IN THE MATTER OF

FELDMAN WHOLESALE FURS INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket C-732. Complaint, April 2, 1964—Decision, April 2, 1964

Consent order requiring wholesale furriers in Chicago to cease violating the Fur Products Labeling Act by labeling artificially colored fur as natural, failing to comply with labeling requirements, substituting non-conforming labels for those originally attached to fur products, and failing to keep required records.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Feldman Wholesale Furs Inc., a corporation and Harry Witt, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Feldman Wholesale Furs Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondent Harry Witt is an officer of the corporate respondent and formulates, directs and controls the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are wholesalers of fur products with their office and principal place of business located at 318 West Adams Street, city of Chicago, State of Illinois.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now en-

gaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce; as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled to show that fur contained therein was natural, when in fact such fur was pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

PAR. 5. Respondents in introducing, selling, advertising, and offering for sale, in commerce, and in processing for commerce, fur products; and in selling, advertising, offering for sale and processing fur products which have been shipped and received in commerce, have misbranded such fur products by substituting thereon, labels which did not conform to the requirements of Section 4 of the Fur Products Labeling Act, for the labels affixed to said fur products by the manufacturer or distributor pursuant to Section 4 of said Act, in violation of Section 3(e) of said Act.

PAR. 6. Respondents in substituting labels as provided for in Section 3(e) of the Fur Products Labeling Act, have failed to keep and preserve the records required, in violation of said Section 3(e) and Rule 41 of the Rules and Regulations promulgated under the said Act.

PAR. 7. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with

violation of the Fur Products Labeling Act and the Federal Trade Commission Act; and

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

The Commission, having reason to believe that the respondents have violated the Fur Products Labeling Act and the Federal Trade Commission Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings and enters the following order:

1. Respondent Feldman Wholesale Furs Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 318 West Adams Street, city of Chicago, State of Illinois.

Respondent Harry Witt is an officer of the corporate respondent and his address is the same as that of the corporate respondent.

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

ORDER

It is ordered, That respondents Feldman Wholesale Furs Inc., a corporation, and its officers and Harry Witt, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce; as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

1. Failing to affix labels to fur products showing in words and in figures plainly legible all of the information required to be disclosed by each of the Subsections of Section 4(2) of the Fur Products Labeling Act.

2. Representing directly or by implication on labels that the fur contained in any fur product is natural when the fur contained therein is pointed, bleached, dyed, tip-dyed, or otherwise artifically colored.

It is further ordered, That Feldman Wholesale Furs Inc., a corporation and its officers, and Harry Witt, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction, sale, advertising or offering for sale, in commerce, or the processing for commerce, of fur products; or in connection with the selling, advertising, offering for sale, or processing of fur products which have been shipped and received in commerce, do forthwith cease and desist from:

1. Misbranding fur products by substituting for the labels affixed to such fur products pursuant to Section 4 of the Fur Products Labeling Act labels which do not conform to the requirements of the aforesaid Act and the Rules and Regulations promulgated thereunder.

2. Failing to keep and preserve the records required by the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in substituting labels as permitted by Section 3(e) of the said Act.

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

IN THE MATTER OF

JAMES PARIS FURS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket C-733. Complaint, April 2, 1964—Decision, April 2, 1964

Consent order requiring manufacturing furriers in New York City to cease violating the Fur Products Labeling Act by failing, on invoices, to show the true animal name of fur and the country of origin of imported furs, to disclose when fur was artificially colored, to use the terms "Persian Lamb" and "natural" where required, and to comply in other respects with invoicing requirements.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that James Paris Furs, Inc., a corporation, and James Paris individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent James Paris Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondent James Paris is an officer of said corporation and formulates the policies, acts and practices of said corporate respondent.

Respondents are manufacturers of fur products with their office and principal place of business located at 259 West 30th Street, city of New York, State of New York.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were falsely and deceptively invoiced by respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed:

1. To show the true animal name of the fur used in the fur product.

2. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.

3. To show the country of origin of imported furs used in fur products.

PAR. 4. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "Persian Lamb" was not set forth on invoices in the manner required by law, in violation of Rule 8 of said Rules and Regulations.

(b) The term "natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(c) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 5. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and constitute unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

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

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

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent James Paris Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Its office and principal place of business is located at 259 West 30th Street, city of New York, State of New York.

Respondent James Paris is an officer of said corporation, and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents, James Paris Furs, Inc., a corporation, and its officers, and James Paris, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, manufacture for introduction, or the sale, advertising or offering for sale, in commerce, or the transportation or distribution, in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act do forthwith cease and desist from falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Failing to set forth the term "Persian Lamb" in the manner required where an election is made to use that term instead of the word "Lamb."

3. Failing to set forth the term "Natural" as part of the information required to be disclosed on invoices under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

4. Failing to set forth on invoices the item number or mark assigned to fur products.

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

IN THE MATTER OF

PUROLATOR PRODUCTS, INC.

ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(a) OF THE CLAYTON ACT

Docket 7850. Complaint, Mar. 29, 1960—Decision, Apr. 3, 1964

Order requiring a manufacturer of air, oil and fuel filters for trucks and automobiles, with nationwide distribution and net sales in 1957 in excess of $37,000,000, to cease discriminating in price in violation of Sec. 2(a) of the Clayton Act by such practices as giving favored warehouse distributors "redistribution" discounts not granted to competing warehouse distributors and jobbers, on sales of its automotive replacement filters.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof has violated and is now violating the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C. Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Purolator Products, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 970 New Brunswick Avenue, Rahway, New Jersey.

PAR. 2. Respondent is now, and for many years past has been, engaged in the manufacture, sale and distribution of a great variety of filters for use in the filtration of fuel, air, water and other liquids and gases. Applications for respondent's filters range from the air and fuel filters found on motor vehicles, through filters for hydraulic and cooling fluids, to industrial filters for use in the production and refinement of petroleum, chemicals and nuclear materials.

Respondent's total net sales for the year 1957 were in excess of $37,000,000.

PAR. 3. Respondent manufactures filters in Rahway, New Jersey, and in other cities in the United States and ships them to its various customers located throughout the United States.

Respondent's customers have been divided, by it, into two classifications. The first, designated as the Equipment Sales Division, is composed of customers who incorporate respondent's filters in their own products or equipment and include such customers as automobile, truck and aircraft manufacturers, and chemical and petroleum producers.

The second, designated as the After Market Division, is composed primarily of customers who resell respondent's automotive filters (hereinafter referred to as "automotive replacement filters") as replacements for worn components on automobiles, trucks and other motor vehicles and include such customers as automotive parts distributors, truck fleets and oil companies marketing replacement parts under their own trade name.

In the sale and distribution of automotive replacement filters bearing the Purolator trade name to the replacement market, respondent ships said filters to a number of its selected, large volume, direct franchise distributors, classified by respondent as "warehouse distributors", located throughout the United States. Respondent also has a large number of associate distributors (hereinafter called "jobbers") who purchase said products from the direct franchise distributors. Respondent exercises such a degree of control over sales by direct franchised warehouse distributors to jobbers as to render such sales in all essential respects sales by respondent to such jobbers.

There is and has been at all times mentioned herein a continuous current of trade and commerce in respondent's automotive replacement filters across State lines, between their respective points of origin and respondent's customers. Said products are sold and distributed for use, consumption and resale within the various States of the United States and the District of Columbia.

PAR. 4. In the course and conduct of its business, respondent is now, and during the times mentioned herein has been, in substantial competition with other corporations, partnerships, individuals and firms engaged in the manufacture, sale and distribution of various types of filters.

Respondent's warehouse distributors are competitively engaged with each other in the sale of respondent's automotive replacement filters to jobbers and some users, and with each other and with jobbers in the sale of said filters to retailers (hereinafter called "dealers") such as service stations, garages and automobile dealers and to some users such as truck fleets, in their respective trade areas.

PAR. 5. Respondent, in the course and conduct of its business as above described, has been for many years last past, and presently is, discriminating in price between different purchasers of automotive replacement filters, by selling said products of like grade and quality to some of its purchasers at substantially higher prices than to other of its purchasers.

PAR. 6. Respondent has been, and now is, discriminating in price in the sale of automotive replacement filters of like grade and quality

by granting special rebates, allowances, discounts and other forms of price reductions, direct or indirect, to some warehouse distributors over and above those made available by respondent to other warehouse distributors who compete with the favored warehouse distributors in the resale of respondent's products. The special price concessions to the favored warehouse distributors are effected by various ways and means, some, but not all, of which are more particularly described as follows:

(a) Respondent grants and has granted "redistribution allowances", varying from 4% to 15.8% to some warehouse distributors on their sales of respondent's products to dealers and users, which allowances are withheld from other warehouse distributors.

PAR. 7. Respondent has been, and now is, discriminating in price in the sale of automotive replacement filters of like grade and quality by granting warehouse distributors special rebates, allowances, discounts and other forms of price reductions, direct or indirect, over and above those made available by respondent to its jobbers who compete with the warehouse distributors in the resale of respondent's automotive replacement filters. The special price concessions to warehouse distributors are effected by various ways and means, some, but not all, of which are more particularly described as follows:

(a) Respondent grants a "warehouse distributor" discount, varying during different periods from 5% to 9%, to warehouse distributors on purchases by them of automotive replacement filters for resale to dealers and users, which discount is withheld by respondent from its jobbers.

(b) Respondent grants "redistribution allowances", varying in total amounts during different periods from 4% to 15.8%, to warehouse distributors on their sales of respondent's products to dealers and users, which allowance is withheld by respondent from its jobbers.

PAR. 8. The special rebates, allowances, discounts and other forms of price reductions granted by respondent, as alleged herein, result, either directly or indirectly, in reducing prices charged such favored purchasers to substantially lower amounts than respondent charges other of its purchasers, many of whom compete with said favored purchasers in the sale of said products of like grade and quality within the trading areas in which they are engaged in business.

PAR. 9. The effect of such discriminations in price, as alleged herein, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and its customers are respectively engaged; or to injure, destroy or prevent competition with respondent or with purchasers therefrom who receive the benefits of such discriminations.

PAR. 10. The aforesaid acts and practices of respondent constitute violations of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C. Title 15, Sec. 13).

Mr. Thomas A. Sterner for the Commission.

Willkie, Farr, Gallagher, Walton & Fitz Gibbon, of New York 5, N.Y., for respondent.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

NOVEMBER 27, 1962

This proceeding is based upon a complaint charging the respondent with violation of Section 2(a) of the Clayton Act and is now before the undersigned hearing examiner for final consideration on the complaint, answer thereto, testimony and other evidence and proposed findings of fact and conclusions of law, together with briefs in support thereof, filed by counsel. The hearing examiner has given consideration to the proposed findings of fact and conclusions of law submitted by both parties and briefs in support thereof, and all findings of fact and conclusions of law proposed by the parties respectively, not hereinafter specifically found or concluded, are herewith rejected, and the hearing examiner having considered the record herein and now being duly advised in the premises makes the following findings of fact, conclusions drawn therefrom, and issues the following order.

1. Respondent, Purolator Products, Inc., is a Delaware corporation with its executive office located at 970 New Brunswick Avenue, Rahway, New Jersey. For many years respondent has been engaged in the manufacture and in the sale and distribution in interstate commerce of many sizes, and types of filters for use in the filtration of fuel, air, oil, water and other liquids and gases. Among the filters so sold and distributed in interstate commerce, were automotive replacement filters, which were sold as replacements for worn components on automobiles, trucks and other motor vehicles. Respondent's net sales of all products for the year 1957, exclusive of the sales of its Canadian subsidiaries, were approximately $35,880,000. The sales of automotive replacement filters in 1957 were in excess of $5,000,000.

2. Respondent sells its replacement filters to warehouse distributors located throughout the United States. Such warehouse distributors resell respondent's automotive replacement filters either from a central warehouse location or through branch locations to owners or operators of automotive and truck fleets and to distributors or jobbers, who in turn resell such automotive replacement filters to retailers or dealers

such as service stations, garages and automobile dealers. Many of such warehouse distributors have also resold a substantial portion of their automotive replacement filters purchased from respondent, direct to dealers from their central warehouse locations or through their branch locations.

3. In the sale and distribution of its replacement filters in interstate commerce, respondent has been in substantial competition with other corporations and concerns engaged in the manufacture and in the sale and distribution in interstate commerce of various types of filters for use in automobiles. In general, each warehouse distributor purchasing automotive replacement filters from respondent is in substantial competition with one or more warehouse distributors selling respondent's filters of like grade and quality in the same area. In addition, such warehouse distributor by selling respondent's filters of like grade and quality to dealers and fleets, is in competition with its own jobber customers and with other jobbers purchasing replacement filters of like grade and quality from distributors of respondent.

4. As of March 1, 1960, respondent had 6,956 warehouse distributor-jobber agreements on file. As of August 5, 1960, there were approximately 367 branch locations maintained by such warehouse distributors. The estimated number of dealers purchasing Purolator trademarked automotive replacement filters in the United States was 150,000. In the case of some warehouse distributors with branch locations, sales to independent jobbers were executed by and shipped from the branch locations, as well as from the central warehouse location. Those branch locations may receive respondent's filters from the central warehouse location or by shipment directly from respondent.

5. Warehouse distributors may vary greatly in size. For example, a warehouse distributor may be composed of over ten individual branches located in an equal number of different towns or cities with a central warehouse adjacent to one of the branch locations, or it may have a small central warehouse with one branch, while another warehouse distributor may be a single unit operator with warehouse facilities all at one location, who sells to both jobbers and dealers. Both warehouse distributors and jobbers sell to dealers, typically small retailers who carry little or no stock of automotive replacement parts, and who buy frequently and in small amounts.

6. During the period of January 1, 1957 through February 1, 1959, respondent issued its so-called gray price list showing its net prices to warehouse distributors. In addition, the respondent supplied its warehouse distributors with its blue price list which contained suggested resale prices to jobbers. The respondent also published a second sug-

gested price list (green) for use by distributors and jobbers in selling to dealers. The warehouse distributors prices (gray list) were lower than the suggested net prices to jobbers (blue list), and the suggested net prices to jobbers were less than the suggested net prices to dealers.

7. Effective February 2, 1959, and continuing until the present time, respondent abolished its suggested jobber blue price list. The prices in the gray warehouse distributor price list were increased to levels comparable to those theretofore appearing on the suggested jobber blue price list; and the gray price list thereupon became and has since been a list of respondent's suggested resale prices to jobbers. The prices at which respondent has since sold automotive replacement filters to warehouse distributors, have been uniformly computed by deducting 5% from the suggested gray resale prices to jobbers, either on shipments to the warehouse distributor's central warehouse location or direct shipments to its branch locations.

8. The practices of the respondent involved in this proceeding, consisted of price discriminations arising out of two discounts known as "External Redistribution Discounts" and the "Internal Redistribution Discounts." The entire case-in-chief in support of the complaint was stipulated by the parties and the issues were reduced to three:

(a) Price Discrimination under Indirect Purchaser Concept.

(b) Injury to Competition under the Internal Redistribution Discount.

(c) Meeting a lower price of a Competitor.

I.

External Redistribution Discounts

9. During the period involved in this proceeding, the respondent granted to its warehouse distributors an external redistribution discount either off the face of respondent's invoices or by credit memoranda. Such external redistribution discounts were and are at the following percentages.

February 1, 1957 to January 31, 1958	11%
February 1, 1958 to present	15%

On some occasions during this period, the respondent granted the external redistribution discount as a percentage of gray prices, rather than the blue prices which showed a difference in the percentages, but in the last analysis, the ultimate net cost of the filters to the warehouse distributor was the same.

10. It has been the announced policy of respondent to pay or allow the above described external redistribution discount only on that

portion of each warehouse distributor's purchases of automotive replacement filters resold by such warehouse distributor from a central warehouse location or through branch locations to jobbers, and since August 3, 1959, to fleets. In order to ascertain the discount due, the warehouse distributor either made a monthly report of all sales to jobbers and fleets upon which discount was paid monthly or the warehouse distributor informed the respondent in writing the percentage of sales which would be made to jobbers and fleets and respondent would then deduct the external redistribution discount from the face of the invoice, or issue a credit memorandum. The reporting warehouse distributor in making his monthly report used forms furnished by respondent which require the sales to be reported on the basis of respondent's suggested resale prices to jobbers.

11. During the period January 1, 1957 through January 31, 1958, respondent did not in all cases adhere to its announced policies concerning the granting of the external redistribution discount described above. For example, in one instance respondent allowed a warehouse distributor the full external redistribution discount off the face of its invoices on automotive replacement filters purchased by it from respondent, and resold directly to dealers (of which respondent had notice). This resulted in said favored warehouse distributor receiving lower net prices, by the amount of the external redistribution discount, than other warehouse distributors, who did not receive said discount, but who purchased automotive replacement filters of like grade and quality from respondent and resold them in the same trade area to dealers in competition with the favored warehouse distributor.

12. The price differentials between warehouse distributors resulting from the granting of the external redistribution discount by respondent to the favored warehouse distributor on automotive replacement filters purchased from respondent and resold to dealers, while not granting such external redistribution discount to competing warehouse distributors on their purchases from respondent of automotive replacement filters of like grade and quality for resale by them to dealers in the same trade area, had a reasonable probability of substantially lessening competition or tending to create a monopoly in the lines of commerce in which such warehouse distributors were engaged, and to injure, destroy or prevent competition with the favored warehouse distributor.

13. The foregoing facts with reference to the external redistribution discounts including injury to competition were incorporated in a stipulation entered into between counsel supporting the complaint and counsel for respondent, and was made a part of the record in this proceeding.

II.

Indirect Purchaser Concept

14. It is the opinion of the hearing examiner and so found that the charges of the complaint based upon the indirect purchaser concept have been sustained. During the years 1949 to 1956, the warehouse distributor contract provided that the distributor distribute Purolator products to jobbers with whom he has executed an agreement approved by the respondent. The agreement with jobbers referred to, provides that the jobber maintain a minimum stock of $500 of respondent's products, that the distributor will supply jobber at prices shown on blue list (suggested jobber price list) : that jobber will purchase his requirements from the distributor and that the agreement between distributor and jobber shall become effective when signed by the parties and recorded by respondent. The so-called recording was simply a signed acceptance of the contract entered into between the distributor and the jobber.

15. From July 1, 1955 to February 1, 1957, respondent executed a letter agreement granting a discount or rebate of 14% upon sales to jobbers with whom the distributor has executed a contract. All such sales to be reported by distributor monthly are based upon the net price shown on blue price sheet. In June 1956, respondent modified its warehouse distributor contract and removed therefrom the provision that distributor's contract with jobbers be approved by respondent. Beginning July 1, 1959, the warehouse distributor's contract with respondent was modified to provide that current price lists were merely suggestive and not intended to be binding in any way.

16. The above actions taken in 1956 and 1959, appear to be an attempt on the part of respondent to divorce itself from the selection of jobbers by warehouse distributors and fixing of resale prices, which the jobber should charge. In actual practice, however, this was not the result. In the memorandum of agreement attached to warehouse distributor's contract allowing an external redistribution discount on sales by warehouse distributors to jobbers, it was expressly stated that such discount would be paid on sales to jobbers who have an executed contract with distributor, known as GS–74, with external redistribution discount based upon suggested jobber price list. This appeared in memorandum agreement in effect during the following periods: February 1957 to February 1958—CX 8; February 1958 to July 1959, CX 9; from July 1, 1959 and subsequent thereto, CX 10(a–b). In jobber agreement forms used from March 1953 through 1956 and later, known as form GS–74, the jobber agreed to purchase his entire

Purolator requirements from the warehouse distributor with which it has entered into this agreement. As set out in the stipulation and as hereinbefore found, respondent issued suggested price lists for sales by the distributor to jobbers and suggested price lists for resale by jobber to dealers. These price lists were generally followed by both the distributor and jobber and, in fact, the external redistribution discount was based upon the suggested jobber price list.

17. As previously found, all the elements necessary to establish that the jobber customer of the warehouse distributor is an indirect purchaser from respondent are present in this record. The respondent has been able to fix and control resale prices by issuance of the suggested jobber price list which were uniformly followed. The respondent has maintained franchise controls and suggests resale prices at all levels down to dealers.

III.

Internal Redistribution Discounts

18. Beginning February 1, 1958, the respondent allowed an additional discount of 4% of the suggested jobber price to its warehouse distributor on all replacement filters reshipped from their central warehouse to their branch locations. This discount was known as the "Internal Redistribution Discount". The single warehouse distributor who makes up the vast majority of the warehouse distributors or customers, does not receive this discount or its equivalent even though it competes with the favored distributor in sales to jobbers, dealers and fleets.

19. Respondent's internal redistribution discount is paid on quantities of its products which the favored warehouse distributor reships from its central warehouse to its branches. Obviously it is available only to those warehouse distributors having branches and who are engaged in supplying their branches from a central warehouse. In 1959 respondent recognized approximately 335 warehouse distributors located throughout the United States. Some of these were owned units of multi-warehouse organizations. Of the total warehouse distributors, approximately 80 had branch locations and were thus physically able to qualify for respondent's internal redistribution discount. Of that number, approximately 70 or 87% were supplying branches from a central warehouse and claimed, and received, the internal redistribution discount. In 1958 respondent paid this discount to 61 of its warehouse distributors.

20. Warehouse distributors may vary greatly in size. For example, Colyear Motor Sales in 1959 had 15 warehouse locations with 24 branch locations, while several competing warehouse distributors are single unit operators with no branches. Both warehouse distributors and job-

bers sell to dealers, typically small retailers who carry little or no stock of automotive replacement parts, and who buy frequently and in small amounts. As a result, warehouse distributors carry large inventories of such parts, very often numbering from 20,000 to 45,000 different items, and jobbers carry somewhat smaller inventories.

21. Automotive parts wholesaling, whether at the warehouse distributor or jobber level, is a keenly competitive business. It is also a business of relatively high costs at all levels just mentioned. As a direct result of such high operating costs, net profit margins typical of the business, range between 3% and 4% (after taxes which are generally considered a cost of doing business). With such net profit margins, both the warehouse distributor's and jobber's profitability are extremely sensitive to the cost of product acquisition. Consequently, the 2% cash discount which is offered by respondent and most other suppliers of automotive replacement parts, is uniformly taken whenever possible, and is considered by warehouse distributors and jobbers alike, to be important, and sometimes essential to a profitable business.

22. Automotive parts and their distribution have been the subject of a long series of recent Commission actions (see for example, *Moog Industries Inc.*, v. *Federal Trade Commission*, 238 F. 2d 43 (1956); *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253 (1956). In all those cases the capacity of discounts to injure competition has been exhaustively examined. The holdings appear to be unanimous in their evaluation of the relevant economic realities such as the keenness of competition, the very small margins of profits, and the importance of discounts as small as 2% to profitability. For example, Beard & Stone Electric Co., in Dallas, which reshipped about 50% of its $71,237 worth of purchases from respondent in 1959 and was paid $1,390, had an obvious and substantial competitive advantage which could be used to subsidize its branch operations. The same competitive advantage accrued to Clinton Square Auto Parts, which reshipped about 30% of its Purolator purchases and earned $1,202 in 1959.

23. Although the individual dollar amounts paid favored purchasers by respondent are in themselves substantial in their probable competitive effect, the cumulative result of similar payments by 200–300 other suppliers would have obvious and dramatic anti-competitive effects in this market. These impersonal economic facts hold valid even though unfavored purchasers testify that they have not been injured. *Moog Industries*, v. *Federal Trade Commission*, *supra*; *E. Edelman & Co.*, v. *Federal Trade Commission*, *supra*, 239 F. 2d 152 (1956).

24. Since the filters when delivered become the property of the warehouse distributor, any expense or saving of expense on the part of the customer cannot be used by the seller as a cost justification. This is recognized by the respondent who has maintained upon the record

that the cost studies based upon the internal redistribution discount, were offered solely to show no injury to competition on the theory that redistribution expenses of double handling by the purchaser are equivalent to, or surpass, the allowance given.

25. In support of this contention, respondent presented to the examiner a study made of a group of warehouse distributors by an independent accounting firm, which study purported to show the cost of each of the central warehouse locations in redistributing automotive replacement parts to branch locations, principally by use of the sampling technique. As hereinabove stated, this study was presented not as a cost justification, but for the purpose of supporting respondent's contention that no injury to competition is involved.

26. This cost study was rejected by the hearing examiner as not being relevant and material to the issues in this proceeding. In addition to being based upon customer's costs, the cost study was based upon a sampling technique which was unscientific and valueless. The study purported to be of all automotive parts instead of being limited to automotive replacement filters involved in this proceeding. The record does not show that the samples used were chosen on any other criteria than the arbitrary one of cooperation, with no consideration given to geographical distribution.

27. Respondent's evidence of its customer's costs of doing business cannot be considered competent, relevant or material to the question of competitive injury. The question of competitive advantage or disadvantage is not resolved by determining what a customer does with the price advantage received. Respondent as seller cannot evaluate the relative competitive strength of its customers and vary its prices according to its own determination. Respondent cannot ascertain which of its purchasers is operating at a competitive disadvantage, and, by varying its price, wipe out that "disadvantage." Such pricing could result in the systematic preference of the inefficient customer to the competitive disadvantage of the efficient customer.

28. Respondent's favored warehouse distributors did not initiate the practice of supplying their branches out of a central warehouse location in response to respondent's internal redistribution discount. That method of supplying branches had been in effect for years before the internal redistribution discount came into existence in 1958. The warehouse distributor determined by his own independent business judgment that this method of distribution was the best possible for his operation. As a result of this decision to supply his branches from his central warehouse, the distributor can maintain a smaller inventory at the branch freeing capital for other investment; he can keep his physical facilities small in size at the branch, reducing capital investment and have more control of inventory. The important fact is

that the warehouse distributor had organized and operated his business in a chosen fashion, accepting the competitive advantages and disadvantages inherent in it. The respondent's intervention to pay all or part of the cost of supplying branches has relieved the favored warehouse distributor of an operational cost which has been traditional in his organization.

29. Therefore, it is found that respondent's internal redistribution discount of 4% is paid to the vast majority of its warehouse distributors with branches; that such discounts are substantial in the competitive context of this market; that such discounts are not available to or paid to competing single unit warehouse distributors; and that the discriminations in price resulting from such discounts bestow a substantial competitive advantage on the favored purchasers. Further, it is found that this same discount results in a discrimination in price between the favored warehouse distributor and the jobber with whom he competes for sales to dealers and that such discrimination has the same competitive effect. Likewise, it is found that the discrimination in price of 5% between the favored warehouse distributors and the unfavored jobbers has a similar and added competitive effect.

IV.

Meeting Competitor's Price

30. In an attempted justification of its internal redistribution discount, respondent offered evidence to prove that the lower prices resulting from its adoption of the challenged discount were only a good faith meeting of a lower price of a competitor. That evidence was only the price and discount schedules of two of its competitors. It does not constitute evidence sufficient to support a 2(b) defense for two important reasons. First, the record indicates that prior to February 1, 1958 respondent's price schedule to warehouse distributors was list price less 60%, less 9%, less 11% for sales to independent jobbers. At that time its competitor's prices were 60% less 10% less 10% and 60% less 9% less 10%. Then on February 1, 1958, respondent unilaterally changed its discount schedule to 60% less 5% less 15%. When respondent's competitors did not follow in this change, respondent adopted the internal redistribution discount. From these facts it is obvious that respondent was not meeting a competitor's lower price. Neither of its competitors had lowered its price. Respondent was attempting to repair a defect in the discount schedule it had unilaterally adopted. Section 2(b) is not available on such a set of facts.[1] Second, it is apparent that respondent's internal redistribution discount is designed to accommo-

[1] *Federal Trade Commission* v. *Staley Mfg. Co.*, 324 U.S. 746 (1945).

date a class of respondent's customers and is applicable to all without regard to any other factors. As such, respondent's discount is simply a system of pricing which results in routine and continuing discrimination in favor of a particular group of its customers. Section 2(b) does not allow a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others.[2] That defense is reserved for prices which are lowered in response to an individual competitive demand and not as part of a seller's pricing system.[3]

CONCLUSIONS

1. The price differentials between warehouse distributors resulting from respondent's granting of the external redistribution discount to one warehouse distributor on its purchases from respondent, of automotive replacement filters, which said warehouse distributor resold to dealers while not granting such external redistribution discount to competing warehouse distributors on their purchases from respondent of automotive replacement filters of like grade and quality, for resale by them in the same trade area to dealers, has a reasonable probability of substantially lessening competition or tending to create a monopoly in the lines of commerce in which such warehouse distributors are engaged, or to injure, destroy or prevent competition with the favored warehouse distributors.[4]

2. As heretofore found, the control maintained by the respondent over jobber-customers of its warehouse distributors was such that sales by the warehouse distributors to jobbers should be considered in all essential respects sales by respondent to such jobbers within the meaning of Section 2(a) of the Act, and the granting of an external redistribution discount by the respondent to the warehouse distributor on sales by it to dealers while not allowing such discount or its equivalent to the jobber-customers selling dealers in competition with said distributor has a reasonable probability of substantially lessening competition or tending to create a monopoly in the lines of commerce in which such independent jobbers were engaged, or to injure, destroy or prevent competition by such independent jobbers with said warehouse distributor.[5]

3. The granting of the internal redistribution discount to warehouse distributor-customers having branch locations, while not granting said discount to competing single unit warehouse distributors, had

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[2] *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 725 (1948).

[3] *Standard Motor Products, Inc.*, v. *Federal Trade Commission*, 265 F. 2d 674 (1959), *cert. denied*, 361 U.S. 826.

[4] This practice and its effect upon competition was stipulated by the parties and such stipulation was incorporated into the record of this proceeding (Tr. 31–34).

[5] Effect on and injury to competition was stipulated by the parties (Tr. 34).

a reasonable probability of substantially lessening competition or tending to create a monopoly in the lines of commerce in which such warehouse distributors were engaged, or to injure, destroy or prevent competition with said unfavored warehouse distributors.

4. The acts and practices of the respondent as herein found are in violation of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It is ordered, That respondent Purolator Products, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale, for replacement purposes, of automotive replacement filters, in commerce as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Discriminating, directly or indirectly, in the price of such products of like grade and quality:

By selling to any direct or indirect purchaser at net prices higher than the net prices charged to any other purchaser, direct or indirect, who in fact competes with the purchaser paying the higher price in the resale and distribution of respondent's replacement filters.

Opinion of the Commission

APRIL 3, 1964

By Dixon, *Commissioner:*

The Commission issued its complaint against respondent, a manufacturer of air, oil, and fuel filters for trucks and automobiles, on March 29, 1960, charging violations of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.[1] The case is presently before us on respondent's exceptions to the hearing examiner's initial decision, dated November 27, 1962, in which the examiner found instances of price discrimination on the part of respondent and issued an order to cease and desist therefrom.

