaint counsel points out, was construed by the District Court on remand (CCH 1962 Trade Cases 76748, 76753) to predicate benefit on the reduction in the price of copies of the magazine by reason of the advertising payments—as to which there are similar facts here—and thus does not necessarily rely on payments indirectly received by a stockholder of the publication.

Respondents' counsel also in his argument hereon takes the opportunity of pointing out (1) that major toy manufacturers have been

¹⁰ Referring to respondents Steltz and Trader in particular, who alone are named individually in the order issued hereunder.

subjected to the entry of cease and desist orders, and (2) that Billy & Ruth in 1961 accepted advertising payments pursuant to manufacturers' regular published cooperative advertising payments. However, as to (1) the public record shows that such cease and desist orders have been issued against far fewer manufacturers than have advertised in Billy & Ruth catalogs. Moreover, as to (2), the acceptance referred to related only to such manufacturers, apparently only a few, who had such programs.

Accordingly, the examiner cannot sustain respondents' contention of mootness, based on change of the stockholder setup, or for other reasons.

However, in view of the two new names introduced—one the changed name of Supplee and the other the name of the successor corporation to Billy & Ruth—the examiner, on his own motion, will include these names, in a manner deemed appropriate, in the cease and desist order below.

12. Scope of Order

Complaint counsel proposes a broad order, one not even limited to toy catalogs or other printed media, as in orders issued by the Commission against manufacturers in *Transogram* and related cases ¹¹ (D. 7948, September 19, 1962) [61 F.T.C. 629] and as filed by this hearing examiner against jobbers in *ATD Catalogs* (D. 8100, December 19, 1962) [pp. 71, 81 herein] and *Santa's Playthings* (D. 8259, September 28, 1962) [pp. 225, 228 herein], *supra*.

(a) In his main brief (p. 8) complaint counsel urges that a broad order is more justified against the inducing jobber than the paying manufacturer, *i.e.*, that "the inducer of discriminatory treatment, knowing that the discrimination will result, is in a fundamentally different position than a seller who accedes to the inducements of, or in behalf of, his customers * * *."

Complaint counsel, in making this argument, is obviously thinking of inducers as instigators, not as persons who, in the primary sense of the word, "lead on" or "influence", as adopted in this decision. There is no proof in this case that any respondent non-stockholder jobber, at least, played any inducing part apart from leading on the manufacturers or influencing them, to make the advertising payments. As to these non-stockholders, comprising all the respondent jobbers herein, the examiner flatly rejects the distinction and supporting argument propounded by complaint counsel. As to the other respondents the

¹¹ Eleven of these cases were reviewed on initial decisions, with limited orders, issued by the present hearing examiner. See *Kohner Bros., Inc.* (D. 8226 [61 F.T.C. 629], December 7, 1961); *Revell, Inc.* (D. 8224 [61 F.T.C. 629], January 25, 1962); and *Milton Bradley Company* (D. 8256 [61 F.T.C. 629], January 31, 1962).

examiner also rejects the distinction and argument since, on the record in this case, the manufacturers seem to have been just as anxious to advertise in Billy & Ruth as Billy & Ruth and its people were anxious to have them do so.

(b) Complaint counsel also urges that "the well known decline in significance in the industry of catalog advertising and the equally well known growth of significance of advertising in other media, notably television" is an argument for a broad order not tied up with catalog or similar advertising. Respondents argue that the decline of catalog advertising is an argument for a narrow order.

Ordinarily, the examiner would agree with the reasoning advanced by complaint counsel in connection with the decline in catalog advertising. But here the violation is essentially and almost inextricably tied up with catalogs and the proof is largely based merely on knowledge of the operating facts, not of a violation arising from these facts, except possibly as to Billy & Ruth and Supplee. It is thus unrealistic in this case to belittle the catalog advertising as a mere *manifestation* of the practice constituting the violation, as does complaint counsel in his brief. There is no reason whatever to anticipate that the respondent non-stockholder jobbers herein will permit themselves to be lured into a television cooperative advertising venture in the same way they have gotten into this catalog setup, which at least on its face easily gives the impression of being much like ordinary advertising in a regular periodical. And there is little reason to believe that Billy & Ruth, a toy catalog company, and Supplee, its sole stockholder no longer in the toy jobbing business, are going into the television promotional business for toys, or any such non-catalog business—or if they do, that they will go into it on a discriminatory basis like the catalog system, or for that matter any discriminatory basis.

(c) Complaint counsel also contends that respondents' knowledge, or lack of it, of the illegality of their toy catalog practices, or lack of challenge by the government over many years, has "no materiality whatever."

The Commission has apparently thought otherwise, by ruling in *Transogram, supra*, that in drafting an order the "facts in each case" will be considered, and stating:

It does mean that our objective in drafting orders must be to restrain unlawful acts and practices "whose commission in the future, unless enjoined, may fairly be anticipated from the [respondent's] conduct in the past." *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426, 435.

Certainly there is a difference of approach in reference to respondents who have been deliberately flouting the law and those who have been violating without intent to do so. This does not involve the con-

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cept of punishment, as complaint counsel suggests, but of likelihood of future unlawful conduct.

The toy catalog system, as followed in this and other cases, has been open and aboveboard, as contrasted with the under-the-table payments at which the law is primarily directed. The system has been in operation some thirty years. As pointed out by respondents, it has been adhered to widely in the toy industry, and has operated without government challenge until about three years ago. There is a special newness and novelty in proceeding against buyers receiving payments, as contrasted with supplier-sellers, covered expressly by Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act.

* * * * *

Respondents make some specific proposals in regard to any order herein, which are now discussed:

(d) It is requested that the order be limited to situations where respondents have affirmative knowledge, as contrasted with what they should know or implied knowledge. This request must be denied, in view of the examiner's holdings herein in favor of the broader meaning of knowledge and the applicability of *American News Company, supra*, despite respondents' contentions to the contrary. Respondents refer to *F.T.C. v. Cement Institute* 333 U.S. 683 (1948), somewhat unprofitably it would seem, considering the at least faint resemblance between the toy catalog system and the basing point system, *i.e.*, each a system with potentially unlawful results, and the mortal blow dealt the basing point system by the Supreme Court in *Cement Institute* and other cases.

(e) Respondents also request that any order should apply only to inducement if accompanied by receipt. The examiner's order below is so framed, as is complaint counsel's proposed order. However, the examiner's order, again following complaint counsel's proposed order, also applies in the alternative to receipt alone, unaccompanied by inducement. The complaint, Paragraph Five, alleges "induced *or* received" (our emphasis).

(f) Respondents propose that any order be directed only against—apart from officers, agents, individuals, etc.—respondent Billy & Ruth, or perhaps also respondent Supplee; and that, if directed against non-stockholder jobbers, the seven as to whom there is no proof of an unfavored competitor should in no event be named.

The examiner's order, however, is directed against Billy & Ruth, Supplee, and all respondent non-stockholder jobbers.

* * * * *

As to the scope of the order and certain other details not covered above, the examiner has the following views:

(g) The order should not be broader in scope than the order issued by the Commission against manufacturers in *Transogram*, *supra*, or the orders patterned on that order filed by this examiner against jobbers in *Santa's Playthings* and *ATD Catalogs*, *supra*.

That the order in this case should be in the broad form proposed by complaint counsel, not even restricted to catalogs and the like, seems to this examiner, with all due respect for the ability and earnestness of counsel, to be a somewhat shocking proposition—certainly as to non-stockholder jobbers, but also as to the other respondents as well.

As to non-stockholder jobbers all that the proof shows, if only to repeat, is that they knew the operating facts of the Billy & Ruth catalog and other toy catalogs. Although a conclusion of unlawfulness derives from these operating facts, there is no proof that these jobbers had knowledge, even in a broad sense, that there was unlawfulness, unless knowledge of resulting discrimination is equated with knowledge of unlawfulness.

Even the Commission, not to mention any other appropriate government agency, did not until about three years ago have a sufficiently keen awareness of unlawful practices resulting from the openly operated toy catalog system to commence legal proceedings or otherwise publicly challenge these practices.

Thus, although knowledge of unlawfulness is not necessary to prove violation, and lack of knowledge does not perforce negate violation, it does seem that it would unjustly be "throwing the book" at non-stockholder respondents to impose on them the broad order proposed, and to be grossly unfair, if not in violation of certain considerations of due process itself.

After all, the issue of scope of order is regarded as part of the issue of public interest, *i.e.*, whether it is in the public interest to issue an order of one scope or another, and this examiner cannot see what public interest will be served by issuing the broad order proposed by complaint counsel against these relatively small business concerns which have somewhat fortuitiously become involved with the law. To impose upon them broad restraints going far beyond catalogs and leading directly to onerous penalties is simply to put shackles on them which their competitors, and others, do not bear, except for those subjected to similar orders. See *F.T.C. v. Henry Broch & Co.*, 368 U.S. 360.

Moreover, since the facts of active participation by non-stockholders in this case are weaker than in *ATD Catalogs*, it could be argued that the order here might appropriately be narrower than in *ATD Cata-*

logs, and certainly than in *Santa's Playthings*, where the jobbers were active stockholders.

These observations relating to scope of order in respect to non-stockholder respondents apply perhaps with special force to the seven of them as to whom there was no proof of unfavored competitors.

As to Supplee, respondent stockholder jobber, and Billy & Ruth, an order patterned on the orders in *Transogram*, *Santa's Playthings*, and *ATD Catalogs*, also seems to be indicated—particularly since Supplee is now divorced from its former jobber business, and Billy & Ruth, or more properly its successor corporation, is free from any jobber holding its stock.

The divestitive by Supplee of its toy jobbing business, so as to leave the catalog company free from stock control by even a single jobber, deserves consideration in evaluating the possibilities of a resumption of the unlawful acts found herein. It certainly seems to be a bona fide effort to run the catalog business in a way that, it was at least considered, would not run afoul of the law, even though under the present decision this result may not follow. Moreover, the examiner is definitely impressed with the probity of both Mr. Steltz, the principal of Supplee and Billy & Ruth, and respondents' counsel, apparently the regular attorney for these two concerns, as well as with the desire of both of them to see to it that the law is not violated.

(h) There is also the question whether the officers of Billy & Ruth, who are named as respondents in the complaint both individually and as officers, should be named in the order individually in addition to being included under the class designation of officers.

This question is not discussed, at least not directly, in the briefs on either side.

It is true that it is stipulated (CX 164 B, Stipulation CX 163 A) that these officers, all five of them, "direct, formulate and control the acts and practices" of Billy & Ruth, and it has been so found herein (Finding of Fact 1).

However, it is equally true that, on the proof in this case, the two individuals, among those named, who have dominated and run Billy & Ruth, particularly in connection with controversial activities pertinent here, are respondents Steltz and Trader. These two respondents, of course, should therefore clearly be named individually in the order.

Contrariwise, the three other individuals named—respondents Vandegrift, Geppinger and Adams—are scarcely referred to in the proof in this case. There accordingly appears to be no pressing reason in the public interest to name them individually in the order, particularly since they are enjoined in their capacity as officers without being named.

(i) Finally, there is the question whether the order should name in one way or the other the successor corporation to Billy & Ruth, and whether it should identify Supplee by its old name, its new name, or both. As will be seen in the order the examiner has resolved this by naming the successor corporation but not in the same way as Billy & Ruth or other respondents, and by identifying Supplee under both names.

CONCLUSIONS OF LAW

The following are the Conclusions of Law herein:

1. The entire operation of Billy & Ruth Promotion, Inc., was conducted in commerce, as "commerce" is defined in the Federal Trade Commission Act. Each of the respondent jobbers, in purchasing toy, game and hobby products from Transogram Company, Inc., Remco Industries, Inc., Emenee Industries, Inc., and Ideal Toy Corporation, and in participating in the activities of Billy & Ruth Promotion, Inc., including the purchase of catalogs, was engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

2. The payments by the four manufacturers named above to Billy & Ruth Promotion, Inc., in 1959 and 1960, were made in the course of such commerce as compensation or in consideration for services or facilities furnished by or through the respondent jobbers in connection with the processing, handling, sale, or offering for sale of the products of such manufacturers.

Said payments as made were also to or for the benefit of respondent jobbers herein, customers of the manufacturers.

3. Each of the respondents named in the below order, in 1959 and 1960, knew or should have known that the payments by Transogram Company, Inc., Ideal Toy Corporation, Emenee Industries, Inc., and Remco Industries, Inc. to Billy & Ruth Promotion, Inc. in those years were not available on proportionally equal terms to all the other customers of those manufacturers who competed with the respondent jobbers in the distribution of products which were advertised in the Billy & Ruth catalogs.

Each of the said respondents, in the course and conduct of such commerce, knowingly induced and received the foregoing payments and consideration or benefit from the said manufacturers.

4. The acts and practices of the said named respondents constitute unfair acts and practices and an unfair method of competition in violation of the provisions of Section 5 of the Federal Trade Commission Act.

5. The Federal Trade Commission has jurisdiction of the subject matter of this action and of the party respondents.

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6. The order set forth below is appropriate and necessary, as against each of the respondents named therein, and all others to whom it is directed, so as to safeguard adequately the public interest in this proceeding.

* * * * *

The foregoing Conclusions of Law adopt those proposed by complaint counsel, except as follows:

Paragraph 2 adds a paragraphed sentence stating that the payments were "to or for the benefit of respondent jobbers." It also refers to the payments as being made "in the course of such commerce."

Paragraph 3 adds a paragraphed sentence stating that the respondents "knowingly induced and received the foregoing payments", etc. It also refers to the respondents as "named in the below order", instead of as named herein.

Paragraph 4 refers to "said named respondents", instead of respondents herein.

Paragraphs 5 and 6 are new.

