to the misrepresentation of the operation of plants or offices in London, Paris, Rome and Canada, as more specifically set forth in Paragraph Seven of the complaint be, and the same hereby is dismissed.

It is further ordered, That Paragraph Five of the complaint be, and it hereby is, dismissed.

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

By the Commission, Commissioner Anderson not participating.

IN THE MATTER OF

ELYSÉE FABRICS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION, THE TEXTILE FIBER PRODUCTS IDENTIFICATION, AND THE WOOL PRODUCTS LABELING ACTS

Docket C-236. Complaint, Sept. 18, 1962—Decision, Sept. 18, 1962

Consent order requiring importers in Jamaica, N.Y., to cease violating the Textile Fiber Products Identification Act by labeling, invoicing, and advertising textile fiber products falsely as to the name or amount of constituent fibers, and by use of such misleading terms as "linen weave" and "silky"; failing to disclose on labels on textiles the true generic name of the fibers present, the percentage thereof, and the order of predominance by weight; failing to set forth in catalogs the true generic names of fibers in advertised fabrics, and using therein the name "leopard" or other fur bearing animal for textiles which were not fur products; and to cease violating the Wool Products Labeling Act by failing to disclose the true generic name of fibers present in wool fabrics.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Textile Fiber Products Identification Act and the Wool Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Elysée Fabrics, Inc., a corporation, and Gunther F. Ziegler, 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 Textile Fiber Products Identification Act and the Wool Products Labeling Act of 1939, 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 Elysée Fabrics, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Individual respondent Gunther F. Ziegler is vice-president of the corporate respondent and assists in formulating, directing and controlling the acts, practices and policies of the corporate respondent. Respondents are engaged in the importation of fabrics into the United States and in the retail sale of fabrics by mail and through its retail stores. The office and principal place of business of all respondents is located at 152–20 Rockaway Boulevard, Jamaica, N.Y.

PAR 2. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondents have been and are now engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation and causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported, and have caused to be transported, textile fiber products, which have been advertised and offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported, and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce", and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR 3. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the Rules and the Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products which were falsely and deceptively labeled, in that they were labled as "50% cotton, 18% artificial fiber, 2% nylon, 30% rayon" whereas, in truth and in fact, such textile fiber products contained substantially different amounts of fibers from those represented on the label.

Also among such misbranded textile fiber products, but not limited thereto, were textile fiber products which were falsely and deceptively advertised by means of "catalogs", sold and distributed by respondents throughout the United States, in that certain of said advertisements contained terms which represented, either directly or by implication, certain fibers as present in said products when such was not the case.

Among such terms, but not limited thereto, were the terms "linen weave" and "silky".

PAR. 4. Certain of said textile fiber products were further misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form as prescribed by the Rules and Regulations promulgated under said Acts.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products with labels which failed:

1. To disclose the true generic name of the fibers present.
2. To disclose the percentage of such fibers.
3. To designate each fiber in the products in order of predominance by weight.

PAR. 5. Certain of said textile fiber products were further misbranded by respondents in that fibers present in such textile fiber products in the amount of five per centum or less of the total fiber weight were designated by their generic names, in violation of Section 4(b) of the Textile Fiber Products Identification Act and Rule 3 of the Rules and Regulations promulgated thereunder.

PAR. 6. Certain of said textile fiber products were misbranded in violation of the Textile Fiber Products Identification Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

A. Fiber trademarks were placed on labels without the generic name of the fibers appearing on such labels, in violation of Rule 17(a) of the aforesaid Rules and Regulations.

B. Fiber trademarks were used on labels without a full and complete fiber content disclosure appearing on such labels, in violation of Rule 17(b) of the aforesaid Rules and Regulations.

C. Samples, swatches and specimens of textile fiber products subject to the aforesaid Act which were used to promote or effect sales of such textile fiber products, were not labeled to show their respective fiber content and other information required by Section 4(b) of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, in violation of Rule 21(a) of the aforesaid Rules and Regulations.

PAR. 7. Certain of said textile fiber products were falsely and deceptively advertised in that respondents in making disclosures or implications as to the fiber content of such textile fiber products in written advertisements used to aid, promote, and assist directly or indirectly in the sale or offering for sale of said products, failed to set forth the required information as to fiber content as specified by Section 4(c) of the Textile Fiber Products Identification Act and in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

Among such textile fiber products, but not limited thereto, were fabrics which were falsely and deceptively advertised by means of "catalogs" sold and distributed by respondents throughout the United States in that the true generic names of the fibers in such fabrics were not set forth.

PAR. 8. In advertisements of textile fiber products by the means alleged in paragraph 7, certain of said textile fiber products were falsely and deceptively advertised in that fibers present in such textile fiber products in the amount of five per centum or less of the total fiber weight were designated by their generic name, in violation of Section 4(c) of the Textile Fiber Products Identification Act and Rule 3 of the Rules and Regulations promulgated thereunder.

PAR. 9. In advertisements of textile fiber products by the means alleged in paragraph 7, certain of said textile fiber products were falsely and deceptively advertised in that the name of a fur-bearing animal, including among others leopard, but not limited thereto, was used in the advertisement of such products when said products or parts thereof in connection with which the name of the fur-bearing animal was used, were not furs or fur products within the meaning of the Fur Products Labeling Act and did not contain the hair or fiber of such fur-bearing animal, in violation of Section 4(g) of the Textile Fiber Products Identification Act and Rule 9 of the Rules and Regulations promulgated thereunder.

PAR. 10. In advertisements of textile fiber products by the means alleged in paragraph 7, certain of said textile fiber products were falsely and deceptively advertised in violation of the Textile Fiber Products Identification Act in that they were not advertised in accordance with the Rules and Regulations promulgated thereunder, in the following respects:

A. The generic name of a fiber was used in advertising textile fiber products, in such a manner as to be false, deceptive, and misleading as to fiber content and to indicate, directly or indirectly, that such textile fiber products were composed wholly or in part of such fiber when such was not the case, in violation of Rule 41(d) of the aforesaid Rules and Regulations.

Among such products, but not limited thereto, were textile fiber products advertised as "linen weave" thus implying that such products were composed wholly or in part of linen when in fact the products contained no linen.

B. Nonrequired information and representations used in advertising textile fiber products were false, deceptive and misleading as to the fiber content of the textile fiber products and were set forth and used so as to interfere with, minimize and detract from the required information, in violation of Rule 42(b) of the aforesaid Rules and Regulations.

Among such products, but not limited thereto, were textile fiber products advertised as linen-weave and linen-like weave thus representing, directly or by implication that the said products contained linen when such was not the case.

PAR. 11. The acts and practices of respondents, as set forth above, were, and are, in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, and constituted, and now constitute unfair methods of competition and unfair and deceptive acts and practices, in commerce, under the Federal Trade Commission Act.

PAR. 12. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have introduced into commerce, sold, transported, distributed, delivered for shipment, shipped, and offered for sale in commerce, wool products, as the terms "commerce" and "wool product" are defined in said Act.

PAR. 13. Certain of said wool products were misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified with the information required under Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool fabrics which failed to disclose the true generic name of the fibers present.

PAR. 14. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939 in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in that specimens or samples of wool products which were used to promote or effect sales of such wool products in commerce, were not labeled or marked to show the information required under

Section 4(a)(2) of the Wool Products Labeling Act of 1939 and the Rules and Regulations thereunder, in violation of Rule 22 of the aforesaid Rules and Regulations.

PAR. 15. The acts and practices of the respondents as set forth in paragraphs 12, 13 and 14 above, were, and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations thereunder, and constituted, and now constitute unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of 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, the Textile Fiber Products Identification Act and the Wool Products Labeling Act of 1939, 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, Elysée Fabrics, 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 152–20 Rockaway Boulevard, in the city of Jamaica, State of New York.

Respondent, Gunther F. Ziegler, 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 Elysée Fabrics, Inc., a corporation, and its officers, and Gunther F. Ziegler, individually and as an officer of the said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States, of textile fiber products; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of textile fiber products which have been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

A. Misbranding textile fiber products by:

1. Falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of constitutent fibers contained therein.

2. Falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products by representing either directly or by implication, through the use of such terms as "linen weave", and "silky", or any other terms, that such products contain any fibers which are not present therein.