Purolator Products, Inc., hereinafter referred to as respondent, sells its automotive filters in commerce as original equipment for new vehicles and for replacement of worn equipment. This case is concerned with respondent's pricing system in the replacement market or "after-market." According to respondent's executive vice-president, the company enjoys thirty to thirty-two percent of that market, while

[1] 49 Stat. 1526 (1936); 15 U.S.C. 13(a) (1958).

AC Spark Plug Division of General Motors Corporation and Fram Corporation hold roughly equivalent shares. It was stipulated that respondent's sales in the replacement market exceeded five million dollars in 1957.

Respondent's only direct sales of its replacement filters are to independent warehouse distributors, most of which handle a multiplicity of other automotive parts. Some of these warehouse distributors operate from a single location, while others maintain central warehouses and reship filters as needed to their owned or controlled warehouse branches. Distributors with branches service customers both from their central location and from their multiple branches. Warehouse distributors resell to jobbers, to dealers (garage owners, filling station operators, and other retail establishments), and to truck fleet operators. Jobber customers of the warehouse distributors also resell to dealers and to fleet operators, and thus are in competition with distributors in such sales. Individual car owners purchase from dealers only.[2]

The prices at which warehouse distributors purchase respondent's filters are dependent upon the channel through which the filters move to the ultimate consumer. The discount accorded to all warehouse distributors was, at the time of the hearing, sixty percent of the suggested consumer list price, plus five percent.[3] The resulting purchase price is thus 38¢ on a hypothetical filter with a suggested consumer price of $1.00. If the warehouse distributor sells either to a jobber or a fleet operator, he receives an additional fifteen percent "external redistribution discount," which lowers respondent's price to the warehouse distributor to 32¢ (40¢—2¢—15% of 40¢ (6¢)). There is no additional discount for sales directly to dealers. Those warehouse distributors maintaining branches are awarded a four percent "internal redistribution discount" on all filters reshipped to their branches from the central warehouse. Thus, the price to the warehouse distributor of a filter sold through one of its branches to a dealer is 36.4¢ (40¢—2¢—4% of 40¢ (1.6¢)). If the filter was sold by the branch to a jobber or fleet operator, the warehouse distributor pays only 30.4¢ (40¢—2¢—6¢—1.6¢).

When the warehouse distributor sells to a jobber, he sells at respondent's suggested resale price of 40¢, which is computed by allowing

[2] See Appendix I for diagram of respondent's system of distribution. [Page 43 herein.]

[3] In computing its discounts, respondent first deducts sixty percent from the suggested consumer list price. On a hypothetical filter sold to the consumer for $1.00, the discount amounts to 60¢, and the price of the filter is 40¢. Additional discounts granted to the warehouse distributor are computed as percentages of the 40¢ and subtracted from that amount. The discount of 60% and 5% is thus computed by subtracting sixty percent of $1.00 from $1.00, leaving 40¢, and then subtracting five percent of 40¢ from 40¢ ($1.00—60% of $1.00 (60¢)—5% of 40¢ (2¢)).

a sixty percent discount off the suggested consumer price of $1.00. When the distributor sells to a dealer, respondent's suggested price entails a 45% discount, making the price 55¢ on the hypothetical $1.00 filter. Fleet operators now purchase from distributors at the jobber price of 40¢, rather than at dealer prices of 55¢.

Respondent's suggested resale price when jobbers sell to dealers is 55¢—the same as that when distributors sell to dealers. When the jobber sells to a fleet, his price is also the same as that charged by a distributor—40¢. Since the warehouse distributor-jobber price is 40¢, the jobber would thus be selling at cost when he serviced fleets. To provide compensation for the jobber in that situation, respondent grants to the warehouse distributor an additional fifteen percent discount, computed by subtracting fifteen percent of 40¢ from 40¢, on all sales shown to have been made via jobbers to fleet operators. This discount amounts to 6¢ per $1.00 and is passed on to the jobber by the distributor. Thus, the price to a warehouse distributor for a filter channeled through a jobber to a fleet operator is 26¢ (40¢—2¢—6¢—15% of 40¢ (6¢)).[4] The warehouse distributor passes the fifteen percent discount to the jobber, who thus pays the distributor 34¢ rather than the normal 40¢ for the filter.[5]

We are presently concerned with price differences in two echelons of respondent's distribution system. First, price differences occur in those instances where warehouse distributors compete with jobbers for sales to dealers and truck fleet operators. The warehouse distributor pays respondent 38¢ for a filter resold to a dealer for 55¢, and thus obtains a 17¢ markup. On the other hand, the jobber purchases filters from the warehouse distributor at respondent's suggested price of 40¢ and resells in competition with the distributor to the dealer for 55¢. The jobber's markup is thus only 15¢. A similar disparity of price occurs when the warehouse distributor competes with the jobber for sales to truck fleet operators. The warehouse distributor pays respondent 32¢ for filters resold to fleets at 40¢, thus receiving a markup of 8¢. The jobber purchases filters from the warehouse distributor at respondent's suggested price of 34¢ and resells to the fleet operator for 40¢, thus receiving a gross profit of only 6¢. In each of the abovementioned instances, therefore, the jobber is in competition with the warehouse distributor, but realizes 2¢ less on each of its sales of a filter which is eventually sold to the individual car owner for $1.00.

Secondly, price differences occur as a result of the 4% internal redistribution discount awarded warehouse distributors with branches,

[4] If the filter is channeled through a warehouse distributor's branch by reshipment, the four percent "internal redistribution discount" is subtracted, making the price of such a filter to the distributor 2¢–4¢. This discount is not passed to the jobber.

[5] See Appendix II for a chart illustrating respondent's pricing system. [Page 44 herein.]

but withheld from warehouse distributors without branches. The favored warehouse distributor thus pays respondent only 30.4¢ for filters to be resold to fleets and jobbers, while the nonfavored distributors pay 32¢ for filters to be sold to the same customers. The favored distributors pay respondent 36.4¢ for filters to be resold to dealers, while the nonfavored distributors are required to purchase at the higher price of 38¢ when they sell to dealers. This internal redistribution discount not only causes discrimination against those warehouse distributors without branches, but also adversely affects jobbers who compete with the favored warehouse distributors in sales to dealers and fleets. Thus, a warehouse distributor with branches pays respondent 36.4¢ for filters to be resold to dealers, while the jobber pays 40¢ for filters to be similarly resold to the same customers. Since the cost to dealers of these filters is 55¢, the favored warehouse distributors receive profits of 18.6¢, while jobbers receive only 15¢. The favored warehouse distributors pay respondent 30.4¢ for filters resold to fleet operators for 40¢, while jobbers pay the warehouse distributor respondent's suggested resale price of 34¢ for filters similarly resold. Again, there is a 3.6¢ disparity in price on filters sold to the consumer for the hypothetical price of $1.00. Further, price differences occur as a result of the four percent internal redistribution discount when the filters move through jobbers to fleet operators. The nonfavored warehouse distributors pay respondent 26¢ for filters to be resold to fleet operators via jobbers. The favored distributors pay only 24.4¢. The jobber selling to fleets in competition with the favored warehouse distributor pays respondent's suggested price of 34¢, while the favored distributor selling direct to a fleet pays only 30.4¢. Thus, the internal redistribution discount results in price differences of 1.6¢ between the favored and nonfavored warehouse distributors, and 3.6¢ between the favored distributors and jobbers selling in competition with them.

This case also involves a stipulated violation of Section 2(a) of the amended Clayton Act in connection with the allowance of the fifteen percent external redistribution discount to a single warehouse distributor on goods resold directly to dealers. As previously stated, this discount was generally available only when the distributor sold to jobbers or fleets. The only question regarding this violation is the scope of the order to be issued.

The facts as above stated are undisputed, and the entire case in support of the complaint was submitted on stipulated facts. Respondent urges that the stipulated facts are insufficient to support findings of a violation of Section 2(a) of the amended Clayton Act, and that

examiner erred in several legal conclusions predicated upon the stulated facts.

I.

spondent first asserts that complaint counsel's evidence does not esta sh the element of competitive injury required for a holding that it vi ted Section 2(a) of the amended Clayton Act. As previously noted, it is undisputed that price differentials exist throughout the variou echelons of respondent's distribution system. A warehouse distribu r without branches pays 2¢ less per dollar for filters sold to deale and fleet operators than does a jobber. A warehouse distributor ith branches pay 3.6¢ less per dollar than a jobber for filters simi r y sold and 1.6¢ less than a warehouse distributor without branche. It is further undisputed that this differential in price involves pur asers who are in competition with one another.[6] Thus, there is a clea case of price discrimination. *Federal Trade Commission* v. *Anheuer-Busch, Inc.*, 363 U.S. 536 (1960).

Complaint ounsel relies upon the following paragraphs from the stipulation of icts to establish that the effect of these price differences may be a substatial lessening of competition.

> If competent wnesses were duly called by counsel supporting the complaint and duly sworn at the hearings in this proceeding, the competent, relevant and material testimony of such witnesses, plus competent, relevant and material documentary evidece which would be introduced by counsel supporting the complaint and the Iearing Examiner would receive in evidence at such hearings, would constitte substantial evidence in support of the following * * *. (Tr. 46, 47.)
>
> Automotive parts wholesaling, whether at the warehouse distributor or jobber level, or acros such levels (*i.e.*, where the warehouse distributor competes with the jobbe for sales to dealers and fleets), is a keenly competitive business. It is also a business of relatively high costs, at all levels just mentioned. As a direct result of such high operating costs, net profit margins typical of the business range betwee 3% and 4% (after taxes, which are generally considered a cost of doing busines). With such net profit margins, both the warehouse distributor's and jobber's profitability is extremely sensitive to the cost of product acquisition. Consequently, the 2% cash discount, which is offered by respondent and most other suppliers of automotive replacement parts is uniformly taken, whenever possible, and is considered by warehouse distributors and jobbers alike to be important, and sometimes essential, to a profitable business. (Tr. 49.)

Respondent assails the latter paragraph as being insufficient to support a finding of competitive injury for the following reasons. First, the exact meanings of such phrases as "keenly competitive," "relatively high operating costs," and "net profit margins" are not apparent

[6] Tr. 18, 19, 62.

from a reading of the stipulation. Secondly, the paragraph crea a false impression, since filters, as opposed to automotive parts, not mentioned and there is no statement that the net profit mar of 3% to 4%, which are typical for the industry as a whole, are ty of respondent's customers. Respondent thus intimates that for a appears in the record, the cost of handling filters may be *de mimis* and the profit margins on filters may be munificent. Finally, r ondent asserts that the price differentials themselves are insi ificant and could have little effect on competition.

In construing the stipulation, we note that it avoided th necessity of calling an endless succession of witnesses to establish contested but pertinent facts, and immeasurably shortened the ti e spent in hearings. The stipulation was beneficial to all parties cerned and must be interpreted with this factor in mind. We fur ler note that, as a general proposition, stipulations are favored in the w. They may be construed liberally and should be interpreted in c junction with the entire record and the surrounding circumstances. *National Labor Relations Board* v. *J. L. Hudson Co.*, 135 F. 2d 380 6th Cir. 1943), *cert. denied*, 320 U.S. 740 (1943); *Hodgsen Oil Refining Co.* v. *United States*, 74 Ct. Claims 303. Any interpretation should if possible, give effect to the intent of the parties. *Cf. United States ex rel. Hoehn* v. *Shaughnessy*, 175 F. 2d 116 (2d Cir. 1949), *cert. denied*, 338 U.S. 872 (1949).

After considering the instant stipulation in conjunction with the issues in the case, and all surrounding circumstance, we conclude that the phrases attacked by respondent are, in the absence of countervailing evidence, sufficiently clear. Specifically, we conclude that the questioned paragraph of the stipulation does not create an untrue picture by its use of the phrase "automotive parts" rather than "filters." The phrase "automotive parts" when considered in the context of this proceeding must be interpreted to include automotive filters. If the profit on automotive filters is substantially greater than the average profit on all automotive parts, respondent had the opportunity to produce evidence demonstrating such fact. If the statement that the net profit margins ranged between 3% and 4% after taxes was misleading and may not be accorded its generally accepted meaning, or if that margin was not typical of respondent's customers, respondent was accorded ample opportunity to so show. In the absence of any evidence indicating that the questioned paragraph of the stipulation was basically incorrect or created an untrue picture, we are not constrained to strictly interpret it or to endow it with a construction which would rob it of its intended significance. We further note that the phrases under attack are similar or identical to phrases used by this Commission

and the courts in similar cases in summarizing findings of competitive injury.[7]

Respondent's contention that the price differentials themselves are insignificant and thus could not conceivably injure competition is also rejected. When the various price differences are reduced to percentages, their importance within the context of this case is immediately apparent. Thus, the warehouse distributor without branches receives a five percent discount on the purchase price of filters ultimately sold to dealers which the jobber does not receive for similar sales. On sales to fleet operators, the distributor receives approximately a six percent discount on the purchase price not accorded the competing jobber. Viewed in a different light, the two cent differential between warehouse distributors and jobbers on sales to fleets is thirty-three percent of the jobber's gross profit on such sales, while the warehouse distributor's advantage over the jobber on sales to dealers is thirteen percent of the jobber's gross profit. When price differentials of this magnitude occur in an industry characterized by net profit margins of three to four percent, they cannot be construed as inconsequential. An even stronger indication of the potential effect of these discriminations in price is revealed by the stipulated statement that the two percent cash discount offered by respondent and other suppliers of automotive parts is considered by warehouse distributors and jobbers alike to be important and even essential to a profitable business.[8] On the $1.00 filter purchased for 32¢ by a distributor for resale to a jobber the two percent cash discount would be six-tenths of one cent. When customers regard a price difference of a fraction of a cent on individual items as vital to a profitable business, it is obvious that the granting on a systematic and continuous basis of a price difference of two cents or more on individual items purchased by the same customers has the requisite capacity and tendency to injure competition.

The four percent internal redistribution discount, which amounts to 1.6¢ per $1.00 list price and is awarded to warehouse distributors with branches for reshipping filters from their central warehouse to their branches, is similarly capable of causing the requisite competitive

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[7] *E.g., Moog Industries, Inc.*, 51 F.T.C. 931 (1955), *aff'd.*, 238 F. 2d 43 (8th Cir. 1956), *aff'd.*, 355 U.S. 411 (1958) ; *Whitaker Cable Corp.*, 51 F.T.C. 958 (1955), *aff'd.*, 239 F. 2d 253 (7th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957) ; *E. Edelmann & Co.*, 51 F.T.C. 978 (1955), *aff'd.*, 239 F. 2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958) ; *C. E. Niehoff & Co.*, 51 F.T.C. 1114 (1955), *aff'd. as modified*, 241 F. 2d 37 (7th Cir. 1957), vacated with directions to affirm, 355 U.S. 411 (1958) ; *P. & D. Mfg. Co.*, 52 F.T.C. 1155 (1956), *aff'd.*, 245 F. 2d 281 (7th Cir. 1957), *cert. denied*, 355 U.S. 884 (1957) ; *P. Sorensen Mfg. Co.*, 52 F.T.C. 1659 (1956), *aff'd.*, 246 F. 2d 687 (D.C. Cir. 1957) ; *Standard Motor Products, Inc.*, 54 F.T.C. 814 (1957), *aff'd.*, 265 F. 2d 674 (2d Cir. 1959), *cert. denied*, 361 U.S. 826 (1959) ; *Thompson Products, Inc.*, 55 F.T.C. 1252 (1959) ; *American Ball Bearing Co.*, 57 F.T.C. 1259 (1960).

[8] Tr. 49.

injury. On sales directly to dealers, the favored warehouse distributors receive a 4.4% price advantage over their nonfavored competitors. This is 9.4% of the nonfavored distributor's gross profits on such a sale. If the sale is made to a jobber, or directly to a fleet, the favored distributor's advantage over the distributor without branches is 5% on price, and is 20% of the nonfavored distributor's gross profits on the sale. Where the sale is made to a fleet via a jobber, the favored distributor's price advantage is 6%, which again is 20% of the nonfavored distributor's gross profits on the sale. When the favored distributor competes with jobbers for sales to dealers and fleets, its price advantages are 9% and 10%, respectively, amounting to 23% and 60%, respectively, of the jobber's gross profits on the sales. Again, such systematic and continuing price differences cannot be construed to be "*de minimis*" or trivial.

In the context of this case, therefore, where the evidence shows a highly competitive market with narrow profit margins, we conclude that complaint counsel has established through the stipulation a prima facie case of competitive injury, the effect of which "may be substantially to injure competition." *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726 (1945); *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948); *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958); *Mueller Co.* v. *Federal Trade Commission*, 323 F. 2d 44 (7th Cir. 1963); *The American Oil Co.* v. *Federal Trade Commission*, 325 F. 2d 101 (7th Cir. 1963). If not rebutted, it is our opinion that this showing is sufficient to establish the above-stated requirement of a likelihood of competitive injury. Respondent offered no probative evidence rebutting the prima facie case thus made concerning the price differences in the areas where warehouse distributors compete with jobbers and we accordingly find "* * * what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay." *Federal Trade Commission* v. *Morton Salt Co.*, *supra*, at pp. 46, 47.

In an effort to show that those warehouse distributors who did not receive the four percent internal redistribution discount for reshipment to branches suffered no competitive injury, respondent offered in evidence studies of central warehouse distributors' costs in reshipping merchandise to their branches. The purpose of these studies was to show that the cost of reshipment to the distributors involved was greater than the amount granted to them by respondent through the redistribution discount and, therefore, that no competitive injury was sustained by the nonfavored warehouse distributors without branches.

Obviously, this is not a cost justification defense under Section 2(a), but is instead an effort to show that there can be no competitive injury because of distributors' added costs in redistributing to branches. Respondent had two of these cost surveys prepared. According to the first, the cost to the warehouse distributors of redistributing the filters to their branches varied between 6.5% and 14.8%, and thus were larger than the 4% internal redistribution discount granted. The second study indicated costs between 4.1% and 12.4%.

The examiner rejected the cost studies, but permitted them to be incorporated in a "rejected" file for further consideration. In so ruling, he reasoned that evidence of buyers' costs was not relevant to the issues in this case, and that the sampling technique utilized in preparing these studies was unscientific and valueless. In reaching our conclusion, we find it unnecessary to consider the sampling technique itself and thus adopt none of the examiner's conclusions concerning the method of preparation of the studies.

The testimony of the representatives of various warehouse distributors called by respondent indicates that warehouse distributors who maintain a central warehouse and reship to branches operate in this manner for reasons of efficiency, convenience, and economy. The branches are in closer proximity to customers and permit the distributors to fill orders more promptly. In addition, distributors realize various savings through maintenance of branches. For example, the branches are able to operate on smaller inventories, since the products can be stored at the central warehouse and then reshipped on short notice. This results in savings of space and permits smaller buildings to be used by the branches. In addition, this method of operation permits a branch unable to purchase in large quantities to take advantage of any savings occurring as the result of mass purchasing. It is further apparent from the testimony that those warehouse distributors who operate branches and reship would not cease to operate in this manner even if respondent's four percent internal redistribution discount were discontinued. Apparently these distributors have determined that they are best able to compete through such organization and thus have freely selected this method of operation. By granting to those distributors who reship to their branches a discount, respondent is, in effect, subsidizing their internal operation. Funds normally used for internal reshipment are released for use elsewhere. Thus, by making available this discount, respondent is granting to the favored distributors a competitive weapon which they would not otherwise receive. We are not of the opinion that such price discrimination may be excused by proof that the buyer receiving the more favorable price has higher internal expenses than his competitor. As the examiner

stated in *C. E. Niehoff & Co.*, 51 F.T.C. 1114 (1955); *aff'd., Federal Trade Commission* v. *C. E. Niehoff & Co.*, 355 U.S. 411 (1958):

> * * * If a price preference can be justified to one customer because the recipient's location is poorer or his rent higher or his maintenance more expensive than those of a customer not receiving such price preference, it would inevitably lead to an evaluation of the efficiences of hundreds of purchasers and to a probable subsidization by the seller of inefficiency itself. Pricing by resale efficiency must inevitably lead to pricing by customer—the very practice at which the law was aimed to prevent. The Hearing Examiner does not believe such was the Congressional intention. He is of the opinion that the mandate requires only equal price opportunity, that what the purchaser does thereafter in the resale of his own merchandise, if he then operates inefficiently or fritters away his equal price start, is, presently at least, no concern of the law. 51 F.T.C. at 1122.

Accordingly, we conclude that even though respondent's cost studies demonstrate that warehouse distributors spend more in reshipping than respondent granted through its internal redistribution discount for this operation, such fact does not demonstrate an absence of competitive injury. Therefore, the examiner was correct in concluding that the instant cost studies were not relevant to the issue of competitive injury and should be excluded from evidence for that reason.

II.

We next turn to respondent's contention that jobbers who purchase only from warehouse distributors are not "purchasers" from respondent within the purview of Section 2(a) of the Clayton Act as amended and that the price which they pay for products cannot be used as a basis for a finding that respondent has discriminated in price in violation of that Act, which requires a finding that the discrimination in price occurs between different purchasers from the same seller. In past cases, where the evidence has demonstrated that the manufacturer exercised a specified degree of control over the terms of the sale between the wholesaler and his purchaser, there have been findings that the wholesaler's purchaser, termed the "indirect purchaser," was, for the purposes of Section 2(a), a purchaser from the manufacturer. E.g., *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537 (1937); *Luxor, Ltd.*, 31 F.T.C. 658 (1940); *Dentists' Supply Co. of New York*, 37 F.T.C. 345 (1943); *Champion Spark Plug Co.*, 50 F.T.C. 30 (1953). The courts have recognized and applied this doctrine on several recent occasions. E.g., *Elizabeth Arden, Inc.* v. *Federal Trade Commission*, 156 F. 2d 132 (2d Cir. 1946), *cert. denied*, 331 U.S. 806 (1947); *I. M. Skinner* v. *United States Steel Corp.*, 233 F. 2d 762 (5th Cir. 1956); *K. S. Corp.* v. *Chemstrand Corp.*, 198 F. Supp. 310 (S.D.N.Y. 1961); *American News Co.* v. *Federal Trade Commission*, 300 F. 2d 104 (2d

Cir. 1962), *cert. denied*, 371 U.S. 824 (1962).[9] If the doctrine enunciated by these cases is applicable in the present case, the jobbers may be considered "purchasers" from respondent as that term is used in Section 2(a). We thus examine the factors which resulted in such findings in past cases.

In *Kraft-Phenix Cheese Corp.*, *supra*, the Commission found that retailers who received disparate prices on cheese products manufactured by that respondent were purchasers from that respondent within the purview of Section 2(a), even though they had actually received title to the products from independent warehousemen. In arriving at this conclusion, the following factors were considered to be of importance: the exercise of control by that respondent over the channels through which its products were distributed, the respondent's successful and effective establishment of discounts and prices throughout the various levels of the distribution system, and the direct solicitation of the retailers by respondent's salesmen, even though the retailers obtained their title from the independent jobbers. The doctrine was succinctly stated:

> * * * A retailer who purchases respondent's goods from jobbers and wholesalers is considered by the Commission to be a "purchaser" within the meaning of the Robinson-Patman Act as well as retailers buying direct. This is because of the fact that respondent recognizes the retailers buying through jobbers as customers by personally soliciting them and by making effective its price policies and schedules as applied to them. A retailer is none the less a purchaser because he buys indirectly if, as here, the manufacturer deals with him directly in promoting the sale of his products and exercises control over the terms upon which he buys. 25 F.T.C. at 546.

In *American News Co.* v. *Federal Trade Commission*, *supra*, the latest application of this theory, the court of appeals noted that the indirect purchaser doctrine stemmed from "a fundamental aim of the Robinson-Patman Act to protect buyers' competitors from the evil effects of direct or indirect price discrimination" and commented as follows:

> The "customer" or "purchaser" requirement marks one of the outer limits of the seller's responsibility not to discriminate. As long as he exercises control over the terms of a transaction he is held to this duty; otherwise the requirement of the statute could be easily avoided by use of a "dummy" wholesaler. If there is no control the duty naturally ends, for the manufacturer has no power to protect the buyer's competitors. 300 F. 2d at 109–110.

In determining whether a dealer or jobber purchasing a manufacturer's products through a distributor or wholesaler is to be con-

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[9] In *Klein* v. *Lionel Corp.*, 237 F. 2d 13 (3d Cir. 1956), the court of appeals indicated that the doctrine of the indirect purchaser was inapplicable when the manufacturer established the prices through state fair trade laws. No such issue arises in the instant case, however, because respondent does not utilize fair trade contracts.

sidered a purchaser from the manufacturer, we agree with the court in *K. S. Corp.* v. *Chemstrand Corp.*, *supra*, when it stated that "each case must be decided on its own facts." We conclude from the above cases that the primary factor in such a finding is that of control by the manufacturer over the prices and other terms of the sale between the intermediary and the indirect purchaser. Where the prices to be charged the indirect purchaser are effectively established by the manufacturer, and where virtually all the conditions and terms upon which the sale is to be consummated are fixed by the manufacturer or are subject to its approval, the predicate for a finding that the indirect purchaser is a purchaser from the manufacturer has been constructed. Other factors to be considered in arriving at that conclusion are instances of direct contact between the indirect purchaser and the manufacturer, such as direct negotiation of franchise agreements, direct solicitation of orders by the manufacturer's salesmen even though the orders are filled by the intermediary and the manufacturer looks to the intermediary for payment, direct negotiations for changes in price, direct policing of the indirect purchaser's resale prices, direct provision of advertising materials, and inspection by the manufacturer to insure that the indirect purchaser is fulfilling the terms of its agreement with the manufacturer's distributor or wholesaler.

In the instant case, the evidence reveals that, from 1949 to the present date, respondent has executed agreements with its warehouse distributors which govern their relationship. The 1949–1956 agreements are typified by respondent's Form GS–84, CX 1, which provided that the distributor would distribute respondent's filters through "Jobbers with whom he has executed agreements approved by the Manufacturer," and/or through the distributor's branch outlets. See also CX 2 (1954 agreement form). In 1956 and 1957, respondent began using a new form which omitted this provision. CX 3, 4. Since 1959, substantially all of respondent's 320 warehouse distributors have signed the current form contract, GS–84B, CX 5, which states that the distributor has the "legal right to select the customers to whom it will sell filters." At the same time, however, respondent began sending its distributors "attachments" to the agreements, in the form of letters. Each letter closes with a request that the addressee sign and return one copy to respondent and attach another copy to the contract the addressee originally signed with respondent. See, e.g., CX 6, 8, 9, 10. These attachments established the redistribution discounts involved here.

The January 1955 letter, CX 6, made available a 10% discount or rebate on "your sales of Purolators * * * at 60% discount when made to jobbers with whom you shall have executed a contract under the

following condition," one of which was that the jobber maintain a $500 inventory of respondent's products, as provided by "the Jobber Contract, Form GS–74, a supply of which is being forwarded to you." The other condition was that the distributor report sales monthly on respondent's Form GS–77, CX 18, and that "the sales figures reported shall be based on the net price * * * shown on the blue price sheet." See also CX 7 (used from July 1955–February 1957, Tr. 40, 52), to the same effect. In 1957, the 10% discount was raised 1%, and the condition was added that the discount was available only when the jobber was not owned or controlled by the distributor. CX 8, 11. In 1958, the discount was raised to the present 15% figure. CX 9, 12. At that time and since then, respondent's attachments have stated that the allowance of the discount was "subject, however, to the following terms and conditions," one of which has been that the signatory's customers must execute or have executed a Form GS–74 contract. See, e.g., CX 10, 12, 13. See also CX 11.[10]

The GS–74 "Warehouse Distributor-Jobber Agreement" has gone through several editions since 1953 when it was first used. See CX 16, 17. They have all required that the jobber purchase his entire Purolater requirements from the warehouse distributor with whom he signs the contract, and that the jobber use Purolater signs and try to promote demand for the product. The revised GS–74, CX 17, mentions price only in a memorandum on the reverse side of the contract, suggesting that the jobber advise respondent of his dealer and jobber price sheet requirements. The earlier version, CX 16, provided "a suggested resale schedule." [11]

The GS–77 "Report of Sales to Jobbers" form, CX 18, provides spaces for the indication of the name and location of each jobber to whom the distributor has sold respondent's products, and the amount billed to each. The instructions in the margin state that "the sales figures reported shall be based on the net price * * * as shown in the blue price sheet" that respondent supplied. The form also states, "The manufacturer reserves the right to check the information given on this report whenever he wishes to do so." Not all warehouse distributors, however, were required to file these reports. For the "non-reporting warehouses," respondent allowed the jobber discount on the basis of the distributor's representations as to what percentage of his annual Purolater products sales were to jobbers. Respondent reserved

[10] The attachment CX 11 went into use early in 1957, and has the first expressly mandatory language in the clause involving jobber execution of respondent's GS–74 contract, making that a condition of the warehouse distributor's getting the redistribution discount. Compare CX 8 (also adopted early in 1957) and CX 9 (used in 1958), which do not contain expressly mandatory language.

[11] It also stated that the distributor would sell to the jobber at the prices shown on respondent's "blue price list."

the right to make periodic record examinations in order to verify these jobber sales volume representations. See CX 11, 12, 13.

The record as a whole thus indicates substantial control by respondent over the relationship between its warehouse distributors and their jobber subvendees, who were nominally the distributor's customers rather than respondent's. As we have indicated, this control by respondent included the approval or selection of jobbers, the imposition of exclusive dealing or full requirements contracts on jobbers, the prescription of distributor-jobber resale prices, and jobber inventory control.