ORDER

It is ordered, That each of the below-named respondents (as well as the officers, directors, representatives, agents, and employees of each said respondents, as the case may be, and as indicated below) shall, in or in connection with any purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith *cease and desist*, individually or in collaboration with others, from:

Inducing and receiving, or receiving, a *payment* of anything of value to or for the benefit of a respondent jobber, or other toy jobber, engaged in commerce, where the respondent or other jobber receives the benefit—and in the case of any of the below-named respondents who are jobbers, inducing and receiving, or receiving the *benefit* of such payment—where such payment is in compensation or consideration for any services or facilities consisting of advertising or other publicity furnished by or through such respondent or other toy jobber receiving said benefit, in a toy catalog, handbill, circular, or any other printed publication, serving the purpose of a buying guide, distributed, directly or through any corporate or other device, by such respondent or other toy jobber, in connection with the processing, handling, sale, or offering for sale, of any toy, game or hobby product manufactured, sold, or offered for sale by the manufacturer or supplier, when the respondent or other person herein ordered to cease and desist *knows or should know* that such payment or consideration is not made available on proportionally equal terms to all other customers competing with the respondent or other toy jobber receiving the benefit, in the distribution of such toy, game or hobby products.

Ordered, That "toy jobber" or "jobber", as used herein, includes an individual doing business as a partner, or under a trade name, of a jobber concern, and also includes a "toy, game, and hobby" jobber.

Ordered, That the following are the respondents and others who shall cease and desist as ordered above:

Corporations

(Also all officers and directors thereof)

Billy & Ruth Promotion, Inc., and Distributors' Promotions, Inc.,
as successor in interest to Billy & Ruth Promotion, Inc.

* * * * *
Supplee-Biddle-Steltz Company, now known as SDM&R Inc.

* * * * *

Albany Hardware & Iron Co., Inc.

Chapman-Harkey Co.

Cullum & Boren Company

Farwell, Ozmun, Kirk & Co.

Faucette Co., Inc.

Frankfurth Hdw. Co.

John J. Getreu and Son, Inc.

House Hasson Hardware Co.

Morley Brothers

Ohio Valley Hardware Co., Inc.

Orgill Brothers & Co.

The Thomson-Diggs Company

J. A. Williams Company

Wyeth Company

Individuals

Leon Levin, A. K. Levin, Harry Levin, J. K. Levin, Robert K.
Levin, and Samuel Chernin, doing business as Kipp Brothers

* * * * *

William George Steltz, Jr., and Floyd F. Trader, individually
and as officers of Billy & Ruth Promotion, Inc., and of Dis-
tributors' Promotions, Inc.

Agents, Employees, Etc.

This order to cease and desist is also directed to, and binding on, the respective representatives, agents, and employees of the foregoing respondents, whether corporations or individuals, acting directly or through any corporate or other device.

Ordered, That in addition to service of copies of this decision and order on respondents named in the order, a copy may be served on each

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of the following at their address, 5th and Bristol Streets, Philadelphia, Pa.—

Distributors' Promotions, Inc.
SDM&R Inc.

OPINION OF THE COMMISSION

APRIL 3, 1964

By MACINTYRE, *Commissioner*:

The complaint charges that the respondent toy wholesalers and the toy catalog publishing concern, Billy & Ruth Promotion, Inc. (Billy & Ruth), violated Section 5 of the Federal Trade Commission Act by knowingly inducing or receiving discriminatory promotional payments from toy manufacturers for advertising services in the Billy & Ruth catalogs. In short, respondents are charged with knowingly inducing or receiving payments violative of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act.

In general, the examiner held the allegations of the complaint sustained and respondents appeal from that finding. Complaint counsel, while urging that the majority of the examiner's findings be affirmed, has appealed from the examiner's failure to place certain of the individual respondents under order and further contends that the order entered below is unduly narrow. Excluding the cases in which consent agreements have been negotiated, this is the fourth case coming before the Commission involving the receipt of advertising or promotional payments from manufacturers by a toy catalog publishing concern and the toy wholesalers related to it. The three prior proceedings, *Individualized Catalogues, Inc., et al.*, Docket No. 7971 [p. 48 herein], *Santa's Playthings, Inc., et al.*, Docket No. 8259 [p. 225 herein], and *ATD Catalogs, Inc., et al.*, Docket No. 8100 [p. 71 herein], have many basic points of resemblance to this case and their rationale is in large measure applicable here.

An examination of the respondents' business in the relevant period will be helpful in placing the issues raised by the appeals in their proper context. Respondent Billy & Ruth Promotion, Inc., is a wholly owned subsidiary of respondent Supplee-Biddle-Steltz Company (Supplee), a toy wholesaler located in Philadelphia, Pennsylvania. Prior to the incorporation of Billy & Ruth in 1950, Supplee conducted the toy catalog business directly. The record further indicates that certain key officials of the publishing concern held office in both Billy & Ruth and Supplee. The remaining respondents, who in this proceeding have been frequently referred to as "members" of the Billy & Ruth group, however, hold no stock or any other proprietary

interest in the toy catalog publishing corporation, and they apparently have no responsibility for its administration.

The manufacturers' payments for advertising in the Billy & Ruth catalog were made directly to the respondent publishing concern. The corporate funds of Billy & Ruth were transferred solely to the parent corporation, Supplee, and none of the other respondent wholesalers, directly or indirectly, received any rebates or dividends from the publishing company. The membership of the group, which might vary from year to year, in the relevant period, 1959-1960, consisted of Supplee and approximately fifteen other toy wholesalers. The Billy & Ruth catalog was sold exclusively to those toy wholesalers adhering to the group. If a territorial disagreement developed between members of the group with respect to distribution of the catalog, officials of Billy & Ruth would attempt to mediate the dispute and determine who had priority in the area.

The Billy & Ruth wholesalers sold the group's catalog at cost to their retailer customers who, in turn, distributed the brochure to the consumer at no charge. Billy & Ruth, in addition, conducted a number of promotional activities, such as children's contests, mainly to increase the effectiveness of its catalogs as an advertising medium. The examiner has described those activities in detail and there is no need for repetition here.

The pertinent objections of respondents to the examiner's initial decision may be summarized briefly as follows: Basically, they contend that there could be no violation of Section 5 by inducing or receiving payments violative of Section 2(d), since the respondents did not receive benefits from such payments which were either illegal or disproportionate. Respondents also deny that the record supports a finding that any of the respondents, including the toy catalog publishing corporation, or its parent, knowingly induced and received disproportionate promotional allowances. They deny there was any illegal inducement and further argue that in any case no order should issue against the respondent wholesalers not holding stock in Billy & Ruth, since they are not chargeable with, or responsible for, the acts of the toy catalog publishing corporation by virtue of agency or any other theory. In this connection, respondents contend that the examiner's finding that the toy catalog publishing corporation acted as the agent of the nonstockholding jobbers must be rejected on the ground that the record dictates a contrary finding, namely, that the nonstockholding jobbers were simply customers of Billy & Ruth. Finally, respondents claim, on the basis of Supplee's apparent departure from the toy distributing business, that whatever the finding on the merits of the case, it is clear there is no longer any public interest in the issuance of an order to cease and desist by the Commission.

The threshold question to be resolved is whether the payments under consideration by the manufacturers to Billy & Ruth were to or for the benefit of the respondent toy wholesalers so as to come within the scope of Section 2(d) of the Clayton Act, as amended. The Commissions' power to proceed under Section 5 against knowing inducement or receipt of payments violative of Section 2(d) is, of course, by now well established and requires no further comment here.¹

Section 2(d) prohibits payments to or for the benefit of customers for advertising or promotional services not made available on proportionally equal terms to other customers competing in distribution of the products involved in the advertisement or promotion. Respondents argue that with respect to the Billy & Ruth members not holding stock in the catalog publishing concern, the record shows neither a financial benefit accruing to the respondents nor an advantage in the resale of the goods to dealers at the retail level. We find no merit in either contention. Respondents challenge the examiner's findings that the manufacturers' payments were for the benefit of the respondent jobbers, since such payments enabled the jobbers to secure the cooperative advertising through the medium of the Billy & Ruth catalog at cost, and in the case of Supplee, at a financial profit. Respondents, in paraphrasing the examiner's finding, apparently interpolated the additional condition that the record must demonstrate that the cost of the catalog was less than would be the case if a respondent wholesaler had published a catalog individually or maintained a catalog facility independently.² In fact, the hearing examiner made no such finding, holding merely that the respondent jobbers were able to purchase the Billy & Ruth catalog cheaper than they would have been able to purchase it without such subsidies by the manufacturers.³ That, of course, is sufficient benefit to bring the challenged payments within the scope of Section 2(d).

Despite respondents' contentions to the contrary, Billy & Ruth's operating figures⁴ for 1959 and 1960 bear out the examiner. They show

¹ See *Individualized Catalogues, Inc.*, Docket No. 7971 [p. 48 herein], *Santa's Playthings, Inc., et al.*, Docket No. 8259 [p. 225 herein], and cases cited therein.

² In this connection it is significant, however, that Robert G. Faucette, an official of one of the respondent jobbers, testified that in the case of this company, it would have been impossible to produce the catalog individually. Tr. 277.

³ "They were at least payments 'for the benefit' of all respondent jobbers since they got exactly what they wanted, to wit, a cooperative advertising mechanism, principally the catalog setup—including catalogs at cost, and, as for Supplee, a money profit." Initial decision, p. 180.

⁴ Initial decision, p. 164.

	1959	1960
Sales of catalogs to respondent jobbers.....	\$107,326.99	\$97,919.95
Sales of advertising to manufacturers.....	106,937.43	129,722.00
Cost of publishing catalogs.....	121,255.89	120,168.39
General administrative and selling expenses.....	40,867.52	40,936.02
Net income before taxes.....	52,235.92	67,217.07

that in both years the dollar volume of sales of the publication to respondent jobbers was less than the cost of publishing the catalog, even disregarding the general administrative and selling expense of Billy & Ruth. As a matter of fact, taking into account the general expense, these figures show that had it not been for the manufacturers' payments in question, Billy & Ruth would have had to increase the price of these catalogs to its members by 51 percent in 1959 and approximately 65 percent in 1960 merely to break even. The inference on the basis of respondents' figures is inescapable that the toy suppliers' payments to Billy & Ruth were a direct and indispensable factor in lowering the unit price of the Billy & Ruth catalogs to Supplee and the other Billy & Ruth wholesale distributors. Supplee, as the parent of its wholly owned subsidiary, Billy & Ruth, as a result of the manufacturers' payments was able to reap the benefit of a rather handsome profit in both of the years in question.

The fact that respondents received a direct benefit in the resale of the products involved in the catalog promotion to retailers is equally clear. For example, William George Steltz, Jr., president of Supplee, as well as of Billy & Ruth, testified that in the normal course of events it was the expectation that a retailer would purchase the featured items from the wholesaler supplying him with the catalog and that Supplee hoped that the catalogs would induce small retailers to deal with Supplee.⁵ In addition, this witness stated that manufacturers checked up on whether Billy & Ruth members purchased the items illustrated in the catalog, and that in his personal opinion, if something is advertised and not available, then the advertising dollar is wasted.⁶ This testimony is corroborated by Robert G. Faucette, an official of another Billy & Ruth member named as a respondent in this proceeding. The fact that Billy & Ruth wholesalers sold the catalog at cost to their retailers is also a significant circumstance compelling the conclusion that these publications were a device to promote respondents' sales of toys to their customers. Taken as a whole, the record is sufficient to support the finding that the respondent wholesalers gained an advantage in the sale of toys to retailers purchasing the catalogs from them, as opposed to other jobbers. The mere fact that retailers purchasing the catalog from respondents were not legally bound to make their toy purchases from these wholesalers does not overcome or even significantly detract from the other evidentiary facts indicating that catalog distribution complemented the respondent wholesalers' sales of toys to retailers. See *Individualized Catalogues, Inc., et al.*, Docket No. 7971 [p. 48 herein], and *Santa's Playthings, Inc., et al.*, Docket No. 8259 [p. 225 herein]. The nature of the benefit

⁵ Tr. 112-113.

⁶ Tr. 133-134.

conferred by these payments on respondents brings these allowances within the scope of Section 2(d) of the Clayton Act, as amended.

The record further demonstrates that payments for advertising or other suitable alternatives were not made available to other wholesalers competing with respondents in the distribution of toys advertised in the Billy & Ruth catalog.⁷ The final element of the violation charged, which complaint counsel must establish, is that respondents knew or should have known when they induced or received the challenged advertising payments from the manufacturers that they were not available on proportionally equal terms to their competitors. In dealing with this issue, complaint counsel, respondents, and the hearing examiner all recognize that different considerations apply to the non-stockholding jobbers, as opposed to the publishing corporation, Billy & Ruth, and to its parent company, Supplee.

The hearing examiner's conclusions attributing the requisite knowledge to those respondent wholesalers not holding stock in Billy & Ruth and whose officers or principals did not concurrently hold office in the publishing company will be vacated. The record shows the respondent jobbers in this category were apparently not acquainted with the internal administration of Billy & Ruth or the details of the latter's negotiations with manufacturers leading up to the payments under consideration. These wholesalers therefore are not chargeable with actual or constructive knowledge that the advertising payments induced or received by the publishing company were not available to their competitors on proportionally equal terms. See *ATD Catalogs, Inc., et al.*, Docket No. 8100 [p. 71 herein]. Moreover, since the prime movers of the scheme were Supplee and its wholly owned subsidiary, Billy & Ruth, no remedial purpose would be served in this instance by imputing actual or constructive knowledge of the illegality of the payments in question to these wholesalers under the guise of an agency theory. Accordingly, the initial decision will be reversed on this point.