3. Failing to affix labels to such textile fiber products showing each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

4. Setting forth the generic name or fiber trademark of a fiber present in any of the aforesaid textile fiber products when the amount of such fiber is five per centum or less of the total fiber weight of such product.

5. Using a fiber trademark as a part of the required information on labels affixed to such textile fiber products without the required generic name of the fiber appearing on the said labels in immediate conjunction therewith and in type or lettering of equal size and conspicuousness.

6. Using a generic name or fiber trademark on any label, whether required or nonrequired, without making a full and complete fiber content disclosure in accordance with the Act and the Rules and Regulations promulgated thereunder, the first time such generic name or fiber trademark appears on the label.

7. Failing to affix labels showing the respective fiber content and other required information to samples, swatches and specimens of textile fiber products subject to the aforesaid Act which are used to promote or effect sales of such textile fiber products.

B. Falsely or deceptively advertising textile fiber products by:

1. Making any representation, by disclosure or by implication, as to the fiber content of any textile fiber product in any written advertisement which is used to aid, promote or assist, directly or indirectly, in the sale or offering for sale of such textile fiber product unless the same information required to be shown on the stamp, tag, label or other means of identification under Section 4(b) (1) and (2) of the Textile Fiber Products Identification Act is contained in the said advertisement, except that the percentages of the fibers present in the textile fiber product need not be stated.

2. Using any names, words, depictions, descriptive matter, or other symbols which connote or signify a fur-bearing animal, unless such products or parts thereof in connection with which the names, words, depictions, descriptive matter or other symbols are used, are furs or fur products within the meaning of the Fur Products Labeling Act, provided, however, where a textile fiber product contains the hair or fiber of a fur-bearing animal, the name of such animal, in conjunction with the word "fiber", "hair", or "blend", may be used.

3. Setting forth the generic name of a fiber present in any of the aforesaid textile fiber products when the amount of such fiber is five per centum or less of the total fiber weight of such product.

4. Using a generic name of a fiber in advertising textile fiber products in such a manner as to be false, deceptive or misleading as to the fiber content or to indicate, directly or indirectly, that such textile fiber products are composed wholly or in part of such fiber when such is not the case.

5. Using nonrequired information and representations in such advertising in such a manner as to be false, deceptive or misleading as to the fiber content of the textile fiber products or so as to interfere with, minimize or detract from required information.

It is further ordered, That respondents, Elysée Fabrics, Inc., a corporation, and its officers, and Gunther F. Ziegler, 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 offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products as the terms "commerce", and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Failing to securely affix to or place on each product a stamp, tag, label or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

2. Failing to affix labels to samples, swatches or specimens of wool products used to promote or effect sales of wool products, showing each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

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

HOME FREEZER FOODS, INC., ET AL.

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

Docket C-237. Complaint, Sept. 18, 1962—Decision, Sept. 18, 1962

Consent order requiring a Washington, D.C., seller of freezers and foods by means of a so-called freezer food plan to cease making deceptive savings claims and other misrepresentations in advertising in newspapers, by radio, etc., as in the order below more specifically indicated.

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 Home Freezer Foods, Inc., a corporation, and Philip L. Lendenbaum, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Home Freezer Foods, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia with its principal office and place of business located at 5455 Third Street, N.E., Washington, D.C.

Respondent Philip L. Lendenbaum is an officer of corporate respondent. He formulates, directs and controls the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of freezers and food by means of a so-called freezer food plan.

PAR. 3. Respondents now cause, and for some time last past have caused, the said freezers and food when sold, to be delivered from respondents' place of business in Washington, D.C., to purchasers located in the State of Virginia, the State of Maryland, and the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained a substantial course of trade in said freezers and food in commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce is and has been substantial.

PAR. 4. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition in commerce, with corporations, firms and individuals in the sale of freezers, food and freezer food plans.

PAR. 5. In the course and conduct of their business respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said food and freezer food plan, by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements inserted in newspapers, brochures and circulars and by means of radio broadcasters by stations having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of food as the term "food" is defined in the Federal Trade Commission Act; and have disseminated and caused the dissemination of advertisements by various means including those aforesaid, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of food and freezers in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. By means of advertisements disseminated as aforesaid and by the oral statements of sales representatives, respondents have represented directly or by implication:

1. That respondents have been in the freezer food business for 30 years.

2. That purchasers of respondents' freezer food plan will save enough money on the purchase of their food to pay for the freezer.

3. That "Home Economists" will assist purchasers of the aforesaid freezer food plan in planning their food orders.

4. That purchasers of respondents' freezer food plan will receive all their food needs and a 16.9 cubic food freezer for $16.00 per week.

5. That the "Total" shown in respondents' sales contract represents the total of all charges, including freezer, food and finance charges.

6. That purchasers of the freezer food plan will be able to buy their food from respondents through the plan at wholesale prices.

PAR. 7. The advertisements disseminated as aforesaid were and are misleading in material respects and constituted and now constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, and the aforesaid statements and representations made as aforesaid are false, misleading and deceptive. In truth and in fact:

1. Respondents have not been in the freezer food business for 30 years.

2. Purchasers of respondents' freezer food plan do not save enough money on the purchase of their food to pay for the freezer.

3. The individuals sent to help purchasers of the aforesaid freezer food plan in planning their food orders are not "Home Economists". They have not had sufficient or proper training to warrant calling them "Home Economists", or to help purchasers in planning their food orders.

4. Purchasers of respondents' freezer food plan do not receive all their food needs and a 16.9 cubic foot freezer for $16.00 per week. There are many food items which respondents do not supply.

5. The "Total" as shown in respondents' sales contract does not include the cost of the food.

6. Purchasers of respondents' freezer food plan are not able to buy their food from respondents through this plan at wholesale prices.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of substantial quantities of freezers, food and freezer food plans from respondents, by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, including the dissemination by respondents of false advertisements as aforesaid, were, and are, all to the prejudice and injury of the public and of respondents' competitors, and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act, and in violation of Sections 5 and 12 of said 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 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 agreemet 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, Home Freezer Foods, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia with its office and principal place of business

located at 5455 Third Street, N.E., in the city of Washington, District of Columbia.

Respondent Philip L. Lendenbaum 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

PART I

It is ordered, That respondents Home Freezer Foods, Inc., a corporation, its officers and Philip L. Lendenbaum, individually and as an officer of said corporation and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of freezers, food or freezer food plans in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication that:

(a) Purchasers of respondents' freezer food plan will save enough money on the purchase of their food to pay for a freezer;

(b) "Home Economists" or other qualified individuals will assist purchasers of respondents' freezer food plan in planning their food orders.

(c) For any stated price, purchasers of respondents' freezer food plan, will receive all their food needs and a freezer.

2. Representing that respondents have been in the freezer food business for 30 years or for any other length of time not in accordance with the facts.

3. Representing that purchasers of their freezer food plan can buy their food from respondents at wholesale prices.

4. Misrepresenting in any manner the amount of food or the food items purchasers of their freezer food plan will receive from respondents.

5. Misrepresenting in any manner the savings realized by the purchase of the freezer food plan.

6. Obtaining purchasers' signatures to contracts without full and complete disclosure of charges therein and full and complete disclosure of the total of all charges involved therein.

PART II

It is further ordered, That respondents Home Freezer Foods, Inc., a corporation, and its officers and Philip L. Lendenbaum, individually and as an officer of said corporation and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of any food or any purchasing plan involving food, do forthwith cease and desist from:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any of the representations or misrepresentations prohibited in paragraphs 1, 2, 3, 4, and 5 of Part I of this order.

2. Disseminating or causing the dissemination of any advertisement by any means for the purpose of inducing or which is likely to induce, directly or indirectly the purchase of any food, or any purchasing plan involving food in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any of the representations or misrepresentations prohibited in paragraphs 1, 2, 3, 4, and 5 of Part I of this order.