Respondent's executive vice president testified that the provision in CX 1-2 that jobber-distributor agreements be approved was abandoned in 1956 with the adoption of the new form agreement, CX 3. He further explained, but not persuasively, that the real purpose of this provision, and the purpose of the provision that the jobber must buy his entire Purolator requirements from a single warehouse distributor, was to permit respondent, by vertical allocation of customers, to prevent quarrels between its distributors when one tried to raid another's jobbers. Tr. 114, 116, 188–189. Respondent concludes, on the basis of this testimony, that the approval provision was not designed "to limit the activity of the jobber but rather 'to nurture the relationship between our warehouse distributor customers and Purolator.'" Exceptions Br. 18; see Tr. 188. And that at any rate the particular nurturing device has been abandoned since 1956. This explanation misapprehends the significance of the clause and its successors in this proceeding. There is no issue as to respondent's attempting "to limit the activity of the jobber," as if respondent were attempting to make him a mere agent.[12] The relevant issue is whether respondent so limited or controlled the activity of the warehouse distributor in relation to the jobber that the jobber became respondent's customer and the warehouse distributor became virtually respondent's agent in handling the sale. The approval provision, even accepting respondent's witness' explanation, indicates respondent's exercise of substantial control over the distributor-jobber relationship. As for the alleged abandonment of control over the relationship, the subsequent attachments to the contracts imposed as much control as the provisions of CX 3 and CX 5 abandoned, if not more. The first attachments, e.g., CX 8, assumed or implied that the distributors and jobbers must execute respondent's form GS–74 contract before the distributor could receive his functional discount. The later attachments, e.g., CX 13,

[12] Respondent's control over the jobber is relevant only in that it shows that respondent had *so much* control over the distributor-jobber relationship that by this means it could itself exert control over jobbers.

expressly require this. Far from abandoning its control over the distributor-jobber relationship, respondent tightened it by providing and requiring the execution of its distributor-jobber form contract by the two parties.

Respondent denies, further, that it *in fact* exercised control over its distributors' prices to jobbers, so that it can be said to be responsible for whatever competitive injury resulted from them, or over its jobbers' prices to others. It maintains that there is no evidence that it ever attempted to enforce the suggested price provisions. This argument ignores the plain wording of the various attachments, which makes the discount available on the basis of the respondent's suggested resale prices, and which requires the distributor to report sales volumes monthly for each jobber to whom he sells, on a GS–77 form, CX 18, that in turn requires sales to be reported on the basis of the suggested resale prices and that states that the manufacturer may check up on the information given in the report "whenever he wishes to do so." For "non-reporting warehouses" the manufacturer instead periodically examines the distributors' books. See CX 12–13. Further, there is evidence that respondent has policed its jobbers' and dealers' resale prices "to encourage adherence to" the suggested resale price lists. See tr. 44 (stipulation), 199–202 (testimony of respondent's executive vice president). According to respondent, however, it had "absolutely no interest in seeing whether they [suggested prices] are observed or not" and policed them only at the instance of aggrieved jobbers or dealers who complained to it when their competitors failed to observe the price lists.

Finally, respondent denies that it enforced against dealers or jobbers the other contractual obligations it imposed upon them—so that, in effect, it only "suggested" rather than controlled the distributor-jobber relationship. Thus it states that it has not denied discounts to distributors on jobber sales because the jobber failed to keep up a $500 inventory or failed to sign a form GS–74. This may or may not be, but as of March 1, 1960, respondent had on file some 6,956 GS–74 contracts and over 300 GS–84B contracts with attachments, all of which imposed the indicated contractual obligations on the signatories. In the absence of countervailing evidence, the normal presumption of regularity of conduct, see *Bank of United States* v. *Dandridge*, 25 U.S. (12 Wheat.) 64, 69–70 (1827), dictates the conclusion that the jobbers and distributors regarded themselves as bound by their contracts. This conclusion is strengthened by respondent's vice president's concession that most jobbers would probably regard themselves as bound by the agreement.

In concluding that the jobbers are to be classified as purchasers from the manufacturer for purposes of Section 2(a) of the Clayton Act as amended, we deem the following factors decisive. First, the respondent possesses the requisite control over the price and the terms of the contract of sale between the distributor and the jobber. As previously noted, respondent's suggested resale prices for this sale are virtually universally adhered to by the distributors. These prices are not established by fair trade contracts. In the overwhelming majority of instances, the respondent provides the contract forms utilized by the distributor in his agreement with the jobber. These contracts require the jobber to purchase his supply of respondent's filters from a particular distributor, and to maintain a minimum inventory. Further, the contract between the distributor and jobber may be disapproved by respondent, and, in any event, must be filed with the respondent. Finally, the degree of control exercised by respondent over the prices which the jobbers pay the distributors is illustrated by the situation which arises when the jobber sells to a fleet operator. As heretofore stated, respondent grants to the distributor a fifteen percent discount which it "suggests" be passed on to the jobber in full on all sales made by the jobber to fleets. There is no indication that jobbers fail to receive this discount. Thus, we conclude that the prices which the distributors charge the jobbers are effectively established by the respondent.

Secondly, we find instances of direct contact between respondent and the indirect purchasing jobbers. Respondent's own salesmen on occasion solicited directly from these jobbers orders which were subsequently turned over to the distributors for processing. Respondent at times "dropped shipped" or shipped direct to the jobbers at the request of distributors. Respondent mailed directly to the jobbers price lists and advertising materials. Respondent's representatives at times "policed" the jobbers to encourage adherence to the suggested resale prices and on other occasions inspected their inventories.

Thus, the evidence reveals that respondent has, in effect, established the prices at which the jobbers purchase from the warehouse distributors and controls the terms under which the purchases are consummated. The evidence also reveals instances of direct contact between respondent and the indirect buying jobbers. On the basis of the entire record, therefore, we conclude that the respondent *did* exercise control over the distributor-jobber relationship to such an extent that the jobbers effectively were respondent's customers rather than the distributors' and, for the purposes of the Robinson-Patman Act, respondent is thus chargeable with the competitive effects of distributors' prices to jobbers.

III.

As a defense to the finding that warehouse distributors and jobbers in competition with each other were charged disparate prices for filters sold to dealers and fleets, respondent contends that the differences are cost justified in accordance with the cost justification proviso of Section 2(a). As applied to filters ultimately resold to dealers, respondent's argument may be summarized as follows. The warehouse distributor pays respondent 32¢ for a filter it sells to a jobber for resale to a dealer. The warehouse distributor pays respondent 38¢ for a filter it resells directly to a dealer. Thus, respondent's "cost" of channeling a filter through a jobber to a dealer is 6¢ more than its "cost" of selling through a warehouse distributor to a dealer. Accordingly, even though the price charged the jobber for acquisition of a filter for resale to a dealer is 40¢ and is thus 2¢ more than that of a warehouse distributor selling in competition to the same dealer, the lower price charged the warehouse distributor is justified by the 6¢ less it "costs" respondent to sell filters through that channel.

We are unable to accept this contention. It is settled that the burden of establishing the cost justification defense rests upon the one claiming its benefits. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 45 (1948). The wording of the statute contemplates differences in price related to differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are sold or delivered. In the instant case, the jobber is an indirect purchaser from respondent and pays 40¢ for filters resold to dealers. The warehouse distributor pays only 38¢ for filters it resells to dealers. We have found respondent responsible for establishing this price differential. To justify it under the cost justification defense, respondent must offer evidence showing that its lower price to the warehouse distributor of 38¢ results from lower *costs* of manufacture, sale, or delivery related to differing methods or quantities in which such commodities are sold. The "costs" contemplated under Section 2(a) are vastly different from the "prices" charged by respondent in selling to the various parties.

Here, respondent offered no evidence on the different costs incurred by it in manufacturing, selling, and delivering various quantities of filters to warehouse distributors for sale directly to dealers. Instead, the only evidence before us is the price respondent chooses to charge the distributor—in this instance, 38¢. Moreover, respondent did not establish its costs of selling to a jobber through a distributor. To the contrary, the only evidence we have before us in regard to this latter transaction is respondent's price to the warehouse distributor when

the filter is sold to a jobber for resale to a dealer (32¢), the price at which the distributor sells to the jobber (40¢), and a contention that the 6¢ difference between the 32¢ paid by the distributor when it resells to jobbers and the 38¢ paid by the distributor when it resells directly to a dealer is a "cost" incurred by respondent in channeling filters through a jobber. Without deciding whether the 6¢ may be classified as a "cost" as that term is used in the cost justification proviso, it is obvious that there is no evidence in the record showing either what it costs respondent to distribute to jobbers for resale to dealers or what it costs respondent to distribute to warehouse distributors for direct resale to dealers. Since we have before us only evidence of the prices which respondent chooses to charge rather than evidence of the costs incurred by respondent in the manufacture, sale, and delivery of varying quantities of its products, we have no basis for making a cost comparison and thus are unable to conclude that respondent's different prices are cost justified. Since there was a similar failure of proof in regard to the remaining price differences which respondent contended are cost justified, we are compelled to answer in the same manner. We conclude, therefore, that the differences in prices charged warehouse distributors in competition with jobbers for sales to dealers and fleets are not excused by the cost justification proviso.

Respondent contends that its four percent internal redistribution discount is excused under the Section 2(b) good faith meeting competition defense. Respondent's evidence in support of this defense is confined to a schedule of the discounts and prices of its chief competitors, the resulting comparison which may be made with its schedule of discounts and prices, and testimony by one of its officers that adoption of the discount was necessary. The evidence submitted reveals that prior to February 1, 1958, respondent granted a discount to all warehouse distributors of sixty percent plus nine percent. The effective price of the hypothetical $1.00 filter to the warehouse distributor was thus 36.4¢ ($1.00—60% of $1.00 (60¢)—9% of 40¢). If the filter was in fact sold to a jobber, the distributor received another discount of eleven percent of the price of the filter after the basic discount had been deducted, lowering the warehouse distributor's price to 32¢. This series of discounts was referred to as "60%—9%—11%." Fram Corporation maintained an identical 60%—9%—11% schedule, while General Motors' AC Spark Plug Division used 60%—10%—10%, resulting in a 40¢, 36¢, 32¢ price.

On February 1, 1958, respondent changed its 60%—9%—11% system to 60%—5%—15%. The effect of this change was to raise the price of filters sold to warehouse distributors for resale to dealers from 36.4¢ to 38¢. However, the price to distributors of filters for resale to jobbers

remained at 32¢. The purpose of this change, according to respondent's executive vice president, was to encourage warehouse distributors to sell to jobbers rather than directly to dealers.[13] Respondent's chief competitors did not alter their prices in this manner. Respondent's vice president stated that this caused "considerable unrest among those warehouse distributors who have branch operations" and that "[t]here was the very distinct risk entailed in the pursuance of this policy that some of these warehouse distributor accounts of ours may see fit to drop our line and take on a competitive line."[14] Respondent thus asserts that the four percent internal redistribution discount granted to those warehouse distributors who reshipped to their branches was granted in good faith response to competition.

We disagree. In the first place, there is substantial evidence indicating that the internal redistribution discount was announced on February 1, 1958, the same date on which prices were raised through a reduction in the basic discount from 60% and 9% to 60% and 5%.[15] If the price changes and discount were announced on the same date, this would indicate that the discount was in fact a preconceived plan of discrimination. As such, it was not excusable under the Section 2(b) defense. *Cf. Exquisite Form Brassiere, Inc.*, Docket No. 6966 (January 20, 1964) [64 F.T.C. 271].

Secondly, and of more importance, respondent's action in granting the four percent internal redistribution discount was not in any manner an individual response to competition. Respondent did not on an individual basis determine which of its customers were receiving or could receive lower prices from competitors and then grant lower prices to these particular customers on an individual basis. Nor did respondent determine which particular customers were likely to defect to competitors because of the availability of lower prices. To the contrary,

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[13] Respondent's executive vice president testified:

"Well our philosophy, as far as the automotive replacement market is concerned, was to emphasize the importance of the warehouse distributor account and to so establish our marketing procedures, marketing policies, as to make our line an attractive line for the warehouse distributor to handle. When we changed from 60, 9 and 11, to 60, 5 and 15, what we were doing was making the line more attractive to the warehouse distributor when he distributed our product line in accordance with our announced policy of distribution, namely, we sell to the warehouse distributor, he in turn sells to a jobber. When he does this, when he distributes the product in accordance with our desired method of distribution, he then qualified for a 15 percent redistribution allowance on the sales that he made to his jobber outlets, his jobber customers.

"We did this in order to emphasize what to us was a very important function in the redistribution of our product. This is the way we wanted it distributed and in order to have it distributed in the manner which we desired, we made this as attractive as we could." (Tr. 92, 93.)

[14] Tr. 98, 99.

[15] E.g., tr. 107. In a statement made by one of respondent's attorneys, which cannot be considered to be evidence, there is some indication that the discount was not announced until later in February of 1958, but was made retroactive to February 1. Tr. 1099.

after receiving some vague threats of defection by a few warehouse distributors with branches, respondent arbitrarily selected and granted to this entire group lower prices through its internal redistribution discount. There is no indication that each member of this group was eligible to receive lower prices from competitors, or that all distributors without branches could not receive lower prices from competitors. In short, respondent's selection of such an arbitrary group for no apparent reason cannot be deemed to be an individual response to competition in any sense of the word. *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945); *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948); *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419 (1957); *Exquisite Form Brassiere, Inc., supra.*

Thirdly, although respondent introduced in evidence its own price lists and price lists of its chief competitors, there is no conclusive evidence indicating that the filters of the competitors sold at the various prices were of the same or substantially the same quality or enjoyed the same or substantially the same public acceptance as those manufactured by respondent and sold at similar prices. Both the courts and the Commission have consistently denied the shelter of the defense to sellers whose product, because of intrinsic superior quality or intense public demand, normally commands a price higher than that usually received by sellers of competitive goods. For example, it has been held that the defense will not lie when the price of Lucky Strike cigarettes is dropped to meet the price level of a "poorer" grade of cigarettes, *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234, 237 (2d Cir. 1929), *cert. denied*, 279 U.S. 858 (1929); or when the price of Budweiser beer is dropped to match the price of "nonpremium" local beers, *Anheuser-Busch, Inc.*, 54 F.T.C. 277 (1957), *set aside for other reasons*, 265 F. 2d 677 (7th Cir. 1959), *rev'd.*, 363 U.S. 536 (1960), *again set aside for other reasons*, 289 F. 2d 835 (7th Cir. 1961). Thus, respondent, by granting virtually identical discounts as those of its chief competitors to a selected class of customers may have been "undercutting" the prices of its competitors and, as a result, not acting in good faith.

It is not disputed that a respondent asserting the good faith meeting competition defense bears the burden of establishing it. *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505 (1963). The evidence introduced herein patently falls short of establishing that respondent, in granting the four percent internal discount to a selected group, was granting a lower price "in good faith to meet an equally low price of a competitor * * *."

Respondent advances the additional theory that an essential element in the proof of a "secondary line" injury case under Section 2(a) was

neither alleged nor proved. Respondent asserts that there is nothing to indicate that the favored warehouse distributors who received the internal redistribution discount were "knowing" recipients of a price discrimination, and that such knowledge is an essential element in the offense. In rejecting the contention that knowledge of this nature is a necessary element, we reiterate our conclusion to the same effect in *The American Oil Co.*, Docket No. 8183, 60 F.T.C. 1786 (June 27, 1962), *set aside for other reasons*, *The American Oil Co.* v. *Federal Trade Commission*, 325 F. 2d 101 (7th Cir. 1963). In that case we pointed out that there is no logical reason why protection of nonfavored customers from the harmful effects of discriminatory practices should be made to depend upon the state of knowledge of the favored customers. Section 2(a) prohibits a price discrimination which may injure competition "with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." It is our interpretation that the words "customers of either of them" include customers of the person granting the discriminatory price. Under that interpretation, there is thus no requirement that the customer receiving the favorable price be a "knowing" recipient in order for the respondent to be held accountable for its discriminatory actions in charging competing customers higher prices. See H.R. Rep. No. 2951, 74th Cong., 2d Sess., pp. 5–6 (1936).

Respondent attacks the order issued by the examiner as being unnecessarily broad. However, respondent has been found guilty of price discriminations in several parts of its distribution system. The violations occurred throughout the country and were pervasive throughout, rather than peripheral to, respondent's business activities. In the circumstances, the public interest calls for a broad order that will block off all paths to violation, rather than merely the traveled ones. See *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 (1952). Such an order, broad though its scope may be, should not be regarded as placing the respondent under a vague, perilous unspecific prohibition. *Cf. United States* v. *National Dairy Products Corp.*, 372 U.S. 29 (1963). The entry of this order is but the beginning of a relationship under which the Commission is obliged to render the respondent binding and definitive legal advice as to whether proposed conduct meets the requirements of the order. See *Vanity Fair Paper Mills* v. *Federal Trade Commission*, 311 F. 2d 480, 488 (2d Cir. 1962); *Western Radio Corp.*, Docket No. 7468, 63 F.T.C. 882 (September 25, 1963); *Foremost Dairies, Inc.*, Docket No. 7475, 62 F.T.C. 1344 (May 23, 1963); Rule 3.26, 16 CFR § 3.26. In the circumstances, a broad order is fair to both the respondent and the public.

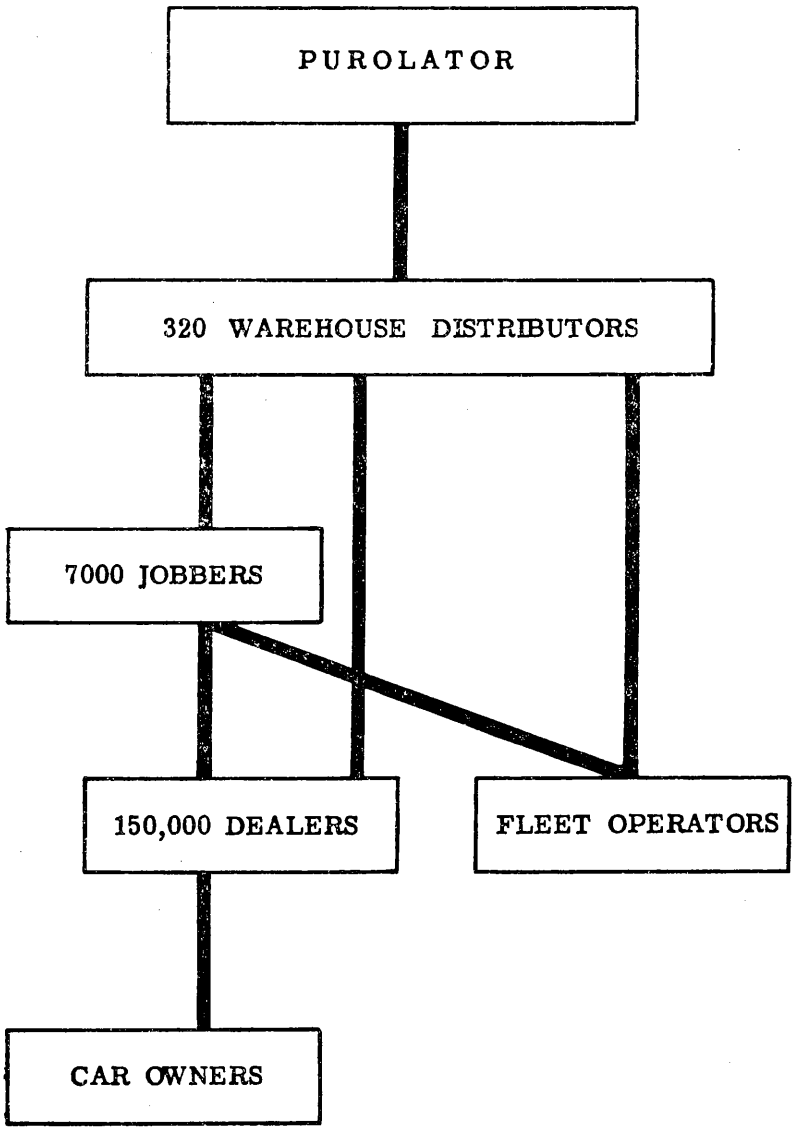
Respondent also attacks the order for failing to present guide lines which could be used in determining under what circumstances a supplier might grant external redistribution discounts to warehouse distributors on their sales to jobbers having some degree of affiliation or connection with the warehouse distributor. Since this important question was neither precisely raised nor litigated during the hearings, its resolution is not required for the proper disposition of this proceeding. We therefore express no opinion on that issue at this time.

For the aforementioned reasons, an order will issue adopting the order and those parts of the initial decision of the hearing examiner not in conflict with our views as expressed herein. Rules of Practice, § 3.24(b) (August 1, 1963), 28 Fed. Reg. 7080, 7091 (July 11, 1963).

Commissioner Elman does not concur and has filed a separate opinion. Commissioner Reilly did not participate in the decision herein for the reason that he did not hear oral argument.

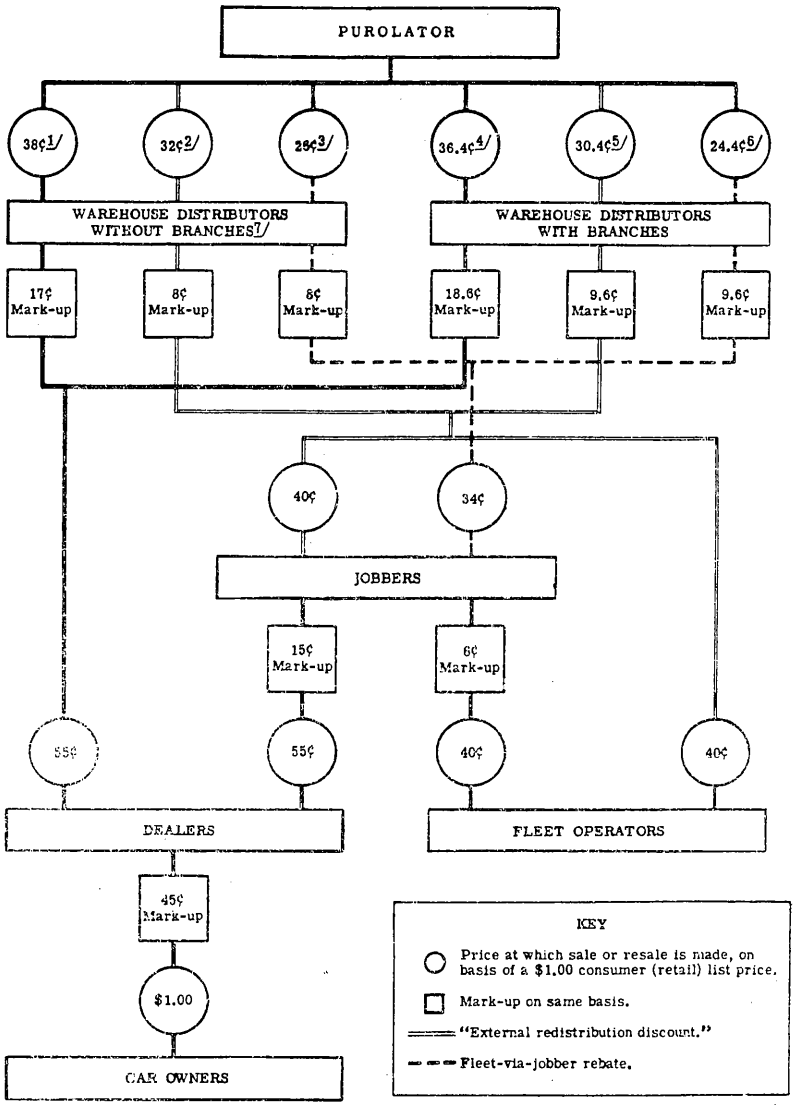
APPENDIX I

DISTRIBUTION SYSTEM OF RESPONDENT



APPENDIX II

PRICING AND DISCOUNTING SYSTEM OF RESPONDENT



1/Basic discount only.
2/Basic discount and external redistribution discount.
3/Basic discount and fleet-via-jobber discount.
4/Basic discount and internal redistribution discount.
5/Basic discount and external and internal redistribution discounts.
6/Basic discount, internal and external redistribution discounts, and fleet-via-jobber discount.
7/Includes direct shipments to branch locations.

SEPARATE OPINION

APRIL 3, 1964

By Elman, *Commissioner:*

In my opinion in *National Parts Warehouse*, F.T.C. Docket 8039 (Dec. 16, 1963) [63 F.T.C. 1692], I pointed out the complexity of the competing channels of distribution in the automotive parts industry and the resulting danger of easy generalizations concerning the competitive effects of specific methods of distribution. In the present case, this complexity is manifested in the relationships between the different companies within a single channel of distribution. As the chart in Appendix II of the Commission's opinion graphically demonstrates, the "independent" channel of distribution of respondent's products—i.e., through warehouse distributors, jobbers, and dealers—is characterized by an intricate and finely balanced pricing system under which respondent receives different prices for products sold through different sub-channels of distribution, which are defined according to the functions performed by the companies in each of them. The result of this system is that competing companies which perform different functions pay different prices for the same products. It does not necessarily follow, however, that there is present the kind of anti-competitive price discrimination which the Robinson-Patman Act was intended to, or as a practical matter can, prevent.

This system of "competitive-functional pricing", far from being the unique invention of the respondent, is typical of the automotive parts industry. See Davisson, *The Marketing of Automotive Parts* (1954), chapter 24, pp. 909 *et seq.* Moreover, it is a result not of coercive force applied by powerful buyers, but, rather, of the manufacturers' problem, which is especially acute in this industry, of providing for the ready availability of their parts through as many channels and sub-channels of distribution as possible. As a recent study of the industry has pointed out:

> The parts industry must maintain a massive, costly inventory, which is always undergoing obsolescence and is in constant need of replenishment * * *. The distributors' problem is to have replacement parts immediately available in every corner of the U.S.—and not to go broke in the process. The way it is done baffles outsiders. Lincoln, "The $7 Billion Aftermarket Gets an Overhaul", *Fortune*, March 1962, pp. 84, 85.

This problem of distribution is the root of the willingness of parts manufacturers to accept different prices to obtain distribution through different channels. The demand for ready availability by dealers (service stations, garages, etc.) is responsible for a substantial inventory burden and a concomitant demand from those shouldering the burden for sufficient margins or mark-ups to compensate for this cost. As a

result, competition in the automotive parts industry tends to be felt at intermediate distribution levels in the form of spread of margins. Manufacturers vie with one another to make warehouse distributors and jobbers more willing to carry their goods by offering them large margins. As Professor Davisson has described it:

> individual sellers must strive to price so that satisfactory volume is obtained from each of several channels used * * *. The objective is to provide margins sufficient to assure sales through each of several channels used. *Functional pricing rests on the reasoning that the vendor is "buying distribution" by accepting different nets from accounts which differ in trade status. Op. cit. supra,* p. 39.

At the same time, and offsetting this rivalry among manufacturers to obtain outlets for their products, competition between the companies at each functional level of distribution tends to reduce these margins to a point approaching the average costs of performing the distributional functions. *Id.*, p. 953. In short, the practice whereby varying net receipts are received by a parts manufacturer from different channels of distribution reflects, as it should in a competitive system, the result of the free interplay of market needs and interests.

Illustrating this pricing system, the chart in Appendix II shows that Purolator receives 38¢ for a filter sold to a warehouse distributor without branches for direct resale to a dealer; 36.4¢ for the same filter sold to a warehouse distributor with branches, also for direct resale to a dealer; and 32¢ for the same filter sold to a warehouse distributor without branches for resale, at a price of 40¢, to a jobber. In other words, Purolator is willing to accept 1.6¢ less than its 38¢ price to obtain distribution through warehouse distributors with branches and 6¢ less to obtain distribution through jobbers.

The Commission should hesitate to tamper with this delicately balanced pricing structure in order to improve the competitive position of the warehouse distributors without branches and of the jobbers who purchase from warehouse distributors. Consider how the Commission's order would apply to the examples given above. It would require that the difference between the 38¢ paid by the warehouse distributor without branches, the 36.4¢ paid by such a distributor with branches and the 40¢ paid by the jobber, be eliminated. But whether, as a practical matter, the Commission's order can eliminate all differences in the prices paid by competing sellers, regardless of differences in the functions which they perform, will depend on competitive forces which the Commission can neither predict nor prevent.

Indeed, the order's ultimate effect may be quite different from that which the Commission now anticipates. Thus, the 40¢ now paid by jobbers can be reduced to 38¢ only if Purolator is willing to accept 2¢

less than its present 32¢ price to warehouse distributors without branches for resale to jobbers, or if such warehouse distributors are willing to accept 2¢ less in their mark-up. But if 32¢ is the minimum price that Purolator is willing to accept in order to obtain jobber distribution, and if 8¢ is the minimum that warehouse distributors will accept as a mark-up, Purolator might simply abandon its present pricing system and instead obtain what distribution it could by selling all of its products to warehouse distributors at the same price, regardless of their ultimate destination, and abandoning any control over the resale price of such distributors. Thus, if Purolator should sell its filters to warehouse distributors for 38¢ regardless of their intended destination, and if the warehouse distributors should insist on an 8¢ mark-up, the jobbers would be forced to pay 46¢ for the same part that now costs them 40¢. Although this result clearly would not accomplish the purposes of the Commission's order, it equally clearly would not violate it, since no price discrimination by Purolator would be involved. Similarly, if warehouse distributors with branches are unwilling, or unable because of their costs, to pay the 38¢ price now paid by distributors without branches, and if Purolator is unwilling to lower the price to distributors without branches, the result may be simply to cause Purolator to abandon its distribution through distributors with branches or to cause such distributors to abandon their branch systems.

The conclusion to be drawn from these examples is that where, as in this case, differences in price exist as part of a complex and delicately-poised pricing system which is the result of normal competitive forces and not of simple discrimination coerced by powerful buyers, the Commission should avoid automatic assumptions of competitive injury. We should recognize that the market forces which have shaped the existing system may be expected to continue to operate, regardless of any Commission order, and that such partial intervention into an industry structure may only serve to introduce new and more intractable competitive inequities.

Final Order

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, dated November 27, 1962, and upon briefs and argument in support thereof and in opposition thereto; and

The Commission having rendered its decision determining that respondent's appeal should be denied and that the initial decision of the examiner should be modified in accordance with the views and for

the reasons expressed in the accompanying opinion, and, as so modified, adopted as the decision of the Commission:

It is ordered, That the initial decision, dated November 27, 1962, be modified by striking therefrom paragraphs 26 and 30, and substituting therefor the findings and conclusions of the accompanying opinion.

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

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

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

IN THE MATTER OF

INDIVIDUALIZED CATALOGUES, INC., ET AL.

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

Docket 7971. Complaint, June 23, 1960—Decision, Apr. 3, 1964

Order requiring a New York City association composed of three toy wholesale distributors located respectively in New York City, San Antonio, Tex., and Los Angeles, Calif., engaged in publishing and distributing to retail outlets, catalogs illustrating toys in which various toy manufacturers advertise their toys, to cease inducing or receiving promotional payments from toy manufacturers which they knew or should have known were not available on proportionally equal terms to all other customers of such toy manufacturers competing with respondents in the resale of toy products.

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 Individualized Catalogues, 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 10, New York.

Respondent Rollin Shulberg is an individual who is President and a director of respondent Individualized Catalogues, Inc. His principal office and place of business is located, c/o Schranz & Bieber Co., Inc., 115 Fifth Avenue, New York 3, New York.