With respect to Supplee and Billy & Ruth, respondents contend that even in their case there is insufficient evidence to impute the requisite knowledge of the disproportionate nature of these payments. They contend further that, at any rate, there is no showing that Supplee and its subsidiary knowingly *induced* the prohibited payments. We may note at the outset that respondents' evident insistence that the payments must result from an inducement, which they apparently equate with coercion or undue economic pressure, constitutes a fundamental misapprehension of the nature of the offense charged in the complaint.⁸ This construction ignores the fact that the com-

⁷ The record is silent in the case of four of the respondents as to whether there was nonfavorable competition in their trade areas in the relevant period. Since the complaint will be dismissed as to all respondents except Billy & Ruth, Supplee, and their officers, that issue requires no discussion here.

⁸ Cf. *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 72 (1953).

plaint has set forth the elements of inducement and receipt in the disjunctive. As respondents contend, coercion sometimes verging on economic blackmail has been manifested by buyers involved in certain prior Commission proceedings which challenged the inducing or receiving of payments violative of Section 2(d). These circumstances are, however, merely evidentiary facts which, among others, may have a bearing on the buyer's state of mind or knowledge. They are not the *sine qua non* to a finding of inducement. Under the circumstances of this case it is clear that by negotiating for the challenged payments Billy & Ruth induced them. Furthermore, the fact that the advertising payments under consideration were received from toy manufacturers is, of course, unchallenged and respondents' contentions on the nature of an "inducement" are accordingly academic. The question remains: Did Billy & Ruth and Supplee and its officials know, or should they have known, that the payments they received were not available to all competitors of the membership of the Billy & Ruth group on proportionally equal terms?

The evidence compels an affirmative answer. The rates of the manufacturers' advertising payments were in each case unilaterally fixed and determined by respondent Billy & Ruth. The record demonstrates, in addition, that catalog advertising for various reasons was not a service which could be furnished by or which would be useful to all toy wholesalers competing with respondents in the resale of the goods promoted in the Billy & Ruth catalogs.⁹

⁹ It was stipulated that certain wholesalers located in the trade areas of the respondent jobbers purchasing from four manufacturers participating in the Billy & Ruth catalog would state one or more of the reasons set forth in the stipulation (CX 175) for not utilizing catalogs. Among the reasons stipulated were the following:

The customer believed that effective utilization of catalogs as a sales device required a significant increase in the normal inventory to permit the stocking of all or substantially all of the items included in any of the existing catalogs.

The customer believed that effective utilization of catalogs as a sales device required that all or substantially all of the items included in the catalog be carried by the wholesaler. In many instances this would require a cessation of purchases of similar items from other suppliers with whom particularly cordial and satisfactory relationships had been developed over a period of years in favor of new suppliers whose practices and policies are unknown.

The wholesaler once tried to join a catalog group but was unable to join any of the desired groups because of the policy of such groups of restricting their membership to one wholesaler in each territory.

The wholesaler knew that he could join certain catalog groups if he chose, but the catalogs published by such groups included items considered unsaleable in his business by the wholesaler.

Certain manufacturers whose products are included in the available catalogs have refused to accept the wholesaler as a customer and therefore the wholesaler would not be able to carry substantially all of the items included in the catalog. (CX 175.)

The stipulated facts with respect to the inventory consideration were corroborated by the testimony of Robert Faucette, an official of, and a former member of, the Billy & Ruth group. This evidence is sufficient to demonstrate the functional unavailability of catalog advertising to certain wholesalers competing with respondents in the distribution of toys purchased from manufacturers participating in the Billy & Ruth catalog. Its probative force is not vitiated by other proof in this record.

Billy & Ruth and its officials, on the basis of their experience with the industry, must be credited with knowledge of these facts.¹⁰ Supplee, whose own officers participated in an official capacity in directing the affairs of the publishing corporation, is, of course, chargeable with constructive knowledge of the discriminatory nature of the advertising payments received by its subsidiary.¹¹

Another question presented on respondents' appeal is whether changed circumstances arising from a reorganization of the business of Billy & Ruth and Supplee obviate the need for an order. The circumstances relied upon by respondents are evidently as follows: In 1962, Billy & Ruth was merged with Distributors' Promotions, Inc., whose stock is also owned by Supplee, now operating under its new name, SDM&R, Inc., adopted by respondent in early 1963. In the same year Supplee, now SDM&R, the examiner found, "apparently sold all but its toy catalog interest, *i.e.*, to International Fastener Research Corporation". According to the examiner, in a finding not challenged by respondents, Distributors' Promotions, Inc., is the successor in interest to Billy & Ruth. As we understand respondents' argument, they contend, among other things, that Supplee has sold all assets, except those related to catalog publication, and therefore created, in effect, a "permanently independent toy catalog company without any connection with a toy wholesaler."

As we have already stated in *ATD Catalogs, Inc., et al.*, Docket No. 8100 [p. 71 herein], our decision in these cases is not to be taken as the promulgation of a general rule that a jobber's lack of proprietary or stock interest in a catalog group necessarily precludes a finding of a knowing inducement or receipt of discriminatory advertising or promotional payments. The dismissal of the charges against the nonstockholder jobbers in this case, as in *ATD*, it should be noted, is not based on their lack of stock or other proprietary interest in the toy catalog publishing corporation. Rather, the complaint is dismissed as to those respondents because they were not sufficiently informed of the internal administration of the publishing concern and the negotiations with the manufacturers, leading up to the challenged payments, so as to justify imputing the requisite knowledge to them. The toy catalog publishing concern, even if it is not affiliated to a toy wholesaler by

¹⁰ See our opinions in *Individualized Catalogues, Inc., et al.*, Docket No. 7971 [p. 61 herein], *Santa's Playthings, Inc., et al.*, Docket No. 8259 [p. 61 herein], and *ATD Catalogs, Inc., et al.*, Docket No. 8100 [p. 117 herein].

¹¹ See *ATD Catalogs, Inc., et al.*, Docket No. 8100 [p. 71 herein].

virtue of stock or other proprietary interest, is, of course, not necessarily insulated from a proceeding under Section 5 for knowingly inducing or receiving disproportionate advertising payments for a group of jobbers. In this case, for example, respondent Billy & Ruth's receipt of the challenged advertising allowances was a knowing receipt of disproportionate payments by the publisher, even though the majority of the affiliated jobbers had no stock interest in the catalog company and could not themselves be charged with the requisite knowledge of their discriminatory nature.

Whether a toy catalog operation is merely selling advertising as an ordinary advertising medium or inducing or receiving payments in behalf of or for the benefit of a group of toy wholesalers distributing the toys of the manufacturers making the payments necessarily depends on the facts of each case. The fact that there is no proprietary relationship between the publisher and toy wholesalers using the catalog is not necessarily determinative. Other criteria which may be pertinent in this connection are, for example, the extent to which the catalog is available to all jobbers desiring the publication, as well as the presence or absence of territorial restrictions. At this point we do not have sufficient information to determine the prospective legality or illegality of respondents' new or reorganized catalog venture. The reorganization subsequent to the initiation of this proceeding, therefore, will not justify dismissal of the charges against either respondent Supplee or Billy & Ruth.

Finally, respondents contend that even if they are found to have violated the law as charged, nevertheless the Commission should suspend enforcement of the cease and desist order against them, as well as other respondents in related proceedings. Such a procedure, respondents contend, would avoid putting them in a position of competitive impotence vis-a-vis approximately nine other toy catalogs not involved in Commission proceedings at this time. Respondents' plea will be denied. This is not an isolated proceeding against a background of industrywide utilization of the challenged practices.¹² The Commission's activities in this area, which also covered a not inconsiderable number of toy manufacturers,¹³ have been widespread and as a result we may expect abatement of the competitive pressure resulting from the granting and receipt of illegal advertising allowances in this industry. At this juncture, at any rate, the competitive disadvantages

¹² Compare *Atlantic Products Corporation, et al.*, Docket No. 8513 (1963).

¹³ *E.g.*, see *Transogram Company, Inc.*, Docket No. 7978 (1962) [61 F.T.C. 629].

to respondents which may be expected from the imposition of an order to cease and desist are at best conjectural. In our judgment the quickest measure to encourage fair dealing in the toy industry is to commence enforcement of orders in those proceedings now concluded. If illegal practices persist in other segments of the industry or future events bear out respondents' supposition as to their prospective competitive disadvantage by virtue of the activities of other catalog groups not yet touched by Commission proceedings, then, of course, the Commission can take whatever further action is necessary to enforce the law. To follow respondents' request under these circumstances would, in effect, constitute an abdication of our duty to use our facilities and resources to foster fair competitive practices under the statutes we are charged to enforce.

We may pass over quickly respondents' remaining argument, apparently added as a make-weight to their appeal. The contention that the Commission must negate the good faith meeting of competition defense in proceedings of this nature is rejected for the reasons stated in *Individualized Catalogues, Inc., et al.*, Docket No. 7971 [p. 48 herein], and *Santa's Playthings, et al.*, Docket No. 8259 [p. 225 herein].

Turning to complaint counsel's appeal, the first question presented is whether the examiner erred in refusing to make the terms of the cease and desist order applicable to J. Wilson Vandegrift, Roy G. Geppinger, and Lawrence S. Adams, all officers of Billy & Ruth, in their individual capacities. In this connection, the examiner reasoned that the proof demonstrated the individual respondents Steltz and Trader had dominated and run the Billy & Ruth enterprise, particularly in connection with the activities under scrutiny, and that the evidence scarcely referred to the role played by Vandegrift, Geppinger and Adams. He concluded the public interest did not require naming them individually in the order. We disagree and the examiner will be reversed on this point. The facts as stipulated by the parties are that Messrs. Vandegrift, Geppinger and Adams directed and formulated and controlled the acts and practices of the corporate respondent, Billy & Ruth. The activities of the toy catalog publishing concern center on, and in the main were confined to, the practices challenged in the complaint. The individual respondents, including Geppinger, Adams and Vandegrift, who were responsible for directing the affairs of Billy & Ruth, must therefore be held accountable for the activities of the corporate respondent in the absence of countervailing evidence.¹⁴

¹⁴ *ATD Catalogs, Inc., et al.*, Docket No. 8100 [p. 71 herein].

Complaint counsel also appeals the order entered by the examiner which incorporates essentially the substance of the provisions in the order formulated by the Commission in *Transogram Company, Inc.*, Docket No. 7978 (1962) [61 F.T.C. 629], and the related proceedings against other toy manufacturers. Complaint counsel's appeal will be denied for the reasons stated in *Individualized Catalogues, Inc., et al.*, Docket No. 7971 [p. 48 herein], and *Santa's Playthings, Inc., et al.*, Docket No. 8259 [p. 225 herein]. Under the circumstances of these cases, fairness demands that there be no undue disparity between the remedies imposed upon the toy catalog publishing concerns and their related wholesalers as opposed to the toy manufacturers involved in these transactions.

The initial decision, as modified to conform to and as supplemented by this opinion, is adopted as the decision of the Commission.

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

FINAL ORDER

This matter has been heard by the Commission upon the appeals of respondents and counsel supporting the complaint from the initial decision filed August 13, 1963, and upon briefs and oral argument in support thereof and in opposition thereto. The Commission, for the reasons stated in the accompanying opinion, has denied in part and granted in part the appeals of respondents and counsel in support of the complaint. The Commission has further determined that the initial decision and order should be modified by striking therefrom those portions which are either inconsistent with, or superfluous to, the decision in this matter, set forth in the accompanying opinion. Accordingly,

It is ordered, That the initial decision be modified by striking therefrom that section beginning on page 147 with the phrase "Facts somewhat similar to those in this case" and ending on page 149 with the phrase "which are set forth, in full detail, below"; the last sentence of the last full paragraph on page 164, beginning with the word "Moreover"; the last paragraph on page 178, beginning with the phrase "Billy & Ruth was the agent" and ending on page 179 with the phrase "mere customers' theory."; that section beginning on page 179 with the phrase "Each manufacturer" and ending on the same page with the phrase "to make the payments"; the phrase "as agent and collaborator" "mere customers' theory."; that section beginning on page 179 with the full paragraph on page 180, beginning with the phrase "They were payments"; the last sentence of the first full paragraph on page 181, beginning with the phrase "Respondents here".

It is further ordered, That the initial decision herein be modified by striking therefrom the phrase on page 182, "Each of the respondents," and substituting "Billy & Ruth, Supplee and their officials".

It is further ordered, That the initial decision be modified by striking therefrom the phrase on page 182 "and also chargeable to non-stockholder respondent jobbers herein for whom it acted as agent"; the phrase on page 182, "in particular, and non-stockholder jobbers as well"; that part of the initial decision beginning on page 182 with the phrase "Respondent jobbers, referring more particularly to" and ending on page 192 with the phrase "(*F.T.C. v. Broch*, 363 U.S. 166, 168; *Grand Union, supra*, p. 96)"; and that section beginning on page 192 with the phrase "Respondents also contend" and ending on page 204 with the phrase "Paragraphs 5 and 6 are new."

It is further ordered, That the order contained in the initial decision be, and it hereby is, modified to read as follows:

It is ordered, That Billy & Ruth Promotion, Inc., a corporation, Distributors' Promotions, Inc., as successor in interest to Billy & Ruth Promotion, Inc., and William George Steltz, Jr., J. Wilson Vandegrift, Floyd F. Trader, Roy G. Geppinger, and Lawrence S. Adams, individually and as officers of Billy & Ruth Promotion, Inc., and Supplee-Biddle-Steltz Company, now known as SDM&R, Inc., and their agents, representatives and employees, directly or through any corporate device in connection with any purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Inducing and receiving, or receiving, the payment of anything of value, to or for the benefit of any toy wholesaler, as compensation or in consideration for any services or facilities consisting of advertising or other publicity furnished by or through respondents, or any of them, or any toy wholesalers in a toy catalog, handbill, circular, or any other printed publication, serving the purpose of a buying guide, distributed, directly or through any corporate or other device, by said respondents, or any of them, or any toy wholesalers, in connection with the processing, handling, sale or offering for sale, of any toy, game or hobby products manufactured, sold, or offered for sale by the manufacturer or supplier, when said respondents know or should know that such payment or consideration is not made available on proportionally equal terms to all other customers competing with the toy wholesalers to whom or for whose benefit such payments are made in the distribution of such toy, game, or hobby products.