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

TRANSOGRAM COMPANY, INC.*

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

*Docket 7978. Complaint, June 24, 1960 **—Decision, Sept. 19, 1962*

Order requiring 16 toy manufacturers to cease violating Sec. 2(d) of the Clayton Act by making payments to certain toy catalog companies of jobber cus-

*and the following related cases: Wolverine Supply and Manufacturing Co., Docket 7972; Emenee Industries, Inc., Docket 7974; American Machine & Foundry Company, Docket 7977; Ideal Toy Corporation, Docket 7979; Knickerbocker Toy Co., Inc., Docket 8101; Remco Industries, Inc., Docket 8103; Revell, Incorporated, Docket 8224; Kohner Bros., Inc., Docket 8226; Mattel, Inc., Docket 8227; The Porter Chemical Company, Docket 8228; Fisher-Price Toys, Inc., Docket 8243; Wen-Mac Corporation, Docket 8245; The Hubley Manufacturing Company, Docket 8254; Milton Bradley Company, Docket 8256; Hassenfeld Bros., Inc., Docket 8258.

**Complaints are combined.

tomers for advertising in their catalogs, but failing to make payments available on proportionally equal terms to all competing distributors.

Complaint

The Federal Trade Commission, having reason to believe that the respondents named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, hereby issues its complaint stating its charges with respect thereto as follows:

Paragraph 1. Each of the respondents herein is a corporation organized and doing business under the laws of one of the States of the United States as follows, and has its principal office and place of business located as follows:

Respondent Transogram Company, Inc., Docket 7978, 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 200 Fifth Avenue, New York, N.Y.

Respondent Wolverine Supply and Manufacturing Co., Docket 7972, 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 200 Fifth Avenue, New York, N.Y.

Respondent Emenee Industries, Inc., Docket 7974, 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 41–06 De Long Street, Flushing 55, Long Island, N.Y.

Respondent American Machine & Foundry Company, Docket 7977, 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 261 Madison Avenue, New York, N.Y.

Respondent Ideal Toy Corporation, Docket 7979, 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, N.Y.

Respondent Knickerbocker Toy Co., Inc., Docket 8101, 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 1107 Broadway, New York, N.Y.

Respondent Remco Industries, Inc., Docket 8103, 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 113 North 13th Street, Newark, N.J.

Respondent Revell, Incorporated, Docket 8224, 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 4223 Glencoe Avenue, Venice, Calif.

Respondent Kohner Bros., Inc., Docket 8226, 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 155 Wooster Street, New York, N.Y.

Respondent Mattel, Inc., Docket 8227, 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 5150 Rosecrans Avenue, Hawthorne, Calif.

Respondent The Porter Chemical Company, Docket 8228, is a corporation organized and doing business under the laws of the State of Maryland, with its principal office and place of business located at Hagerstown, Md.

Respondent Fisher-Price Toys, Inc., Docket 8243, 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 East Aurora, Erie County, N.Y.

Respondent Wen-Mac Corporation, Docket 8245, 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 11511 Tennessee Avenue, Los Angeles, Calif.

Respondent The Hubley Manufacturing Company, Docket 8254, 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 Pitney Road, Lancaster, Pa.

Respondent Milton Bradley Company, Docket 8256, is a corporation organized and doing business under the laws of the State of Massachusetts, with its principal office and place of business located at 74 Park Street, Springfield, Mass.

Respondent Hassenfeld Bros., Inc., Docket 8258, is a corporation organized and doing business under the laws of the State of Rhode Island, with its principal office and place of business located at 1033 Broad Street, Central Falls, R.I.

PAR. 2. Each of the respondents herein has been engaged, and is presently engaged, in the business of manufacturing and distributing toys. These products are sold and distributed by each respondent to wholesalers located in various parts of the nation for resale to retail outlets. Sales for each respondent for the calendar year 1959 (or corresponding fiscal year below indicated) were approximately as follows:

	Sales, 1959	
Wolverine Supply and Manufacturing Co	$4,000,000	
Emenee Industries, Inc	4,000,000	(1958)
American Machine & Foundry Co.[1]	225,000,000	
Transogram Company Inc	10,000,000	
Ideal Toy Corp	20,000,000	
Knickerbocker Toy Co., Inc	4,000,000	
Remco Industries, Inc	10,500,000	
Revell Incorporated	10,100,000	
Kohner Bros, Inc	1,000,000	
Mattel, Inc	[2] 18,000,000	
The Porter Chemical Co	2,096,000	
Fisher-Price Toys, Inc	[3] 7,650,000	
Wen-Mac Corp	1,750,000	
The Hubley Manufacturing Co	10,380,000	
Milton Bradley Co	7,500,000	
Hassenfeld Bros. Inc	15,590,000	

PAR. 3. Respondents have sold and distributed, and now sell and distribute, their products in substantial quantities in commerce, as "commerce" is defined in the amended Clayton Act, to competing customers located throughout various States of the United States, and in the District of Columbia.

PAR. 4. In the course and conduct of their business in commerce, respondents [4] paid or contracted for the payment of something of value to or for the benefit of some of their customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale, of products sold to them by respondents. Such payments or allowances were not offered or made available on proportionally equal terms to all other customers of respondents competing with the favored customers in the distribution of respondents' toy products.

PAR. 5. As an example of the practices alleged herein, respondents [5] have granted, and are presently granting, promotional payments or

[1] Respondent is engaged in the business of manufacturing, among other things, bowling, swimming, and other sporting equipment, home power shop machines and toy products; its toy products are manufactured, sold and distributed through its AMF Wheel Goods Division, located at 215 Marble Street, Hammond, Ind. Toy products accounted for more than $8,000,000.

[2] Fiscal year ending February 27, 1960.

[3] Fiscal year ending January 31, 1960.

[4] Respondent American Machine & Foundry Co. through its AMF Wheel Goods Division.

[5] See footnote 4.

allowances for the promoting and advertising of their toy products to certain wholesale customers who publish toy catalogues either in combination with each other through toy wholesaler associations and groups, or in an individual capacity. The payments or allowances are granted by respondents to said wholesale customers in connection with their advertising respondents' products in their toy catalogues. These catalogues are sold and distributed by said favored wholesale customers to retail outlets for redistribution to the consuming public.

The aforesaid promotional payments or allowances were not offered or granted on proportionally equal terms to all other customers of respondents who compete with said favored customers in the distribution of respondents' toy products. These unfavored competing customers include wholesalers who are not members of any toy wholesaler associations or groups. Some of the favored customers of each respondent are as follows:

Wolverine Supply and Manufacturing Co., Docket 7972: Members of Individualized Catalogues, Inc., New York, New York, an association composed of toy wholesalers which publishes a toy catalogue.

Emenee Industries, Inc., Docket 7974: Members of Individualized Catalogues, Inc., New York, New York, an association composed of toy wholesalers which publishes a toy catalogue. In 1958, the promotional payments or allowances granted to the members of said wholesaler association by respondent approximated $4,000.

American Machine & Foundry Co., Docket 7977: Members of Individualized Catalogues, Inc., New York, New York, an association composed of toy wholesalers which publishes a toy catalogue. In 1958, the promotional payments or allowances granted to the members of said wholesaler association by respondent, through its AMF Wheel Goods Division, exceeded $4,000.

Transogram Company, Inc., Docket 7978: Members of Individualized Catalogues, Inc., New York, New York, an association composed of toy wholesalers which publishes a toy catalogue. In 1958, respondent paid the members of Individualized Catalogues, Inc., approximately $6,200 for promoting and advertising its products.

Another example of respondent's practices which violate Section 2(d) of the amended Clayton Act is its granting of television advertising payments or allowances to certain customers which were not offered or made available on proportionally equal terms to all other competing customers. Respondent has paid Pensick and Gordon, Inc., Los Angeles, California, a toy wholesaler, substantial sums of money for promoting and advertising its products on television. In 1959, respondent paid said favored customer approximately $8,300 for such promotion. These payments were not offered or made available on proportionally equal terms to all other customers competing with Pensick and Gordon, Inc.

Ideal Toy Corporation, Docket 7979: Members of Individualized Catalogues, Inc., New York, New York, an association composed of toy wholesalers which publishes a toy catalogue. In 1958, the promotional payments or allowances granted to the members of said wholesaler association by respondent exceeded $2,200.