The hereinafter specifically named individual respondents are all officers and directors of respondent Individualized Catalogues, Inc:

Leo Rose—Vice President,
c/o Lachman-Rose Company, Inc.,
3200 East Houston Street,
San Antonio 6, Texas.

Samuel Pensick—Treasurer,
c/o Pensick & Gordon, Inc.,
845 S. Los Angeles Street,
Los Angeles 14, California.

Donald Honig—Secretary,
c/o Schranz & Bieber Midwest Sales Co., Inc.,
200 Fifth Avenue,
New York 10, New York.

The foregoing individual respondents own the stock, direct, formulate and control the practices and policies of Individualized Catalogues, Inc.

Respondent Schranz & Bieber Co., Inc., is a corporation organized and doing business under the laws of the State of New Jersey, with its principal office and place of business located at 115 Fifth Avenue, New York 3, New York.

Respondent Schranz & Bieber Midwest 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 200 Fifth Avenue, New York 10, New York.

Respondent Lachman-Rose Company, Inc., 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 3200 East Houston Street, San Antonio 6, Texas.

Respondent Pensick & Gordon, 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 845 S. Los Angeles Street, Los Angeles 14, California.

All of the foregoing corporate respondents have been and are now members of respondent Individualized Catalogues, Inc.

PAR. 2. Individualized Catalogues, Inc., is an association composed of toy wholesale distributors, named herein as corporate respondents,

who sell and distribute their toy products to retail outlets located in various States of the United States. The stock of Individualized Catalogues, Inc., is owned in equal shares by the president of each of the aforesaid wholesale distributors. These officers, named herein as individual respondents, direct and control on behalf of said corporate members the policies and practices of Individualized Catalogues, Inc.

Respondent Individualized Catalogues, Inc., has been engaged, and is presently engaged, in the business of publishing and distributing annually a catalogue illustrating toys. Various manufacturers of toys have been and are now advertising their toys in this catalogue. Respondent members of respondent Individualized Catalogues, Inc., have sold and presently sell their catalogue to retail outlets located throughout the United States, for redistribution to the consuming public.

PAR. 3. 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. 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 in said toy products between and among the various States of the United States.

In addition, respondents publish, or cause to be published, a toy catalogue 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 business in commerce, said respondents have been, and are now, in competition with other corporations, partnerships and individuals in the sale and distribution of toy catalogues 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 business 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 a toy catalogue, induced or received payments or allowances from the aforesaid suppliers in connection with the promotion and advertising of their toy products in respondents' catalogue. 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 other of such suppliers' customers competing with respondents in the distribu-

tion of such suppliers' products. Said payments in 1958 exceeded $180,000.

Among the toy suppliers granting promotional payments or allowances to respondents in 1958 which were not offered or made available to all other competing customers of said suppliers on proportionally equal terms were the following:

Toy supplier	*Approx. payments received*
Transogram Company, Inc	$6,200
Emenee Industries, Inc	4,000
Ideal Toy Corporation	2,200

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 such 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. Martin C. Greene and *Mr. Aaron Locker* of *Aberman & Greene*, New York, N.Y. for respondents.

INITIAL DECISION BY HARRY R. HINKES, HEARING EXAMINER

SEPTEMBER 26, 1962

By complaint issued June 23, 1960, the respondents were charged with a violation of the Federal Trade Commission Act in the knowing inducement or receipt of allowances from various suppliers which were not offered or made available on proportionally equal terms to respondents' competitors. Answers were filed by the several respondents, which in substance denied any violation of the Act, following which hearings were held, the testimony of a number of witnesses heard, and a number of exhibits received in evidence. Through the cooperation of counsel, several stipulations were negotiated, obviating the necessity of extensive hearings in distant places.

Proposed findings have been filed by the parties. To the extent the proposed findings are inconsistent with those made herein, they are deemed rejected. In the proposed findings of the respondents, request was made for oral argument. It appears, however, that both parties

have had ample opportunity to present their respective positions as well as arguments thereon, and no useful purpose is likely to be served by oral argument. Accordingly, their request is denied.

FINDINGS OF FACT

1. Respondent Individualized Catalogues, Inc., hereinafter called (ICI) is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business presently located at 10 East 19th Street, New York, New York. The former address of said corporate respondent was 200 Fifth Avenue, New York, New York.

2. Respondent Schranz & Bieber Co., Inc., is a corporation organized and doing business under the laws of the State of New Jersey, with its principal office and place of business located at 115 Fifth Avenue, New York 3, New York.

Respondent Schranz & Bieber Midwest 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 200 Fifth Avenue, New York 10, New York.

Respondent Lachman-Rose Company, Inc., 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 3200 East Houston Street, San Antonio 6, Texas.

Respondent Pensick & Gordon, 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 845 S. Los Angeles Street, Los Angeles 14, California.

3. Rollin Shulberg is an officer and director of ICI, as well as an officer of Schranz & Bieber Co., Inc., and maintains his principal office and place of business at c/o Schranz & Bieber Co., Inc., 115 Fifth Avenue, New York 3, New York.

4. Donald Honig is an officer and director of ICI (Tr. 51). In addition, he is president of Schranz & Bieber Midwest Sales Co., Inc., and vice president of Schranz & Bieber Co., Inc., with his principal office and place of business at c/o Schranz & Bieber Midwest Sales Co., Inc., 200 Fifth Avenue, New York 10, New York.

5. Leo Rose is an officer and director of ICI, as well as an officer and director of Lachman-Rose Company, Inc., with his principal office and place of business at c/o Lachman-Rose Company, Inc., 3200 East Houston Street, San Antonio 6, Texas.

6. Samuel Pensick is an officer and director of ICI, as well as an officer and director of Pensick & Gordon, Inc., with his principal

office and place of business at c/o Pensick & Gordon Inc., 845 S. Los Angeles Street, Los Angeles 14, California.

7. The individual respondents listed above formulate, direct and control the practices of ICI (respondents' Answer).

8. ICI is engaged in the business of publishing and distributing catalogues illustrating toy products. Its sole stockholders are respondents Schranz & Bieber Co., Inc., Lachman-Rose Company, Inc., and Pensick & Gordon, Inc. These three corporate respondents are toy, game, and hobby wholesale jobbers who sell and distribute toy, game, and hobby products to retail outlets located in various states of the United States. ICI sells and distributes the catalogues it publishes to its three corporate stockholders who in turn resell said catalogues to retail outlets located in various states of the United States.

9. Schranz & Bieber Midwest Sales, Co., Inc., is a wholly owned wholesaling subsidiary of Schranz & Bieber Co., Inc. This subsidiary was formed for the purpose of absorbing a group of salesmen who were employed by S. Starkman Company, formerly a member of ICI, so that Schranz & Bieber Co., Inc., would have sales representation in the midwest. Schranz & Bieber Midwest Sales Co., Inc., operates its own warehouse during the two peak sales periods of the year; at other times it ships from the warehouse owned and operated by the parent corporation.

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.

11. In 1958, certain toy manufacturers paid ICI over $218,000 as compensation for furnishing catalogue advertising, services or facilities. In 1959, the payments amounted to over $234,000. In the first half of 1960, the amount received was over $53,000. Among the toy manufacturers who made these payments to ICI were Ideal Toy Corporation, Emenee Industries, Inc., Transogram Company, Inc., and Remco Industries, Inc.

12. Respondents Schranz & Bieber Co., Inc., Lachman-Rose Company, Inc., and Pensick & Gordon, Inc., are wholesaler customers of Transogram Company, Inc., Emenee Industries, Inc., Remco Industries, Inc., and Ideal Toy Corporation. These wholesaler respondents purchased the products manufactured by these manufacturers, and which were advertised or illustrated in the ICI catalogues, directly from said manufacturers at or about the same time that the promotional payments to ICI were made by these four manufacturers and when the contracts for such advertising were executed by the four manufacturers with ICI.

13. The contracts relating to catalogue advertising were submitted by ICI to the various toy manufacturers. The terms relating to price were determined by ICI, and the manner of illustrating the toys reserved to ICI. The items to be advertised in these catalogues were selected by ICI from a list of items submitted by the manufacturer. The manufacturer would sometimes indicate its preference of an item for advertising, but the preferences of the manufacturer were not always followed by ICI. Sometimes representatives of the wholesaler respondents would participate in the selection of an item to be advertised in the catalogue.

14. Salesmen of Schranz & Bieber Co., Inc., Schranz & Bieber Midwest Sales Co., Inc., Lachman-Rose Company, Inc., and Pensick & Gordon, Inc., solicited toy retailers to buy the ICI catalogues. When the retail outlet ordered these catalogues, the salesman turned the order in to his company which, in turn, submitted the order to the catalogue printer who imprinted the retailer's name on the catalogues and shipped them directly to the retailer. The retailer was not obligated to buy any toys from the wholesaler selling him the catalogues.

15. Toy manufacturers advertise in several catalogue publications owned or controlled by various toy wholesalers. Not every toy wholesaler, however, is an owner of, or is associated with, a catalogue publishing enterprise. ICI never asked these advertising manufacturers whether the payments made by them to ICI were being offered or granted on proportionally equal terms to all wholesaling customers competing with the wholesaler respondents, or to wholesaling customers operating in the same areas in which the wholesaler respondents made sales.

16. During 1958, 1959, and 1960, there were many toy wholesalers competing with the wholesaler respondents in the various areas of sales involved. These competitors also bought from the four manufacturers that sold to the wholesaler respondents at the same time that such manufacturers were paying ICI for catalogue advertising. These competitors, however, were not offered or granted any allowances for advertising. Some of them would, and some of them would not, have been interested in a catalogue-advertising allowance. In many instances they were not informed of the nature and terms of the advertising allowances being made to ICI. In several instances their understanding of such arrangements was not in accordance with the facts; as, for example, in those instances where the wholesaler thought that his participation in a catalogue required his purchase of all of the catalogue's advertised items.

17. Some of the catalogues published in the industry contain the advertisements of certain manufacturers, while others contain those

of other manufacturers. Although the manufacturer may not be familiar with the corporate structure of the catalogue publishing corporation, it does know the identity of the jobbers who are affiliated with the particular catalogue.

18. Respondents knew, or should have known, that the promotional payments which they induced and received from the toy manufacturers were not affirmatively offered or otherwise made available on proportionally equal terms to all other customers competing with respondents in the distribution of said products.

19. The payments made by the toy manufacturers to ICI for advertising in ICI's catalogues were made to or for the benefit of the wholesaler respondents for services or facilities furnished by or through these wholesaler respondents in connection with the sale or offering for sale of the manufacturer's products.

DISCUSSION

The respondents ask that the complaint be dismissed, basing their request on a number of different arguments. They contend first of all that the payments made to ICI were not payments within the proscription of § 2(d) of the Clayton Act. Counsel supporting the complaint cites *State Wholesale Grocers, et al.* v. *The Great Atlantic & Pacific Tea Co., et al.*, 258 F. 2d 831 (7th Cir. 1958) *cert. denied, sub. nom., General Foods Corp., et al.* v. *State Wholesale Grocers, et al.*, 358 U.S. 947 (1959), where the court ruled that advertising payments to a wholly owned subsidiary of a customer are payments to or for the benefit of the customer. Respondents contend that the cited case can be distinguished from the instant case. In the *State Wholesale Grocers* case the payments were made for advertising appearing in a magazine published by a wholly owned subsidiary of the A&P chain. But, in addition, the publication bore the A&P name and was thereby identified with it. In the instant case, the toy catalogues bear no name other than the name of the retailer who buys them. Respondents argue that these toy catalogues, therefore, are identified with no particular jobber and specifically not with the wholesaler respondents herein. This argument, however, has no substance. The record clearly establishes that the wholesaler respondents use their own salesmen to promote the sale of these catalogues to retailers and, in some cases, participate in the selection of items to be advertised. The identification of these jobbers with the publication was open and notorious, not only to the retailers purchasing the catalogues, but to the advertisers as well. The presence or absence of the jobber's name on the catalogues is not nearly as persuasive in establishing its identification with the

respondents as is the active promotion and backing given by the jobbers for this publication.

Respondents also cite the fact that the A&P publication was distributed only at A&P stores, while the toy catalogue was distributed through independent retail stores throughout the country. This apparent difference only confuses the actual similarity in distribution. The toy catalogue sponsored by the wholesaler respondents was distributed only through these same wholesaler respondents, just as the A&P magazine was distributed only by A&P stores. Similarly, the argument that retailers could obtain distribution rights for some toy catalogues whereas the A&P magazine had a limited and exclusive distribution has no real relevance. We are not concerned here with the availability of distribution to *retailers*. The issue is discriminatory promotional payments to competing *wholesalers* by a supplier-manufacturer.

Finally, respondents argue that the payments for advertising in the A&P case inured solely to A&P, while the payments for the toy catalogue advertising inured to the benefit of all jobbers and retailers selling the advertisers' products. Here, too, there is a confusion of issues. The benefit of the payments received, not simply the advertising, inures to the recipient of the payments. In the A&P case, the recipient was the A&P chain. In the instant case, it is the wholesaler respondents. Indeed, the parallel of the instant case with the *State Wholesale Grocers* case is so close as to make extended discussion unnecessary. In this respect, therefore, a cease and desist order is warranted not only by the dictates of the Commission decision in the matter of *Nuarc Company*, Docket No. 7848, August 7, 1962 [61 F.T.C. 375], but, as well, by the more limiting opinion of Commissioner Elman dissenting in that case. As in the *State Wholesale Grocers* case, where A&P was directly benefited and its suppliers indirectly benefited by A&P's mass distribution, the catalogue advertising directly benefited the wholesaler respondents by the receipt of advertising money and indirectly benefited the suppliers, who were thus able to reach many retailers through the respondents' mass distribution of the catalogues.

Respondents next contend that the payments made by the manufacturers for catalogue advertising were, in fact, available to wholesalers competing with the respondents. They stress the fact that many of the unfavored wholesalers had no interest in catalogue advertising and argue therefrom that an offer of an advertising payment would have been futile and therefore unnecessary. This argument, however, ignores the uncontradicted testimony of several wholesalers who were not familiar with the terms of catalogue advertising that might have

been available to them, as well as the testimony of others who definitely indicated a willingness to consider catalogue advertising.

Moreover, even if there were none among these unfavored wholesalers who were interested in catalogue advertising, this would not excuse a supplier's discriminatory program of advertising unless some provision were made which would in effect provide proportionally equal benefits to all competing customers. A plan which by its nature cannot be used by all competing customers is not "available" and is tantamount to no offer at all, and, therefore, violates § 2(d) (*State Wholesale Grocers, et al., supra*). Respondents cite *Lever Brothers Company*, 50 F.T.C. 494 (1953) where the complaint was dismissed, the Commission having found that every customer of the respondent knew or could easily have known what respondent was offering and how he could get it. But, as the Commission pointed out in the matter of *Liggett & Myers Tobacco Company, Inc.*, 56 F.T.C. 221 (1959), Lever "offered alternative promotional allowances for the customers who did not for any reason use advertising allowances and it made its several plans known to all." Here, as in the *Liggett* case, the advertiser's plan was directed for the benefit and use of only some of his customers without any alternative provisions for those who did not use that plan. Such alternative provisions were never attempted during the years in question.

Respondents further contend that counsel supporting the complaint has not met the burden of going forward with evidence showing that the allowances paid were not offered by the manufacturers in good faith to meet competition. They first cite *Exquisite Form Brassiere Co., Inc.* v. *Federal Trade Commission*, 301 F. 2d 499 (D.C. Cir. 1961), *cert. denied*, 82 SC 1162 (1962), and *Shulton, Inc.*, v. *F.T.C.*, 30 U.S. L. Week 2567, May 22, 1962 (7th Cir. 1962), where the courts held that the defense of meeting competition is available to a person charged with violating § 2(d) of the Clayton Act. They then cite *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61 (1953), where the Court held in a case involving a buyer's receipt of an unlawful *price* discrimination that the Commission was required to come forward with evidence negating the existence of the seller's defense of *cost justification*. The Court said:

> * * * It would not give fair effect to § 2(b) to say that the burden of coming forward with evidence as to costs and the buyer's knowledge thereof shifts to the buyer as soon as it is shown that the buyer knew the prices differed. Certainly the Commission with its broad power of investigation and subpoena, prior to the filing of a complaint, is on a better footing to obtain this information than the buyer.

Respondents argue that the meeting competition defense available to the advertising suppliers should have been negated by the Commission and that, since it was not, the complaint must be dismissed. Assuming that the § 2(b) defense of meeting competition is available to a person charged with violating § 2(d) of the Act, this argument equates the defense of cost justification to the defense of meeting competition and seeks to apply the rules laid down in the *Automatic Canteen* case to the meeting competition defense. I cannot agree with this construction of the *Automatic Canteen* case. In that case the Court recognized that conventional rules of evidence put the burden of showing a justification on the one who claims its benefits. In the case of cost justification, however, the Court found it necessary to carve out an exception where the action is against the buyer. The Court stated:

> * * * decisions striking the balance of convenience for Commission proceedings against sellers are beside the point. And we think the fact that the buyer does not have the required information, and for good reason should not be required to obtain it, has controlling importance in striking the balance in this case. This result most nearly accommodates this case to the reasons that have been given by judges and legislators for the rule of § 2(b), that is, that the burden of justifying a price differential ought to be on the one who "has at his peculiar command the cost and other record data by which to justify such discriminations." * * * It would not give fair effect to § 2(b) to say that the burden of coming forward with evidence as to costs and the buyer's knowledge thereof shifts to the buyer as soon as it is shown that the buyer knew the prices differed. (Footnotes omitted.)

In a footnote, the Court made it quite clear that this "balance of convenience" rule was tailored to the nature of the evidence in question and added:

> Evidence, for example, that the seller's price was made to meet a competing seller's offer to a buyer charged under § 2(f) might be available to a buyer more readily even than to a seller.

In this case, the supplier's possible defense of meeting competition would involve evidence of practices within the industry of which the respondents, the buyers, would be at least as familiar as the sellers, requiring no special balance of convenience rule in their favor. Exceptions to conventional rules of evidence should be made sparingly, and only when a clear and compelling reason therefor is convincely demonstrated. Here no such showing has been made.

Respondents also contend that the record fails to establish that they knew that the promotional allowances were illegal. Assuming that such is the case, it does not necessarily follow that the argument is therefore successful. Actual knowledge is not necessary. If the re-

spondents *should have known* of the illegality, it is sufficient. This is clearly spelled out in *American News Company and The Union News Company* v. *Federal Trade Commission*, 300 F. 2d 104 (2d Cir. 1962). In that case, the court approved an order against the buyer receiving discriminatory payments, which order obligated the buyer who induces and receives a payment from his supplier to learn whether the payments are proportionalized or otherwise made available. The court there stated:

> Petitioners contend that the order places undue burdens on them by forbidding inducement and receipt of payments when they know, *or should* know, that proportional payments are not "*affirmatively offered* or otherwise made available" to their competitors. They attack specifically the provisions we have italicized. There is nothing in the Supreme Court's opinion in *Automatic Canteen Co. of America v. F.T.C., supra*, 346 U.S. 61, which precludes the imposition of a duty of reasonable inquiry upon a buyer. 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. *Automatic Canteen Co. of America v. F.T.C., supra*, 346 U.S. 61, 81. Nor can there be any objection to including the term "affirmatively offered." Petitioners seem to feel that this provision makes the order more onerous and imposes a requirement on sellers not called for by § 2(d). Whatever may be the merits of petitioners' contention that § 2(d) imposes no duty of affirmative offering on sellers, inclusion of this provision cannot prejudice the buyer. As the order now reads, this clause does not change what sellers must do, but simply defines the obligation of the buyer to learn whether payments are "proportionalized." If he is apprised of sufficient information about payments which he induces and receives to create a duty of further inquiry, the buyer, under this order, must see first if the payments are affirmatively offered to his competitors on a proportionally equal basis; if not, the order indicates he may have a further duty to see whether they are "otherwise made available."

In this case, the respondents induced and received a payment for advertising. They made no inquiry from their suppliers as to whether the payments were being proportionalized or otherwise made available to competing purchasers. In fact, since the plan originated with the respondents and was completely controlled by them as to amount of payment and terms, with apparently little or no negotiation thereon, the respondents would have little reason to think that their program of catalogue advertising was being proportionalized or otherwise made available to their competitors pursuant to preconceived standards of a promotional program of their suppliers. In any event, little inquiry would be necessary on the part of these respondents to indicate to them that the promotional payments they were receiving were not being offered to all competing purchasers or that some of these competing

purchasers were not using the promotional plan offered by the suppliers, but were not offered any alternative allowances in its stead. It strains one's credulity to believe that these respondents were not aware of this discrimination, or could not have learned of the discrimination, in view of their position in the industry, their wide-spread operations and their experience in the trade.

Finally, respondents ask that if an order is issued, it be limited to the particular practices alleged in the complaint, specifically to toy catalogues or other printed publications. For the reasons expressed in the initial decisions of this hearing examiner in *Transogram Company, Inc.*, Docket No. 7978, August 29, 1961 [61 F.T.C. 629, 636]; *Wen-Mac Corporation*, Docket No. 8245, December 20, 1961 [61 F.T.C. 629, 658]; *American Machine and Foundry Company*, Docket No. 7977, December 20, 1961 [61 F.T.C. 629, 665]; and *Ideal Toy Corporation*, Docket No. 7979, January 2, 1962 [61 F.T.C. 629, 672], reference to which is hereby made, the order issued in this case is not so limited. It is, however, limited to advertising and promotional services rather than covering all services, for the same reasons expressed in the above initial decisions.

Respondents also ask that the order be limited to the knowing inducement and receipt, or knowing receipt, of discriminatory payment, rather than to the inducement, or receipt, or contract for the receipt, of such payments as proposed by Commission counsel. The difference between these two proposals is that the Commission counsel's proposed order would cover the mere inducement of a discriminatory allowance without any receipt; the respondents' proposed order would prohibit an inducement of a discriminatory allowance only when accompanied by actual receipt. Respondents' proposal appears to be better founded in the law. For one thing, since the evidence in this case involved inducement of discriminatory allowances coupled with the actual receipt, rather than the mere inducement alone, the order should be tailored to fit the practices found to violate the Act in accordance with the *American News Company* case, *supra*. In addition, there seems to be considerable doubt that the mere inducement alone would violate the Act. As the court stated:

> * * * Neither the Commission nor the courts have held that an attempt to induce or inducement (if the two are distinguishable) without a concomitant receipt of alleged payments, violated § 5.

ORDER

It is ordered, That corporate respondents Individualized Catalogues, Inc., Schranz & Bieber Co., Inc., Schranz & Bieber Midwest Sales Co., Inc., Lachman-Rose Company, Inc., Pensick & Gordon, Inc.,

their officers and directors; and individual respondents Rollin Shulberg, Donald Honig, Leo Rose and Samuel Pensick; and the respective representatives, agents and employees of these corporate and individual 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 anything of value to or for the benefit of respondents as payment or in consideration for advertising or any other promotional services or facilities furnished by or through respondents 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 suppliers to the respondents, when the respective respondents know or should know that such payment or consideration is not affirmatively offered or otherwise 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.

OPINION OF THE COMMISSION*

APRIL 3, 1964

By MacIntyre, *Commissioner:*

The complaints in *Individualized Catalogues, Inc.*[1] *et al.* and *Santa's Playthings, Inc.*[1] *et al.*, charged that respondent toy wholesalers and publishing concerns violated Section 5 of the Federal Trade Commission Act by inducing or receiving payments and allowances from toy manufacturers which they knew or should have known were not available on proportionally equal terms to all other customers of such manufacturers competing with respondent jobbers in the resale of the toy suppliers' products.

Except for the identity of the respondents in each case, the facts in the two proceedings are substantially similar[2] and they have been consolidated here for final decision. In both cases, the presiding hearing examiners found the allegations of the complaints sustained, and

*Consolidated opinion in two related cases: Individualized Catalogues, Inc., et al., docket No. 7971 and Santa's Playthings, Inc., et al., docket No. 8259.

[1] Hereinafter referred to sometimes as ICI and SP, respectively.

[2] Counsel in SP stipulated into evidence the entire transcript of testimony taken in the ICI proceeding. In ICI, counsel for both sides stipulated that the testimony of Charles J. Cunius, the only witness actually appearing in the SP proceeding should be treated as if it had been given by Rollin Shulberg, President of ICI, with reference to the operation of that respondent, excluding only that portion of the testimony relating to the annual financial statements of SP and payments to that respondent's officers. (Stipulation between complaint counsel and counsel for respondents, Apr. 10, 1962).

Respondents in the SP proceeding who were represented by the same counsel in essence adopt the substance of the ICI brief.

issued orders to cease and desist. Respondents in each proceeding take exception to the finding that the promotional payments they received were illegally induced or received and the respondents involved in ICI contend further that, even if their conduct violated the law, the order imposed is unduly broad. Complaint counsel, on the other hand, takes exception to the order entered by the examiner in SP, arguing that the scope of the order is too narrow to constitute an effective remedy.

Before proceeding to an examination of the merits of the parties' contentions, a brief description of the respondents in each proceeding and their operations is warranted. Respondent ICI, a corporation engaged in the business of publishing and distributing catalogs featuring toy products, is located in New York City. ICI's sole stockholders are the three toy wholesalers also named in the complaint. Respondent, Schranz & Bieber Co., Inc., one of the largest toy jobbers in the nation, is located in New York City.[3] The other respondent stockholders of ICI are Lachman-Rose Company, Inc., situated in San Antonio, Texas, and Pensick & Gordon, Inc., Los Angeles, California. The individual respondents named in the ICI proceeding are officers of the respondent toy wholesalers and also hold office as directors and officers of ICI. Respondents' answer conceded that these individuals formulated, and controlled the practices of ICI.

The payments in issue here were substantial. In 1958 they amounted to over $218,000 and in 1959 they totalled over $234,000. It may be noted in passing that the toy manufacturers, disclosed by both records to have made the payments in issue here, have already become the subject of Commission proceedings under Section 2(d) of the Robinson-Patman Act, as amended.[4]

Santa's Playthings, Inc., the respondent publishing concern in Docket 8259, has its principal office in New York City. The stock of SP is owned equally by the four toy wholesaling concerns named as respondents, and by one individual, Charles J. Cunius.[5]

The four toy jobbers named as respondents are widely distributed: L.A. Sales Co., Inc., is located in New York City; Marcus Mercantile Co. in Milwaukee, Wisconsin; Uhlen Carriage Company, Inc., in Rochester, New York, and the partnership of Abraham Ponnock, Leon Ponnock, Samuel Ponnock, and Joseph Stein, copartners doing business as A. Ponnock and Sons, has its principal office and place of

[3] Also named in the complaint is this respondent's wholly owned subsidiary, Schranz & Bieber Midwest Sales Co., Inc.

[4] See *Transogram Company, Inc.*, Docket 7978 [61 F.T.C. 629], *Ideal Toy Corporation*, Docket 7979 [61 F.T.C. 629], *Emenee Industries, Inc.*, Docket 7974 [61 F.T.C. 629], *Remco Industries, Inc.*, Docket 8103 [61 F.T.C. 629], decided Sept. 19, 1962.

[5] Cunius holds the stock of SP through the medium of a corporation Charles J. Cunius, Inc.

business in Philadelphia, Pennsylvania. The individual respondent, Charles J. Cunius, according to the record, is not in the toy wholesaling business and confines his activities to the offices of Administrator and General Manager of SP. With the exception of Cunius, all of the individual respondents, holding positions as officers and directors of SP, were also officers or partners in their respective toy wholesaling businesses named as respondents by the complaint.

As in the ICI proceeding, the payments received from toy manufacturers were substantial. In 1959 the amounts under consideration totalled $112,450, and in 1960, $171,000.

The gist of both the SP and ICI proceedings is summarized in Paragraph Five of their respective complaints, which state, in pertinent part:

> Respondents, in the course and conduct of their business 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.

It is now clearly established that a buyer's knowing inducement and receipt of, or receipt of promotional payments which violate Section 2(d) of the Clayton Act, as amended, is an unfair method of competition within the remedial scope of Section 5 of the Federal Trade Commission Act.[6] At the outset, we are therefore confronted with respondents' contention that the payments in issue here were not payments to or for the benefit of the respondent toy wholesalers and therefore not within the proscription of Section 2(d).

In essence, respondents argue that the payments in question were to the toy catalog publishing corporations, ICI and SP, separate and apart from the respondent toy wholesalers holding the stock of the publishing corporations. They further contend that since the catalogs sold by the respondent jobbers to retailers for distribution to consumers were imprinted with the retailers' name rather than that of the jobber, that the promotional payments to ICI or SP must be considered a form of national brand advertising benefitting all toy wholesalers alike. Respondents earnestly argue that accordingly the payments may not be regarded as benefitting the respondent jobbers in the resale of the products involved in the promotions.

Upon our examination of the record, we are not persuaded that the evidence supports the finding which, in effect, we are asked to make

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[6] See *Giant Food Inc.* v. *Federal Trade Commission*, 307 F. 2d 184 (D.C. Cir. 1962) *cert. denied* 372 U.S. 910 (1963); *The Grand Union Company* v. *Federal Trade Commission*, 300 F. 2d 92 (2nd Cir. 1962); *American News Company, et al.* v. *Federal Trade Commission*, 300 F. 2d 104 (2nd Cir. 1962) *cert. denied* 371 U.S. 824 (1962).

here, namely that respondent jobbers' sales of toys to their retailer customers were divorced from the distribution of catalogs by respondents to such dealers. In fact, the weight of the evidence is to the contrary.

As a general rule, the record discloses that catalogs are sold by the distributing jobber to those retailers who purchase toys from them.[7] Certain jobbers refused to handle catalogs because they were unable to sell all of the lines featured therein. These witnesses stated that they would be embarrassed with their retailer customers if unable to sell all the lines promoted in these publications.[8] Moreover, jobbers are expected to buy the items featured in the catalogs to "back up the book",[9] although there was no express requirement to that effect. The inference is inescapable that both jobbers and manufacturers intended and fully expected the distribution of the catalogs to facilitate toy sales by the wholesalers distributing these brochures.

Moreover, the ICI record documents an instance establishing that the dichotomy between a jobber's distribution of toy catalogs and sales of toys to retailers, advanced by respondents, is simply unrealistic as a practical business matter. The ICI group at one time had two simultaneous editions differing with respect to the dolls featured because one of the respondent jobbers was unable to purchase dolls from a particular manufacturer.[10] Unless there were a connection between the jobbers' resale of toys and distribution of catalogs, there would have been no necessity for two editions of the ICI catalog in this instance.