It is further ordered, That the complaint be, and it hereby is, dis-

missed as to Albany Hardware & Iron Co., Inc., a corporation; Chapman-Harkey Co., a corporation; Cullum & Boren Company, a corporation; Farwell, Ozmun, Kirk & Co., a corporation; Faucette Co., Inc., a corporation; Frankfurth Hdw. Co., a corporation; House Hasson Hardware Co., a corporation; Leon Levin, A. K. Levin, Harry Levin, J. K. Levin, Robert K. Levin, and Samuel Chernin, individuals doing business as Kipp Brothers; Morley Brothers, a corporation; Ohio Valley Hardware Co., Inc., a corporation; Orgill Brothers & Co., a corporation; The Thomson-Diggs Company, a corporation; J. A. Williams Company, a corporation; Wyeth Company, a corporation; and John J. Getreu and Son, Inc., a corporation.

It is further ordered, That the initial decision, as modified and supplemented by the accompanying opinion, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents Billy & Ruth Promotion, Inc., a corporation, and William George Steltz, Jr., J. Wilson Vandegrift, Floyd F. Trader, Roy G. Geppinger, and Lawrence S. Adams, individually and as officers of Billy & Ruth Promotion, Inc., and Supplee-Biddle-Steltz Company, a 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 set forth herein.

Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

UNITED VARIETY WHOLESALERS ET AL.

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

*Docket 8255. Complaint, Dec. 30, 1960—Decision, Apr. 3, 1964**

Consent order requiring a New York City association, formed by six toy wholesalers in different States to publish and distribute to retail outlets catalogs in which various manufacturers advertised their toys, to cease violating Section 5 of the Federal Trade Commission Act by receiving from toy suppliers such promotional payments as the \$1,200 granted them in 1959 by Hassenfeld Bros., Inc., of Pawtucket, R.I., for advertising its toy products in their catalogs, when they knew, or should have known, that

*Reported as modified by Commission's order dated June 11, 1964.

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proportionally equal terms were not offered by the suppliers to all their customers competing with respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent United Variety Wholesalers is an unincorporated association formed by six wholesalers, named as respondents in the caption hereof, with its principal office and place of business located at 212 Fifth Avenue, New York 10, New York.

Each wholesaler member of respondent association contributes a specified sum of money to said association in order to enable the association to publish and distribute toy catalogs.

Individual respondents Cornelius B. Meyers, Morris Kling, Mack Forbes and Marvin Singer are the officers and directors of respondent United Variety Wholesalers. Their addresses are the same as that of United Variety Wholesalers. Said individual respondents direct and control the acts, practices and policies of United Variety Wholesalers.

Respondent Gail Enterprises, Inc., is a corporation organized and doing business under the laws of the State of Massachusetts, with its principal office and place of business located at 59 Bedford Street, Boston 11, Massachusetts.

Respondent Kling Company, Incorporated, is a corporation organized and doing business under the laws of the State of Kentucky, with its principal office and place of business located at 2828 W. Jefferson Street, Louisville 12, Kentucky.

Respondent The C. B. Meyers Company is a corporation organized and doing business under the laws of the State of Michigan, with its principal office and place of business located at 1410 28th Street, S.E., Grand Rapids, Michigan.

Respondent Progressive Wholesalers, Inc., is a corporation organized and doing business under the laws of the State of California, with its principal office and place of business located at 1925 South Figueroa Street, Los Angeles 7, California.

Respondent Singer & Co. is a corporation organized and doing business under the laws of the State of Georgia, with its principal office and place of business located at 450 Brown Avenue, Columbus, Georgia.

Respondent Variety Supply Company is a corporation organized and doing business under the laws of the State of Minnesota, with its principal office and place of business located at Clara City, Minnesota.

The wholesaler members of respondent United Variety Wholesalers, through the individually named respondents, formulate, direct and control the acts and practices of said association.

PAR. 2. United Variety Wholesalers is an association composed of toy wholesale distributors or jobbers, named herein as corporate respondents, who sell and distribute their toy products to retail outlets located in various States of the United States. Respondent United Variety Wholesalers has been engaged, and is presently engaged, in the business of publishing and distributing annually, on behalf of the wholesale members, catalogs illustrating toys. Various manufacturers of toys have been, and are now, advertising their toys in said catalogs. Respondent members of respondent United Variety Wholesalers have sold and distributed, and presently sell and distribute, their catalogs to retail outlets located throughout the United States.

PAR. 3. Respondents in the course and conduct of their businesses have engaged, and are presently engaged, in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondents purchase their products from many toy suppliers located throughout the various States of the United States and cause such products to be transported from various States in the United States to other States for distribution and sale by respondents to retail outlets. There is now, and has been, a constant current of trade in commerce of said products between and among the various States of the United States.

In addition, respondents publish, or cause to be published, said catalogs which they sell and distribute to retail outlets located in various States of the United States.

PAR. 4. In the course and conduct of their businesses in commerce, said respondents have been, and are now, in competition with other corporations, partnerships and individuals in the sale and distribution of toy catalogs to retail outlets, and in the sale and distribution of toy products to said retailer outlets.

PAR. 5. Respondents, in the course and conduct of their businesses in commerce, knowingly induced or received, or contracted for the payment of, promotional payments or allowances from various toy suppliers which were not offered or made available on proportionally equal terms to all other customers of said suppliers competing with respondents in the distribution of said suppliers' toy products.

Respondents, as publishers and distributors of toy catalogs, induced or received payments or allowances from the aforesaid suppliers in connection with the promotion and advertising of their products in

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respondents' catalogs. Respondents knew, or should have known, that said payments or allowances which they induced or received, were not granted or offered on proportionally equal terms to all others of said suppliers' customers competing with respondents in the distribution of said suppliers' products. Included among the toy suppliers granting promotional payments or allowances to respondents in 1959 was Hassenfeld Bros., Inc., Pawtucket, Rhode Island. This supplier granted respondents \$1,200 in 1959 for advertising and displaying said supplier's toy products in their catalogs.

PAR. 6. The acts and practices of respondents as hereinbefore alleged, of knowingly inducing or receiving special promotional payments or allowances from their suppliers which were not made available by said suppliers on proportionally equal terms to respondents' competitors, are all to the prejudice and injury of competitors of respondents and of the public; have the tendency and effect of obstructing, injuring and preventing competition in the sale and distribution of toy products, and have the tendency to obstruct and restrain and have obstructed and restrained commerce in such merchandise; and constitute unfair methods of competition in commerce and unfair acts and practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

Mr. Jerome Garfinkel for the Commission.

Mr. Edward M. Post, Taustine & Post of Louisville, Ky. for respondents.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

APRIL 20, 1962*

The Federal Trade Commission issued its complaint against the above-named respondents on December 30, 1960, charging them with violation of Section 5 of the Federal Trade Commission Act in that they knowingly induced or received promotional payments in commerce from various toy suppliers, for toy catalog advertisements, not made available on proportionally equal terms to other customers and therefore unlawful for this and other reasons.

On January 19, 1962 there was submitted to the hearing examiner a consent agreement signed by respondents and by counsel for both sides, and approved by the Bureau of Restraint of Trade. The agreement provided for the entry of a consent order in the wording and form set forth therein.

*Reported as amended by order of hearing examiner dated April 27, 1962.

Accompanying the submission of the agreement to the hearing examiner, there was an application signed by counsel supporting the complaint requesting the hearing examiner to accept the agreement despite late filing or to certify to the Commission the question of excusing lateness of filing. Under the Rules, the agreement should have been filed prior to September 1, 1961.

On certification by the hearing examiner, the Commission, by order dated February 21, 1962, excused lateness of filing and referred the matter to the Office of Consent Orders, *i.e.*, for the purpose of passing on the consent agreement.

By direction of the Commission on or about April 3, 1962, the matter was referred back to the hearing examiner, *i.e.*, for consideration of the consent agreement.

Under the terms of the agreement, the respondents admit the jurisdictional facts alleged in the complaint. Respondents waive any further procedural steps, the making of findings of fact and conclusions of law and the right of judicial review or other challenge of the validity of the consent order. It is also agreed that the record shall consist solely of the complaint and the agreement, but that the agreement is for settlement purposes only and does not constitute an admission by respondents of violation. It is further agreed that the order may be entered without further notice, and have the same force and effect and shall become final and may be altered, modified or set aside as provided by statute for other orders. The complaint may be used in construing the terms of the order.

The hearing examiner finds that said agreement includes all of the provisions required by § 3.3 of the Commission Rules, which contain substantially the same provisions, pertinent here, as § 3.25 of the old Rules of the Commission.

In addition, the agreement contains certain permissive provisions set forth in the Rules.

The agreement also contains the following provision:

10. Although respondent Morris Kling is not an officer or director of respondent United Variety Wholesalers, he actively participates in the policy decisions of said unincorporated association.

Having considered said agreement, including the proposed order, and being of the opinion that it provides an appropriate basis for settlement and disposition of this proceeding the hearing examiner accepts the agreement but directs that it shall not become part of the official record until it becomes a part of the decision of the Commission.*

*This paragraph added by order of hearing examiner dated April 27, 1962.

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The following jurisdictional findings are made and the following order is issued:

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

2. Respondent United Variety Wholesalers is an unincorporated association, with its principal office and place of business located at 212 Fifth Avenue, New York 10, New York.

Respondent Cornelius B. Meyers is an individual and an officer and director of respondent United Variety Wholesalers, with his office and place of business located at 212 Fifth Avenue, New York 10, New York.

Respondent Morris Kling is an individual, with his office and place of business located at 212 Fifth Avenue, New York 10, New York.

Respondent Mack Forbes is an individual and an officer and director of United Variety Wholesalers, with his office and place of business located at 212 Fifth Avenue, New York 10, New York.

Respondent Marvin Singer is an individual and an officer and director of United Variety Wholesalers, with his office and place of business located at 212 Fifth Avenue, New York 10, New York.

All of the individual respondents named above control the acts, practices and policies of respondent United Variety Wholesalers.

Respondent Gail Enterprises, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Massachusetts, with its principal office and place of business located at 59 Bedford Street, Boston 11, Massachusetts.

Respondent Kling Company, Incorporated, is a corporation existing and doing business under and by virtue of the laws of the State of Kentucky, with its principal office and place of business located at 2828 W. Jefferson Street, Louisville 12, Kentucky.

Respondent The C. B. Meyers Company is a corporation existing and doing business under and by virtue of the laws of the State of Michigan, with its principal office and place of business located at 1410-28th Street, S.E., Grand Rapids, Michigan.

Respondent Progressive Wholesalers, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 1925 South Figueroa Street, Los Angeles 7, California.

Respondent Singer & Co. is a corporation existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office and place of business located at 450 Brown Avenue, Columbus, Georgia.

Respondent Variety Supply Company is a corporation existing and doing business under and by virtue of the laws of the State of Minne-

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sota, with its principal office and place of business located at Clara City, Minnesota.

ORDER

It is ordered, That respondent United Variety Wholesalers, an unincorporated association, and the following individual respondents: Cornelius B. Meyers, Morris Kling, Mack Forbes, and Marvin Singer; and the following corporate respondents: Gail Enterprises, Inc., Kling Company, Incorporated, The C. B. Meyers Company, Progressive Wholesalers, Inc., Singer & Co., and Variety Supply Company; and their respective officers, directors, representatives, agents and employees directly or through any corporate or other device in or in connection with any purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Inducing, receiving or contracting for the receipt of anything of value as payment for or in consideration for advertising or any other services or facilities furnished by or through respondents in connection with the processing, handling, sale, or offering for sale of toy, game, and hobby products manufactured, sold, or offered for sale by the supplier, when the respective respondents know or should know that such payment or consideration is not made available by such supplier on proportionally equal terms to all its other customers competing with the respective respondents in the distribution of such products.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

APRIL 3, 1964

On April 20, 1962, the hearing examiner filed his initial decision in this matter, accepting the consent agreement negotiated between complaint counsel and respondents. On May 15, 1962, the Commission placed this case on its own docket for review. The Commission has determined that the order contained in the initial decision adequately disposes of the allegations of the complaint. The parties to the consent agreement, however, agreed further that:

"In the event the Commission should issue any cease and desist order in Dockets 7971, 8100, 8231, 8240 or 8259 more limited in scope than the order provided for in this agreement, the Bureau of Restraint of Trade agrees that it will join in a motion by respondents to the Commission requesting that respondents' order be modified in accordance with such more limited cease and desist order."

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Accordingly,

It is ordered, That the initial decision of the examiner filed April 20, 1962, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents named in the above-captioned proceeding 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.

It is further ordered, That respondents, if they so desire, may, within sixty (60) days after service of this order upon them, request modification of the order in the light of the Commission's decisions in *Individualized Catalogues, Inc., et al.*, Docket No. 7971 [p. 48 herein], *Santa's Playthings, Inc., et al.*, Docket No. 8259 [p. 225 herein], *ATD Catalogs, Inc., et al.*, Docket No. 8100 [p. 71 herein], and *Billy & Ruth Promotion, Inc., et al.*, Docket No. 8240 [p. 143 herein]. Such a request, if made, will stay the time within which respondents would otherwise be required to file a report of compliance.

Commissioner Reilly not participating.

ORDER MODIFYING CONSENT ORDER

JUNE 11, 1964

This matter is before the Commission on the joint motion of the Bureau of Restraint of Trade and respondents to modify the consent order adopted on April 3, 1964, in the light of the Commission's decisions in *Individualized Catalogues, Inc., et al.*, Docket No. 7971 [p. 48 herein]; *Santa's Playthings, Inc., et al.*, Docket No. 8259 [p. 225 herein]; *ATD Catalogs, Inc., et al.*, Docket No. 8100 [p. 71 herein]; and *Billy & Ruth Promotion, Inc., et al.*, Docket No. 8240 [p. 143 herein]. The Commission has determined the request should be granted.