Another example of respondent's practices which violate Section 2(d) of the amended Clayton Act is its granting of television advertising payments or allowances to certain customers which were not offered or made available on proportionally equal terms to all other competing customers. Respondent paid Pensick and Gordon, Inc., Los Angeles, California, a toy wholesaler, substantial sums of money for promoting and advertising its products on television. In 1959, respondent paid said favored customer approximately $6,000 for such promotion. These payments were not offered or made available on proportionally equal terms to all other customers competing with Pensick and Gordon, Inc.

Knickerbocker Toy Co., Inc., Docket 8101: Members of ATD Catalogs, Inc., New York, New York, an association composed of toy wholesalers which publishes a toy catalogue. In 1959, the promotional payments or allowances granted to the members of said wholesaler association by respondent approximated $2,345.

Remco Industries, Inc., Docket 8103: Members of ATD Catalogs, Inc., New York, New York, an association composed of toy wholesalers which publishes a toy catalogue. In 1959, the promotional payments or allowances granted to the members of said wholesaler association by respondent approximated $2,250.

Revell, Incorporated, Docket 8224: Members of the following wholesaler associations or groups:

Associations or Groups:	*Approx. Payments Granted in 1959*
Santa's Official Toy Prevue, Inc	$550
Individualized Catalogues, Inc	750
March of Toys	500

Kohner Bros., Inc., Docket 8226: Members of Santa's Official Toy Prevue, Inc., Philadelphia, Pennsylvania, an association composed of toy wholesalers which publishes a toy catalog. In 1959, the promotional payments or allowances granted to the members of said wholesaler association by respondent approximated $550.

Mattel, Inc., Docket 8227: Members of the following wholesaler associations or groups:

Wholesaler, Associations or Groups:	Approx. Promotional Payments Received (1959)
Santa's Official Toy Prevue, Inc	$825
ATD Catalogs, Inc	1,500
Individualized Catalogues, Inc	6,750
Billy & Ruth	648
Santa's Playland	1,059
March of Toys	2,000

Another example of respondent's practices which violate Section 2(d) of the amended Clayton Act is its granting of television advertising payments or allowances to certain customers which were not made available on proportionally equal terms to all other competing customers. Included among the favored customers are:

Customer:	Approx. Payments Received in 1960
Pensick & Gordon, Inc	$27,300
Imex Toy Corp	5,655
Kipp Brothers	3,737

These payments were not offered or made available on proportionally equal terms to all others customers competing with said favored customers.

The Porter Chemical Company, Docket 8228: Members of Santa's Official Toy Prevue, Inc., Philadelphia, Pennsylvania, an association composed of toy wholesalers which publishes a toy catalog. In 1959, the promotional payments or allowances granted to the members of said wholesaler association by respondent approximated $825.00.

Fisher-Price Toys, Inc., Docket 8243: Members of the following wholesaler associations or groups:

Wholesaler Associations or Groups:	Approx. Promotional Payments Received in 1959
Billy & Ruth Promotion, Inc	$2,930
Individualized Catalogues, Inc	3,300
ATD Catalogs, Inc	2,812

Wen-Mac Corporation, Docket 8245: Members of the following wholesaler associations or groups:

Wholesaler Associations or Groups:	Approx. Promotional Payments Received in 1959
Billy & Ruth Promotion, Inc	$1,170
Individualized Catalogues, Inc	1,500
United Variety Wholesalers	300

The Hubley Manufacturing Company, Docket 8254: Members of the following wholesaler associations or groups:

Wholesaler Associations or Groups:	*Approx. Amounts Received in 1959*
United Variety Wholesalers	$1,200.
Santa's Playthings, Inc	6,000.
ATD Catalogs, Inc	5,535.
Individualized Catalogues, Inc	4,350.

Milton Bradley Company, Docket 8256: Members of the following wholesaler associations or groups:

Wholesaler Associations or Groups:	*Approx. Amounts Received in 1959*
Santa's Playthings, Inc	$2,400
Billy & Ruth Promotion, Inc	1,932
ATD Catalogs, Inc	3,000

Hassenfeld Bros., Inc., Docket 8258: Members of the following wholesaler associations or groups:

Wholesaler Associations or Groups:	*Approx. Amounts Received in 1959*
Santa's Playthings, Inc	$2,400.
Billy & Ruth Promotion, Inc	2,880.
Individualized Catalogues, Inc	4,500.

PAR. 6. The acts and practices of respondent, as alleged above, are in violation of the provisions of subsection (d) of Section 2 of the amended Clayton Act.

Mr. Jerome Garfinkel for the Commission.

Mr. Sumner S. Kittelle, Mr. Allan Trumbull, and *Mr. L. Neil Le Roy* of *Willkie Farr Gallagher Walton & Fitz Gibbon,* of New York, N.Y., for respondent.

INITIAL DECISION AS TO RESPONDENT TRANSOGRAM COMPANY, INC., BY HARRY R. HINKES, HEARING EXAMINER *

The complaint charges the respondent, Transogram Company, Inc., (erroneously named in the complaint as Transogram Company Inc.) with violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. Sec. 13), in the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of products sold to them by respondent, without making such payments or allowances available to all other competing customers on proportionally equal terms. As an example of this practice, the complaint alleges

*Docket No. 7978, filed August 31, 1961.

the respondent made payments to certain wholesale customers for the advertising of its products in the catalogs of these wholesale customers, as well as for television advertising by some of its customers, without proportionally equal payments to the rest of respondent's customers competing with the recipients of the promotional payments.

Respondent's answer to the complaint, dated September 13, 1960, made partial admissions of the allegations of the complaint pertaining to the catalog advertising, but denied that any of its promotional payments constituted violations of the Act.

On May 15, 1961, a stipulation was executed by the respondent and counsel for both parties, setting forth certain facts and waiving hearing. Argument was reserved on the scope of the cease and desist order to be entered. Proposed findings and order were submitted by both parties and, on August 18, 1961, oral argument was allowed thereon.

FINDINGS OF FACT

1. Respondent Transogram Company, Inc., (erroneously named in the complaint as Transogram Company Inc.) is a corporation organized and doing business under the laws of the State of Pennsylvania, with its principal office and place of business located at 200 Fifth Avenue, New York 10, New York.

2. Respondent has been engaged, and is presently engaged, in the business of manufacturing toys, games and hobbies (hereinafter called "products"). These products are sold by respondent to jobbers located in various parts of the Nation for resale to retailers. Respondent's gross sales in 1959 exceeded $10,000,000.

3. Respondent has sold, and now sells, its products in commerce, as "commerce" is defined in the amended Clayton Act, to customers located throughout various States of the United States, and in the District of Columbia, some of whom are in competition with other of its customers.

4. In the course and conduct of its business in commerce, respondent made payments in substantial amounts to certain toy catalog companies, which companies are owned or controlled, in whole or in part, by jobber customers of respondent. Some of respondent's jobber customers who own or control, in whole or in part, said toy catalog companies sell and distribute the toy catalogs to retailers for redistribution to the consuming public. Such payments were made as compensation or in consideration for the illustration and description in such catalogs of one or more products sold by respondent to some or all of such jobber customers. Such payments were not offered or made

available by respondent on proportionally equal terms to all of its other jobber customers who were in competition in the contemporaneous resale of its products of like grade and quality with those jobber customers who owned or controlled, in whole or in part, a toy catalog company to which such an advertising payment was made.

DISCUSSION

The findings enumerated above obviously warrant the issuance of a cease and desist order (see *State Wholesale Grocers, et al.* v. *The Great Atlantic & Pacific Tea Co. et al.*, 258 F. 2d 831 (CA 7, 1958) *cert. denied, sub nom. General Foods Corp., et al.* v. *State Wholesale Grocers, et al.*, 358 U.S. 947 (1959)), and, indeed, such an order has been proposed by the respondent. It argues, however, that the order to be entered should be limited to prohibiting the respondent's payments to toy catalog companies owned or controlled by jobber customers for advertising in their catalogs. It bases this argument upon the fact that the only specific practice found in violation of the Act is the respondent's practice of discriminatory promotional payments for advertising in the catalogs of companies owned or controlled by some of its customers. Counsel supporting the complaint, on the other hand, urges that the order be sufficiently broad to cover discriminatory payments by the respondent to its customers for *any* services or facilities furnished by or through such customers.