Representatives of two toy manufacturers testified that they determined the extent of their participation in jobber catalogs on the basis of the purchases of the jobbers distributing these publications.[11]

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[7] Q. Mr. Shulberg, generally speaking, isn't it a fact that the retailers who buy catalogs from Schranz and Bieber buy products from Schranz and Bieber?

A. Generally speaking, we sell the book to our customers. (Testimony of Rollin Shulberg, president of respondents ICI and Schranz and Bieber Co., Inc., ICI Tr. 106.)

[8] See testimony of Saul Baron, Novelty Sales Corporation, New York, New York:

"As I stated, there was no point in making a fool out of myself. If I couldn't get half the toys that were in the book, supplied by these catalogues, I would look like an awful fool to the retailer." (ICI Tr. 313.)

[9] See testimony of Charles J. Cunius, president of SP, SP Tr. 104–105.

* * * * * * *

Q. Let me ask you about Transogram Products that are advertised in the catalogs. Isn't it expected that jobbers who were members of groups that advertise Transogram Products would purchase the products that are advertised?

A. It is expected from all manufacturers that advertise in books * * *.

Q. And those jobbers believe they should buy them?

A. Yes, sir.

Q. And if they don't buy them, it would look bad for them?

A. It would look bad for the book, too. (Testimony of Charles J. Cunius, SP Record, Tr. 147.)

[10] See testimony of Rollin Shulberg, president ICI, ICI Tr. 57, 58; CX 8 and 9.

[11] Testimony of Morton Simon, Transogram Co., Inc., ICI Tr. 157, 158; Philip Cohen, Vice President in Charge of Sales, Remco Industries, Inc., ICI Tr. 211, 212.

This evidence further supports the finding that distribution of the catalogs was intended by these manufacturers to complement the sales efforts of jobbers engaged in the distribution of these brochures, and tends to contradict respondents' argument that the expenditures under consideration are simply national brand advertising benefitting all toy wholesalers alike.

Considered together, the facts set forth above compel the conclusion that respondent jobbers gained a competitive advantage in the sale of toys to retailers purchasing the catalogs from them as opposed to other jobbers.[12] In short, in both cases, there is substantial evidence to support the finding of the examiner in the *Santa's Playthings* proceeding, that:

> * * * 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 * * *.

These cases are therefore to be distinguished from the proceeding in *The Nuarc Company*, Docket 7848 [61 F.T.C. 375] (1962) reversed 316 F. 2d 576 (7th Cir. 1963) where the record did not show that the payments under consideration there conferred a competitive benefit on respondent's customer in the resale of the goods involved in the promotion. Since the payments challenged in these proceedings were "for the benefit of" respondent jobbers in the resale of goods featured in the catalogs, they are clearly within the scope of the Act.[13] The fact that the promotional payments were made to the toy catalog publishing concerns rather than directly to respondent toy wholesalers holding stock in SP or ICI, is accordingly immaterial. An exploration in detail of the close interrelationship of respondent toy catalog publishing concerns with respondent jobbers at this point would, therefore, be superfluous.

The fact that in distributing the catalogs to retailers, respondent jobbers performed a service for their suppliers within the contemplation of Section 2(d) cannot be subject to dispute. The payments received by respondents in both proceedings are therefore within the scope of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act.[14]

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[12] Although there is some evidence in the record, as respondents argue, that certain dealers did not make all their purchases from jobbers selling the catalogs to them, and made some purchases from the latter's competitors, this is insufficient to vitiate the evidentiary facts supporting the finding that catalog distribution complemented the respondent wholesalers' sale of toys to retailers.

[13] See *Swanee Paper Corporation* v. *Federal Trade Commission*, 291 F. 2d 833 (2nd Cir. 1961); *cert. denied* 368 U.S. 987 (1962) and *P. Lorillard Company* v. *Federal Trade Commission*, 267 F. 2d 439 (3rd Cir. 1959); *cert. denied* 361 U.S. 923 (1959).

[14] Respondents' remaining contention on this point notwithstanding, the record is adequate to establish reasonably contemporaneous purchases by favored and nonfavored customers from manufacturers making the payments under consideration.

We now turn to respondents' contention that the payments made to ICI and SP were, in fact, available to the non-favored customers, who did not choose to avail themselves of or accept such payments. The argument on this point may be briefly summarized. Respondents argue any jobber who desired to do so, could avail himself of catalog advertising, but nevertheless, many of the non-favored customers testifying in this proceeding failed to take advantage of such opportunities. They further attempt to bolster their case by stating that non-favored toy wholesalers testifying in these proceedings refused specific offers of catalog allowances from the Emenee and Transogram Companies in 1961. As a matter of fact, they contend that since the testimony of Messrs. Shulberg and Cunius established widespread knowledge of the existence and operation of catalogs, the hearing examiner in ICI should not have credited the testimony of those non-favored jobbers who stated that they were not aware of the nature of the operation of catalogs in the toy industry. The testimony of Cunius on this point at any rate was not entirely unequivocal. He admitted meeting numerous wholesalers who were not acquainted with jobber catalogs and his affirmative reply to respondents' counsel's subsequent question "But they learned about it by talking [at the Toy Fair]?" is not altogether convincing.[15] Under the circumstances we are not persuaded that all jobbers were fully cognizant of the workings of the catalog groups when dissemination of this information in many cases depended on happenstance.

Respondents' argument that the benefits of catalog advertising were as a practical matter available to all wholesalers and their further contention that suppliers were not obliged to make offers of advertising payments to all of their customers on the ground that such offers would have constituted a futile gesture must be rejected. The record shows that during the period under consideration, 1958 to 1960, the jobber witnesses brought to the stand by complaint counsel uniformly testified that they were not offered advertising or promotional payments by certain of the manufacturers making payments to the respondent catalog publishing corporations. Despite assertions by the individual respondents and the representatives of some manufacturers that any jobber could have joined a catalog group, certain of complaint counsel's jobber witnesses made it clear that at the time they were doubtful that they could join a catalog group or explained, that they

[15] SP Tr. 95.

did not desire to join such a group because it would not be practical for them.[16]

This testimony is entitled to greater weight than the more general testimony on which respondents rely. While some catalog groups may have solicited jobbers generally, the operations of the ICI group and of the SP group indicate that they were not necessarily open to all comers. ICI's catalogs are distributed solely by the respondent jobbers.[17] Respondent Cunius testified that it was the policy of catalog groups, including Santa's Playthings, to pick out one or two jobbers to represent the group in a particular city for catalog distribution. Although claiming that a jobber seeking to distribute SP's catalog would not be turned down, he admitted that if the catalog already had distribution in a certain area no effort would be made to contact other wholesalers for possible participation.[18]

On the basis of the record as a whole, we are persuaded that catalog payments were not available as a practical matter to all jobbers. Significantly, not all jobbers for one reason or another could use catalog payments. As heretofore noted, some jobbers found it impractical to distribute a catalog if they could not purchase all the lines advertised therein; the desire to avoid embarrassment with their retailer customers if they did not handle all lines in a catalog was of course a very important business consideration. The record is also clear that no alternatives were made available to those customers not able to furnish or utilize catalog advertising and distribution in their business.

Where certain customers or groups of customers are precluded from taking advantage of promotional offers because of the inherent limitations of promotional arrangements which provide for services they cannot use or perform, then the offer is simply not available as a practical matter. In this case, the record shows that in 1958–1960 the nonfavored customers were not even granted the boon of such an illusory offer.

The requirements of the Robinson-Patman Act on this point have been succinctly summarized by one of its co-authors in the following terms:

> The [supplier's] plan must allow all types of competing customers to participate. It must not be tailored to satisfy the needs of a favored customer or class, but

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[16] E.g., Milton Cohen testified that he did not believe he could have gotten into a consumer catalog (ICI Tr. 254); David Pelta stated that he had been told that the good catalog groups were not available and were limited to a few wholesalers (ICI Tr. 277). Philip Sherman testified that he did not know how to go about joining a catalog group and had never inquired since he did not have certain lines that go in all the catalogs. Had he been approached at the proper time, this witness might have joined a catalog group. (ICI Tr. 345–346.)

[17] ICI Initial Decision, Findings 8 and 14.

[18] SP Tr. 132, 133.

must be suitable and useable under reasonable terms by all competing customers. This may require offering all customers more than one way to participate in the plan. The seller cannot eliminate some competing customers, either expressly or by the way the plan operates. Where the seller has alternative promotional plans, his customers must be given the opportunity to choose among the plans.[19]

Or, as the Seventh Circuit Court has ruled—

* * * the Act requires a frank recognition of the business limitations of each buyer. 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.[20]

Respondents dispute the crucial findings entered below in both proceedings, that they knew or should have known that the promotional payments received from certain manufacturers were not made available on proportionally equal terms to all other customers of such suppliers competing with the respondent wholesalers in the distribution of toys. Respondents argue that the findings cannot stand, since payments for advertising in jobber catalogs by manufacturers had been an open and overt practice for some thirty years. The mere fact that the practices under consideration here were of long standing, of course does not permit respondents to assume that such payments were available on proportionally equal terms to all of their competitors. The description by one of complaint counsel's jobber witnesses of the operations of his catalog group, as essentially a method to extort money from manufacturers, is enlightening in this connection.[21] The record suggests, therefore, that receipt of these payments depended to a large degree upon the initiative and the aggressiveness of certain jobbers or groups of jobbers even though these practices may have continued for some time, throughout much of the industry. This is, of course, inconsistent with the hypothesis that the reception of such payments by various jobber groups over a period of time, justifies the assumption on the part of respondents that the payments they received were available on proportionally equal terms to all of their competitors. Furthermore, the record conclusively establishes that advertising in jobber catalogs is a form of service that cannot be furnished by or which would be useful to all toy wholesalers. Respondents on the basis of their collective experience with the industry must be credited with knowledge of these facts.

In addition, the records in both proceedings establish that respondents themselves fixed rates of payments for advertising and solicited

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[19] Wright Patman, *Complete Guide to the Robinson-Patman Act,* Prentice-Hall, Inc. (1963) p. 139; *Cf. Lever Bros. Co.,* 50 F.T.C. 494, 512 (1953).

[20] *State Wholesale Grocers* v. *The Great Atlantic & Pacific Tea Company,* 258 F. 2d 831, 839 (7th Cir. 1958); *cert. denied* 358 U.S. 947 (1959).

[21] The Minsky group referred to by the witness was not named as a respondent herein. See testimony of Milton Wiseman ICI Tr. 415: "It means that a sharp jobber got an idea on how to extort money from manufacturers, basically * * *"

payments at these rates from the manufacturers. A presumption arises therefore that they knew or should have known that such payments would not be available on proportionally equal terms to all of their competitors. Under the circumstances, respondents had no right to assume that the manufacturers in question would thereafter proportionalize such payments *ex post facto*. The record, of course, conclusively demonstrates that in the relevant period, no such proportionalization took place. The record further clearly establishes that although put on notice by these facts, that it was most unlikely that such payments were available to their competitors on proportionally equal terms, they nevertheless neglected in the period 1958–1960 to make any inquiry to determine whether such allowances were available to their competitors.

Respondents also argue, in effect, that it is necessary to document their knowledge of the illegality of the allowances received. It is, of course, not necessary to prove that respondents had actual knowledge of *illegality*. All that is required is that the record substantiate a finding that respondents knew or should have known that the payments made were not available on proportionally equal terms to their competitors.

On the authority of *Automatic Canteen Company of America* v. *Federal Trade Commission*,[22] respondents make the related argument that complaint counsel had the burden of negating the meeting of competition defense. We recently rejected a similar contention in *Fred Meyer, Inc., et al.*,[23] and in view of the elaborate discussion of this question in that case we see no need for further analysis here.

In both proceedings the scope of the order is in issue. In taking exception to the order in the ICI proceeding, respondents invoke the Commission's order and decision in *Transogram Company, Inc.*, Docket No. 7978 [61 F.T.C. 629] (1962). There the Commission limited the order to a prohibition requiring the manufacturer in that case to cease and desist from paying to or for the benefit of any customer compensation for services furnished in toy catalogs, hand bills, circulars, or any other printed publication serving the purpose of a buying guide distributed directly or indirectly by the customer. In *Transogram* the Commission held that a broader order was not justified since there was insufficient data in the record on which a forecast could be made as to the likelihood, if any, that respondent would extend the discriminatory practices to other media. The records in the instant cases, although somewhat more extensive than in *Transogram*, never-

[22] 346 U.S. 61 (1953).

[23] *Fred Meyer, Inc., et al.*, Docket 7492 (1963); *Cf. American Motor Specialties Inc.*, 55 F.T.C. 1430, 1446 (1959) *aff'd.* 278 F. 2d 225 (2nd Cir. 1960) *cert. denied* 364 U.S. 884 (1960).

theless do not differ significantly from that case as to the availability of market data facilitating a prognosis whether respondents herein would extend the scope of their illegal activities from catalogs and similar publications to other advertising media. The order entered by the hearing examiner in the ICI proceeding will therefore be vacated and an order consistent with our decision and order in *Transogram* substituted therefor. For the same reasons, complaint counsel's exceptions to the order entered by the examiner in *Santa's Playthings, Inc., et al.* will be denied.

Upon an examination of the record we find that the allegations of the complaint are not sustained as to respondents Donald Honig and Schranz and Bieber Midwest Sales Co., Inc., in the ICI proceeding and respondent Marcus Mercantile Company in the SP proceeding. The allegations in the complaints will therefore be dismissed as to these respondents.

Except as noted herein, the exceptions of respondents in both the ICI and SP proceedings are denied. Complaint counsel's exceptions to the order in *Santa's Playthings, Inc., et al.* are also denied. The initial decisions in both proceedings, as modified to conform to the findings and views expressed in this opinion, are adopted as the decisions of the Commission.

Commissioner Reilly did not participate.

Decision of the Commission and Order to File Report of Compliance

This matter having been heard by the Commission upon respondents' exceptions to the initial decision filed September 26, 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 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 order contained in the initial decision be, and it hereby is, modified to read as follows:

It is ordered, That corporate respondents Individualized Catalogues, Inc., Schranz & Bieber Co., Inc., Lachman-Rose Company, Inc., Pensick & Gordon, Inc., their officers and directors; and individual respondents Rollin Shulberg, Leo Rose and Samuel Pensick; and the respective representatives, agents and employees of these corporate and individual 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 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 respondents Donald Honig, an individual, and as to Schranz & Bieber Midwest Sales Co., Inc., a corporation, be, and it hereby is, dismissed.

It is further ordered, That the hearing examiner's 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 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 the said order.

Commissioner Reilly not participating.

IN THE MATTER OF

ATD CATALOGS, INC., ET AL.*

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

Docket 8100. Complaint, Aug. 25, 1960—Decision, Apr. 3, 1964

Order requiring a New York City association of toy wholesale distributors, its members and officers, engaged in publishing and distributing to retailers annual catalogs illustrating toys, to cease violating the Federal Trade Commission Act by inducing and receiving from toy suppliers payments for advertising furnished by respondents in such catalogs or other publications in connection with the sale of suppliers' products, when they knew, or should

*Reported as modified by orders of the Commission dated June 4, 1964, and June 29, 1964.

have known that proportionally equal payments were not offered to all other customers of the suppliers competing with respondent.

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 ATD Catalogs, Inc. (hereinafter referred to as respondent ATD), 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 1133 Broadway, New York 10, New York.

The following named individual respondents are officers and/or directors of respondent ATD:

N. Irwin Shapiro,
% ATD Catalogs, Inc.,
1133 Broadway, New York 10,
New York
Executive Director

Jay Mills,
3128–38 Sheffield Avenue,
Chicago, Illinois
Vice President & Director

Jack R. Hoffman,
12 Winthrop Street,
Rochester, New York
Treasurer, Controller & Director

Harold Bortz,
21st Street,
Pittsburgh, Pennsylvania
Director

Ernest H. Coonrod,
6060 Plains Boulevard,
Amarillo, Texas
Director

Lee Hildebrand,
1009 West Main Street,
Louisville, Kentucky
President & Director

George Kahn,
477 Broadway,
New York, New York
Secretary & Director

Marvin C. Miner,
16 So. Ionia Avenue,
Grand Rapids, Michigan
Director

Stanley P. Shapiro,
415 West Broad Street,
Richmond, Virginia
Director

Harold L. Cantor,
1401 Germantown Avenue,
Philadelphia, Pennsylvania
Director

The foregoing individual respondents direct, formulate and control the acts, practices and policies of ATD.

Respondent Acme Premium Supply Corporation 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 2201 Washington Avenue, St. Louis 3, Missouri.

Respondent The Buckeye Paper & Specialties Company 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 1102–06 Summit Street, Toledo, Ohio.

Respondent James V. Cariddi is an individual doing business as Cariddi Sales Company, with his principal office and place of business located at 264 State Street, North Adams, Massachusetts.

Respondents Harold L. Cantor and Willard S. Cantor are copartners, doing business as H&W Cantor, with their principal office and place of business located at 1401 Germantown Avenue, Philadelphia, Pennsylvania.

Respondent Hilb & Co., Inc., is a corporation organized and doing business under the laws of the State of Colorado, with its principal office and place of business located at 1700 Lawrence Street, Denver, Colorado.

Respondents Lee Hildebrand, Sidney Hildebrand and Jacob Hildebrand are copartners, doing business as Hildebrand & Company, with their principal office and place of business located at 1009 West Main Street, Louisville, Kentucky.

Respondent Hoffman Sales & Distributing 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 12 Winthrop Street, Rochester, New York.

Respondent The Jay Mills Company is a corporation organized and doing business under the laws of the State of Illinois, with its principal office and place of business located at 3128–38 Sheffield Avenue, Chicago, Illinois.

Respondent M&A Wares 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 477 Broadway, New York, New York.

Respondent M. C. Miner, Inc., 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 16 So. Ionia Avenue, Grand Rapids, Michigan.

Respondent Morris Paper 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 21st Street, Pittsburgh, Pennsylvania.

Respondents Nathan Goldman, Lane Kaufman and James C. Abro are copartners, doing business as Nathan Goldman and Company,

with their principal office and place of business located at 1820 Industrial Street, Los Angeles, California.

Respondents Lewis O. Buchwach, Herbert J. Shapiro, Robert M. Bodner and Herbert L. Bodner are copartners, doing business as Northern Specialty-Sales Company, with their principal office and place of business located at 1507 N.W. Pettygrove Street, Portland, Oregon.

Respondents William S. Davis, George P. Alton, Leon H. Davis, Natalie Sosnick, Frances Goldfarb, Lila Schmulowitz and Henry Charles Alton are copartners, doing business as Oakland Stationery & Toy Co., with their principal office and place of business located at 8941 San Leandro Street, Oakland, California.

Respondent Reuben Sann is an individual doing business as Sann Sales Company, with his principal office and place of business located at 703 No. 21st Avenue, Phoenix, Arizona.

Respondent Sawyer-Barker Co. is a corporation organized and doing business under the laws of the State of Maine, with its principal office and place of business located at 120 Center Street, Portland, Maine.

Respondent The S&M 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 13th and Hennepin Avenue, Minneapolis, Minnesota.

Respondent Southland Distributors, Inc., 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 7811 Ambassador Row, Dallas, Texas.

Respondent Stanley Toy & Novelty Company, Incorporated, is a corporation organized and doing business under the laws of the State of Virginia, with its principal office and place of business located at 415 West Broad Street, Richmond, Virginia.

Respondent Tampa Novelty Company Inc., is a corporation organized and doing business under the laws of the State of Florida, with its principal office and place of business located at 501 S. Florida Avenue, Tampa, Florida.

Respondents Harold F. Anderson and Frank L. Beeler are copartners, doing business as V. & A. Distributing Co., with their principal office and place of business located at Bridger, Montana.

Respondent West Texas Wholesale of Amarillo, Inc., is a corporation organized and doing business under the laws of Texas, with its principal office and place of business located at 6060 Plains Boulevard, Amarillo, Texas.

All of the foregoing corporate, partnership and single proprietorship respondents have been, and are now, members of respondent ATD.

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

The officers of ATD, named herein as individual respondents, direct and control the policies and practices of ATD on behalf of said wholesaler members.

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 in said products between and among the various States of the United States.

In addition, respondents published, or caused to be published, toy catalogues 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 catalogues 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 catalogues, induced or received payments or allowances from the aforesaid suppliers in connection with the promotion and advertising of their products in

respondents' catalogues. 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 other of said suppliers' customers competing with respondents in the distribution of said suppliers' products. Said payments to ATD for the period from July 1, 1958 to September 30, 1959 exceeded $200,000. Among the toy suppliers granting promotional payments or allowances to respondents in 1959 were:

	Approximate payments received
Toy suppliers:	
The A. C. Gilbert Co	$4,500
Ideal Toy Corp	11,595
Transogram Co., Inc	6,255
Knickerbocker Toy Co., Inc	2,345
Alexander Miner Sales Corp	1,635
Remco Industries, Inc	2,250

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 proportionately 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 and *Mr. Stanley M. Lipnick* supporting the complaint.

Fried, Beck, Tannenbaum, Ruggieri & Field, by *Mr. Arnold R. Rosenwasser* of New York City, for respondent ATD Catalogs, Inc., and various other respondents.

Willkie, Farr, Gallagher, Walton & Fitz Gibbon, by *Mr. Allen Trumbull* of New York City, for respondents Morris Paper Company and Southland Distributors, Inc.

Mr. Simon Meshbesher, of Minneapolis, for respondent The S&M Company.

Mr. Benjamin Masor, of Masor & Masor, New York City, for respondents.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

FILED JUNE 13, 1962

The Federal Trade Commission issued its complaint against the above-named respondents on August 25, 1960, charging them with violation of Section 5 of the Federal Trade Commission Act in that they knowingly induced or received, in commerce from various toy suppliers for toy catalog advertisements, promotional payments not made available on proportionally equal terms to other customers and therefore unlawful for this and other reasons.

There were submitted to the hearing examiner consent agreements, dated March and April, 1962, which are signed by all respondents named below and by counsel for both sides, and approved by the Bureau of Restraint of Trade. The agreements each provide for the entry of a consent order as set forth therein.

The number of signatory respondents is twenty (20), with the case proceeding to hearing as to remaining respondents.

On certification by the hearing examiner, the Commission, by order dated May 23, 1962, excused lateness of filing and referred the matter back to the hearing examiner for consideration of the consent agreements.

One consent agreement is signed by 17 respondents, some of them corporations and some individuals. The other agreements are signed by 3 respondents, each a corporation, and each signing one of the agreements. All the agreements are uniform. All provide for an order containing the same special language, as applicable, for corporations, individuals, or both, and containing precisely the same language describing the acts from which each respondent shall cease and desist.

Under the terms of the agreements, the signatory respondents admit the jurisdictional facts alleged in the complaint. They 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 agreements include all of the provisions required by § 3.3 of the Commission Rules, which contain substantially the same provisions pertinent here as § 3.25(b) of the old Rules of the Commission.

In addition, the agreements contain certain permissive provisions set forth in the Rules.

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

JURISDICTIONAL FINDINGS

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

2. The following facts relate to signatory respondents in this case:

Respondent ATD Catalogs, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 200 Fifth Avenue, New York 10, New York (erroneously cited in the complaint as 1133 Broadway, New York 10, New York).

Respondent Lee Hildebrand is an individual and an officer and director of ATD Catalogs, Inc., with his principal office and place of business located at 1009 West Main Street, Louisville, Kentucky.

Respondent Jay Mills is an individual and an officer and director of ATD Catalogs, Inc., with his principal office and place of business located at 3128–38 Sheffield Avenue, Chicago, Illinois.

Respondent George Kahn is an individual and an officer and director of ATD Catalogs, Inc., with his principal office and place of business located at 477 Broadway, New York, New York.

Respondent Jack R. Hoffman is an individual and officer and director of ATD Catalogs, Inc., with his principal office and place of business located at 12 Winthrop Street, Rochester, New York.

Respondent Harold L. Cantor is an individual and a director of ATD Catalogs, Inc., with his principal office and place of business located at 1401 Germantown Avenue, Philadelphia, Pennsylvania.

Respondent Marvin C. Miner is an individual and a director of ATD Catalogs, Inc., with his principal office and place of business located at 16 South Ionia Avenue, Grand Rapids, Michigan.

Respondent Ernest H. Coonrod is an individual and director of ATD Catalogs, Inc., with his principal office and place of business located at 6060 Plains Boulevard, Amarillo, Texas.

Respondent James V. Cariddi is an individual doing business as Cariddi Sales Company, with his principal office and place of business located at 264 State Street, North Adams, Massachusetts.

Respondents Harold L. Cantor and Willard S. Cantor are copartners doing business as H&W Cantor, with their principal office and place of business located at 1401 Germantown Avenue, Philadelphia, Pennsylvania.

Respondents Lee Hildebrand, Sidney Hildebrand and Jacob Hildebrand are copartners doing business as Hildebrand & Company, with their principal office and place of business located at 1009 West Main Street, Louisville, Kentucky.

Respondent Hoffman Sales & Distributing Co., Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 12 Winthrop Street, Rochester, New York.

Respondent The Jay Mills Company is a corporation existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 3128–38 Sheffield Avenue, Chicago, Illinois.

Respondent M&A Wares Co., Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 477 Broadway, New York, New York.

Respondent M. C. Miner, Inc., is a corporation existing and doing business under and virtue of the laws of the State of Michigan. with its principal office and place of business located at 16 South Ionia Avenue, Grand Rapids, Michigan.

Respondent West Texas Wholesale of Amarillo, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 6060 Plains Boulevard, Amarillo, Texas.

Respondent The S&M Company is a corporation existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office and place of business located at 13th and Hennipan Avenue, Minneapolis, Minnesota.

Respondent Morris Paper Company is a corporation existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at 21st Street, Pittsburgh, Pennsylvania.

Respondent Southland Distributors, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 7811 Ambassador Row, Dallas, Texas.

The following order is hereby made:

ORDER

It is ordered, That respondents ATD Catalogs, Inc., Hoffman Sales & Distributing Co., Inc., The Jay Mills Company, M&A Wares Co., Inc., M. C. Miner, Inc., West Texas Wholesale of Amarillo, Inc., corporations, their officers and directors; individual respondents Jay Mills, George Kahn, Jack R. Hoffman, Marvin C. Miner, Ernest H. Coonrod, James V. Cariddi, Harold L. Cantor, Willard S. Cantor, Lee Hildebrand, Sidney Hildebrand and Jacob Hildebrand; and their respective 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 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.

It is ordered, That respondent The S&M Company, a corporation, its 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 other services or facilities furnished by or through respondent 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 respondent knows 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 respondent in the distribution of such products.

It is ordered, That respondent Morris Paper Company, a corporation, its 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 other services or facilities furnished by or through respondent 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 respondent knows 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 respondent in the distribution of such products.

It is ordered, That respondent Southland Distributors, Inc., a corporation, its 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 other services or facilities furnished by or through respondent 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 respondent knows 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 respondent in the distribution of such products.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

FILED DECEMBER 19, 1962

The complaint herein, issued on August 25, 1960, is under Section 5 of the Federal Trade Commission Act, hereinafter referred to simply as Sec. 5. It alleges discriminatory payments by toy manufacturers for advertisements in toy catalogs published by respondent catalog company. Allegedly the payments were to or for the benefit of respondent toy jobbers[1] who allegedly induced the payment knowing of the benefit and the discrimination.

A number of respondent toy jobbers herein were also stockholders in respondent catalog company, but neither they nor the respondent catalog company, nor certain other respondents, were contesting at the hearings held herein.

[1] The word respondent jobbers as used herein refers to jobber firms, *i.e.*, corporations and individuals doing business as partners or under a trade name.

The present decision deals with eleven remaining respondent jobber firms who were not stockholders of the catalog company, with one possible exception. It also deals with three individuals who were active in the catalog company.

Instead of being stockholders of respondent catalog company, the respondent jobbers considered in the present decision were merely "subscribers"—except that one of them, Stanley Toy and Novelty Company, transferred its stock to its principals, the Shapiro's, the date and details being in dispute.

Together with stockholder jobbers, who also were obliged to be subscribers to obtain the privileges, said respondent jobbers each paid $300 a year to the catalog company for the privilege of distributing catalogs to retailers in their respective areas (each area being assigned to one subscriber only) and for other privileges or services unconnected with catalogs.

Of the eleven respondent jobbers above referred to, nine of them, represented by the same counsel, have gone through full hearings before this examiner, held in New York, Denver, and Los Angeles. The other two, Sawyer-Barker and Tampa Novelty, did not appear at the hearings.

As to four of the nine respondent jobbers represented at the hearings the special question is raised by their counsel as to whether there was proof of an actual unfavored competitor in the area of each, or one substantial enough or otherwise qualified to be considered a competitor. The four are respondent jobbers Buckeye Paper, Sann Sales, Nathan Goldman, and Oakland Stationery.

Contrariwise, there is the question whether proof of an unfavored competitor is necessary as to each and every jobber if such proof, and other necessary proof to show violation, has been produced as to other jobbers and if they have all operated together as active subscribers in connection with violation.

The nine respondent jobbers actively represented at the hearings were joined in their defense by three individuals—N. Irwin Shapiro, Stanley P. Shapiro, and Harold Bortz—all represented by the same counsel as the nine jobbers.

N. Irwin Shapiro and Stanley P. Shapiro were principals of Stanley Toy and Novelty Company, although N. Irwin Shapiro seems to have eventually divorced himself from the toy company. More importantly, both had active parts in the catalog company, particularly N. Irwin Shapiro, who was its dominating leader, and variously its executive director and president, giving full time to it for a fixed salary, until he left it in 1962 to form a new catalog company of his own.

Harold Bortz was active in the catalog company as representative of the jobber who employed him, but claims that he was a "dummy", and is now associated with N. Irwin Shapiro in his new catalog company.

* * * * * * *

If the respondent jobbers now under consideration were stockholders of the catalog company the hearing examiner might have less difficulty in possibly finding a violation as charged. This would present the question involved *In the Matter of Santa's Playthings, Inc.*, et al. (D. 8259, September 28, 1962), decided by the examiner adversely to stockholder jobbers. That case was very much like the present except that all the respondent jobbers were stockholders of the catalog company involved, and all contested through full hearings. On the implied Sec. 2(d) aspect of the case the decision rested primarily on *State Wholesale Grocers* v. *Great Atlantic & Pacific Tea Company*, 258 F. 2d 831 (C.A. 7; 1958), *cert. denied* under another name, 358 U.S. 947 (1959), which involved advertising payments by the suppliers to a publishing company whose stock was owned by the buyer, A & P. The decision also relied on *In the Matter of The Nuarc Company*, D. 7848, decided by the Federal Trade Commission on August 7, 1962 [61 F.T.C. 375].