Accordingly,

It is ordered, That the consent order adopted by the Commission on April 3, 1964 [p. 217, 223 herein], be, and it hereby is, modified to read as follows:

It is ordered, That respondent United Variety Wholesalers, an unincorporated association, and the following individual respondents: Cornelius B. Meyers, Morris Kling, Mack Forbes, and Marvin Singer; and the following corporate respondents: Gail Enterprises, Inc., Kling Company, Incorporated, The C. B. Meyers Company, Progressive Wholesalers, Inc., Singer & Co., and Variety Supply Company; and their respective officers, directors, representatives, agents and employees, directly or through any corporate or other device in or in connection with any purchase

in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Inducing and receiving, or receiving, the payment of anything of value to or for the benefit of the respondents, or any of them, as compensation or in consideration for any services or facilities consisting of advertising or other publicity furnished by or through respondents, or any of them, in a toy catalog, handbill, circular, or any other printed publication, serving the purpose of a buying guide, distributed, directly or through any corporate or other device, by said respondents, or any of them, in connection with the processing, handling, sale or offering for sale, of any toy, game or hobby products manufactured, sold, or offered for sale by the manufacturer or supplier, when the said respondents know or should know that such payment or consideration is not made available on proportionally equal terms to all other customers competing with said respondents in the distribution of such toy, game or hobby products.

It is further ordered, That respondents 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.

Commissioner Reilly not participating.

IN THE MATTER OF

SANTA'S PLAYTHINGS, INC., ET AL.*

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

Docket 8259. Complaint, Dec. 30, 1960—Decision, Apr. 3, 1964

Order requiring three toy wholesalers and their association, engaged in publishing and distributing to retail outlets annual catalogs illustrating toys, to cease inducing and receiving from suppliers payments for advertising in the catalogs or other publications in connection with the sale of their products, when respondents knew, or should have known, that proportionally equal payments were not made available to all the suppliers' other customers competing with respondents.

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

*For Commission opinion in this case, see consolidated opinion of the Commission. *In the Matter of Individualized Catalogues, Inc., et al.*, docket No. 7971, pp. 48, 61 herein.

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Trade Commission, having reason to believe that the parties respondent named in the caption hereof have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent Santa's Playthings, Inc., is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at 200 Fifth Avenue, New York 17, New York.

The stock of this corporate respondent is owned in equal shares by individually named respondents Charles J. Cunius, Arthur Euben, William T. Uhlen, Larry Marcus and Joseph Stein, who are the officers and/or directors of respondent Santa's Playthings, Inc. The addresses of these individually named respondents are the same as corporate respondent Santa's Playthings, Inc. Individual respondents Arthur Euben, Larry Marcus and William T. Uhlen are respectively the presidents of L. A. Sales Co., Inc., Marcus Mercantile Co., Uhlen Carriage Company, Inc., toy wholesalers named as respondents in the caption hereof. Joseph Stein is a partner in A. Ponnock and Sons, a toy wholesaler also named as a respondent.

The officers and/or directors formulate, direct and control the acts, practices and policies of Santa's Playthings, Inc.

Respondent L. A. Sales Co., Inc., is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at 2572 Park Avenue, Bronx, New York.

Respondent Marcus Mercantile Co. is a corporation organized and doing business under the laws of the State of Wisconsin, with its principal office and place of business located at 345 N. Water Street, Milwaukee, Wisconsin.

Respondent Uhlen Carriage Company, Inc., is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at 416 St. Paul Street, Rochester 5, New York.

Respondents Abraham Ponnock, Leon Ponnock, Samuel Ponnock and Joseph Stein are copartners doing business as A. Ponnock and Sons, with their principal office and place of business located at 1012-14 Chestnut Street, Philadelphia 7, Pennsylvania.

All of the foregoing corporate and partnership respondents have been, and are now, members of respondent Santa's Playthings, Inc.

PAR. 2. Santa's Playthings, Inc., is an association composed of toy wholesale distributors or jobbers, named herein as corporate and partnership respondents, who sell and distribute their toy products to retail

outlets located in various States of the United States. Respondent Santa's Playthings, Inc. has been engaged, and is presently engaged, in the business of publishing and distributing annually on behalf of the wholesale members catalogs illustrating toys. Various manufacturers of toys have been, and are now, advertising their toys in said catalogs. Respondent members of respondent Santa's Playthings, Inc., have sold and distributed, and presently sell and distribute, their catalogs to retail outlets located throughout the United States.

The wholesaler members of corporate respondent Santa's Playthings, Inc., acting through the officers and/or directors of respondent association, formulate, direct and control the acts and practices of said association.

PAR. 3. Respondents in the course and conduct of their businesses, have engaged, and are presently engaged, in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondents purchase their products from many toy suppliers located throughout the various States of the United States and cause such products to be transported from various States in the United States to other States for distribution and sale by respondents to retail outlets. There is now, and has been, a constant current of trade in commerce of said products between and among the various States of the United States.

In addition, respondents publish, or cause to be published, toy catalogs which they sell and distribute to retail outlets located in various States of the United States.

PAR. 4. In the course and conduct of their businesses in commerce, said respondents have been, and are now, in competition with other corporations, partnerships and individuals in the sale and distribution of toy products to said retail outlets.

PAR. 5. Respondents, in the course and conduct of their businesses in commerce, knowingly induced or received, or contracted for the payment of promotional payments or allowances from various toy suppliers which were not offered or made available on proportionally equal terms to all other customers of said suppliers competing with respondents in the distribution of said suppliers' toy products.

Respondents, as publishers and distributors of toy catalogs, induced or received payments or allowances from the aforesaid suppliers in connection with the promotion and advertising of their products in respondents' catalogs. Respondents knew, or should have known, that said payments or allowances which they induced or received, were not granted or offered on proportionally equal terms to all others of said suppliers' customers competing with respondents in the distribution of said suppliers' products. The payments to said association for

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1959, exceeded \$110,000. Among the toy suppliers granting promotional payments or allowances to respondents in 1959 were:

Toy suppliers:	<i>Approximate payments granted to respondents</i>
Hamilton Steel Products, Inc.-----	\$800
Milton Bradley Company-----	2,400

PAR. 6. The acts and practices of respondents, as hereinbefore alleged, of knowingly inducing or receiving special promotional payments or allowances from their suppliers which were not made available by said suppliers on proportionally equal terms to respondents' competitors, are all to the prejudice and injury of competitors of respondents and of the public; have the tendency and effect of obstructing, injuring and preventing competition in the sale and distribution of toy products, and have the tendency to obstruct and restrain and have obstructed and restrained commerce in such merchandise; and constitute unfair methods of competition in commerce and unfair acts and practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

Mr. Jerome Garfinkel counsel for the complaint.

Mr. Martin C. Greene and *Aaron Locker* of *Aberman & Greene*, New York City counsel for respondents.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

SEPTEMBER 28, 1962

The complaint herein, alleging violation of section 5 of the Federal Trade Commission Act, was filed on December 30, 1960, and the case assigned to this hearing examiner on July 25, 1961. A prehearing conference was held. Both sides cooperated commendably, resulting in signed stipulations and statements, including the stipulating into evidence of the entire transcript in *Individualized Catalogues, Inc.*, Docket No. 7971 [p. 48 herein], heard by another hearing examiner. The time of many witnesses was saved by this process, as well as the time which would have been required to hold hearings in various cities. Hearings were held in New York City. Proposed findings and conclusions of law, together with proposed orders, were duly submitted. Oral argument thereon was held in Washington, D.C.

The respondents herein are charged with having knowingly received discriminatory promotional payments or allowances in violation of Section 5 of the Federal Trade Commission Act forbidding unfair methods of competition and unfair acts and practices in commerce.

The payments were for advertisements, of a display nature, in a toy catalog published by respondent Santa's Playthings, Inc., whose president is respondent Charles J. Cunius.

The stock of Santa's Playthings, Inc., is owned in equal shares by the four respondent toy jobbers and respondent Charles J. Cunius.

The other respondents herein are principals of the four respondent jobbers, *i.e.*, they are the presidents of the three which are corporations, and the partners of the one which is a partnership.

These principals of the respondent jobbers (including, however, only one from the partnership) are, together with respondent Cunius, the officers and directors of Santa's Playthings, Inc.

Thus, each of the respondent jobbers, together with respondent Cunius, has an equal stock interest in Santa's Playthings, Inc., and the principals of each of the jobbers, together with Cunius, constitute the officers and directors of Santa's Playthings, Inc.

Although the present tense is used in this discussion, the time referred to includes, in general, the period primarily in issue, namely, 1959 and 1960. When the word toy or toys is used it refers to toys, hobbies, and similar products.

Respondents' memorandum is divided into five major parts, I through V, and this numbering will be followed in the present decision.

I. Respondents submit proposed findings, but most of them deal with their so-called defenses. Although the hearing examiner, in view of his holdings in this case, regards these defense proposals as generally irrelevant, he devotes the latter part of the Findings of Fact to them.

II. Respondents defend on the ground that advertising payments to Santa's Playthings, Inc., are in no event to or for their benefit. However, the hearing examiner rejects this defense, largely on the basis of the *State Wholesale Grocer's* case, *infra*.

III. Respondents also defend on the ground that the payments are to the benefit of all jobbers inasmuch as the catalogs are available to non-stockholders for distribution to their retail customers, and inasmuch as this has been the pattern for various other catalogs in the toy industry. This seems to be joined to the argument that any jobber or group of jobbers can start a new toy catalog in which the manufacturers would presumably be happy to advertise. The hearing examiner rejects this defense.

IV. Respondents defend on the ground that, assuming that they are chargeable with receiving discriminatory payments, not only are they entitled to the benefit of the Clayton Act Section 2(b) defense of good faith meeting of competition, available to advertising manufacturers, *i.e.*, meeting the competition of manufacturers operating in

toy catalog groups engaged in similar practices, but they do not even have the burden of bringing in proof to establish this defense of good faith meeting of competition. Instead, respondents contend that complaint counsel has the burden, which he did not undertake in this case, to bring in evidence that there are no facts sustaining such a good faith defense, available to the manufacturers and enuring to the respondent jobbers. The hearing examiner disagrees with respondents on this burden of proof point, and he also believes that in any event the facts in the record as to other catalog groups actually negate any defense of meeting competition in good faith.

V. Respondents also defend on the ground that there are no facts showing that they knowingly induced or received discriminatory payments. However, on the basis of what they of necessity have known about their own toy catalog group, as well as what they have known about other toy catalog groups—all adding up to lack of participation by and benefit to at least some jobbers not adapted by their operations to catalog advertising, although competing with favored jobbers—the hearing examiner holds that this defense also is untenable.

The foregoing points, I through V, will now be discussed in detail:

I.

Proposed Findings of Fact

As already stated, most of respondents' proposed findings of fact deal with their so-called defenses, in general deemed irrelevant by the hearing examiner, although the pertinent proposals will be dealt with in the latter part of the Findings of Fact herein.

II.

State Wholesalers Case. Payment Benefit

It is the holding of the hearing examiner that on the payment benefit point the decision in this case is more or less concluded against respondents by *State Wholesale Grocers v. Great Atlantic & Pacific Tea Company*, 258 F. 2d 831 (C.A. 7, 1958), *cert. denied*, 358 U.S. 947, sub nom. *General Foods Corp. v. State Wholesale Grocers*. The case holds that promotional payments, for advertisements, to the wholly owned publisher subsidiary of the distributor-customer (A & P) are payments to or for the benefit of the distributor-customer where the published magazine caters largely (though not exclusively) to products sold by the distributor-customer, and is circulated among the customer's own consumer-customers through its stores. The hearing examiner also believes that the decision herein on the payment benefit point is further supported by the somewhat more general

holding *In the matter of Nuarc Company*, F.T.C. Docket No. 7848 [61 F.T.C. 375] (decided August 7, 1962).

Respondents contend that the present case is distinguished from *State Wholesale Grocers* by four¹ salient differences, but their contention cannot be sustained as to the alleged differences.

First, it is true that the A & P magazine bears, although only more recently, the name of the distributor, A & P, whereas the Santa's Playthings catalog does not bear the name of the distributor, that is, of any of the respondent jobbers or other jobbers distributing the catalog. But obviously a retailer who purchases a toy catalog from a jobber knows that it is, so to speak, the jobber's catalog. The ultimate consumer has no possible interest, of course, in the jobber's name, nor does the jobber have any interest in the consumer's knowing its name. The jobber is satisfied with the practical result, a cooperative advertising venture with the manufacturer reaching out to the retailer and the ultimate consumer, with the probable effect of bringing business to the jobber.

Secondly, it is true that the A & P magazine is dispensed, in general, only through A & P retail stores, whereas the toy catalogs are dispensed through toy retail stores generally, stores not ordinarily identified with the jobber distributors. But the retail toy store, by purchasing catalogs from a particular jobber, establishes a channel of relationship clearly conducive to the purchase, or continued purchase, of its toys from the particular respondent jobber. Moreover, this result is not changed, as suggested by respondents, by the fact that there are jobbers distributing the Santa's Playthings catalog other than respondent jobbers (who are stockholders of Santa's Playthings, Inc.) or by the fact that there seems to be analogous supplemental jobber distribution of other toy catalogs in the industry. Whether the catalogs are distributed by stockholder jobbers, or mere distributing jobbers, the result is the same so far as jobber-retailer-consumer relationship is concerned.

Thirdly, despite respondents' contention to the contrary, this result is not in the least changed by the fact that toy retailers can obtain the right to dispense, without restriction or condition, Santa's Playthings catalogs, or even other toy catalogs in the industry.