In *F.T.C.* v. *Ruberoid Co.* 343 U.S. 470 (1952), the court upheld a cease and desist order which prohibited *all* price differentials between competing purchasers although the only differentials found were differentials of five cents or more. The court noted that very small differences in price were material factors in competition. The court, however, went on to state:

We first consider the contentions of Ruberoid, which are mainly attacks upon the breadth of the order. Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. *In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.* Moreover, "[t]he Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" disclosed. *Jacob Siegel Co.* v. *Federal Trade Comm'n*, 327 U.S. 608, 611 (1946). Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices. Therefore we have said "the courts will not interfere *except where the remedy selected has no reasonable relation to the unlawful practices found to exist.*" (Emphasis added)

This sanction of the broad orders has been followed by the Commission in a number of cases (See *In the Matter of Chestnut Farms Chevy Chase Dairy*, Docket 6465, 53 F.T.C. 1050, 1062 (1957); *In the Matter of Henry Rosenfeld, Inc., et al.*, Docket 6212, 52 F.T.C. 1535, 1544–1545 (1956); *In the Matter of P. Lorillard Company*, Docket 6600, Init. Dec., dated Oct. 9, 1957, Init. Dec. adopted by Commission May 7, 1958 [54 F.T.C. 1550]; *In the Matter of Swanee Paper Corporation*, Docket 6927, Init. Dec. dated August 18, 1959, adopted by Commission March 22, 1960 [56 F.T.C. 1077]).

Respondent argues, however, that the legislative history of the 1959 amendment to the Clayton Act renders the Ruberoid dicta inapplicable. The amendment, sometimes referred to as the Finality Act, deletes one of the three steps which formerly had to be complied with before a civil penalty could be imposed upon a violator of Section 2(d). When a Commission cease and desist order becomes final, a civil action may be instituted against a respondent who violates such order and money damages recovered by the United States. No intermediate steps between the issuance of the order and the imposition of a penalty is required as in the past when the court issued its own enforcement order, after the Commission order, which was the foundation for a civil penalty action.

The subjection of a respondent to immediate civil penalty, argues the respondent, makes greater specificity mandatory. It cites the testimony of members of Congress to that effect (see Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 1st Sess.; Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 85th Cong., 2d Sess.; and House debates at 105 Cong. Rec. 12734–5, where descriptive adjectives such as "definitive," "clear," and "specific" were used to describe the types of Clayton Act orders desired.)

No one can argue seriously that cease and desist orders should not be as specific, clear, and definitive as is reasonably possible. Any other approach would violate ordinary standards of fairness which require orders to inform the respondent of what he may not do. This requirement of specificity, however, is not to be confused with respondent's proposal for a cease and desist order which is limited in scope. An order which is broad in scope and covers many activities may, nevertheless, be quite specific. By the same token, an order which may be very narrow in scope but which uses imprecise language may be quite lacking in specificity. The law is well settled that the order should be "adequate to cope with the unlawful practice."

Respondent argues, however, that this interpretation of the Clayton Act has been modified in the recent case of *Swanee Paper Corp.* v. *F.T.C.* (CCH Trade Cases, par. 70,054, p. 78,235 [7 S. & D. 175, 181] (June 22, 1961)) where the Court held that the 2(d) order should be limited to the particular practice found to violate the statute. It is important to note, however, that the Court realized that under some circumstances the order could extend beyond the particular practice found.

> . . . Administrative agencies have wide discretion in framing their orders and are empowered to enjoin other related unlawful acts which may occur in the future (e.g., *FTC* v. *Mandel Brothers Inc.*, 359 U.S. 385 (1959)), but there must be some relation between the facts found and the breadth of the order. . . . Nothing in the record here indicates flagrant or extensive violations of Section 2(d) by Swanee; the single violation found occurred in an uncertain area of the law and was discontinued before the complaint was filed. [*Swanee Paper Corp.* v. *F.T.C., supra.*]

Although the court condemned the order which had been phrased in the language of Section 2(d), I find that case quite dissimilar from the instant case. There is nothing in this case to indicate a "*single* violation . . . in an *uncertain area* of the law and . . . *discontinued* before the complaint was filed." (Emphasis added). Moreover, there is an obvious relationship in methods of promotional payments. The advertising media are many and varied. Catalog advertising, which was the practice found here, is only one of such ways. It would take but little imagination to continue discriminatory promotional programs in other media were the order to be limited to catalog advertising. Such an order would be clear abandonment of the responsibility placed by Congress upon the Commission.

In the *Matter of Shulton, Inc.*, Docket No. 7721, July 25, 1961, [59 F.T.C. 106] a broad Section 2(d) cease and desist order in the language of that section was upheld by the Federal Trade Commission despite proof of only one kind of discriminatory payment (i.e., newspaper advertising). Following the dicta of that opinion requires the issuance of a broad cease and desist order here. Any other approach could lead to absurd results. The respondent proposes, for example, that the order be limited to discriminatory payments to toy catalog companies controlled by jobber customers of respondent located in the United States, since such was the specific practice found in this proceeding. Such an order would permit the respondent to make discriminatory payments directly to its jobber customers while prohibiting the indirect payment through the catalog companies. Such an order would also permit the respondent to continue discriminatory practices in foreign trade. It could be argued with equal logic that the order should be limited to the products involved in the practice specifically found, an argument which was specifically rejected in the *Shulton* opinion, or that the prohibited practices be limited to the catalogs published in past years since such were the only ones involved in the practices found. The respondent's position is clearly untenable in the light of the objectives of the Clayton Act as expressed in innumerable other decisions and in its legislative history.

The order issued here, although phrased in the words of the statute, cannot be said to have "no reasonable relation to the unlawful practices found to exist" as stated in the *Ruberoid* case. On the contrary, even according to the standards set in the *Swanee Paper* decision of the Court of Appeals, there is "some relation between the facts found and the breadth of the order" as exemplified by the varied and almost limitless means of evasion possible in a narrow or limited order as proposed by respondent.

CONCLUSIONS OF LAW

The foregoing Findings of Fact, as stipulated, support the following conclusion:

The respondent, Transogram Company, Inc., which is engaged in commerce, has paid or contracted for the payment of something of value to or for the benefit of a customer of the respondent in the course of such commerce as compensation or in consideration for services or facilities furnished by or through such customers in connection with the handling, sale, or offering for sale of a product manufactured, sold, or offered for sale by respondent, without such payment being available on proportionally equal terms to all other customers competing in the distribution of such products.

ORDER

It is ordered, That respondent Transogram Company, Inc., a corporation, its officers, directors, representatives, agents or employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale, or distribution of toy, game, or hobby products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation or in consideration for any advertising or other promotional services or facilities furnished by or through such customer 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 respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such toy, game, or hobby product.

Mr. Jerome Garfinkel supporting the complaints.

Aberman & Greene, by *Mr. Martin C. Greene* and *Mr. Aaron Locker* for respondents.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER AS TO RESPONDENTS KOHNER BROS., INC., DOCKET 8226; MATTEL, INC., DOCKET 8227; FISHER-PRICE TOYS, INC., DOCKET 8243; THE HUBLEY MANUFACTURING COMPANY, DOCKET 8254; HASSENFELD BROS., INC., DOCKET 8258; KNICKERBOCKER TOY CO., INC., DOCKET 8101; REMCO INDUSTRIES, INC., DOCKET 8103; THE PORTER CHEMICAL COMPANY, DOCKET 8228; WOLVERINE SUPPLY AND MANUFACTURING CO., DOCKET 7972

The question is the form of cease and desist order to be issued under Section 2(d) of the Clayton Act as against respondents, all of them large toy manufacturers. The cases have been submitted on stipulations of fact and consents to cease and desist order, respondents reserving the right to object to the form of the order. Each case involves one respondent.

Under the stipulations the respondents in very general terms admit facts as to Section 2(d) violations in connection with toy catalog advertising payments. The question in general is whether the cease and desist order should be limited to such payments or cast in a broad form so as to include, by implication, television advertising payments in particular.

There is also a motion by one of the respondents, Mattel, Inc., against whom alone there are allegations as to television advertising payments, to strike these allegations, on the ground that there is no proof of such payments and no reference thereto in the stipulations. The motion is not too important and will be denied.