In the said *Santa's Playthings* decision this examiner found and concluded, on the Sec. 2(d) aspect, that the advertising payments by the manufacturers to the catalog company were to or for the benefit of the respondent stockholder jobbers, and also that they were not available on proportionally equal terms to competitor jobbers—even though there might be other toy catalogs ready to serve jobbers so desiring. On the Sec. 5 violation actually charged he found that said respondent stockholder jobbers induced these payments knowing their unlawful and discriminatory character. This conclusion was aided by the consideration that the stockholder jobbers were actively represented as board members and officers of the catalog company, and that they knew the operating facts that proportionally equal payments were not available despite payments claimed to be available through other catalogs.

The hearing examiner's decision in *Santa's Playthings*, which discusses various aspects of law, may be read as a companion to the instant decision. It rejects the applicability of *Automatic Canteen Company* v. *F.T.C.*, 346 U.S. 61 (1953), as claimed by respondents. First, it holds that that case neither directly nor impliedly held that the burden of proof as to a Sec. 2(b) Clayton Act defense is on the Commission. Secondly, it rejects respondents' construction of certain wording in that case as imposing an ultrastrict standard on the Commission in proving that respondents knowingly induce violations, and

quotes in support *American News Company and Union News Company* v. *F.T.C.*, 300 F. 2d 104, 111 (C.A. 2; 1962).

The present decision is mainly concerned with the question whether the same result as with stockholder jobbers follows in connection with non-stockholder jobbers such as the present respondent jobbers. Not only do the present respondent jobbers, with the one qualification referred to above, own no stock in the catalog company, or are they entitled to any dividends, but they in no way, through their principals or others, served on the board or as officers of the catalog company, nor have they been shown to have been intimately acquainted with its internal financial affairs—although, it is true, they did come to the annual Toy Show and voted at catalog company meetings on what particular toys should be featured by the advertising manufacturer.

Thus it cannot be said that the present respondent jobbers by any possibility received advertising payments even indirectly, even though it may be argued that the payments were received for their benefit, *i.e.*, that the catalog enterprise, nurtured by the advertising payments, was for their benefit. Secondly, there is the question as to whether as mere subscribers, they had sufficient knowledge or notice to be found to have knowingly induced for the purposes of Sec. 5.

As already stated, the present respondents were subscribers and, with one possible exception, not stockholders, and actually paid for the privilege of being subscribers rather than receiving dividends as stockholders.

Certainly on first blush they would seem to be unlikely violators of Sec. 5, requiring not only proof of payments to or for their benefit but knowing inducement of discriminatory payments for the advertisements. The hearing examiner indicated at the hearings that he seriously considered the possibility of regarding present respondents as far removed from the situation of stockholder jobbers, and he requested that submissions be particularly directed to the point involved.

Both respondents' counsel and complaint counsel submitted excellent written presentations illuminating the central question indicated, and the hearing examiner has given much further independent thought to this question.

Some Salient Facts

In order to give a frame of reference for legal observations hereinafter indicated, a somewhat sketchy statement of facts is hereby made, culling from the detailed Findings of Fact made below:

The catalog company herein, ATD Catalogs, Inc., published toy catalogs, illustrating and listing the products of 175–200 manufacturers. The stock of the catalog company was owned largely by a few toy jobbers. The catalogs were distributed through "subscribers",

who included stockholder and non-stockholder jobbers, and each of whom paid a fee of $300 a year to the catalog company. There was only one subscriber for each of the relatively few areas carved out of the continental United States. The catalogs, rather impressive publications, were sold to the subscribers for about 5¢ each, to wit, $57 a thousand. The subscribers sold the catalogs, at the said cost to them, to their retailers. The retailers gave them away free to their own customers, the consumers. The retailer's name was imprinted on the cover, not the jobber's.

Entirely apart from catalogs, many other services were provided for by the catalog company to subscribers, as described in Findings of Fact No. 18 below. Local telephone service with manufacturers was provided for, so that out-of-town subscribers had available to them the functions of a New York office. The catalog company issued frequent bulletins as to price changes by manufacturers and as to ordering procedures. It contacted manufacturers for subscribers in short supply, or to expedite deliveries, or to adjust disputes with manufacturers. It furnished subscribers' customers with display materials and identification materials showing the customer store to be a purchaser of the catalog. It also supplied them with a monthly news letter containing merchandising and personnel training advice. It also conducted elaborate prize contests through the retail store customers of subscribers.

Something over 300 products might be listed in the catalog, of which something under 250 would be illustrated. We are mostly concerned herein with the illustrated advertisements, each featuring a single toy or similar product.

The advertising rate for an illustrated toy was $750 per item, with the one-line listing free. The rate was fixed by the catalog company. Advertising was by written contract, drafted and submitted by the catalog company.

Shortly before March of each year catalog company officials met in New York City with the manufacturers (apparently separately). Some of the manufacturers might specify the particular item they wished to advertise, as illustrated items; others might specify the particular types; and others might specify only the maximum number of items.

As respondents contend, each manufacturer controlled the number of illustrated items for the paid advertising, thus controlling the total dollar amount of its advertising budget with the catalog company. However, as pointed out by complaint counsel, the wording of the contract required approval of each toy to appear as an illustrated advertisement, the approval to be by the "participating distributors", i.e., the subscribers.

The catalog company officials, after their conferences with the manufacturers, would prepare a list of cooperating manufacturers, with special notations as to which had actually signed contracts or orally agreed to do so. Each of the subscribers received a copy of this list.

In March, during the Toy Show held each year in New York City, 4 to 6 meetings were held by the catalog company, presided over by respondent N. Irwin Shapiro, and attended by representatives of the subscribers, both stockholders and non-stockholders.

At these meetings, the list of cooperating manufacturers above referred to was discussed by the subscribers, who had also each received toy sheets from each of the various manufacturers, apparently showing their product offerings. A vote was taken as to just which toys of each manufacturer the subscribers wished to be the subject of illustrated advertisements by the manufacturer. It may be assumed that they did not ride roughshod over a manufacturer's preferences, but that they would not vote for items they thought would not sell as well as others. Each subscriber, stockholder or non-stockholder, had one vote. The majority controlled. A list tabulating results was sent to each subscriber. Contracts were sent to the manufacturers, showing by insertions the items selected by vote. The items voted and so shown were strictly followed, except occasionally on pressure from a manufacturer.

Advertising payments by manufacturers totaled $197,000 in 1959 and $282,000 [2] in 1960. The catalog company in correspondence with the manufacturers refers to them as "our participating manufacturers."

The manufacturers regarded, or identified, the catalog company as a group of jobbers (including respondent non-stockholder jobbers) and their retail customers. As already stated, the catalog company referred to the subscribers, both stockholders and non-stockholders, as "participating distributors."

In 1960, to give an example for one year, total operating expenses of the catalog company were about $385,000, including the $225,000 cost of printing catalogs. Total revenue was $500,000, including $285,000 [2] for illustrated advertisements, $7,000 for subscription fees, and something over $120,000 derived from sales of catalogs. Over-all profit was about $125,000.

Legal Observations

Bearing in mind the facts disclosed in the above sketch and the full facts stated in the Findings of Fact, and giving full consideration to the presentations of counsel on both sides, the following observations may be made showing, among other things, that the distinction be-

[2] These approximated figures involve an unimportant discrepancy.

tween stockholder jobbers and non-stockholder jobbers is not as great, for the purposes of this case, as it may initially seem to be.

The fact that the respondent non-stockholders had to pay $300 a year, *i.e.*, to become subscribers, is of dubious importance since, according to the proof, the stockholder jobbers also had to pay $300 a year, namely, to become subscribers, if they wished to enjoy the privileges enabling them to distribute the catalogs to their retail customers, on the exclusive area basis, and to enjoy the various non-catalog privileges. Considering the relatively small amount of the fee and of the total of all the fees, $7,000 in 1962, and bearing in mind the exclusive territory arrangement for each subscriber distributing catalogs, as well as the non-catalog privileges, the fee begins to look more like membership dues in a perhaps exclusive club, if not merely part of a legal facade. All the facts herein amply demonstrate the enormous benefits derived from this so-called fee paid by the subscribers. Moreover, apart from the size of the fee it seems fairly clear that so far as the fee is concerned, and the ensuing privileges, the non-stockholder jobbers and the stockholder jobbers were on a par.

So far as the benefit from the advertising payments is concerned, it is true that only the stockholder jobbers can be said in some sense to have received them or the money benefit thereof, *i.e.*, indirectly in the form of dividends. However, the hearing examiner has concluded that the truly direct and primary benefit from the payments was, even for the stockholder, not so much the money profit therefrom, as the support and maintenance of the whole catalog facility. This catalog setup was for the benefit of all subscribers, both stockholders and non-stockholders. That, apparently, is the theory propounded with a variety of details by the complaint counsel, and the hearing examiner accepts it, at least in the generalized form here indicated.

The uniqueness of the status of the subscriber, whether non-stockholder or stockholder, is demonstrated by the fact that only one subscriber was designated for a particular trading area. The jobber selected and no other had the privilege of distributing catalogs in the area, to his retailers. In this respect again, the non-stockholder jobber was on an absolute par with the stockholder jobber. Moreover, judging by the record, the manufacturers themselves made no distinction between stockholder jobbers and non-stockholder jobbers and the manufacturers did not know who were stockholders or who were not stockholders. Nor, apparently, did they care for the purposes of this toy program. What they were interested in were the names of the firms associated with the catalog, irrespective of whether they were stockholders or not. This information would enable them to determine the value that they were getting for dollars spent in advertising in the catalog.

Non-stockholder subscribers were not merely innocent bystanders in the affairs of the catalog company, but, as stated above, had an equal right to vote with the stockholder jobbers as to which particular toys of an advertising manufacturer would be accepted for illustrated advertising. The advertising contracts indicate that this right was reserved for the "participating distributors", and this legal result was not changed because an insistent advertiser might on occasion in effect overrule the vote.

Moreover, the gathering together each year of the subscribers in New York City for the Toy Show, and for the purposes of voting, not only put the non-stockholders on a par with the stockholders in connection with the paramount privilege of voting, but, in the hearing examiner's opinion, tended to put them in the same position as stockholders in respect to knowledge or notice as to the nature of advertising payments and their non-availability on proportionally equal terms to competing jobbers, *i.e.*, even if payments of some kind were available through other catalogs.

Furthermore, the hearing examiner cannot close his eyes to the fact that during the Toy Show there were many informal opportunities—in various catalog offices, hotel lobbies and cocktail lounges, for instance—for jobbers to get all the "low-down." It is not very conceivable that a respondent non-stockholder jobber, one of the elite jobbers having an exclusive territory for distribution of the catalogs, and having a voting privilege on par with that of a stockholder subscriber, would not, by attending the Toy Show, have sufficient knowledge or notice, reasonably comparable to that of a stockholder jobber, to be chargeable with having knowingly induced any discriminatory payments from the manufacturers, as charged herein. This is so even assuming that the jobber would not have had such knowledge or notice prior to attending the Toy Show as an ordinary business man knowing what advertising payments would be for in a program of this kind.

Accordingly, there seems to be no reason why, if a Sec. 5 order may properly issue against stockholder jobbers, it may not properly issue against the respondent non-stockholder jobbers here.

* * * * * * *

It is true that there is no proof in this case as to five of the respondent jobbers that they attended any of the ATD voting meetings in New York City or the Toy Show generally. The five are Tampa, V. & A., Acme, Northern Specialty, and Sawyer-Barker, and as to the first two there may also be a failure of proof as to whether they were even subscribers. Accordingly, on the reasoning adopted here no order may be issued against these five in this case.

Contrariwise, there were four respondent jobbers—Stanley, Oakland, Buckeye, and Sann—who did attend the annual meetings and vote, and thus were in New York during the Toy Show, but as to each of whom respondents contend there was insufficient proof of an unfavored competitor in the area concerned, although the hearing examiner is inclined to regard the contention as substantial only in respect to two of them, Buckeye and Sann, and upholds it only in respect to Buckeye.

As to all four of them, however, including Buckeye, the hearing examiner holds that, irrespective of the sufficiency of proof as to unfavored competitor, they were liable with the other respondent jobbers as to whom there was clear proof of unfavored competitors in their respective areas. They were directly linked, by attendance and voting together, with the violations on the part of said respondents as to whom there was such proof. They must be deemed to have known or to have been on notice that said respondents, or at least some of them, would in all probability have unfavored competitors in their respective areas, and also that stockholder respondents would be in the same situation and otherwise engaged in violation of Sec. 5 as charged herein.

These respondent jobbers who claim there is no proof as to unfavored competitors had the requisite knowledge or notice by having attended the voting meetings and the Toy Show. They assisted, and knowingly assisted, in bringing about such violations by the others. In the examiner's opinion such jobber activity, involving direct collaboration with other jobber violators, comes within the purview of the general language "unfair methods of competition" used in Sec. 5.

Thus, the hearing examiner regards attendance at the voting meetings and the Toy Show as a crucial signpost and finds as follows:

1. If a respondent jobber did not attend the vote, the jobber will not be found to have knowingly induced nor will any other issue against the jobber.

2. If the respondent jobber did attend and vote, the jobber will be found to have knowingly induced, in connection with the violation on the part of the other respondents, and an order will issue against the jobber, even though there has been no proof of an unfavored competitor.

* * * * * * *

Thus the hearing examiner holds that respondent non-stockholder jobbers, or at least most of them, have violated Sec. 5, as charged in the complaint.

As to respondent Stanley Toy & Novelty Company, Inc., the examiner finds that it was a stockholder, in the catalog company, and

therefore more clearly in violation, perhaps, than non-stockholder respondents. However, the violation is still proved, of course, if it was a non-stockholder.

Individual Respondents

There remains for consideration the disposition to be made as to the three respondent individuals, that is, individuals other than those doing business under partnership or trade names. These individuals were officers or employees of other respondents, and the real question is whether they should be held liable in their individual capacities.

As to respondent N. Irwin Shapiro, he was variously president and executive director and was the dominant spirit of respondent catalog company, the collaborating activities of which must be regarded as in violation of Sec. 5. In the hearing examiner's opinion, he is clearly liable in his individual capacity, apart from any representative capacity. Any possible doubt as to whether an order should issue against him individually is removed by reason of his present connection with the new toy catalog company of his own, particularly because of the holding herein extending Sec. 5 liability so as to apply even to non-stockholder jobbers and thus predicating liability on the particular facts rather than emphasizing a single factor such as ownership of stock.

As to respondent Harold Bortz, there is some doubt as to his individual liability. However, he not only served as a director of the catalog company, but was on the executive committee. Admittedly he actively participated in catalog matters, even though it is denied that he participated in internal financial matters of the catalog company. It is strange for him to claim that he was a "dummy" in respect to the catalog activities he admits. His present connection with N. Irwin Shapiro in the latter's new catalog company adds a conclusive reason for individual liability on his part, *i.e.*, on the issue of likelihood of engaging in other violations.

Respondent Stanley P. Shapiro was a stockholder and principal of Stanley Toy and Novelty Company, which has not contested at the hearings herein. Apparently he now owns, or claims to own, all of Stanley Toy's former stockholdings in the catalog company. He was a director of the catalog company as Stanley's representative. There seems to be no impressive reason why the order herein should not run individually against him as well as the two others, particularly since the order will be limited to catalog or similar activities.

Scope of Order

It is not believed that the facts and circumstances warrant the issuance of a very broad order against respondents found herein to have violated Sec. 5.

The practice of toy advertising as attacked in the present complaint is by its nature a more or less public affair, and it has been indulged in openly and aboveboard, for over thirty years without complaint from any Government agency until less than three years ago even at this late date.

Legislative history shows that Sec. 2(d) was aimed primarily at under-the-table allowances and secret rebates. Furthermore, the utilization of Sec. 5 to reach buyers who induce Sec. 2(d) violations has been a fairly recent development.

Actually, therefore, toy catalog advertising of the kind typified in this case has represented an uncertain area of law for the applicability of Sec. 2(d) to manufacturers or of Sec. 5 to jobbers inducing Sec. 2(d) violations.

It is difficult to think of the respondent jobbers here as having deliberately flouted the law, or even the spirit of the law. The law is designed to enforce substantially equal treatment of customer competitors, and the availability of other catalogs to them is at least some substantial indication of possible equality in a popular sense, even though insufficient under the law, on any facts proved herein, to sustain the contentions of respondents.

It is not believed, under the facts and circumstances in this case at least, involving a doubtful area of the law, that the respondent here should be subject to a broad order merely because they have actively contested the imposition of any order, instead of consenting or stipulating.

Moreover, it is highly doubtful that the respondent jobbers now under consideration will repeat their violations. Leading toy manufacturers, including the four used to help prove the present case, are subject to orders not to make these discriminatory payments for advertisements in catalogs or similar publications. Furthermore, it is well known that they are pulling out of catalog advertising and perhaps printed advertising generally, in favor of television advertising.

It may also be noted that the orders sanctioned and issued by the Commission against the manufacturers are definitely narrow, rather than broad. Although these orders were based on only very general facts, as stipulated by the manufacturers, nothing in the rather full hearings in the present case reveals to the hearing examiner facts calling for a broad order against the jobbers.

A narrow order was issued by this hearing examiner against the stockholder jobbers in *Santa's Playthings*, also after full hearings, the order following very closely the one issued by the Commission against the manufacturers. Consistency demands, therefore, that the order to be issued herein against the non-stockholder jobbers should be no

broader. Actually, it might at least be argued that non-stockholder jobbers are entitled to a narrow order even more than stockholder jobbers, if only because of the unsettled question as to whether non-stockholders are properly liable.

The above reasoning also applies in effect to the three respondents N. Irwin Shapiro, Harold Bortz, and Stanley P. Shapiro. Although the first two are appropriately named in the order herein because, among other things, of their being engaged in a new catalog company, it may appropriately be noted here that this new company does seem to have been organized with the idea of eliminating jobber control in a bona fide attempt to comply with the spirit and mandates of the law.

The cases in which the Commission, without dissent, issued a narrow order against toy manufacturers are *In the Matter of Transogram, Inc.*, D. 7978, and fifteen [3] other cases consolidated therewith, decision dated September 19, 1962 [61 F.T.C. 629].

The opinion states 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.

FINDINGS OF FACT

The following numbered paragraphs constitute the Findings of Fact herein. In the main they follow the proposed findings of complaint counsel, including paragraph numbering. However, there are various changes, mostly by way of addition, reflecting respondents' exceptions thereto and respondents' proposed findings. Conclusions also are appended.

Failure to find a fact as proposed does not necessarily mean that it is not true. Except as may have been found above and as found in these Findings of Fact all proposed findings are disallowed.

The Respondents Here Involved:

1. Respondent ATD Catalogs, 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 10, New York (erroneously alleged in the complaint to be 1133 Broadway, New York 10, New York).

2. Respondent N. Irwin Shapiro, an individual, was President of ATD Catalogs, Inc., from July, 1958, through January, 1961. Said respondent was a Director and Chairman of the Executive Committee of said corporation from July, 1958, through September, 1959. Said

[3] Most of them initially decided by this hearing examiner.

respondent was Executive Director of said corporation from October, 1959, through January, 1961.

During the years 1959 and 1960, respondent N. Irwin Shapiro actively participated in the day-to-day management of ATD Catalogs, Inc. He attended all meetings held in those years of the directors, stockholders, Executive Committee and subscribers of ATD Catalogs, Inc., and he presided at substantially all of such meetings.

Originally, he was a principal and stockholder of respondent Stanley Toy & Novelty Company, which was a stockholder of ATD Catalogs, Inc. Either in 1958 or 1960 (respondents' proof as to 1958 is not clear) Stanley Toy transferred its ATD stock to said N. Irwin Shapiro, respondent Stanley P. Shapiro, and J. D. Shapiro, apparently all Stanley Toy stockholder principals. Respondents' proof is that eventually all this ATD stock was transferred to Stanley P. Shapiro. Respondent N. Irwin Shapiro served ATD on a salary basis and received no fees as Director.

In 1961 respondent formed his own toy catalog company, which still operates, which is claimed to be subject to no jobber control.

3. Respondent Harold Bortz, an individual, was a Director of ATD Catalogs, Inc., from July, 1958, through January, 1961. During said period, said respondent was also a member of the Executive Committee of said corporation.

During the time when he was a Director and member of the Executive Committee of ATD Catalogs, Inc., respondent Harold Bortz attended all regularly scheduled meetings of the Board of Directors, all meetings of the Executive Committee, and all meetings of the subscribers of ATD Catalogs, Inc. At such meetings, said respondent participated in discussions and voted.

Said respondent was Director and Executive Committee member of said catalog company as representative of respondent Morris Paper Company, a stockholder jobber not contesting at the hearings herein and of which he was an employee. The amount of his fees as director of the catalog company was deducted from his salary from this jobber. He was not active with the catalog company on other than strictly catalog matters. He was never an ATD stockholder.

4. Respondent Stanley P. Shapiro, an individual, was a Director of ATD Catalogs, Inc., from October, 1959, through January, 1961.

During the period when he was a Director of ATD Catalogs, Inc., said respondent attended all regularly scheduled meetings of the Board of Directors and all meetings of the subscribers of ATD Catalogs, Inc. At such meetings, he participated in discussions and voted.

As aforestated, the proof is that all the ATD stock of respondent Stanley Toy came to be transferred to him and he shared in ATD profits.

Also stated above, Stanley P. Shapiro was a principal and stockholder of Stanley Toy.

5. Respondent *Acme Premium Supply Corporation* 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 2201 Washington Avenue, St. Louis 3, Missouri.

6. Respondent *The Buckeye Paper & Specialties Company* 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 1102–06 Summit Street, Toledo, Ohio.

The Buckeye Paper and Specialties Company is engaged in the business of selling toy products at wholesale to customers located throughout the city of Toledo, Ohio, and in a 75-mile radius from said city.

During the years 1959 and 1960, said respondent purchased all of the products illustrated in the catalogs published by ATD Catalogs, Inc., during such years directly from the manufacturers of such products, including Transogram Company, Inc., Ideal Toy Corporation, Remco Industries, Inc., and Emenee Industries, Inc.

7. Respondent *Hilb & Co., Inc.*, is a corporation organized and doing business under the laws of the State of Colorado, with its principal office and place of business located at 1700 Lawrence Street, Denver, Colorado.

Hilb & Co. is engaged in the business of selling toy products at wholesale to customers, including variety stores, dry goods stores, toy stores, department stores, and stationery stores, located throughout the city of Denver, Colorado, and throughout a 20-mile radius of the city of Denver.

During the years 1959 and 1960, said respondent purchased substantially all of the products illustrated in the catalogs published by ATD Catalogs, Inc., during such years directly from the manufacturers of such products, including Transogram Company, Inc., Ideal Toy Corporation, Remco Industries, Inc., and Emenee Industries, Inc.

8. Respondents Nathan Goldman and James C. Abro are copartners doing business as *Nathan Goldman and Company*, with their principal office and place of business located at 1820 Industrial Street, Los Angeles, California. Respondent Lane Kaufman is deceased.

Nathan Goldman and Company is engaged in the business of selling toy products at wholesale to customers including baby shops, toy shops, department stores, discount houses, hardware stores, and drug stores, located throughout the city of Los Angeles, California and in other parts of the State of California.

During the years 1959 and 1960, said respondents purchased substantially all of the products listed in the catalogs published by ATD Catalogs, Inc., during such years directly from the manufacturers of such products, including Transogram Company, Inc., Ideal Toy Corporation, Remco Industries, Inc., and Emenee Industries, Inc.

9. Respondents Lewis O. Buchwach, Herbert J. Shapiro, Robert M. Bodner and Herbert L. Bodner are copartners, doing business as *Northern Specialty-Sales Company*, with their principal office and place of business located at 1507 N.W. Pettygrove Street, Portland, Oregon.

10. Respondents William S. Davis, George P. Alton, Leon H. Davis, Natalie Sosnick, Frances Goldfarb and Lila Schmulowitz are copartners, doing business as *Oakland Toy Company* (cited in the complaint as Oakland Stationery and Toy Company), with their principal office and place of business located at 8941 San Leandro Street, Oakland, California. Oakland Toy Company is the successor-partnership to Oakland Stationery and Toy Company which consisted of the above-named individuals plus respondent Henry Charles Alton, which was engaged in the same business and which was located at the same address.

Oakland Toy Company is engaged in the business of selling toy products at wholesale to retail outlets, including variety stores, toy specialty stores, discount houses, department stores, and drug stores, located throughout the central California area, including throughout the cities of San Francisco and Oakland, California.

During the years 1959 and 1960, said respondents purchased substantially all of the products listed in the catalogs published by ATD Catalogs, Inc., during said years directly from the manufacturers of such products, including Transogram Company, Inc., Ideal Toy Corporation, Remco Industries, Inc., and Emenee Industries, Inc.

11. Respondent Reuben Sann is an individual doing business as *Sann Sales Company*, with his principal office and place of business located at 703 N. 21st Avenue, Phoenix, Arizona.

Sann Sales Company is engaged in the business of selling toy products at wholesale to retail outlets, including toy stores, department stores, drug stores, variety stores, and general stores, throughout the State of Arizona, including throughout the city of Phoenix.

During the years 1959 and 1960, said respondent purchased substantially all of the products illustrated in the catalogs published by ADT Catalogs, Inc., during such years directly from the manufacturers of such products including Transogram Company, Inc., Ideal Toy Corporation, Remco Industries, Inc., and Emenee Industries, Inc.

12. Respondent *Sawyer-Barker Co.* is a corporation organized and doing business under the laws of the State of Maine, with its principal office and place of business located at 120 Center Street, Portland, Maine.

13. Respondent *Stanley Toy & Novelty Company, Incorporated*, is a corporation organized and doing business under the laws of the State of Virginia, with its principal office and place of business located at 415 West Broad Street, Richmond, Virginia.

Stanley Toy & Novelty Company, Incorporated, is engaged in the business of selling toys at wholesale to large and small retail outlets including toy stores, variety stores, gasoline stations, and super-markets, located throughout Virginia and North Carolina, including throughout the city of Richmond.

In July, 1958, Stanley Toy & Novelty Company, Incorporated, acquired 50 shares of the outstanding capital stock of ATD Catalogs, Inc. Upon securing the agreement of the other ATD stockholders, this stock was transferred to Stanley Shapiro, Julian Shapiro and N. Irwin Shapiro as joint tenants. These three persons were the owners of the outstanding stock of Stanley Toy & Novelty Company, Incorporated, and were permitted to acquire the ATD stock because of their interest in the toy wholesaling business through Stanley Toy & Novelty. Throughout the period from July, 1958, through January, 1961, one of the directors of ATD Catalogs, Inc., was an officer of Stanley Toy & Novelty Company, Inc.

During the years 1959 and 1960, said respondent purchased substantially all of the products illustrated in the catalogs published by ATD Catalogs, Inc., during such years directly from the manufacturers of such products, including Transogram Company, Inc., Ideal Toy Corporation, Remco Industries, Inc., and Emenee Industries, Inc.

14. Respondent *Tampa Novelty Company, Inc.*, is a corporation organized and doing business under the laws of the State of Florida, with its principal office and place of business located at 501 S. Florida Avenue, Tampa, Florida.

15. Respondents Harold F. Anderson and Frank L. Beeler are copartners, doing business as *V. & A. Distributing Co.*, with their principal office and place of business located at Bridger, Montana.

16. Each of the respondent firms referred to above (5 through 15) subscribed to the catalogs published by ATD Catalogs, Inc., in the years 1959 or 1960, except Tampa (#14) and V. & A. (#15).—The word "subscribed", as here used includes the purchase of the catalogs and the utilization of other services performed by ATD for its subscribers, discussed in detail below. However, the record is not clear

as to the actual degree or extent of the utilization of these services by any particular respondent firm.

Each of the said firms with the same exceptions, Tampa and V. & A., purchased the toy products sold by each from many suppliers located throughout the United States and caused such products to be transported from various states in the United States to other states for distribution and sale by said firms to retail outlets.

Each of said firms with the same exceptions, Tampa and V. & A., and with the additional exceptions of Acme (#5), Northern Specialty (#9), and Sawyer-Barker (#12), attended some or all of the meetings of the ATD subscribers which were held in the years 1959 and 1960. Each of such firms in attendance at said meetings participated in the discussions and voting which were conducted therein. Said attending and voting firms also attended and participated in the Toy Show during the holding of which each year, in New York City, the voting meetings were held. Attendance of firms was, of course, by representatives.

The Operations of ATD Catalogs, Inc.

17. During the years 1959 and 1960, ATD Catalogs, Inc., published catalogs devoted exclusively to the illustration and listing of toy, game and hobby products of 175–200 manufacturers. ATD published three types of catalogs, a consumer catalog, a so-called "tabloid," or leaflet, and a dealer catalog. Each of these three types was sold by ATD to its subscribers. The consumer catalogs and the "tabloids" were resold at cost by the ATD subscribers, each of which was a wholesaler, to their respective retailer customers who distributed such catalogs free of charge to their own customers. The consumer catalogs which were resold by the ATD subscribers to their respective retailer customers were delivered to such customers with the name and address of the customer imprinted on the cover. When more than one retailer customer in the same area purchased ATD catalogs, catalogs were furnished with different covers but with indentical internal contents. It is the consumer catalogs with which this case is mostly concerned.

18. ATD Catalogs, Inc., also performed other services and furnished other materials for the use and benefit of its subscribers and their respective retailer customers.

Services performed by ATD Catalogs, Inc., for the use and benefit of its subscribers included (a) the sending of frequent bulletins from the ATD office in New York City containing advance information with respect to future ATD programs, (b) the sending of frequent bulletins from the ATD office in New York City containing market

information, particularly with respect to new products, new prices, manufacturers' addresses and ordering procedures, (c) the contacting of manufacturers directly by ATD officials on behalf of the ATD subscribers in order to obtain services, particularly with respect to delivery during periods of short supply, and prices and terms of sale. ATD officials also contacted manufacturers directly on behalf of individual subscribers, upon the request of such subscribers, to negotiate for the adjustment of disputes between such subscribers and various manufacturers. Each of the services described above was considered, by the ATD officials and the ATD subscribers, to be an important function of the ATD office in New York City.

Services performed by ATD Catalogs, Inc., for the use and benefit of the retailer customers of its subscribers included (a) the furnishing of display materials, (b) the furnishing of store identification materials, (identifying the retail store as a purchaser of ATD catalogs), (c) the furnishing of sales aids, merchandising advice and personnel training material through the use of a monthly newsletter. These services and materials were considered by the ATD officials and the ATD subscribers to be of material assistance to the retailer customers of the ATD subscribers in the conduct of their respective businesses.