Fourthly, it is true that the payments for advertising in the A & P magazine clearly enure only to the benefit of a single distributor, A & P, but in the case at bar the payments quite clearly enure to the particular jobber distributing the magazine to retailers, or, put another way, to the limited class of respondent jobbers and, although

¹ Designated in respondents' memorandum as (a), (b), (c) and (d).

not so decided here, other jobbers distributing Santa's Playthings catalogs.—Even if it were true, as contended by respondents, that advertising in all toy catalogs must be considered together, and if so considered will reveal a benefit from advertisements in any one of them, such as the Santa's Playthings catalog, enuring to the benefit of all jobbers, the benefit is so indirect and secondary as hardly to characterize the payments as being made for the benefit of all jobbers, within the statutory language.

III.

Availability of Catalog Distribution and of Starting New Catalogs

Respondents contend that payments for advertisements in the Santa's Playthings catalog are indeed available to the "non-favored" jobbers competing with respondent jobbers. This is predicated on the fact that Santa's Playthings, Inc., has a limited number of distributing jobbers, *i.e.*, not stockholders, with more such jobbers allegedly welcome, and that analogous conditions allegedly exist in connection with other toy catalogs. The contention completely overlooks the consideration that unless a jobber carries the lines advertised in a particular catalog, or at least does business with the manufacturers advertising, he may have little incentive to distribute the catalog to his retailers. Certainly a jobber who is unable to obtain toys from a well established manufacturer averse to new accounts might have deep reservations about distributing a catalog featuring the toys of that manufacturer. Furthermore, some jobbers may well be too small or ill-equipped to become involved in a catalog distribution business—let alone the setting up of a new catalog publishing business, an alternative also suggested by respondents. As stated in the *State Wholesale Grocers* case, *supra*, p. 839, an "offer to make a service available to one, the economic status of whose business renders him unable to accept the offer, is tantamount to no offer to him."

Moreover, it cannot be forgotten that the particular payment figure of \$400 or \$450 per display advertisement in the Santa's Playthings catalog was not made known to the non-favored jobbers or to jobbers generally to stimulate whatever interest there might be in starting a new toy catalog.

Finally, it is futile for respondents to point to the amended policy of two of the manufacturers herein, subsequent to the issuance of the complaint, whereby there was made available in writing to competing jobbers, including the unfavored jobbers, an allegedly conventional plan for proportional equal payments which plan was not accepted by the unfavored jobbers. It is futile to point to this amended

policy if for no other reason than that the details, or even the substantial essence, of the amended plan and offer, are not in evidence. Moreover, there are also other obvious reasons why this late gesture and lack of response thereto cannot be relied on to change the picture for the years with which we are here concerned.

IV.

Good Faith Defense

Respondents also claim the protection of the defense, available to the manufacturer-seller, of the good faith meeting of competition, as set forth in Section 2(b) of the Clayton Act. This defense has, fairly recently, been held to be available to a person charged with violating Section 2(d) of the Clayton Act, relating to discriminatory payments by sellers. *Exquisite Form Brassiere, Inc. v. F.T.C.*, 301 F. 2d 499 (C.A.D.C., 1961), *cert. denied*, 82 Sup. Ct. Rep. 1162. *Shulton, Inc., v. F.T.C.* (C.A. 7, 1962), 1962 Trade Cases ¶ 70,321.

Respondents argue in effect that the charge in the instant case of violating Section 5 of the Federal Trade Commission Act is based on knowingly inducing the violation of Section 2(d) of the Clayton Act, and that it therefore stands in the same relationship to Section 2(d) as Section 2(f) of the Act, also relating to buyers, stands to Section 2(a) thereof with its cost defense available to sellers, and indeed as Section 2(f) therefore also allegedly stands to Section 2(b) with its good faith defense available to sellers.

This brings respondents to the crux of their argument, the only aspect thereof which will be passed on here, namely, that it has already been decided in *Automatic Canteen Company v. F.T.C.*, 346 U.S. 61 (1953), in a Clayton Act Section 2(f) case, that the burden of bringing in proof in connection with the seller's Section 2(a) cost defense, *i.e.*, its non-availability, is on the Commission, and that the same burden therefore exists even as to the seller's Section 2(b) good faith defense in a Federal Trade Commission Act Section 5 case.

However, in *Automatic Canteen* the proof required to be adduced, to support the Section 2(a) defense, related to the seller's costs, a matter which the court carefully pointed out was intimately known to the seller, a non-party, or available by spot check-ups (p. 68), and a matter hardly known or available to the buyer, although the facts were available to the Commission "with its broad power of investigation and subpoena" (p. 79).

The court placed the "burden coming forward with evidence" (pp. 65, 79) on the Commission, and did so strictly on what it called a "balance of convenience" (p. 74) theory, predicated on the seller's pe-

culiar knowledge of costs or ability to ascertain them. In cases where the buyer has knowledge of the pertinent facts the court explicitly indicated a different result would be quite possible (pp. 79-81). Moreover, the court in no way considered the Section 2(b) good faith defense, with which we are concerned in the present case, as distinguished from the Section 2(a) cost defense, and it even stated (p. 78) that it did not decide whether Section 2(b) applied to Section 2(f).

In the case at bar, respondents have had knowledge of all the necessary facts bearing on the Section 2(b) good faith defense. They have known that they alone, at least indirectly, received the payments for the advertisements in the Santa's Playthings catalog. They have known that other jobbers alone, *i.e.*, apart from the jobbers' competitors, received analogous payments from advertisements in other toy catalogs. They have known that the payments and methods of computation varied among the various catalogs, and they have known that in the case of the Santa's Playthings catalog the cost of the advertisements was fixed by Santa's Playthings, Inc., and indirectly by all the respondents. They have known that even all the catalogs combined have not served, nor has their advertising income benefitted, all jobbers. They have known, or must have known, that there are some jobbers at least, who as a matter of economics, cannot possibly profitably participate by being in a catalog group. Respondents, at least until fairly recently, may not have fully realized that catalog advertising payments come within the purview of payments prohibited by Section 2(d) of the Clayton Act or Section 5 of the F.T.C. Act, but they must be charged with knowledge of the law, and in any event it is the public interest which must control.

On the conclusion that there has been violation of the law herein, at least apart from the Section 2(b) defense, what the defense amounts to, on the state of the proof in this case, is that competitors in their catalog groups have been doing much the same thing as respondents have been doing in their catalog group. But the Section 2(b) defense has been limited by judicial construction to meeting lawful, not unlawful competition—at least in a discriminatory price case. *Standard Oil Co. v. Federal Trade Commission* (1951), 340 U.S. 231, 246. The same reasoning applies to a discriminatory payments or allowance case. In the hearing examiner's opinion, the activities of the respondents in connection with their catalog group have been unlawful, and, in addition, the activities of other competing jobbers, so far as this record shows, have been unlawful. The record is, of course, fairly meager as to the activities of other catalog groups, but as to this respondents had the burden of bringing in evidence, not complaint counsel.

V.

Knowingly Receiving

However, respondents boldly contest knowledge on their part and contend that complaint counsel has failed to prove that they knowingly induced or received discriminatory promotional payments or allowances. Again they cite the *Automatic Canteen* case, quoting remarks therein (p. 71) on the meaning of "knowingly." Their construction of this case is again unwarranted and actually is completely rejected, in effect, in *American News Company and Union News Company v. F.T.C.*, 300 F. 2d 104 (C.A. 2, 1962), where it is said (p. 111) of the opinion in the *Automatic Canteen* case:

Indeed, that opinion stated that the Commission might find knowledge under § 2(f) that payments induced and received were not cost-justified (the issue there) if it showed two things; first, that the buyer knew of a price differential, and second, that one familiar with the trade should know that such a differential could not be cost-justified.

However, as already shown, respondents have had knowledge of all the necessary facts. They have been, of course, "familiar with the trade." They have known the score. They are left only with the unavailing excuse that they have not known the law or the implications of the facts known to them.

The following are the Findings of Fact in this case. Except as found therein, or as may heretofore have been found, all proposed findings of fact are disallowed. Disallowance does not necessarily mean that the facts are not as proposed. The latter part of these Findings of Fact deal with respondents' so-called defenses.

FINDINGS OF FACT

1. Respondent Santa's Playthings, Inc., is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at 200 Fifth Avenue, New York 17, New York.

2. Individual respondents Charles J. Cunius, Arthur Euben, William T. Uhlen, Larry Marcus, and Joseph Stein are the officers and directors of respondent Santa's Playthings, Inc. With the exception of Joseph Stein, the aforementioned individual respondents were the officers and directors of Santa's Playthings, Inc., for the years 1959 and 1960. Joseph Stein became an officer and director in 1960. These individual respondents, as officers and directors, formulate, direct and control the practices of Santa's Playthings, Inc.

3. The principal office and place of business of individual respondent Charles J. Cunius is, % Santa's Playthings, Inc., 200 Fifth Avenue, New York 17, New York, where it is located.

The principal office and place of business of individual respondent Arthur Euben, is % L.A. Sales Co., Inc., 2572 Park Avenue, Bronx, New York, where it is located.

The principal office and place of business of individual respondent William T. Uhlen, is % Uhlen Carriage Company, Inc., 416 St. Paul Street, Rochester 5, New York, where it is located.

The principal office and place of business of individual respondent Joseph Stein, is % A. Ponnock and Sons, 1012-1014 Chestnut Street, Philadelphia 7, Pennsylvania, where it is located.

The principal office and place of business of individual respondent Larry Marcus, is % Marcus Mercantile Co., 345 N. Water Street, Milwaukee, Wisconsin, where it is located.

4. Respondent, L. A. Sales Co., Inc., is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at 2572 Park Avenue, Bronx, New York.

Respondent Marcus Mercantile Co. is a corporation organized and doing business under the laws of the State of Wisconsin, with its principal office and place of business located at 345 N. Water Street. Milwaukee, Wisconsin.

Respondent Uhlen Carriage Company, Inc., is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at 416 St. Paul Street, Rochester 5, New York.

Respondents Abraham Ponnock, Leon Ponnock, Samuel Ponnock and Joseph Stein are copartners doing business as A. Ponnock and Sons, with their principal office and place of business located at 1012-1014 Chestnut Street, Philadelphia 7, Pennsylvania.

5. Respondent Santa's Playthings, Inc., has been engaged entirely in the business of publishing catalogs illustrating toy, game and hobby products. The stock of Santa's Playthings, Inc., is owned in equal shares by respondents Charles J. Cunius, L. A. Sales Co., Inc., Marcus Mercantile Co., Uhlen Carriage Company, Inc., and A. Ponnock and Sons, respondent partnership. With the exception of Charles J. Cunius, the said stockholders are toy, game and hobby wholesale distributors who sell and distribute their toy, game and hobby products to retail outlets located in various States of the United States.

Santa's Playthings, Inc., sells and distributes the catalogs it publishes to the jobber-stockholders, as well as to other jobbers, who in turn

resell said catalogs to retail outlets located in various States of the United States.

6. Individual respondents Arthur Euben, William T. Uhlen, and Larry Marcus, besides being officers and directors of respondent Santa's Playthings, Inc., are also, respectively, the presidents of jobber-respondents L. A. Sales Co., Inc., Marcus Mercantile Co., and Uhlen Carriage Company, Inc. Joseph Stein is also a partner in jobber-respondent A. Ponnock and Sons.

7. As president of Santa's Playthings, Inc., Charles J. Cunius is the administrator and general manager of said corporation. He arranges the advertising contracts with the toy, game and hobby manufacturers. Mr. Cunius approves the art and layout of the catalogs published by Santa's Playthings, Inc.

8. Board of director meetings are held to determine which toy manufacturer products are to be illustrated in the catalogs published by Santa's Playthings, Inc. The board of directors, during these meetings, includes the officers of Santa's Playthings, Inc. These directors include the three presidents and a partner, respectively, of the four respondent jobber concerns.

9. In connection with the income statements of Santa's Playthings, Inc., for the year 1960, in the Operating Expense column there is an item marked Commissions. In 1960 the commissions amounted to \$49,630. These commissions related to payments made by respondent Santa's Playthings, Inc., to the officers of Santa's Playthings, Inc., for all services performed in connection with the preparation, sale and distribution of said publisher's catalogs.

In the income statement of Santa's Playthings, Inc., for the year 1959, relating to operating expenses, there is a column marked Officers Salaries. The salaries in 1959 amounted to \$27,500. This figure refers to payments made to the officers of Santa's Playthings, Inc., for all services performed in connection with the preparation, sale and distribution of the catalogs of Santa's Playthings, Inc.

10. Respondents, in the course and conduct of their businesses, have engaged, and are presently engaged, in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondents purchase their toy products from many toy manufacturers located throughout the various states to other states for distribution and sale by respondents to retail outlets. There is now, and has been, a constant current of trade in commerce in said toy products between and among the various states of the United States. The toy catalogs are similarly in commerce.

Initial Decision

65 F.T.C.

Payments to or for Benefit

11. In the course and conduct of their business in commerce, respondents induced and received discriminatory payments or allowances from their supplier-manufacturers in connection with the furnishing of services and facilities.

Respondents received substantial payments or allowances from various toy manufacturers in connection with the promoting or advertising of said manufacturers' products in the catalogs published by Santa's Playthings, Inc., in the years 1959 and 1960. In 1959, respondents received from toy manufacturing suppliers \$112,450, as compensation for furnishing catalog advertising services or facilities. In 1960, the amount received for similar services totaled \$171,000.

Respondent Santa's Playthings, Inc., received these payments for respondent jobber concerns, its stockholders, in particular, and in any event the payments were received for and were for their benefit.