STATEMENT OF PROCEEDINGS

There are nine separate complaints herein, temporarily consolidated, each directed against one of the above-named respondents.

The complaints are practically identical in form and general content, except for corporate details and annual sales volumes, as well as for details of particular catalog advertising payments charged—

and except for the *Mattel* complaint, which also specifies television advertising payments.

Each complaint charges the respondent named therein with violation of Section 2(d) of the Clayton Act (15 U.S.C. § 13(d)), as amended by the Robinson-Patman Act, by making payments for the benefit of some of its wholesale customers for services or faciilties furnished through said customers in connection with the sale of products sold to them by respondent—such payments not being made available on proportionally equal terms to all other customers of respondent competing with such favored customers.

Each complaint alleges that the respondent has granted promotional payments for the advertising of its products not made available to all competing customers on proportionally equal terms, that as an "example" respondent has made such payments to certain wholesale customers who publish toy catalogs, either alone, in combination with each other, or through other wholesaler associations and groups; that the payments are made in connection with advertising the respondent's products in their toy catalogs, sold and distributed by the wholesale customers to retail outlets for redistribution to the consuming public. In general the complaints give names of some of the alleged favored customers, together with promotional payments received in 1959.

No Television Allegations (Except Mattel)

The one different complaint also charges the respondent named therein, to wit, Mattel, Inc., with violation of Section 2(d) by stating as another "example" the granting of television advertising payments to certain customers, who are named, with amounts allegedly received in 1960, said payments not having been made available on proportionally equal basis. This additional allegation is contained in the same paragraph, to wit, paragraph 5 of the Mattel, Inc., complaint, as are the examples of toy catalog payments. It may be stated, at once, that this additional allegation as to television is completely denied in the answer interposed by this respondent.

The answers interposed by all nine respondents admit in general that payments were made for catalog advertising, but deny any violation of Section 2(d) of the Act.

All respondents appear by the same counsel.

All respondents have executed almost identical stipulations, except for corporate description and annual sales volumes, that, quoting one of them, if competent witnesses were duly called by counsel supporting the complaint * * * the competent, relevant and material testimony of such witnesses, plus competent, relevant and material documentary evidence which counsel supporting the complaint would introduce and the Hearing Examiner would receive in evidence at such hearings, would constitute substantial evidence in support of the following matters:

Immediately following this are Items I, II, III and IV, the evidence so stipulated.

Television Not Mentioned In Stipulations

The evidence so stipulated mentions only catalog advertising, more fully described in Item IV. There is no mention whatever in any of these stipulations—including the Mattel, Inc., stipulation—of television, or payments for television advertising.

Each said stipulation in these nine actions in effect waives hearing. Each such stipulation states the following:

Counsel supporting the Complaint shall be entitled to request the issuance of an appropriate cease and desist order, and counsel for Respondent shall not contest the issuance of such an order, but shall reserve the right to contend that such order should be limited to a prohibition of further acts of the type described in subparagraph A (IV) of this Stipulation.

Thus, each respondent reserves the right to contend that the order be limited to catalog advertising, and not extended to include television advertising.

By order of September 7, 1961, the nine proceedings herein were duly consolidated for purposes of argument, proposed findings and conclusions, and proposed order. On October 13th, 1961 proposed findings, conclusions, and order were submitted by counsel supporting the complaints. On October 17th proposed findings and order were submitted by counsel for respondents. Memoranda were also submitted by both sides.

The proposed findings of both sides, as based on the stipulated facts, are virtually identical, apart from numbering and arrangement, and state without details and very generally that respondents made catalog advertising payments to some jobbers not made available to others on a proportionally equal basis.

Respondents, however, submitted two additional proposed findings, which are not based on the facts as stipulated: (1) that the catalog advertising payments, etc., followed long-time industry practice and were openly made, and (2) that there is no evidence, or stipulation, as to the television payments alleged in the *Mattel* complaint.

Counsel supporting the complaints submitted a very broad proposed order, virtually adopting the wording of Section 2(d) of the Act, which, of course, would reach television advertising payments.

Counsel for respondents submitted a narrow order limited to payments for advertising in catalog—plus, however, other printed matter—and further limited to payments to jobber customers.

Oral argument, requested by counsel for respondents, was heard on October 25, 1961 in Washington, D. C.

The hearing examiner has condensed and consolidated the contents of those proposed findings of both sides as to which the latter are in agreement, and has drafted the Findings of Fact herein accordingly. Both sides have consented to these Findings, as to contents and form, except that counsel for respondents requests the two additional proposed findings referred to above.

The hearing examiner declines to make these two additional findings, although he does not disallow them. Actually the Commission with its expertise might well take judicial notice of the 30-year industry practice as claimed, and, as to the second item, the omission of the stipulations to refer to television practices is a matter of record in the Commission files.

FINDINGS OF FACT

I

Each of the respondents herein is a corporation organized and doing business under the laws of one of the states of the United States as follows, and has its principal office and place of business located as follows:

	Where Incorporated	Principal Office, Etc.
Kohner Bros., Inc	New York	New York City. (155 Wooster St.)
Mattel, Inc	California	Hawthorne, Cal. (5150 Rosecrans Ave.)
Fisher-Price Toys Inc	New York	East Aurora, N.Y. (Erie County.)
Hubley Manufacturing Company.	Pennsylvania	Lancaster, Pa. (Pitney Rd.)
Hassenfeld Bros., Inc	Rhode Island	Central Falls, R.I. (133 Broad St.)
Knickerbocker Toy Co., Inc	New York	Brooklyn, N.Y.C. (401 Butler St.)
Remco Industries, Inc	New Jersey	Newark, N.J. (113 North 13th St.)
The Porter Chemical Company.	Maryland	Hagerstown, Maryland. (No stated street.)
Wolverine Supply and Manufacturing Co.	Pennsylvania	New York City. (200 Fifth Ave.)

II

Each of the respondents herein has been engaged, and is presently engaged, in the business of manufacturing toys, games, and hobbies—hereinafter called "products". These products are sold by each respondent to jobbers located in various parts of the nation for resale to retailers. Sales for each respondent for the calendar year 1959 (or corresponding fiscal year below indicated) were approximately as follows:

	Sales, 1959	
Kohner	$1,000,000	
Mattel	18,000,000	(Fiscal year ending 2/27/60)
Fisher-Price	7,650,000	(Fiscal year ending 1/31/60)
Hubley	10,380,000	
Hassenfeld	15,590,000	
Knickerbocker	4,000,000	
Remco	10,500,000	
Porter	2,096,000	
Wolverine	4,000,000	

III

Each of the respondents has sold, and now sells, its products in commerce, as "commerce" is defined in the amended Clayton Act, to customers located throughout the various states of the United States, and in the District of Columbia, some of whom are in competition with other of its customers.

IV

(a) In the course and conduct of its business and commerce, each respondent made payments to certain toy catalog companies, which companies are owned and controlled, in whole or in part, by its jobber customers. Some of each respondent's customers who so own or control said toy catalog companies sell and distribute the toy catalogs to retailers for redistribution to the consuming public.

(b) Such payments were made as compensation or in consideration for the illustration and description in such catalogs of one or more products sold by each such respondent to some or all of such jobber customers.

(c) Such payments were not offered or made available by each such respondent on proportionally equal terms to all of its other jobber customers who were in competition in the contemporaneous resale of its products of like grade and quality with those jobber customers who owned or controlled, in whole or in part, a toy or toy catalog company to which such an advertising payment was made.

DISCUSSION

Meager Facts for a Drastic Order

The above findings represent a barren record of evidence, based on stipulation, to warrant "throwing the book" at respondents by issuing a broad order in the general words of the statute, and one which would apply to television advertising payments—instead of a moderate order consistent with the quantity and quality of the evidence.

Indeed, it is safe to assume that if a devastatingly broad order may properly issue on such a paucity of facts based on stipulation there would be no gain to statutory enforcement, at least in the long run, since attorneys would no longer stipulate in the manner followed here.

There is nothing in the findings whatever about television—even though the complaint against one respondent alleges violations by television advertising payments, and even though it seems clear that the practical issue in this case is whether any cease and desist order should include television advertising payments.