Services performed by ATD Catalogs, Inc., for the use and benefit of its subscribers and their respective customers included the conduct of a contest for children in which the first prize was a trip to Disneyland and in which various toy items were also awarded as prizes. To enter this contest, the child was required to go in person to a retail store which had purchased ATD catalogs. Prizes were distributed through such retail stores and were awarded personally by such stores to the recipients. This contest was formulated and intended as a promotion for the stores which had purchased ATD catalogs. The ATD officials and the ATD subscribers believed that this contest was of substantial value to such retail stores in promoting their sales of toy, game and hobby products.

Other services provided by ATD Catalogs, Inc., for the use and benefit of its subscribers and their respective retailer customers included the use, on the covers of the ATD consumer catalogs, of pictures of nationally prominent personalities and characters of the entertainment world, including Captain Kangaroo, Shari Lewis and her puppets, and the Walt Disney characters. ATD had successfully negotiated for the exclusive right to associate its toy catalogs with such personalities and characters. This association was considered by the officials of ATD Catalogs, Inc., and by ATD's subscribers to be an important part of the over-all promotional program of ATD Catalogs, Inc.

As stated above, however, the record is not clear as to the precise extent of utilization of these services by any particular respondent firm utilizing them.

19. Only wholesalers of toys were permitted to become subscribers of ATD Catalogs, Inc. Only one wholesaler in each territory was permitted to become an ATD subscriber. Subscribers were charged a subscription fee of $300 per year, and were required to pay for catalogs at the rate of $57 per thousand (consumer catalogs). At the beginning of each year, each subscriber was asked to advance $1000 to ATD Catalogs, Inc., to be applied against future purchases of catalogs, the unused portion being refunded at the end of the year. In addition, there were charges for the "tabloid" catalogs, dealer catalogs, retailers' display materials, and the mailing to retailers of the monthly newsletter published by ATD Catalogs, Inc.

The Mechanics of Publishing the Catalogs of ATD

20. The products of 175–200 manufacturers of toy, game and hobby products were listed and illustrated in the consumer catalogs published by ATD Catalogs, Inc., during the years 1959 and 1960. In 1959, there were approximately 313 toy, game and hobby products listed in the consumer catalog published by ATD Catalogs, Inc., of which approximately 246 were illustrated. In 1960, there were approximately 323 toy, game and hobby products listed in the consumer catalog published by ATD Catalogs, Inc., of which approximately 235 were illustrated.

21. Each manufacturer of products listed in the catalogs published by ATD Catalogs, Inc., made a payment to ATD Catalogs, Inc., in consideration for such listing. The amounts of such payments were determined by the number of products of the respective manufacturer which were illustrated in said catalogs. In each of the years 1959 and 1960, the rates for listing in the ATD catalogs were as follows: $750 per item illustrated in the consumer catalog, $375 per item illustrated in the "tabloid," and $50 per item illustrated in the dealer catalog; the one-line listing of items similar to those illustrated was done by ATD Catalogs, Inc., without charge to the manufacturer; listings in the dealer catalog were given without charge for those items illustrated in the consumer catalogs. The illustration rates as stated above were uniformly adhered to by ATD Catalogs, Inc., and had been unilaterally fixed and determined by ATD Catalogs, Inc. Payment for such illustration was made by the manufacturers whose products were advertised pursuant to written contracts which were drafted and submitted by ATD Catalogs, Inc. It is the illustrated advertisements with which this case is mostly concerned.

22. Shortly before March of each year, during the period from July, 1958, through January, 1961, meetings were held between officials of ATD Catalogs, Inc., and various manufacturers of toy, game and hobby products, at which times illustration of toy, game and hobby products in the catalogs published by ATD Catalogs, Inc., was discussed. At these meetings, those manufacturers who indicated a willingness to pay the charges imposed by ATD Catalogs, Inc., for illustration in the ATD catalogs were given the opportunity to state the number of items for which they were willing to pay such charges, the specific items for which they were willing to pay such charges, and the types of items for which they were willing to pay such charges. Some manufacturers did specify particular items; some manufacturers did specify particular types or categories of products; some manufacturers only stated the maximum number of items for which they would be willing to pay the charges imposed by ATD.

23. Following the meetings referred to in Finding #22, supra, officials of ATD Catalogs, Inc., prepared a list of those manufacturers who had expressed a willingness to pay the charges imposed by ATD for illustration of products in the ATD catalogs. Special notations were made on such list indicating which manufacturers had presented to ATD Catalogs, Inc., signed contracts requiring the payment at the rates referred to in Finding #21, supra, to ATD Catalogs, Inc., of sums of money by such manufacturers, in consideration for illustration of the products of such manufacturers in the ATD catalogs.

During the Toy Show, which is held in New York City in March of each year, four to six meetings were held in 1959 and in 1960 which were attended by representatives of the ATD subscribers; ATD officials also were present. All ATD subscribers were notified of the time, date and place of such meetings prior to the opening of the Toy Show. Prior to the first of such meetings, each ATD subscriber was furnished with a copy of the aforesaid list.

24. In 1959 and in 1960, respondent N. Irwin Shapiro presided at the meetings described in Finding #23, supra. The products of the manufacturers on the list described in Finding #23, supra, were discussed by the representatives of the ATD subscribers in attendance. As the products of each manufacturer were discussed, respondent N. Irwin Shapiro informed the subscribers' representatives of any condition or limitation which the particular manufacturer may have placed, *i.e.*, on his expression of willingness to pay the charges which would be imposed by ATD Catalogs, Inc., for illustration of his products in the catalogs published by ATD Catalogs, Inc. This would involve the manufacturer's preference as to which of the manufacturer's products should be selected for illustrated advertising.

At the conclusion of each such discussion, a vote was taken. The purpose of such votes was to determine which products the ATD subscribers wished illustrated in the catalogs published by ATD Catalogs, Inc. In determining the results of such votes, the majority controlled. Each ATD subscriber, including stockholders and non-stockholders of ATD Catalogs, Inc., had one vote. The ATD officials present recorded the results of such voting.

Shortly after the adjournment of the last of the aforesaid meetings, officials of ATD Catalogs, Inc., sent to each ATD subscriber, including stockholders and non-stockholders of ATD Catalogs, Inc., a list containing the results of the voting conducted at such meetings. At approximately the same time, the manufacturers of the products which had been selected for inclusion in the ATD catalogs were notified of the particular products manufactured by them which had been selected.

The notification to such manufacturers was in the form of contracts to pay, at the rates described in Finding #21, supra, sums of money to ATD Catalogs, Inc., in consideration for inclusion of the products selected in the ATD catalogs. These contracts expressly stated that the selection had been made by representatives of the ATD subscribers. The aforesaid notices, or contracts, were sent to the various manufacturers by officials of ATD Catalogs, Inc., in strict accordance with the results of the voting described above.

25. Following receipt of the notification described in Finding #24, supra, in the years 1959 and 1960, manufacturers of products which had been selected for inclusion in the ATD catalogs requested the opportunity to confer with officials of ATD Catalogs, Inc., with reference to changes in the catalog listing contemplated. Such conferences were arranged whenever requested. There were about 20 to 25 requests for changes a year.

Among the changes requested at such conferences were (a) changes in manufacturer's stock number, (b) changes in listed price, (c) substitution of products, (d) deletion of products. Requests for substitution or deletion of products were made for various reasons including (a) the product originally selected had been removed from production, (b) the product originally selected had been shown in projected form and would not be ready in final form in time for inclusion, (c) in the manufacturer's judgment, inclusion of the product selected would be inappropriate. The officials of ATD attempted to comply with the wishes of the manufacturer as expressed at the aforesaid conferences whenever possible, and usually did so. Changes made as a result of the aforesaid conferences were the only changes made in plans for the ATD catalogs as determined at the meetings described in Finding #23,

supra. As such changes were made, the ATD subscribers were notified thereof by memorandum.

In addition to the negotiations with manufacturers described above and in Finding #22, supra, officials of ATD Catalogs, Inc., also had the duties of determining the most appropriate printer for the catalogs to be published by ATD and of working with the printer selected in developing the format of such catalogs.

Other manufacturers also made payments to ATD Catalogs, Inc., in 1959 and 1960, for the same purpose. In 1959, the total of such payments to ATD Catalogs, Inc., was $197,372.50. In 1960, the total of such payments to ATD Catalogs, Inc., was $282,320.62.

All of the payments referred to above were on the basis of the rates noted in Finding #21, supra.

At no time were any of these four companies made aware, by ATD or by any of its subscribers, that some of the ATD subscribers owned stock in ATD and some did not.

During the years 1959 and 1960, it was common knowledge throughout the toy industry that manufacturers made payments to companies publishing jobber-sponsored consumer toy catalogs in consideration for the illustration of their products in such catalogs.

During the years 1959 and 1960, ATD Catalogs, Inc., referred, in correspondence with its subscribers, to the manufacturers who paid sums of money in consideration for the illustration of their products in the ATD catalogs as "our participating manufacturers."

At no time during the period from January 1, 1959, through December 31, 1960, did Transogram Company, Remco Industries, Emenee Industries, or Ideal Toy Corporation, or anyone acting for or in behalf of any of them, inform ATD Catalogs, Inc., or any of its officers, employees, agents or representatives, or, presumably, any of the ATD subscribers or any of their respective officers, employees, agents and representatives that (a) payments or allowances for promoting or advertising their respective products were offered or granted on proportionally equal terms to all of their respective wholesaler customers which were located in the same cities, or (b) payments of allowances for promoting or advertising their respective products were offered or granted on proportionally equal terms to all of their respective wholesaler customers who competed with each other.

At no time during the period from January 1, 1959, through December 31, 1960, did ATD Catalogs, Inc., or any of its officers, employees, agents or representatives, or, presumably, any of its subscribers or their respective officers, employees, agents and representatives inquire of Transogram Company, Remco Industries, Emenee Industries or Ideal Toy Corporation, or anyone acting for or in behalf of any of

them, whether payments or allowances for promoting or advertising their respective products were offered or granted on proportionally equal terms (a) to all of their respective wholesaler customers located in the same cities, or (b) to all of their respective wholesaler customers who competed with each other.

Relationships and Transactions Between ATD Catalogs, Inc., Its Subscribers, Its Subscribers' Customers, Its Subscribers' Suppliers

26. In 1959 and 1960, Emenee Industries, Inc., paid to ATD Catalogs, Inc., $1,615.00 and $2,775.00, respectively, in consideration for the illustration and listing of Emenee products in catalogs published by ATD.

In 1959 and 1960, Ideal Toy Corporation paid to ATD Catalogs, Inc., $11,595.00 and $9,775.00, respectively, in consideration for the illustration and listing of Ideal products in catalogs published by ATD.

In 1959 and 1960, Remco Industries, Inc., paid to ATD Catalogs, Inc., $2,430.00 and $3,225.00, respectively, in consideration for the illustration and listing of Remco products in catalogs published by ATD.

In 1959 and 1960, Transogram Company, Inc., paid to ATD Catalogs, Inc., $6,240.00 and $8,075.00, respectively, in consideration for the illustration and listing of Transogram products in catalogs published by ATD.

27. ATD Catalogs, Inc., in purpose and in effect functioned as the central office of a geographically diverse and otherwise unaffiliated group of wholesalers of toy, game and hobby products. It was the intent of the officials of ATD Catalogs, Inc., and of each of the ATD subscribers, that, through the medium of ATD Catalogs, Inc., the ATD subscribers would operate as an affiliated group, not only for the distribution of ATD toy catalogs but for making available to each subscriber the various services referred to in Finding #18, supra, connected with purchasing, marketing, inventory control, advertising, public relations, promotional programs, and related activities. ATD Catalogs, Inc., was identified as a group to each manufacturer with which ATD Catalogs, Inc., had dealings. ATD Catalogs, Inc., was identified as a group to each retailer customer of each ATD subscriber. The identity of the ATD subscribers, as a group, was publicized to the entire toy, game and hobby trade, including the manufacturers and retailers described above.

During the period from January 1, 1960, through December 31, 1960, the total operating expense of ATD Catalogs, Inc., was $382,159.02 (including $225,495.55, the cost of printing the ATD catalogs); total

revenue for that year was $506,006.63 (including $285,700.00 received from maunfacturers for illustration of their products in the ATD catalogs, $6,900 from subscribers as subscription fees, and $123,406.63 derived from sales of the ATD catalogs). During that year, ATD Catalogs, Inc., earned an over-all profit of $123,847.61.

During the period from July 1, 1958, through December 31, 1959, the total operating expense of ATD Catalogs, Inc., was $372,620.62 (including $212,279.51, the cost of printing the catalog); total revenue for that period was $441,741.87 (including $199,522.50 received from manufacturers for illustration of their products in the ATD catalogs, $5,400 from subscribers as subscription fees, and $236,819.37 derived from sales of the ATD catalogs).

In connection with the entry "directors fees" on CX 9D and CX 10E, these sums were paid to the directors of ATD Catalogs, Inc., as compensation for their services as directors of ATD Catalogs, Inc. The entry "meeting expenses" in CX 9D and CX 10E refers to money paid by ATD Catalogs, Inc., to the members of its Board of Directors as reimbursement for transportation expenses and as per diem allowance in lieu of reimbursement for living expenses incurred in travelling to New York City to attend the Toy Show and the various ATD meetings.

As a result of its operations during the period from September 1, 1959, through August 31, 1960, ATD Catalogs, Inc., declared a dividend on its common stock of $260.00 per share. Each holder of 50 shares of ATD common stock received $13,000.

Relationships Between Other Wholesalers, Various Manufacturers, the ATD Subscribers

28. *Southern Distributors, Inc.*, is a corporation, with its principal office and place of business located at 1414 East Franklin Street, Richmond, Virginia. Southern Distributors is engaged in the business of selling toy products and school supplies at wholesale to retailers located throughout the City of Richmond and within a 30-mile radius of said city. It was a competitor of respondent *Stanley Toy & Novelty Co., Inc.*

In each of the years 1959 and 1960, Southern Distributors purchased directly from Emenee Industries, Inc., Transogram Company, Inc., and Remco Industries, Inc., toy products, some of which were illustrated in the consumer catalogs published in such years by ATD Catalogs, Inc.

During the years 1959 and 1960, neither Remco Industries, Emenee Industries nor Transogram Company, nor anyone acting for them or in their behalf, paid or offered to pay Southern Distributors sums of

money or anything of value as an allowance or in consideration for promoting or advertising their respective products.

In each of the years 1959 and 1960, Southern Distributors purchased "Santa's Playland" catalogs from Paradies & Sons. During those years, Southern Distributors did not own any of the outstanding capital stock of Paradies & Sons but did participate in the selection of toy items to be included in such catalogs.

In the year 1959, Transogram Company paid Paradies & Sons $1,400 in consideration for the illustration of Transogram products in the "Santa's Playland" consumer toy catalogs. Such sum was computed at the rate of $350 per item. Transogram Company made no such payment to Paradies & Sons in 1960.

In the year 1959, Remco Industries paid Paradies & Sons $1,000 in consideration for the illustration of three Remco products in the "Santa's Playland" consumer toy catalog published in that year by Paradies & Sons. In the year 1960, Remco Industries paid Paradies & Sons $300 in consideration for the illustration of one Remco product in the 1960 "Santa's Playland" catalog.

In the year 1959, Emenee Industries paid Paradies & Sons $800 in consideration for the illustration of Emenee products in the "Santa's Playland" consumer toy catalog published in that year by Paradies & Sons. In the year 1960, Emenee paid Paradies & Sons $900 in consideration for substantially similar services.

In the year 1960, Ideal Toy Corporation made a payment to Paradies & Sons in consideration for the illustration of Ideal products in the "Santa's Playland" consumer toy catalog published in that year by Paradies & Sons; such payment was computed at the rate of $300 per item illustrated. In the year 1959, Ideal Toy Corporation made no such payment to Paradies & Sons.

It is the finding of the hearing examiner that, on the proof in this case, Southern Distributors, Inc., was an unfavored competitor of respondent Stanley Toy & Novelty Co., Inc., even though it was part of the Santa's Playland catalog group.

29. *A. H. Jamra Company*, located at 201 South St. Claire Street, Toledo, Ohio, is engaged in the business of selling tobacco, confectionery and sundries including toys in the City of Toledo.

In each of the years 1959 and 1960, A. H. Jamra Company purchased directly from Ideal Toy Corporation and Remco Industries, Inc., toy products, some of which—or at least items under the same general name as those illustrated—were illustrated in the consumer catalogs published by ATD Catalogs, Inc., during each of those years.

During the year 1959, A. H. Jamra Company purchased directly from Emenee Industries, Inc., toy products, some of which—or at least

items under the same general name as those illustrated—were illustrated in consumer catalogs published in that year by ATD Catalogs, Inc. In the year 1960, A. H. Jamra purchased some toy products directly from Emenee Industries, Inc.

During the period from January 1, 1959, through December 31, 1960, neither Ideal Toy Corporation, Remco Industries, Inc., nor Emenee Industries, Inc., nor anyone acting for them or in their behalf, paid or offered to pay A. H. Jamra Company sums of money or anything of value as an allowance or in consideration for promoting or advertising their respective products.

Complaint counsel contends that said Jamra Company was an unfavored competitor of respondent *Buckeye Company*. However, its business was 85% cigarettes, and 15% numerous sundries, of which toys were only a part. More importantly, toys represented a discount operation in which Jamra was a retailer. There is no proof of any other unfavored competitor of Buckeye.

30. *Cliff-Weil, Inc.*, is a corporation, with its principal office and place of business located at 1317 East Main Street, Richmond, Virginia. Cliff-Weil is engaged in the business of selling tobacco, candy, confections and sundry items including toys at wholesale to retailers located throughout a five-state area, including throughout the City of Richmond.

In each of the years 1959, and 1960, Cliff-Weil purchased directly from Remco Industries, Inc., toy products, some of which were illustrated in the consumer catalogs published in such years by ATD Catalogs, Inc. In the year 1959, Cliff-Weil purchased directly from Ideal Toy Corporation and Emenee Industries, Inc., toy products, some of which were illustrated in the consumer catalogs published in that year by ATD Catalogs, Inc. In the year 1960, Cliff-Weil purchased toy products directly from Emenee Industries.

During the period from January 1, 1959, through December 31, 1960, neither Ideal Toy Corporation, Remco Industries, Inc., nor Emenee Industries, Inc., nor anyone acting for them or in their behalf, paid or offered to pay Cliff-Weil, Inc., sums of money or anything of value as an allowance or in consideration for promoting or advertising their respective products.

Complaint counsel contends that Cliff-Weil was a competitor of respondent *Stanley Toy*. Technically it perhaps was. But it dealt mostly in smoking articles and many sundry items. Its gross in toys was about a quarter of one per cent. Moreover, on the issue of whether it was unfavored, the fact is that it produced its own catalog, although still technically unfavored.

31. *Hobby Jobbers, Inc.*, is a corporation, with its principal office and place of business located at 999 Lawrence, Denver, Colorado. Hobby Jobbers is engaged in the business of selling hobby products at wholesale to retailers located throughout a four-state area, including throughout the City of Denver.

In 1959 and 1960 this jobber purchased one or more products illustrated in the ATD catalog, but not manufactured by any of the four manufacturers considered in this case. In the years 1959 and 1960, Hobby Jobbers purchased directly from Ideal Toy Corporation certain hobby products manufactured by such manufacturer.

During the period from January 1, 1959, through December 31, 1960, neither Ideal Toy Corporation nor anyone acting for it or in its behalf, paid or offered to pay Hobby Jobbers, Inc., sums of money or anything of value as an allowance or in consideration for promoting or advertising the products of Ideal Toy Corporation.

Complaint counsel contends that this jobber was an unfavored competitor of respondent *Hilb & Co., Inc.*

On the proof in this case it is questionable whether it was a competitor of Hilb.

However, if it was a competitor the fact that as a hobby jobber it had no need for the comprehensive toy catalogs is not deemed relevant on the issue as to whether it was "unfavored."

32. Victor Gruber is an individual doing business as *Victor Gruber Toy Company*, with his principal office and place of business located at 1632 Arapahoe, Denver, Colorado. Mr. Gruber is engaged in the business of selling toy products at wholesale to retail outlets including variety stores, drug stores, department stores, and toy stores, located throughout a two-state area including throughout the City of Denver. This jobber was an unfavored competitor of respondent *Hilb & Co., Inc.*

In each of the years 1959 and 1960, Victor Gruber purchased directly from Transogram Company toy products, some of which were illustrated in the consumer catalogs published by ATD Catalogs, Inc., during those years. In the year 1960, Victor Gruber purchased directly from Emenee Industries, Inc., and Remco Industries, Inc., toy products, some of which were illustrated in the consumer catalog published by ATD Catalogs, Inc., during that year. In the year 1959, Mr. Gruber purchased certain toy products directly from Remco Industries, Inc.

During the period from January 1, 1959, through December 31, 1960, neither Transogram Company, Remco Industries, Inc., nor Emenee Industries, Inc., nor anyone acting for or in behalf of any of them, paid or offered to pay Victor Gruber sums of money or anything

of value as an allowance or in consideration for promoting or advertising their respective products.

The evidence indicates that this jobber had no interest in a toy catalog, but this is not deemed relevant on the issue of whether it was an "unfavored" competitor.

33. *J. S. Fishback Company* is a corporation, with its principal office and place of business located at 1742 Arapahoe Street, Denver, Colorado. J. S. Fishback Company is engaged in the business of selling fishing tackle and toys at wholesale to retail outlets located throughout parts of a four-state area, including throughout the City of Denver. This jobber was an unfavored competitor of respondent *Hilb & Co., Inc.*

In each of the years 1959 and 1960, J. S. Fishback Company purchased directly from Ideal Toy Corporation toy products, some of which were illustrated in the consumer catalogs published in those years by ATD Catalogs, Inc.

During the period from January 1, 1959, through December 31, 1960, neither Ideal Toy Corporation nor anyone acting for or in its behalf paid or offered to pay J. S. Fishback Company sums of money or anything of value as an allowance or in consideration for promoting or advertising the products of Ideal Toy Corporation.

The fact that this jobber believed it could do its business just as satisfactorily without the aid of a catalog, as with it, is not deemed relevant on the issue of whether it was an "unfavored" competitor.

34. *Davis Brothers, Inc.*, is a corporation, with its principal office and place of business located in the City of Denver, Colorado. Davis Brothers is engaged in the business of selling liquor, drugs and drug sundries including toys at wholesale to retail outlets located throughout a multi-state area, including throughout the City of Denver.

In each of the years 1959 and 1960, Davis Brothers purchased directly from Ideal Toy Corporation toy products, some of which were illustrated in the consumer catalogs published by ATD Catalogs, Inc., during those years.

During the period from January 1, 1959, through December 31, 1960, neither Ideal Toy Corporation nor anyone acting for or in its behalf paid or offered to pay Davis Brothers, Inc., sums of money or anything of value as an allowance or in consideration for promoting or advertising the products of Ideal Toy Corporation.

After weighing the evidence this jobber is found to be an unfavored competitor of respondent *Hilb & Co., Inc.*

The fact that it used a toy catalog in 1957 or 1958 but discontinued it because it was unprofitable is not deemed relevant on the issue of whether it was an "unfavored" competitor.

35. Roy Van Santen is an individual doing business as *Americana Toy & Novelty Company* with his principal office and place of business located at 5369 West Pico, Los Angeles, California. Mr. Van Santen is engaged in the business of selling toy products at wholesale to retail outlets including toy stores and department stores located throughout the City of Los Angeles.

In each of the years 1959 and 1960, Mr. Van Santen purchased directly from Remco Industries, Inc., toy products, some of which were illustrated in the catalogs published by ATD Catalogs, Inc., during those years.

During the period from January 1, 1959, through December 31, 1960, neither Remco Industries, Inc., nor anyone acting for or in its behalf paid or offered to pay Roy Van Santen sums of money or anything of value as an allowance or in consideration for promoting or advertising the products of Remco Industries, Inc.

Complaint counsel contends that this jobber was an unfavored competitor of respondent *Goldman and Company.*

This jobber was a one man part-time operation and its purchases of listed items infinitesimal, but technically it may qualify as a competitor.

The fact that this jobber, by reason of its small size and scope, was not interested in a catalog is not deemed relevant on the issue of whether it was "unfavored."

36. *Cline-Stewart Company* is a corporation, with its principal office and place of business located at 376 South Los Angeles Street, Los Angeles, California. Cline-Stewart is engaged in the business of selling toy products at wholesale to retail outlets including drug stores, variety stores, liquor stores, and toy stores, located throughout the Cities of Los Angeles, San Bernadino, Santa Barbara, and San Diego. This jobber was an unfavored competitor of respondent *Nathan Goldman and Company.*

In each of the years 1959 and 1960, Cline-Stewart Company purchased directly from Transogram Company, Inc., Remco Industries, Inc., Emenee Industries, Inc., and Ideal Toy Corporation toy products, some of which were illustrated in the consumer catalogs published by ATD Catalogs, Inc., during those years.

During the period from January 1, 1959, through December 31, 1960, neither Transogram Company, Remco Industries, Emenee Industries, nor Ideal Toy Corporation, nor anyone acting for or in behalf of any of them, paid or offered to pay Cline-Stewart Company sums of money or anything of value as an allowance or in consideration for promoting or advertising their respective products.

The fact that this jobber gave up the idea of joining a catalog group in 1955 or 1956 (it was told that only one member or distributor was allowed for each area) does not remove it from the category of being an "unfavored" competitor.

37. *Maxwell Model Distributors* is a corporation, with its principal office and place of business located at 3000 South Hill, Los Angeles, California. Maxwell Model is engaged in the business of selling model and hobby products at wholesale to retail outlets, including hobby stores, toy stores, sporting goods stores, variety stores and drug stores, located throughout the Western States, including throughout the City of Los Angeles.

In each of the years 1959 and 1960, Maxwell Model Distributors purchased some of the products which were illustrated in the catalogs published in those years by ATD Catalogs, Inc., but there appears to be no proof that any of these illustrated products were manufactured by the four manufacturers considered in this case. In each of the years 1959 and 1960, Maxwell Model Distributors purchased hobby products directly from Ideal Toy Corporation.

During the period from January 1, 1959, through December 31, 1960, neither Ideal Toy Corporation nor anyone acting for or in its behalf paid or offered to pay Maxwell Model Distributors sums of money or anything of value as an allowance or in consideration for promoting or advertising Ideal products.

Complaint counsel contends that this jobber is a competitor of respondent *Nathan Goldman and Company*, but it is found that this has not been proved.

38. Mrs. Margaret Silton and her husband are copartners doing business as *Belco Sales Company*, with their principal office and place of business located at 651 North Fairfax, Los Angeles, California. Mr. and Mrs. Silton are engaged in the business of selling toy products at wholesale to retail outlets including toy shops located throughout the City of Los Angeles. This jobber was an unfavored competitor of *Nathan Goldman and Company*.

In each of the years 1959 and 1960, Mr. and Mrs. Silton purchased directly from Transogram Company, Inc., Remco Industries, Inc., Emenee Industries, Inc., and Ideal Toy Corporation toy products, some of which were illustrated in the consumer catalogs published by ATD Catalogs, Inc., during such years.

During the period from January 1, 1959, through December 31, 1960, neither Transogram Company, Remco Industries, Emenee Industries, nor Ideal Toy Corporation, nor anyone acting for or in behalf of any of them paid or offered to pay Mr. and Mrs. Silton sums of money or

anything of value as an allowance or in consideration for promoting or advertising their respective products.

The fact that this jobber found no need for a toy catalog is not deemed relevant here on the issue whether it was "unfavored" as a competitor.

39. *L. A. Whitee, Inc.*, is a corporation, with its principal office and place of business located at 1039 South Los Angeles Street, Los Angeles, California. L. A. Whitee is engaged in the business of selling toy products at wholesale to retail outlets, including variety stores, supermarkets and toy stores, located from Santa Barbara to San Diego, including throughout the City of Los Angeles. This jobber was an unfavored competitor of *Nathan Goldman and Company.*

In each of the years 1959 and 1960, L. A. Whitee, Inc., purchased directly from Transogram Company, Inc., and Ideal Toy Corporation toy products, some of which were illustrated in the catalogs published by ATD Catalogs, Inc., during those years.

During the period from January 1, 1959, through December 31, 1960, neither Transogram Company nor Ideal Toy Corporation, nor anyone acting for or in behalf of either of them, paid or offered to pay L. A. Whitee, Inc., sums of money or anything of value as an allowance or in consideration for promoting or advertising their respective products.

This jobber dealt mostly in low-end merchandise pricewise, but it did buy toy products illustrated in the ATD catalogs and manufactured by two of the manufacturers considered herein. Technically it may be considered a competitor.

The fact that because of its low-price items it was not interested in joining a catalog group is deemed irrelevant on the issue whether it was "unfavored."

40. Henry L. Bruner is an individual doing business as *Bruner Wholesale Company*, with his principal office and place of business located in the City of Phoenix, Arizona. Mr. Bruner is engaged in the business of selling a complete line of variety store merchandise including toys to retail variety stores located throughout the State of Arizona, including throughout the City of Phoenix.

In the year 1960, Henry L. Bruner purchased directly from Ideal Toy Corporation toy products, some of which were illustrated in the consumer catalogs published by ATD Catalogs, Inc., during that year.

During the period from January 1, 1959, through December 31, 1960, neither Ideal Toy Corporation nor anyone acting for or in its behalf paid or offered to pay Henry L. Bruner sums of money or anything of value as an allowance or in consideration for promoting or advertising Ideal products.

Complaint counsel contends that this jobber is an unfavored competitor of respondent *Sann Sales Co.*

It was shown that this jobber bought from Ideal the Colonel McCauley Space Helmet, which is illustrated in the ATD catalog. Moreover, it was conceded that respondent Sann purchased "substantially all" the items in the catalog. The hearing examiner regards this as a presumptive showing that the jobber was in competition with Sann in respect to the Space Helmet. Any contention to the contrary should have been voiced at the hearing.

Technically, Bruner appears to qualify as a competitor of Sann, however minute the competition may have been.

Bruner's lack of interest in joining a catalog group is irrelevant on the issue whether he was "unfavored" as a competitor.