The contracts relating to catalog advertising were submitted by respondents to various toy manufacturers who sold and distributed to respondents the toy products which were advertised or illustrated in the catalogs published by Santa's Playthings, Inc. The evidence further discloses that the terms relating to compensation for respondents' furnishing of promotional and advertising services were determined by respondents. In the 1960 contracts executed between Santa's Playthings, Inc., and various manufacturers, the terms of payment were \$450 per "show item." The figure of \$450 was a figure arrived at by Santa's Playthings, Inc., based on circulation and a comparison of prices charged by other catalogs (HE Ex. 2, p. 5). In the 1959 contracts executed between Santa's Playthings, Inc., and various manufacturers, the terms of payment were \$400 per "show item." The figure \$400 was a figure arrived at by Santa's Playthings, Inc. (HE Exs. 2, p. 6; 4, p. 2; 5, p. 2; 6, p. 2-3).

Discriminatory

12. The promotional payments or allowances made to respondent jobbers by Transogram Company, Inc., Emenee Industries, Inc., Remco Industries, Inc., and Ideal Toy Corporation, supplier-manufacturers, were not offered nor were they available on proportionally equal terms to all other customers of said manufacturers competing with said jobbers in connection with the distribution of the products involved.

13. Said payments, *i.e.*, for advertisements in the Santa's Playthings catalogs, are proved to have been made to or for the benefit of respondent L.A. Sales Co., Inc., through Santa's Playthings, Inc., without

having been available or offered, on proportionally equal terms, to jobber competitors in the New York City area, to wit, the "unfavored" jobbers—Fine Toy Company, Conbro Products, Inc., Prober & Pelta, Crest Toy Corporation, Novelty Sales Corporation, S. Hochhauser & Son, Inc., and Philip and Louis Sherman, Incorporated, said jobbers being customers purchasing goods of like grade and quality in 1959 and 1960 from the manufacturers making the payments.

14. Said payments are also proved to have been similarly made to or for the benefit of respondent partners of A. Ponnock and Sons, without having been available or offered, on proportionally equal terms, to jobber competitors in the Philadelphia area, to wit, the "unfavored" jobbers—Milt Wiseman Company, Incorporated, Harry Toub & Sons, L. Rieber, and M. Gerber, Inc., said jobbers also being customers purchasing goods of like grade and quality in 1959 and 1960 from the manufacturers making the payments.

15. Said payments are also proved to have been similarly made to or for the benefit of respondent Uhlen Carriage Company, Inc., without having been available or offered, on proportionally equal terms, to a jobber competitor in the Rochester area, to wit, the "unfavored" jobber Western New York Toy Co., Inc., said jobber being a customer purchasing goods of like grade and quality in 1959 and 1960 from the manufacturers (two of them) making the payments.

16. Although payments are also proved to have been made to or for the benefit of respondent Marcus Mercantile Co., of Milwaukee, there is no proof that the payments were not available or offered, on proportionally equal terms, to jobber competitors in its area. However, said respondent and the other three respondent jobber concerns are so intimately connected with respondent Santa's Playthings, Inc., the publication of its toy catalog, the acceptance of advertisements and payments therefor, and, in general, with the procurement of the benefits to any one or more of respondent jobber concerns, that it is found that said respondent Marcus Mercantile Co. has equal responsibility with the other three concerns in respect to discriminatory payments made to or for the benefit of any of them, i.e., as one of the parties subject to the cease and desist order issued herein.

Knowingly Received

17. Respondents knew, or should have known, that the promotional payments which they induced and received from Emenee Industries, Inc., Ideal Toy Corporation, Remco Industries, Inc., and Transogram Company, Inc., were not offered or made available on proportionally equal terms to all other customers competing with respondent jobber firms in the distribution of the products of said manufacturers.

The fact that respondents themselves fixed the rates of the payments, for advertising, is definite proof, in the absence here of strong proof to the contrary, that they knew that the payments were not part of a proportionally equal payment system available to all competing jobbers.

Moreover, respondents submitted the proposed advertising contracts to the manufacturers, on forms prepared by respondents (*i.e.*, through respondent Santa's Playthings, Inc.), and solicited the payments at the rates so fixed by respondents.

Furthermore, respondents never made any attempt to inquire of the four manufacturers as to whether the payments to Santa's Playthings, Inc., were being granted or offered on proportionally equal terms to all customers competing with respondent jobbers. Moreover, said manufacturers never informed respondent Santa's Playthings, Inc., or other respondents, that their payments were being offered on proportionally equal terms to all other customers competing with the respondent jobber firms herein, stockholders of Santa's Playthings, Inc.

Actually, there was little for respondents to inquire about in order to charge them with knowledge, since they knew the operative facts establishing the conclusion that they were receiving discriminatory payments, even though they may not have fully understood that the law dictated this conclusion on such facts.

Further support for the finding that respondents are chargeable with knowledge that the payments by said manufacturers were discriminatory is afforded by the testimony of Mr. A. Kent, a vice president of one of the manufacturers (HE Ex. 1B, pp. 356-8).

18. The acts and practices of respondents in knowingly inducing and receiving discriminatory promotional payments or allowances from the four said manufacturers constitute unfair methods of competition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Respondents' Defense or Defenses

Respondents submitted unnumbered proposed findings contained in its memorandum in support thereof (pp. 3-11). Most (pp. 6-11) of the proposed findings relate to respondents' defense or defenses. The hearing examiner has carefully considered these proposed findings. He has adopted, disallowed or modified as appears in the following findings, which are stated as nearly as practicable in the same sequence as the proposed findings. The relevancy of these facts as found below is adjudicated and found only to the extent consistent with the disallowance of the defenses.

19. The catalogs published by respondent Santa's Playthings, Inc., have not borne the name or other identification of any respondent

jobber, or distributing jobber. Instead, they have borne the name of the retailer who purchases them from the jobber for distribution to its customers, the ultimate consumers. The same has been generally true as to toy catalogs published by others, at least the major catalogs. The name of the retailer is ordinarily printed on the front cover (p. 6, par. 1).

20. Toy catalogs published by others, at least the major toy catalogs, have been comparable in form and apparently substantially similar in many respects to the Santa's Playthings catalogs (p. 6, par. 2).

21. The "unfavored" jobbers purchased directly from the four manufacturers named herein who sold toys to respondent jobbers, *i.e.*, the toys sold to respondent jobbers in 1959 and 1960 for which period they were advertised in the Santa's Playthings catalog (as heretofore found) (p. 6, par. 3).

22. The entire practice of publishing and advertising in toy catalogs has been conducted openly and overtly in the toy industry for a period in excess of 30 years, and the activities of the respondents herein have not been in flagrant disregard of the law. There are approximately 13 toy catalogs presently in existence, and an unknown number of minor jobbers toy catalogs. Both major and minor toy catalogs have "a distributing membership," including stockholder and distributing jobbers, numbering at least 300 and comprising, perhaps, most of the toy jobbers in the United States (p. 7, par. 1).

23. Respondents' proof is that the Santa's Playthings catalog group has actively solicited jobbers to distribute its catalogs, *i.e.*, to purchase them for resale (although the evidence is self-serving and the cold fact is that the number of so-called jobber distributors is very small). Respondents' further proof is that the other toy catalog groups also actively solicit jobbers to distribute their catalogs (although the proof is fairly general and hardly specific) (p. 7, par. 2).

24. The list and number of distributing jobbers for each toy catalog tends to vary from year to year by the addition of new jobbers or the withdrawal of old ones (p. 7, par. 3).

25. During the toy show in New York City each year, when jobbers from all over the country congregate, they may also visit various toy catalog houses (presumably the major ones), many located in the city, and change their catalog affiliations (p. 7, par. 5).

26. A jobber distributor (on the self-serving proof submitted) is generally not required to do anything other than agree to buy the catalogs and, in particular, he does not obligate himself to buy the advertised goods of the manufacturers (p. 8, par. 1).

27. Most major toy manufacturers advertise in most of the toy catalogs (or at least in the major toy catalogs) (p. 8, par. 2).

28. During the annual toy fair in New York City manufacturers have had the practice of openly calling on toy catalog publishers in the city to insure that advertisements of their products are carried in their catalogs, and publishers, including Santa's Playthings, Inc., have also called on them to solicit advertisements (p. 8, par. 4).

29. The prices charged for advertising by the various toy catalogs have been conditioned by competitive factors such as circulation, number of colors, paper quality, etc. This has also been true of the Santa's Playthings catalog (although the prices, namely advertising rates, have been determined by respondents, not the manufacturers) (p. 8, pars. 5 & 6).

30. If a manufacturer definitely expresses a strong desire that a particular toy be advertised in the Santa's Playthings catalog, that toy as a practical matter will be advertised (although respondents Santa's Playthings, Inc., has had the contractual right to select which particular toy will be advertised). The same, no doubt, has applied to other toy catalogs, at least the major catalogs (p. 9, par. 1).

31. Arrangements for advertising in toy catalogs, at least the major ones, are usually entered into at the time of the annual toy fair in New York City by means of written contracts and confirmation (p. 9, par. 3).

32. The proof (although general) is that no condition has been imposed by any of the respondent jobbers that a purchasing retailer is required to purchase merchandise from the jobbers selling the catalog. This applies, also, to distributing jobbers for the Santa's Playthings catalogs, and may also apply to all jobbers distributing to retailers any of the other catalogs, at least the major ones (p. 9, par. 4).

33. In 1961, Transogram Company, Inc., and Emenee Industries, Inc., two of the four manufacturers herein, advertised in a Santa's Playthings catalog as well as other toy catalogs, and also offered competing customers of respondent jobbers herein, including the un-favored customers herein, and made available to them, advertising payments or allowances. (However, the hearing examiner notes and finds that there is no evidence of the terms and conditions on which this was done.) There is proof, to be sure, that none of the un-favored customers herein accepted the offer of any such payments or allowances, whatever they were (p. 10, par. 3).

34. During the period 1958-1961, the un-favored jobbers herein did not participate in toy catalog groups either as catalog publishers, directly or indirectly, or merely as distributing jobbers purchasing the catalogs for resale to retailers (p. 10, par. 4).

* * * * *

Anticipating the above defenses, complaint counsel herein points out certain facts and consideration, which form the basis for the following findings:

35. The 13 major catalogs, at least, have a general policy of accepting only 2 jobbers from each city, which would allow for participation by only 26 jobbers in each city. However, in New York City, for instance, three of the four manufacturers used herein to prove allowances have had 40-60 jobber customers each. Furthermore, in the Individualized Catalogs group, one of the major jobbers, the proof indicates that participation was limited to jobbers who were stockholders of the publishing company.

36. Assuming that there were sufficient opportunity for participation by all jobbers in some catalog group or groups, respondents nevertheless failed to meet their burden to go forward and show that payments or allowances to participants in some other group or groups would be as large as those to respondent jobbers, or, more specifically, that payments would be offered or made available to them on proportionally equal terms.

37. The four manufacturers herein never informed the disfavored jobber customers, during the period concerned here, of the details of their catalog payments, particularly the \$400 or \$450 paid by them per item, nor were they so informed by respondents—details which might have stimulated any possible interest in setting up a new catalog, *i.e.*, for the purpose of receiving proportionally equal payments.

The following observation, in effect repeating and implementing certain of the main findings, may be appropriate here:

38. Non-stockholder jobber distributors of catalogs cannot, without more, be said to receive advertising payments made to the catalog publisher in the sense that stockholder distributors of catalogs receive such payments. Nor do such non-stockholder distributors whose principals do not serve on the publisher's board of directors have, without more, the benefit of voting on what toys of the manufacturers will be advertised or what the advertising rate will be.

CONCLUSION

The allegations in the complaint have been proved in all respects. Respondents' acts and practices, as proved, constituted unfair acts and practices in commerce within the intent and meaning, and in violation of, Section 5 of the Federal Trade Commission Act.

The Federal Trade Commission has jurisdiction of the subject matter of this action and of the party respondents.

Respondents' motions to dismiss the complaint on complaint counsel's case, and on the entire case, are denied.

Initial Decision

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ORDER

Ordered, That this order to cease and desist is directed against the following respondents, and other persons:

Corporations and Directors

Santa's Playthings, Inc.,
L. A. Sales Co., Inc.,
Marcus Mercantile Co.,
Uhlen Carriage Company, Inc.,
and the officers and directors of said corporation.

Individuals

Charles J. Cunius,
Arthur Euben,
Larry Marcus,
William T. Uhlen, and
Abraham Ponnock,
Leon Ponnock,
Samuel Ponnock, and
Joseph Stein,

These latter four doing business as A. Ponnock and Sons, and Joseph Stein also being one of the directors of Santa's Playthings, Inc.

Other Persons

This order to cease and desist is similarly directed against the respective representatives, agents and employees of the foregoing corporate and individual respondents, acting directly or through any corporate or other device.

Ordered, That the foregoing corporate and individual respondents, as well as all other persons indicated, shall in or in connection with any purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist, severally or otherwise, from:

Inducing and receiving, or receiving, the payment of anything of value to or for the benefit of the respondents, or any of them, as compensation or in consideration for any services or facilities consisting of advertising or other publicity furnished by or through respondents, or any of them, in a toy catalog, handbill, circular, or any other printed publication, serving the purpose of a buying guide, distributed, directly or through any corporate or other device, by said respondents, or any of them, in connection with the processing, han-

dling, sale, or offering for sale, of any toy, game or hobby products manufactured, sold, or offered for sale by the manufacturer or supplier, when the said respondents know or should know that such payment or consideration is not made available on proportionally equal terms to all other customs competing with said respondents in the distribution of such toy, game or hobby products.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having been heard by the Commission upon the exceptions of respondents and counsel supporting the complaint to the initial decision and order filed September 28, 1962, and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission, for the reasons stated in the accompanying opinion, having determined that the respondents' exceptions should be denied in part and granted in part and that the complaint counsel's exceptions should be denied and that the initial decision should be modified to conform with the views expressed in the Commission's opinion and as so modified adopted:

It is ordered, That the findings in the initial decision be modified by striking therefrom paragraph 16 on page 239 and that section entitled "*Respondents' Defense or Defenses*" beginning with the phrase on page 240, "Respondents submitted unnumbered proposed findings" and ending on page 243 with the phrase "what the advertising rate will be."