There is not the slightest suggestion in the findings that any respondent made its payments secretively or other than in accordance with long-standing trade practices in the toy industry, or that any respondent truly flouted the law, or intends to continue violations—the implications being to the contrary, as confirmed by the statements at the oral argument relating to unchallenged past practices and to present discontinuance.

Moreover, the findings permit of the direct inference that each respondent has discontinued the unlawful catalog advertising payment practices. This is because the findings, which follow the wording of the stipulations, state that each respondent "made payments", i. e., using the past tense. This is in glaring contrast with the present tense of all four verbs used in the following sentence to describe ownership of the catalog companies and distribution of the catalogs.

Finally, even as to the catalog payment violations found, they are described so generally that it is difficult to conclude that they are so substantial as to warrant a cease and desist order reaching out into the television field.*

Ruberoid Case

Counsel supporting the complaint relies heavily on *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470 (1952). The case does hold that the cease and desist order need not be limited to the "illegal prac-

*Since there are consents to an order it may properly be inferred, however, that the facts are not *de minimis* or too remote.

tice in the precise form" (P. 473) found. However, it hardly supports the broad order asked for in the present cases.

Ruberoid is different from the present cases (1) on the facts, including a finding there directly supporting a broad order—adduced on a full hearing, not from cryptic stipulation, (2) as being a Section 2(a) price differential case, without the "proportionally equal" possible ambiguity, particularly for an order, of Section 2(d), and (3) as a case decided long prior to the passage of the *Clayton Act Uniformity Act* with indications for more specific orders.

(1) In *Ruberoid* it was argued by respondent that the order went too far in prohibiting *all* price differentials between competing purchasers since price differentials of only five per cent or more had actually been found. But the Commission had also found that very small differentials in price were material factors in competition. It was on a basis of this latter *finding* that the Supreme Court held that the Commission was not obliged to limit the prohibition of its order to the specific differences shown to have been adopted in past violations of the statute.—Moreover, let us not forget that *Ruberoid* was a hotly litigated case, decided after regular hearings on a full trial of the issues, and not on skimpy stipulations as in the cases at bar.

(2) *Ruberoid* was a price discrimination Clayton Act Section 2(a) case, which lends itself more readily to a broad cease and desist order than does a Section 2(d) case. This is because a Section 2(a) order will not contain the unknown quantity of the phrase "proportionally equal terms to all other customers" found in Section 2(d) orders issued thereunder. This point will be expanded further below, after a discussion of the cases cited in the briefs.

(3) The *Clayton Act Uniformity Act* was not passed until 1959. Under it the Commission's cease and desist order, in a Robinson-Patman case, could for the first time become a final order, leading directly to a penal sanction, namely, a penalty up to $5,000, possibly for each day of violation, recoverable in a U.S. District Court. It would seem to follow without argument that such an order deserves more definitive wording than prior orders not having such potentially drastic effect. It should also be pointed out that in view of the *Uniformity Act* a broad cease and desist order can place on a court the burden of trying the facts of future alleged violations, including the "proportionally equal terms" factual aspect in Section 2(d) cases, instead of on the Commission, aided by its expertise as originally intended by Congress. This also will be discussed as a separate point below.

Morton Salt

Federal Trade Commission v. *Morton Salt Co.*, 334 U.S. 37 (1948), is similarly distinguishable from the present cases:

(1) In *Morton Salt* respondent argued that the order went too far in prohibiting, in effect, a quantity discount system of prices. The Supreme Court held, however, that the broad language used was justified since under a more limited order the respondent could have continued the same unlawful quantity discount practices "by simply altering the discount percentages" (pp. 52, 3). In so holding, the court, by quoting therefrom, made it clear that it was not altering the rule stated by it in *NLRB* v. *Express Publishing Co.*, 312 U.S. 426 (1941), infra. It is submitted that in the cases at bar there would be a much greater alteration of conduct or practice, than mere changes of percentages in an unlawful quantity discount system, if there should be a switch from catalog advertising to the entirely different and diversified field of television advertising, in perpetrating unlawful payments. (The court also held invalid a proviso in the order for a price variation of less than five cents a case because it was indefinite by being linked to a condition of no resulting competitive injury; but, despite the intimation of counsel supporting the complaints herein, respondents are not relying on this part of the decision, which does not bear on any question involved here.)—It must also be noted that *Morton* was a fully litigated case tried on regular hearings, not on stipulations.

(2) *Morton Salt* is also, of course, a Section 2(a) case, and thus its order did not contain the troublesome "proportionally equal terms" wording of Section 2(d) orders.

(3) *Morton Salt*, also, was decided long before passage of the *Clayton Act Uniformity Act* with indications for more specific agency orders.

Shulton

Counsel supporting the complaints herein also cites *In the Matter of Shulton, Inc.*, Docket No. 7721, decided by the Federal Trade Commission on July 25, 1961, [59 F.T.C. 106].

This case supports a broad order, following the words of the statute, and it is a Section 2(d) case like the present cases. However, it is submitted that it does not determine the issue, or issues, presented in the present cases.

First, although this may be called quibbling, there is a specific finding of a particularized payment, and a substantial one considering the relative smallness of operations, to at least one customer, who is also named—namely, the payment of $6,000 in 1958, the date also being so found. This is in sharp contrast to the meager stipulations and findings in the present cases of "payments to certain toy catalog companies," without any further details.

Secondly, *Shulton* was a case with no industry-wide implications in its facts and involved merely a single operator who favored a single customer. Moreover, it involved only isolated newspaper advertising with no overtones comparable to those in the present cases involving a widespread and traditional catalog advertising practice as well as a potential conversion to a new field of television advertising. It is submitted that discretion as to the scope of a cease and desist order may properly vary according to the area and nature of the operating factors.

Thirdly, there is nothing in the *Shulton* decision, or in the entire file of the case, to indicate that the Commission had before it the decision in the *Swanee* case, infra, decided only a month prior thereto, and belatedly reported, in which the Court of Appeals of the 2d Circuit decided against a broad Section 2(d) order. It also may be noted that a petition for review of the *Shulton* decision has been filed by respondent in the Court of Appeals for the 7th Circuit.

Swanee

Respondents naturally lean heavily on *Swanee Paper Corporation* v. *Federal Trade Commission*, 291 F. 2d 833 (CA 2d, June 23, 1961).

In refusing to sanction a broad order "in the very words of the statute" (p. 838) the opinion in that case points out that the violation occurred "in an uncertain area of the law" (p. 835). The same might be said about the catalog advertising payments here, if it is true that the practice has been countenanced by enforcement agencies for many years.

The opinion also notes in the same connection that the violation in that case had been discontinued before the complaint was filed. It would seem that discontinuance even after complaints are filed might excuse respondents from the issuance of a broad order, even though not a defense to the issuance of a cease and desist order as such.

The opinion also refers to the lack of proof of "flagrant or extensive violations of Section 2(d)" (pp. 837–8), which is also the situation in the cases at bar.

It also notes (p. 838) that in view of the *Clayton Act Uniformity Act* a broad order may shift to the courts the very kind of issues which Congress intended the Commission to determine.

It should be observed that the Federal Trade Commission has asked the Solicitor General to file a petition for certiorari in *Swanee*, but on two other points as well as scope of order.

It is the opinion of the hearing examiner that, irrespective of the ultimate disposition of Shulton and Swanee, the cases at bar are resolved in terms of their own facts and circumstances and by well understood general principles applicable thereto. No one contends that the Commission does not have broad discretion as to the scope of a cease and desist order issued by it. And no one can contend that this discretion must be exercised other than reasonably, considering the facts and circumstances.

NLRB Cases

Respondents here also find some support in certain National Labor Relations Board cases, one of which, at least, is cited. It is true, as pointed out by counsel supporting the complaints, that these cases are somewhat remote from the cases involved here. However, they are helpful in evaluating factors of willfulness of violation and likelihood of continued violation, in determining the scope of a cease and desist order.