41. *Golden Gate Toy Company* is a corporation, with its principal office and place of business located at 822 Mission Street, San Francisco, California. Golden Gate is engaged in the business of selling toy products at wholesale to retail outlets, including department stores, toy stores, and variety stores, located throughout several California cities, including throughout the Cities of San Francisco and Oakland. This jobber was an unfavored competitor of respondent *Oakland Stationery Co.*

In each of the years 1959 and 1960, Golden Gate Toy Company purchased directly from Transogram Company, Inc., Remco Industries, Inc., Emenee Industries, Inc., and Ideal Toy Corporation toy products, some of which were illustrated in the consumer catalogs published by ATD Catalogs, Inc., during those years.

During the period from January 1, 1959, through December 31, 1960, neither Transogram Company, Remco Industries, Emenee Industries nor Ideal Toy Corporation, nor anyone acting for or in behalf of any of them, paid or offered to pay Golden Gate Toy Company sums of money or anything of value as an allowance or in consideration for promoting or advertising their respective products.

The fact that this jobber had available, through an accommodation by respondent Oakland Stationery Co., the ATD catalog (there was a blood relationship between the companies) is irrelevant on the issue whether the jobber was "unfavored" as a competitor, *i.e.*, by the manufacturers.

CONCLUSIONS

The following paragraphs include some conclusions based on the above facts and stated in a somewhat cryptic fashion:

42. Under Finding #16 it appears that there is no proof that any of the following five respondent jobbers attended the ATD voting

meetings, so as to have sufficient knowledge or notice to sustain a Sec. 5 violation as expounded in Legal Observations, supra:

Acme	(Finding #5)
Northern Specialty	(Finding #9)
V. & A	(Finding #15)
Sawyer-Barker	(Finding #12)
Tampa	(Finding #14)

As to both Tampa and V. & A. there also appears to be no proof that either of these jobbers was a subscriber or was engaged in commerce. (See complaint counsel's Proposed Finding #16, omitting any reference to #13 and #15 referring to these two jobbers.)

43. There appears to be sufficient proof of a Sec. 5 violation against six of the respondent jobbers now being considered, including, however, one jobber, Buckeye, as to whom there is no proof of an unfavored competitor, such proof not being regarded as necessary on reasoning contained in the Legal Observations, supra. These respondents as to whom there is sufficient proof are:

Stanley
Hilb
Goldman
Oakland
Sann
Buckeye (no unfavored competitor)

44. The proof as to unfavored competitors of said respondent jobbers is as follows:

Stanley (Richmond).—One unfavored competitor (Southern Distributors). A possible second unfavored competitor (Cliff-Weill)-competition, however, being minute.

Hilb (Denver).—Three unfavored competitors (Gruber, Fishback, and Davis)—the fifth proposal (Hobby Jobbers) not being found to be an unfavored competitor.

Goldman (Los Angeles).—Four unfavored competitors (Americana, Cline-Stewart, Belco, and L. A. Whitee)—the fifth proposal (Maxwell) not being found to be an unfavored competitor.

Oakland (San Francisco).—One unfavored competitor (Golden Gate).

Sann (Phoenix).—One unfavored competitor (Bruner), found, although the evidence is fairly thin.

Buckeye (Toledo).—No proof of any unfavored competitor, the only one proposed (Jamra) not being found to be such.

45. As indicated in the Legal Observations, the hearing examiner does not regard the absence of proof (Buckeye) of an unfavored competitor in an area, or the weakness of such proof (Sann, for instance)

as necessarily vital or relevant under a Sec. 5 charge in an implied Sec. 2(d) situation where the respondent jobbers concerned, as here, collaborated with others whom they should have known were probably engaged in a Sec. 5 violation.

46. The entire operation of ATD Catalogs, Inc., was conducted in commerce, as "commerce" is defined in the Federal Trade Commission Act. Each of the ATD subscribers, 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 ATD Catalogs, Inc., was engaged in commerce as "commerce" is defined in the Federal Trade Commission Act.[4]

47. Each of the respondents named in the order annexed to this decision knew or should have known, during the period from January 1, 1959, through December 31, 1960, that:

(a) Transogram Company, Inc., Remco Industries, Inc., Emenee Industries, Inc., and Ideal Toy Corporation had made and were making payments to ATD Catalogs, Inc., in consideration for illustration of their respective products in the catalogs published during that period by ATD Catalogs, Inc.;

(b) that said manufacturers had been and were being induced to make such payments by ATD Catalogs, Inc., acting in conjunction with each ATD subscriber;

(c) that such payments inured to the benefit of each ATD stockholder;

(d) that such payments inured to the benefit of each ATD subscriber;

(e) that payments or allowances for promoting or advertising the products of said manufacturers were not available to or for the benefit of all other customers of said manufacturers who competed with the ATD stockholders and with the ATD subscribers in the sale of the products of said manufacturers, including the products which were illustrated in the catalogs published by ATD Catalogs, Inc.

48. During the period from July 1958 through June 1961 respondent N. Irwin Shapiro, Harold Bortz, and Stanley P. Shapiro, acting singly and in conjunction with the other officers and directors of ATD Catalogs, Inc., directed, formulated and controlled the acts and policies of ATD Catalogs, Inc.

49. The activities described in Findings ##17–19, supra, constituted the over-all "ATD program." Each element of this "ATD program", in itself and in conjunction with the other elements of the program, was of material assistance to the retailer customers of the

[4] See, however, Finding #42 as to Tampa and V. & A.

ATD subscribers in connection with sales by such retailers of the toy, game and hobby products illustrated and listed in the catalogs published by ATD Catalogs, Inc. This "ATD program" was of material assistance to each of the ATD subscribers in connection with their sales of toy, game and hobby products to retailers, not only because of the natural tendency and inclination of their retailer customers to purchase items sold through use of the ATD catalogs from the ATD subscriber through whom the catalogs had been supplied, but also because the opportunity for the retailer to participate in the various benefits of this program constituted an effective weapon with respect to general competition among wholesalers of toy, game and hobby products.

The "ATD program" was of material value and assistance to the ATD subscribers and their retailer customers with respect to all elements of wholesale and retail sales operations, including purchasing, inventory control, display, advertising, promotion, public relations, competitive pricing, personnel training, and sales—insofar as these services were available or actually used.

50. The ATD subscribers who attended the meetings held in New York City during the Toy Show selected the toy, game and hobby products which were subsequently illustrated and listed in the catalogs published by ATD Catalogs, Inc.

51. Publication of the ATD catalogs was one overall operation in which ATD and its subscribers participated, each performing a part of the function required for the successful completion of the whole operation.

52. The manufacturers who paid sums of money to ATD Catalogs, Inc., in consideration for the illustration and listing of their products in the ATD catalogs, did so for the purpose and with the effect of increasing their sales to the ATD subscribers of the items so illustrated and so listed.

53. Each manufacturer who paid sums of money to ATD Catalogs, Inc., in consideration for the illustration and listing of the manufacturer's products in the catalogs published by ATD Catalogs, Inc., was induced to do so by said ATD and by all of the ATD subscribers, acting singly, in conjunction with each other, and in conjunction with ATD Catalogs, Inc., except subscribers who did not actually vote.

54. The sums of money paid by various manufacturers to ATD, in consideration for illustration and listing of their respective products in the catalogs published by said ATD, inured to the benefit of each ATD subscriber which owned ATD stock, including Stanley Toy and Novelty Company, Incorporated, and Morris Paper Company.

55. The sums of money paid by various manufacturers to ATD in consideration for the illustration and listing of their respective products in the ATD catalogs inured to the benefit of each ATD subscriber.

CONCLUSIONS OF LAW

1. The respondents named in the order set forth below have engaged in acts and practices which constitute unfair methods of competition within the meaning of Sec. 5 of the Federal Trade Commission Act, and in violation thereof. The allegations of the complaint have been proved in all substantial respects.

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

3. Entry of the order set forth below is appropriate and necessary, as against each of the respondents named therein, and all others referred to, in order to safeguard adequately the public interest in this proceeding.

ORDER

This order to cease and desist is directed against the following named respondents and other persons described or indicated:

Corporations, Officers, and Directors

Stanley Toy & Novelty Company, Incorporated
Hilb & Co., Inc.
The Buckeye Paper & Specialties Company
and the officers and directors of each of the aforesaid corporations.

Individuals, Partnerships, etc.

Nathan Goldman and James C. Abro, copartners doing business as Nathan Goldman and Company
William S. Davis, George P. Alton, Leon H. Davis, Natalie Sosnick, Frances Goldfarb, and Lila Schmulowitz, doing business as Oakland Toy Company
Reuben Sann, doing business as Sann Sales Company
N. Irwin Shapiro, individually and as an officer and director of ATD Catalogs, Inc.
Stanley P. Shapiro and Harold Bortz, individually and as directors of ATD Catalogs, Inc.

Agents, Employees, etc.

This order to cease and desist is also 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 each of the foregoing respondents named—whether (1) a jobber having an unfavored competitor, (2) a jobber having no unfavored competitor, or (3) an individual formerly with ATD Catalogs, Inc.—and (4) any other person hereinbefore described or indicated, such as agent, employee, officer, or director, 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 or receiving a payment or payments in any respect as to which the following by its wording may apply to the particular respondent or other person concerned and hereby ordered to cease and desist:

Inducing the 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, 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.

Opinion of the Commission

APRIL 3, 1964

By MacIntyre, *Commissioner:*

This is one of the proceedings charging a toy catalog publishing corporation and its affiliated wholesalers with violating Section 5 of the Federal Trade Commission Act by knowingly inducing or receiving from manufacturers payments for catalog advertising not available on proportionally equal terms to competitors of the catalog group's jobber members.

The majority of the respondents named in the complaint have entered consent agreements and such agreements dispose of this proceeding with respect to the respondent publishing concern, ATD Catalogs, Inc. (ATD), and certain of the individuals and corporations named in the complaint including with one possible exception all of the respondent wholesalers holding stock in ATD. The Commission's decision at this time, however, for the reasons set forth in the margin will be confined to those respondents who elected to litigate this proceeding.[1]

We are concerned in this opinion with the exceptions to the initial decision filed by certain respondent wholesalers who subscribed to ATD but who did not own stock in the respondent publishing corporation, as well as with the exceptions of three individual respondents who were officers or directors of ATD and who contend that they should not be held by Commission order in their individual capacities. Complaint counsel on the other hand, takes exception to the hearing examiner's failure to place certain of respondent wholesalers under the order, and objects further that the scope of the order entered below is unduly narrow.

The principal question presented is whether the subscribing jobbers not holding stock in ATD can be charged with a knowing inducement or receipt of advertising payments not available to their competitors on proportionally equal terms. The hearing examiner's findings on this issue will be vacated. The record fails to support a finding that those wholesalers, who had no stock interest in ATD and whose officers or principals did not concurrently hold positions in the publishing corporation, were acquainted with the internal administration of ATD or with the details of the latter's negotiations leading up to the payments under consideration. These jobbers therefore are not chargeable with actual or constructive knowledge that the advertising payments induced or received by ATD were unavailable on proportionally equal terms to their competitors. In taking this position we of course do not posit a general rule that a jobber's lack of stock or other proprietary interest in a toy catalog publishing concern necessarily precludes a finding of a knowing inducement or receipt of discriminatory payments for services on the part of such a wholesaler violative of

[1] By order issued July 30, 1962, the Commission granted the motion of those respondents executing consent agreements to stay the effective date of the initial decision filed June 13, 1962, accepting such agreements, pending final decision by the Commission in Docket Nos. 7971, 8231, 8240, 8255 and 8259. The agreements uniformly provide that in the event the Commission issued cease and desist orders more limited in scope in those proceedings than the order provided for in the consent agreements in this case, then the Bureau of Restraint of Trade would join in a motion by respondents for modification of the order. The consent agreements in this proceeding will be dealt with in a separate order.

Section 5 of the Federal Trade Commission Act. This is a determination which must be made on the facts of each case.

The questions remaining for resolution at this time are whether the individual respondents, N. Irwin Shapiro, Harold Bortz and Stanley Shapiro should be restricted in their individual capacities by Commission order and further whether Stanley Toy & Novelty Company Inc. was in fact a stockholder of ATD in the relevant period.

Before making a determination of these issues, we note that the record documents the fact that ATD and its officers and directors knowingly induced or received discriminatory advertising payments from toy manufacturers.[2] Respondents' contention that the hearing examiner erred in finding the payments under consideration were violative of Section 2(d) of the Robinson-Patman Act, as amended is also without merit.[3]

The exceptions of the Messrs. Shapiro and Bortz to that portion of the order directed to them, seems based primarily on their contention that they had in effect abandoned the practices which are the subject of this proceeding. Harold Bortz in addition contends that his activities as a director of ATD, were largely of a technical nature for which he should not be held personally responsible.

The hearing examiner found and the record supports the finding that respondent N. Irwin Shapiro, who held variously the office of president and executive director of ATD, was the dominant spirit of that concern and responsible for its day to day operations. The fact that during part of the relevant period he may have been strictly on a salary basis and held office at the pleasure of ATD has no bearing on his individual responsibility for the unfair trade practices chal-

[2] E.g., the record shows that advertising payments for catalogs or other suitable alternative services were not made available to competitors of certain ATD members. The record also shows that the rates of advertising payments were uniformly and unilaterally fixed and determined by respondent ATD, and further that catalog advertising was not suitable for all toy wholesalers. On the basis of these facts, the Commission may infer that ATD and its officers knew or should have known that the payments in question were not available to competitors of the subscribing wholesalers. See our Opinion in *Individualized Catalogues Inc., et al.* (Docket 7971) and *Santa's Playthings, Inc., et al.* (Docket 8259) [p. 61 herein].

[3] Citing *The Nuarc Co.* v. *Federal Trade Commission,* 316 F. 2d 576 (7th Cir. 1963), respondents argue that the requisite benefit to ATD's wholesalers is not documented by the record. In fact, the record shows that the respondent wholesalers distributed the consumer catalogs to retailers at cost. It may be inferred that these catalogs complemented their sales efforts to retailers; otherwise there would have been no point in subscribing to the catalog. Moreover, the record contains testimony to the effect that such distribution gave respondents an "in" with retail dealers purchasing the catalogs. We find, therefore, that the payments in question were within the scope of Section 2(d). See our Opinion in *Individualized Catalogues Inc., et al.* and *Santa's Playthings, Inc., et al., supra* [p. 61 herein]. Respondent's further related argument that complaint counsel has the burden of showing that the meeting of competition defense was not applicable to the manufacturers' payments challenged herein, is also rejected. *Individualized Catalogues Inc., et al.* and *Santa's Playthings, Inc., et al., supra.*

lenged by the complaint. There is no reason for disturbing the examiner's findings on this point.

Stanley Shapiro was a principal and stockholder of respondent Stanley Toy & Novelty Company, Richmond, Va., and held office as a director of ATD in the period October 1959 through January 1961. During that time he participated in the formulation and control of the acts and practices of ATD. Some time subsequent to August 1958 all ATD stock held by Stanley Toy & Novelty Company was transferred to him and he shared in ATD's profits. The more important of ATD's functions centered on and in the main were confined to the practices challenged in the complaint; accordingly Stanley Shapiro as an active director of ATD cannot escape personal responsibility for the activities of the respondent publishing concern in the absence of countervailing evidence not presented by the record in his case.

The third individual respondent with whom we are concerned here, Harold Bortz, was on ATD's board of directors as a representative of Morris Paper Company, a respondent wholesaler one of whose principals held stock in the publishing corporation. This respondent argues that he received no salary from ATD, did not retain the director's fees, and had no stock in the publishing concern but acted solely in behalf of his employer the Morris Paper Company; he further contends that his participation in ATD was purely technical, concerning only production of the catalog. His employment as a toy buyer with Morris Paper Company terminated in January 1961, and he severed his relations with ATD in the following month. The hearing examiner found that during his tenure as director and member of the executive committee of ATD, this respondent attended all regularly scheduled meetings of the board of directors and of the executive committee, as well as of the subscribers of ATD, and further that he participated in such meetings and voted although he was not active with respect to ATD in other than strictly catalog matters (Initial Decision page 93). However certain testimony indicates that Bortz in his official capacity with ATD was a figurehead for one of the principals of Morris Paper Company who held stock in the respondent publishing corporation. Under the circumstances dismissal of the complaint as to this respondent in his individual capacity is warranted.

The fact that, subsequent to severing his relationship with ATD, Harold Bortz, became active in N. Irwin Shapiro's Irwin Consumer Catalogs in which he also owns a 50% stock interest does not alone constitute adequate reason for placing him under order individually. We disagree with the examiner on this point since the record at this time will not permit an informed determination of the prospective legality or illegality of that catalog venture.

Respondents direct our attention to the fact that both of the Shapiros and Harold Bortz severed their connection with ATD in 1961.[4] Even assuming arguendo that the unfair trade practices were discontinued by the three individuals subsequent to the issuance of the complaint, dismissal of this proceeding as to any of these respondents would not be justified on that ground alone. Discontinuance of the challenged practices at that juncture does not constitute proof that the unlawful practices have been surely stopped nor a showing of unusual circumstances warranting dismissal.

The record is not altogether clear as to whether Stanley Toy & Novelty Company held stock in ATD in the relevant period and the point at which such stock became vested in its principals. This wholesaler, irrespective of whether or not it held stock in ATD, could be charged with constructive knowledge of the discriminatory nature of the payments received by the publishing corporation by virtue of the fact that it was represented by its principals on the board of respondent publishing corporation. Nevertheless in this instance holding its principal Stanley Shapiro individually seems sufficient to prevent recurrence of similar violations by that wholesaler. The complaint against Stanley Toy & Novelty Company, accordingly, will be dismissed.

Complaint counsel's exceptions to the breadth of the order are denied. See our Opinion and Decision in *Individualized Catalogues Inc., et al* (Docket 7971) and *Santa's Playthings, Inc., et al* (Docket 8259) [pp. 48, 61, 70, 225, 245 herein]. The exceptions of respondents except as herein noted are denied and the initial decision, as modified and supplemented to conform to the views expressed in this opinion, are adopted as the decision of the Commission.

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

Decision of the Commission and Order to File Report of Compliance Relating to Those Respondents Agreeing to Consent Orders

APRIL 3, 1964

On June 13, 1962, the hearing examiner filed his initial decision in this matter, accepting the consent agreements negotiated between complaint counsel and respondents. On July 27, 1962, the Commission placed the initial decision filed June 13, 1962, 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 com-

[4] Stanley Shapiro did not divest himself of his ATD stock until 1962 (Tr. 1030).

plaint. The parties to the consent agreements, however, agreed further that:

> "In the event the Commission should issue any cease and desist order in Dockets 7971, 8231, 8240, 8255, 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."

Accordingly,

It is ordered, That the initial decision of the examiner filed June 13, 1962, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents ATD Catalogs, Inc., Hoffman Sales & Distributing Co., Inc., The Jay Mills Company, M&A Wares Co., Inc., M. C. Miner, Inc., West Texas Wholesale of Amarillo, Inc., Jay Mills, George Kahn, Jack R. Hoffman, Marvin C. Miner, Ernest H. Coonrod, James V. Cariddi, Harold L. Cantor, Willard S. Cantor, Lee Hildebrand, Sidney Hildebrand, Jacob Hildebrand, The S&M Company, Morris Paper Company, and Southland Distributors, Inc., 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 the respondents named in the order filed with the initial decision of June 13, 1962, 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, *Santa's Playthings, Inc., et al.*, Docket No. 8259, *ATD Catalogs, Inc., et al.*, Docket No. 8100, and *Billy & Ruth Promotion, Inc., et al.*, Docket No. 8240. Such a request will stay the time within which respondents would otherwise be required to file a report of compliance.

Commissioner Reilly not participating.

Decision of the Commission and Order to File Report of Compliance

APRIL 3, 1964

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 December 19, 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 denied in part and granted in part the exceptions of respondents and having denied the exceptions of counsel in support of the complaint; and

The Commission having further determined that the initial decision and order entered by the hearing examiner should be modified:

It is ordered, That the initial decision be modified by striking therefrom the third full paragraph on page 82 beginning with the phrase "Of the eleven respondent jobbers" and ending with the phrase "did not appear at the hearings," and that section beginning on page 86 with the phrase "Bearing in mind" and ending on page 90 with the phrase "if it was a non stockholder," and that section on page 90 beginning with the phrase "As to respondent Harold Bortz" and ending on page 90 with the phrase "engaging in other violations."

It is further ordered, That the initial decision be modified by striking therefrom the sentence on page 90 "Apparently he now owns, or claims to own, all of Stanley Toy's former stockholdings in the catalog company" and substituting therefor:

"Some time subsequent to August 1958, he acquired all of Stanley Toy's stock in the catalog company."

It is further ordered, That the initial decision be modified by striking therefrom that section beginning on page 90 with the phrase "It is not believed" and ending on page 92 with the phrase "with the spirit and mandates of the law."; that section entitled "Conclusions" beginning on page 112 with the phrase "The following paragraphs include some conclusions" and ending on page 116 with the phrase "each ATD subscriber", and Paragraphs 1 and 3 of the "CONCLUSIONS OF LAW" on page 116.

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 N. Irwin Shapiro and Stanley P. Shapiro, individually, and their agents, representatives or employees, directly or through any corporate 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 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, distrib-

uted, 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 as to respondents, Harold Bortz, individually and as a director of ATD, Acme Premium Supply Corporation, a corporation, The Buckeye Paper & Specialties Company, a corporation, Hilb & Co., Inc., a corporation, Nathan Goldman, Lane Kaufman and James C. Abro, doing business as Nathan Goldman and Company, Lewis O. Buchwach, Herbert J. Shapiro, Robert M. Bodner and Herbert L. Bodner, doing business as Northern Specialty-Sales Company, William S. Davis, George P. Alton, Leon H. Davis, Natalie Sosnick, Frances Goldfarb, Lila Schmulowitz and Henry Charles Alton, doing business as Oakland Stationery & Toy Co., Reuben Sann, doing business as Sann Sales Company, Sawyer-Barker Co., a corporation, Stanley Toy & Novelty Company, Incorporated, a corporation, Tampa Novelty Company, Inc., a corporation, and Harold F. Anderson and Frank L. Beeler, doing business as V. & A. Distributing 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 respondents N. Irwin Shapiro and Stanley P. Shapiro 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.

Order Modifying Consent Order of Respondent Morris Paper Company

JUNE 4, 1964

This matter is before the Commission on respondent Morris Paper Company's motion to modify its consent order in the light of the Com-

mission's decisions in *Individualized Catalogues, Inc., et al.*, Docket No. 7971; *Santa's Playthings, Inc., et al.*, Docket No. 8259; *ATD Catalogs, Inc., et al.*, Docket No. 8100; and *Billy & Ruth Promotion, Inc., et al.*, Docket No. 8240, pursuant to the authorization given by the Commission in its order of April 3, 1964 [p. 121 herein], in this proceeding, entitled "Decision of the Commission and Order To File Report of Compliance Relating to Those Respondents Agreeing to Consent Orders" and the answer of counsel in support of the complaint in partial opposition thereto. The Commission has determined that the request should be granted to the extent that it is consistent with the orders issued in the aforesaid litigated proceedings. Accordingly,

It is ordered, That the consent order issued against respondent Morris Paper Company be, and it hereby is, changed to read as follows:

It is ordered, That respondent Morris Paper Company, a corporation, its 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 respondent, as compensation or in consideration for any services or facilities consisting of advertising or other publicity furnished by or through respondent 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 respondent, 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 respondent knows or should know that such payment or consideration is not made available on proportionally equal terms to all other customers competing with said respondent in the distribution of such toy, game or hobby products.

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

Commissioner Reilly not participating.

Order Setting Aside Consent Order and Dismissing Complaint Against Respondent Southland Distributors, Inc.

JUNE 4, 1964

This matter has come before the Commission on the motion of respondent Southland Distributors, Inc., to set aside the consent order and to dismiss the complaint against it or, in the alternative, pursuant to the authorization in the Commission's order of April 3, 1964, to modify its consent order in the light of the Commission's decisions in *Individualized Catalogues, Inc., et al.*, Docket No. 7971; *Santa's Playthings, Inc., et al.*, Docket No. 8259; *ATD Catalogs, Inc., et al.*, Docket No. 8100; and *Billy & Ruth Promotion, Inc., et al.*, Docket No. 8240, and the answer of counsel supporting the complaint in partial opposition thereto.

Respondent bases the motion for dismissal on the following grounds:

1. The Commission's holding in the ATD decision:

> "* * * The record fails to support a finding that those wholesalers, who had no stock interest in ATD and whose officers or principals did not concurrently hold positions in the publishing corporation, were acquainted with the internal administration of ATD or with the details of the latter's negotiations leading up to the payments under consideration. These jobbers therefore are not chargeable with actual or constructive knowledge that the advertising payments induced or received by ATD were unavailable on proportionally equal terms to their competitors * * *."

2. Paragraph 2 of the consent agreement executed by respondent states that respondent owned no stock in ATD nor did any of its officers, directors, representatives or employees own any stock in ATD.

3. Paragraph 2 of the consent agreement also states respondent received no dividends from ATD.

4. Testimony that no representative of respondent, Southland Distributors, Inc., was ever a director, officer, or employee of ATD.

The Commission has determined that the facts stipulated in the consent agreement would have precluded the issuance of an order against respondent had it elected to contest this proceeding. See our decision in *ATD Catalogs, Inc.*, Docket No. 8100. The Commission has determined on the basis of the record as a whole that had the issue of knowledge been litigated as to this respondent, it is unlikely that the result would have been different than in the case of the nonstockholding jobbers involved in the litigated portion of this proceeding. Since there is no necessity for going outside the record as presently constituted to

reach that conclusion, the complaint against respondent Southland Distributors, Inc., will be dismissed. Accordingly,

It is ordered, That the consent order of respondent Southland Distributors, Inc. [dated April 3, 1964, p. 121 herein], be, and it hereby is, set aside and that the complaint as to the aforesaid respondent be, and it hereby is, dismissed.

Commissioner Reilly not participating.

Order Modifying Consent Order of Certain Respondents and Placing Consent Order in Suspense as to James V. Cariddi*

JUNE 29, 1964

On May 28, 1964, respondents ATD Catalogs, Inc., Lee Hildebrand, Jay Mills, George Kahn, Jack R. Hoffman, Harold L. Cantor, Ernest H. Coonrod, James V. Cariddi, Willard S. Cantor, Sidney Hildebrand, Jacob Hildebrand, Hoffman Sales & Distributing Co., Inc., The Jay Mills Company, M & A Wares Co., Inc., and West Texas Wholesale of Amarillo, Inc., filed a motion to modify their consent order in the light of the Commission's decisions in *Individualized Catalogues, Inc., et al.*, Docket No. 7971; *Santa's Playthings, Inc., et al.*, Docket No. 8259; *ATD Catalogs, Inc., et al.*, Docket No. 8100; and *Billy & Ruth Promotion, Inc., et al.*, Docket No. 8240, pursuant to the authorization given by the Commission in its order of April 3, 1964 [p. 121 herein]. Counsel supporting the complaint has filed an answer joining in the motion of these respondents to modify their consent order. The Commission has determined that the request should be granted except in the case of respondent James V. Cariddi.

Subsequently, on June 5, 1964, respondent James V. Cariddi, doing business as Cariddi Sales Company, filed a motion to set aside the consent order and dismiss the complaint as to him on the ground that he was not a stockholder of ATD Catalogs, Inc., and that none of his firm's officers, directors, or representatives held stock in ATD. Respondent further alleges he had no representative acting as a director, officer or employee of ATD. Relying on the dismissal of the complaint in the Commission's *ATD* decision, issued April 3, 1964, as to those respondents similarly situated, he requests that the consent order be set aside and the complaint dismissed as to him. Complaint counsel, on June 15, 1964, filed his answer in opposition to Cariddi's motion, on the ground that there is no record basis for the factual assertions made therein. Assuming that respondent's assertions are true, it would ap-

*The consent order was set aside and the complaint was dismissed as to James V. Cariddi on July 31, 1964.

pear that under the circumstances of this record the complaint would have been dismissed as to him had he chosen to litigate this proceeding. See our order in *Southland Distributors, Inc.*, issued June 4, 1964 [p. 126 herein]. The complaint and consent order, however, should not be dismissed merely on the basis of respondent's motion. Respondent will be given thirty days from the service of this order upon him to file a properly sworn affidavit setting forth the factual basis for his request. Complaint counsel will be given thirty days after the service of respondent's affidavit on him to advise the Commission whether he has reason to question any of the factual statements contained therein. In the meantime, respondent's motion will be kept on suspense. Cariddi's duty to comply with the terms of the cease and desist order will be suspended until further order of the Commission. Accordingly,

It is ordered, That the consent order issued against the aforesaid respondents, except in the case of James V. Cariddi, be, and it hereby is, changed to read as follows:

It is ordered, That respondents ATD Catalogs, Inc., Hoffman Sales & Distributing Co., Inc., The Jay Mills Company, M & A Wares Co., Inc., and West Texas Wholesale of Amarillo, Inc., corporations, their officers and directors, individual respondents Lee Hildebrand, Jay Mills, George Kahn, Jack R. Hoffman, Harold L. Cantor, Ernest H. Coonrod, Willard S. Cantor, Sidney Hildebrand, and Jacob Hildebrand, and their respective 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 the aforesaid respondents, ATD Catalogs, Inc., Hoffman Sales & Distributing Co., Inc., The Jay Mills Company, M & A Wares Co., Inc., West Texas Wholesale of Amarillo, Inc., Lee Hildebrand, Jay Mills, George Kahn, Jack R. Hoffman, Harold L. Cantor, Ernest H. Coonrod, Willard S. Cantor, Sidney Hildebrand, and Jacob Hildebrand, 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 within thirty (30) days of service of this order upon him respondent James V. Cariddi may file a properly sworn affidavit to substantiate the factual statements in his motion filed June 5, 1964, requesting that the consent order be set aside and the complaint dismissed as to him.

It is further ordered, That complaint counsel may, within thirty (30) days of the service of Cariddi's affidavit on him, advise the Commission whether he has any reason to question the factual content thereof.

It is further ordered, That enforcement of the cease and desist order as to respondent James V. Cariddi and his duty to comply therewith be, and it hereby is, suspended until further order of the Commission.

Commissioner Reilly not participating.

IN THE MATTER OF

SANTA'S OFFICIAL TOY PREVUE, INC., ET AL.

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

*Docket 8231. Complaint, Dec. 22, 1960—Decision, Apr. 3, 1964**

Consent order requiring a Philadelphia association of toy jobbers engaged in publishing and distributing annually to retail outlets throughout the United States catalogs illustrating toys, to cease inducing or receiving from toy suppliers payments for advertising in such catalogs furnished by respondents in connection with the sale of the suppliers' products, when they knew or should have known, that proportionally equal payments were not made available to all the suppliers' 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

*Reported as modified by order of Commission dated July 9, 1964.