It is further ordered, That the order contained in the initial decision be, and it hereby is, modified to read as follows:

It is ordered, That Santa's Playthings, Inc., a corporation, and Charles J. Cunius, Arthur Euben, William T. Uhlen, Larry Marcus, and Joseph Stein, individually and as officers and directors of said corporation; L. A. Sales Co., Inc., a corporation, Uhlen Carriage Company, Inc., a corporation, and Abraham Ponnock, Leon Ponnock, Samuel Ponnock and Joseph Stein, doing business as A. Ponnock and Sons, individually, and the officers, agents, representatives, and employees of the individual and corporate respondents directly or through any corporate or other device in or in connection with any purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Inducing and receiving, or receiving, the payment of anything of value to or for the benefit of the respondents, or any of them, as compensation or in consideration for any services or facilities

Statement of Commissioner MacIntyre

65 F.T.C.

consisting of advertising or other publicity furnished by or through respondents, or any of them, in a toy catalog, handbill, circular, or any other printed publication, serving the purpose of a buying guide, distributed, directly or through any corporate or other device, by said respondents, or any of them, in connection with the processing, handling, sale or offering for sale, of any toy, game or hobby products manufactured, sold, or offered for sale by the manufacturer or supplier when the said respondents know or should know that such payment or consideration is not made available on proportionally equal terms to all other customers competing with said respondents in the distribution of such toy, game or hobby products.

It is further ordered, That the complaint as to respondent Marcus Mercantile Co. be, and it hereby is, dismissed.

It is further ordered, That the hearing examiner's initial decision and order as modified and supplemented by the accompanying opinion be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondents subject to the order to cease and desist 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 said order.

Commissioner Reilly not participating.

IN THE MATTER OF

THE REGINA CORPORATION

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

Docket 8323. Complaint, Mar. 14, 1961—Decision, April 7, 1964

Order reopening and modifying desist order of Oct. 11, 1962, 61 F.T.C. 983, so that "its terms will be in explicit accord with" the Commission's revised Guides Against Deceptive Pricing issued Jan. 8, 1964.

STATEMENT OF COMMISSIONER MACINTYRE

APRIL 7, 1964

I am again compelled to issue a separate statement setting forth my views on the Commission's action in modifying a cease and desist order in a deceptive pricing case antedating the revised Guides issued

Statement of Commissioner MacIntyre

65 F.T.C.

consisting of advertising or other publicity furnished by or through respondents, or any of them, in a toy catalog, handbill, circular, or any other printed publication, serving the purpose of a buying guide, distributed, directly or through any corporate or other device, by said respondents, or any of them, in connection with the processing, handling, sale or offering for sale, of any toy, game or hobby products manufactured, sold, or offered for sale by the manufacturer or supplier when the said respondents know or should know that such payment or consideration is not made available on proportionally equal terms to all other customers competing with said respondents in the distribution of such toy, game or hobby products.

It is further ordered, That the complaint as to respondent Marcus Mercantile Co. be, and it hereby is, dismissed.

It is further ordered, That the hearing examiner's initial decision and order as modified and supplemented by the accompanying opinion be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondents subject to the order to cease and desist 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 said order.

Commissioner Reilly not participating.

IN THE MATTER OF

THE REGINA CORPORATION

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STATEMENT OF COMMISSIONER MACINTYRE

APRIL 7, 1964

I am again compelled to issue a separate statement setting forth my views on the Commission's action in modifying a cease and desist order in a deceptive pricing case antedating the revised Guides issued

January 8, 1964. In the petition now before us, respondent, Regina Corporation (Regina), requests that the order be set aside in its entirety on the ground that the activities documented by the record do not constitute a violation of Section 5 of the Federal Trade Commission Act as presently interpreted by the Commission in the light of the revised Guides. In the alternative, Regina asks that the order be explicitly modified to conform to the new Guides.

In rejecting respondent's plea that the order be set aside, the Commission employs rather facile generalizations, glossing over the contention that Regina's past activities as documented by the record do not constitute a violation of the law as now construed. Sweeping aside Regina's arguments on this point, the Commission broadly asserts:

* * * the standards enunciated in the Guides are intended to be prospective, rather than retrospective, in their application. The public interest would not be served if the Commission were to undertake the time-consuming and unsatisfactory task of attempting to review, in the light of every new policy pronouncement, the records of all the cases in which cease and desist orders have become final, in order to ascertain whether the records would support a finding of violation under the new standards. It is very doubtful how accurate such retrospective evaluation could be, or how useful would be a process of continuous reexamination of old, and frequently stale, records.

I cannot adopt this rationale, for the simple reason that it does not come to grips with Regina's contention on this point, which, in fact, raises serious questions meriting a responsive and reasoned reply. At the outset, I may state that the assertion that the Guides are intended to be prospective rather than retrospective in their application avoids the realities of the matter. The Commission has only recently dismissed complaints in a number of proceedings brought prior to the issuance of the revised Guides on the ground that the proof in these proceedings did not meet the new standards. *E.g.*, see *Filderman Corporation, Inc., et al.*, Docket No. 7878 (1964) [64 F.T.C. 427]. The Commission's assertion that the Guides are prospective, in rebuttal of respondent's request for rescission, is particularly inappropriate because the application of cease and desist orders are not retrospective but prospective as far as respondent's obligations thereunder are concerned. Regina and respondents in other cases may well question the effect on their future business decisions if all Commission policy reversals of this nature will be prospectively applied without regard to what has gone before.

The Commission, in this instance, has ignored another fundamental consideration. As I understand Section 5 of the Federal Trade Commission Act, the Commission is empowered to issue cease and desist

orders only upon a finding that a violation of law has occurred.¹ Unless the Commission comes to grips with the issue of whether respondent's past actions documented in this proceeding are violative of the Act, I do not see how, in good conscience, it can keep in effect a cease and desist order bearing on respondent's future conduct. The justification that a review of the record in this proceeding would be either unduly troublesome or time consuming does not absolve the Commission from performing its statutory functions. The Commission will have to grapple with this issue, either in this proceeding or in other deceptive pricing cases wherein outstanding orders issued prior to January 8, 1964, are in effect, and the number of cases in this category are, of course, numerous. The Commission may refuse, at this time, to decide the question of whether a respondent's activities leading to an outstanding cease and desist order are in violation of the law as presently interpreted by this agency. We should not, however, be surprised if the courts are asked to fill the vacuum the Commission has left, if we abdicate our functions in this manner.

The Commission's treatment of this issue ignores the further point that a decision on the merits as to whether respondent's past conduct violates the law as now construed is required here so that at least respondent and those on the Commission's staff charged with enforcing this and similar orders will know what the Commission's position is. While the evasion of this question may stave off some admittedly difficult problems in the immediate future, in the long run it can only lead to further disarray in an area of the law already subject to considerable confusion.²

Ignoring the issue of whether the respondent should be under order at all, the Commission has modified *Regina's* order by elaborating on its "*pro tanto*" modification procedure employed in *Clinton Watch Company, et al.*, Docket No. 7434 (Order Denying Petition To Reopen Proceeding, issued February 17, 1964) [64 F.T.C. 1443], with which I was unable to agree at that time.³ In this instance, in addition to stating that all outstanding orders shall be interpreted and "thus *pro tanto* modified, so as to impose on respondents subject to such orders no greater or different obligations than are stated in the Commission's newly-revised Guides Against Deceptive Pricing", the Commission has

¹ Section 5(b) of the Federal Trade Commission Act states in pertinent part: "* * * The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served * * * an order requiring such person, partnership or corporation to cease and desist from using such method of competition or such act or practice. * * *"

² See my statement on the revised Guides, issued January 8, 1964.

³ See my statement, *Clinton Watch Company, et al.*, Docket No. 7434, February 17, 1964 [64 F.T.C. 1444].

specifically amended the order to require respondents to cease and desist from the following:

Advertising or disseminating any list or pre-ticketed price unless such price is a good faith estimate of the actual retail price and does not appreciably exceed the highest price at which substantial sales are made in respondent's trade area.

As I stated in *Clinton Watch Company, et al.*, Docket No. 7434,⁴ respect for the businessmen who come before us, as well as for the appellate courts, requires that Commission orders be drafted with sufficient precision so that they can be understood. Although the modification of the *Regina* order is somewhat more elaborate than that of *Clinton*, Regina's obligations are defined with no greater clarity than those of the watch company under its modified order. The modified order in this proceeding is a classic example of the enforcement problems which may be expected from the use of terms which have not been adequately defined by either the courts or this agency.⁵ In this case the Commission has done again what the Supreme Court said we should not do, namely, shifted to the courts the burden of determining the factual question of what constitutes unfair conduct. See *Federal Trade Commission v. Morton Salt Company*, 334 U.S. 37 (1948). I must reiterate my surprise that this Commission, which recently has made so many pronouncements of the necessity for clear and definitive orders is, in the deceptive pricing area, issuing orders, the terms of which are so imprecise and indefinite that they can lead only to administrative and judicial confusion.⁶

ORDER REOPENING PROCEEDINGS AND MODIFYING CEASE AND DESIST ORDER

By telegram dated February 7, 1964, the Commission advised counsel for respondent in the above-captioned proceeding that, upon appropriate petition therefor, the Commission would modify the cease and desist order against respondent to conform with the revised Guides

⁴ *Id.*

⁵ For example, respondent, under the modified order, is required to employ a "good faith estimate" of the actual retail price prior to advertising or disseminating list or preticketed prices. To my knowledge neither the Commission nor the courts have ever defined the criteria for determining the good faith of the seller in estimating actual retail prices in any trade area. There is the further requirement that Regina cease and desist from disseminating list prices or preticketed prices unless such prices do not "appreciably exceed" the highest price at which substantial sales are made in respondent's trade area. Again, there is no precedent which will aid either Regina or other respondents similarly situated or the Commission's staff, for that matter, in determining the meaning of that phrase. The Commission leaves unanswered the question of by what percentage a list price or preticketed price would have to exceed the highest price in a trade area at which substantial sales are made. Respondents and the Commission's staff will be faced with similar difficulties in trying to divine what "substantial sales" might be in a particular trade area. The applicable percentage could conceivably vary from 1 to 100 percent.

⁶ See my statement, *Clinton Watch Company, et al.*, *supra* n. 3 [64 F.T.C. 1444].

Order

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Against Deceptive Pricing (issued January 8, 1964). Accordingly, on February 12, 1964, respondent filed a petition, pursuant to Section 3.28(b)(2) of the Commission's Procedures and Rules of Practice, to reopen the above-captioned proceeding for the purpose of setting aside or, in the alternative, modifying the cease and desist order. On March 5, 1964, the Director of the Commission's Bureau of Deceptive Practices filed an answer to respondent's petition, and respondent filed a reply on March 13.

Respondent in its petition contends that, tested under the standards of the newly revised Guides Against Deceptive Pricing, the evidence on which the cease and desist order against respondent was based is insufficient to demonstrate a violation of law, and that therefore the order should be vacated and set aside. However, the standards enunciated in the Guides are intended to be prospective, rather than retrospective, in their application. The public interest would not be served if the Commission were to undertake the time-consuming and unsatisfactory task of attempting to review, in the light of every new policy pronouncement, the records of all the cases in which cease and desist orders have become final, in order to ascertain whether the records would support a finding of violation under the new standards. It is very doubtful how accurate such retrospective evaluations could be, or how useful would be process of continuous reexamination of old, and frequently stale, records.

Since, however, the newly revised Guides are intended to have a uniform, prospective application, it is the Commission's stated policy "that all outstanding cease and desist orders involving deceptive pricing shall be interpreted, and thus *pro tanto* modified, so as to impose on respondents subject to such orders no greater or different obligations that are stated in the Commission's newly-revised Guides Against Deceptive Pricing * * *." *Clinton Watch Company*, F.T.C. Docket 7434 (Order Denying Petition to Reopen Proceeding, issued February 17, 1964) [64 F.T.C. 1443]. In view of this policy, the Commission has determined to grant respondent's request to reopen the above-captioned proceeding, and to modify the cease and desist order so that its terms will be in explicit accord with the Guides.

Accordingly, it is ordered, That the Commission's cease and desist order issued on October 3, 1962, as amended by its order correcting final order issued on October 11, 1962 [61 F.T.C. 983], be, and it hereby is, amended so as to require respondent to cease and desist from:

"Advertising or disseminating any list or preticketed price unless such price is a good faith estimate of the actual retail price and does not appreciably exceed the highest price at which substantial sales are made in respondent's trade area."

Commissioner MacIntyre not concurring.

Complaint

IN THE MATTER OF

NORTH AMERICAN PHILIPS COMPANY, INC.

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

Docket 8472. Complaint, Mar. 6, 1962—Decision, Apr. 9, 1964

Order dismissing—since respondent's advertising and promotional matter has carried no reference to price since issuance of the complaint and the Commission lacked information that its advertisements fail to satisfy the requirements of the Guides Against Deceptive Pricing—complaint charging the manufacturer of "Norelco" electric shavers with supplying its distributors and retail dealers with advertising material designating excessive amounts as "Suggested Retail Price", etc., and with advertising the same prices in newspapers and magazines.

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 North American Philips Company, Inc., a corporation, has violated the provisions of said Act, and it appearing that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent North American Philips Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business at 100 East 42nd Street, New York 17, New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale and sale of electric shavers to distributors and retail dealers under the trade name "Norelco".

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said merchandise, when sold, to be shipped from its places of business in the State of New York and elsewhere to purchasers thereof located in States other than the States in which the shipments originated and in the District of Columbia and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of this business, respondent has engaged in the practice of supplying its distributors and retail dealers with advertising material and other printed matter containing amounts designated as "Suggested Retail Price" and "Manufacturer's Suggested Retail Price." Respondent has also placed advertising