In *NLRB* v. *Express Publishing Co.*, 312 U.S. 426 (1941), the opinion states that the court has power to restrain not only acts similar to past unlawful acts, but acts

> whose commission in the future, unless enjoined may fairly be anticipated from the defendant's conduct in the past. (P. 435)

The opinion also observes that there was

> nothing in the *record* (our emphasis) giving any indication that in the future the respondent would engage in all or any of the numerous other unfair labor practices defined by the Act. (P. 434)

Morton Salt, *supra*, which cites this case, obviously does not hold to the contrary by sustaining a cease and desist order in respect to the use of a quantity discount system i.e., even one not using precisely the same percentages used in the past.

In *NLRB* v. *Armour & Co.*, 154 F. 2d 570 (CCA 10, 1945), certiorari denied, 329 U.S. 732 (1946), the court, in holding that a broad order was improper, stated that there was

> nothing in the record to justify the conclusion that Armour entertains an attitude of opposition to the purposes of the Act. (P. 578)

Respondents come well within the protective wording quoted here from these *NLRB* cases. The cryptic stipulations herein, and findings based theron, contain nothing indicating any deliberate affront to the law in connection with the catalog advertising or otherwise, or indicating any intent to violate the law in the future whether in connection with catalog advertising, television advertising, or in any other way. On the contrary, the stipulations and findings can only be construed as relating to more or less pro forma violations in connection with past catalog advertising payments, with no suggestion of continued violation; and there is no mention of television at all.—The very fact that respondents were willing to execute the stipulations herein would seem to be some indication of good faith in respect to law compliance.

Finality Act v. Broad Orders

The *Clayton Act Finality Act* did not come into being until 1959, i.e., as P.L. 86–107, 86th Cong., July 23, 1959. See § 11(g) through § 11(l) of the *Clayton Act;* 15 U.S.C. § 21(g) through § 21(l). Under the *Finality Act*, the Commission's cease and desist order for Clayton Act violations gave rise for the first time, when final, to penal sanctions, namely, a penalty of up to $5,000 a day for each offense, and possibly each day of continuing offense, recoverable in a U.S. District Court.

Prior to the Finality Act amendment comparable penalties for Clayton Act violations could be invoked only after three steps, (1) a violation and issuance of a Commission cease and desist order, (2) a further violation (ordinarily) and issuance of an enforcement order by a Court of Appeals, and (3) violation of the Court of Appeals order and ensuing civil contempt proceedings before the Court of Appeals.

It is thus clear that the Commission's effective authority was vastly increased by the *Uniformity Act*, and it would seem that with this authority greater responsibility rests on the Commission in issuing its Clayton Act cease and desist orders. The courts themselves have traditionally been circumspect in phrasing injunctive orders so that they are clear and definite. There are governing provisions thereon in the *Federal Rules of Civil Procedure.* Rule 65(d), derived from old § 383 of Title 28 of the *U.S. Code*, states that:

> every restraining order * * * shall be specific in terms; shall describe in reasonable detail * * * the act or acts sought to be restrained * * * .

Opponents of the passage of the *Finality Act* cited as one of their objections the alleged indefiniteness of orders issued by the Commission, as well as other agencies affected by the Act. Meeting these objections, proponents of the Act voiced their hope and expectation that Commission orders under the proposed Act would be sufficiently definitive.

Senator Sparkman spoke of "framing orders in a more definitive manner" (*House Judiciary Committee hearings, 1959**). He also referred to a Senate Judiciary Committee report looking forward to "orders which are as definitive as possible."

Senator Kefauver inserted in the record (*Senate Antitrust Subcommittee Hearings, 1958***) an antitrust report looking forward to the time:

> when the Commission makes more specific its orders, particularly in Clayton Act Section 2 cases.

Congressman Patman stated (*105 Congressional Record 12734*)

> the hope that the Federal Trade Commission will seek to make its cease and desist orders more specific * * *.

Congressman Celler reiterated (*105 Congressional Record 12735*) the statement in the committee report that the orders should be "as definitive as possible."

Section 2(d) v. Section 2(a) Orders

"Proportionally equal"

Section 2(d) of the *Clayton Act*, unlike Section 2(a), contains, of course, the "proportionally equal terms" proviso. These words have been frequently challenged as being too indefinite for use in a statute. Whatever the full merits of this criticism, it seems self-apparent that the use now of these words, without more, in a Commission cease and desist *order*, simply leaves open the question of whether any particular way of allegedly treating all customers equally is, or is not, in violation so as to invoke penalties in court proceedings.

Accordingly, although it may well be that there are some types of cases in which an order which merely follows the general wording of Section 2(d) would be proper, it must also be true that there are types of cases where this would not be proper. Thus careful discretion must be exercised in issuing a broad order under Section 2(d), depending on the facts of each case. It would seem that the present cases, where catalog advertising payment violations are claimed by counsel supporting the complaint to justify a broad order comprehending television advertising payments, are definitely cases in which such a broad order is not justified.

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*Antitrust Subcommittee, 86th Cong., 1st Sess., Ser. 3, at 86.
**Subcommittee on Antitrust and Monopoly, 85th Cong., 2nd Sess., at 31.

Advertising Catalogs v. Television
"Proportionally equal"

The cases at bar are unique in that the real question, as already repeatedly pointed out, is whether by issuing a generally worded Section 2(d) order there should be interdicted, under penal sanctions, television advertising payment violations not shown to have been perpetrated in the past or threatened in the future—as well as catalog advertising payments, as to which there have been at least pro forma violations in the past.

For respondents to extend "proportionally equal" terms to all competing customers, small and large, would no doubt be something of a problem even in connection with catalog advertising. However, catalog advertising is an old-time practice in the toy industry, so that there has been ample time to develop and test plans for proportionally equal terms. Moreover, printed advertising generally is so inherently varied that adequate equal substitutes easily suggest themselves for customers unable to afford to participate in catalog advertising.

On the other hand, so far as appears here, cooperative television advertising, certainly for these respondents, is, or would be, something brand-new, although it may be that, in tune with the times, the toy industry is or will be shifting much of its advertising effort to the television field.

It may well be that smaller customers would be unable to participate in cooperative television advertising at all, so that a "proportionally equal" plan would, as to them, have to provide for substitutes which, despite the exercise of the utmost of good faith, might be found by a court not to afford them proportionally equal treatment. Moreover, it does seem that it might well take time and actual experience to develop sound plans of "proportionally equal" treatment in television advertising.

If a broad order comprehending television payments should be issued in the present cases, it might well mean that a respondent who violated the order, even unwittingly, could be brought into a U.S. District Court, that the respondent might have to stand trial there instead of before the body supposed to have expertise on the subject, and be subject to possible penalties up to $5,000 a day, for each violation which might be found.

Such a drastic result is not necessary since even without a cease and desist order, each and every respondent here is still, as a matter of general law, subject to Section 2(d) in respect to payments in connection with television program or radio programs, or any other media of communication, or, for that matter, for any payments for services and facilities in violation of Section 2(d).

If such a drastic result were allowed to obtain here, it would simply, without justification, subject each respondent to possible penalties for television payments which would not be applicable to competitors who have not been named as respondents in the various complaints issued by the Commission in connection with catalog advertising payments. Such competitors would only be subject to Section 2(d) and a possible cease and desist order issued thereunder.

MOTION TO STRIKE DENIED

As already stated, one of the complaints herein, directed against respondent Mattel, Inc., alleges as part of paragraph 5 television advertising payments not made available on proportionally equal terms to all competing customers, an allegation denied by the answer of said respondent and completely avoided in the stipulations of fact.

Counsel in support of the complaints has pointed out that this allegation is simply part of the stated cause of action, in this one complaint, and not a separately stated cause of action; and he has pointed out that the said stated cause of action has been proved without proving this allegation as to television payments.

Respondent has submitted no law to support the motion to strike. Manifest prejudice is not discernible as a possible result of denying the motion and permitting the allegation to remain in the plea. It might be different if the denial of the motion put respondent to its proof, as to the television payment allegations, after presentation of the case-in-chief on a formal hearing. Respondent, through counsel, claims prejudice in the event of penalty proceedings on alleged violation of any cease and desist order, particularly a broad one, to be issued herein, which proceedings would disclose the present complaint alleging past television payment violations. However, this could be explained by the fact that the stipulation and findings make no reference to television or to other than catalog payments. Moreover, so far as the television allegation in the complaint is concerned the fact is, of course, that it was made, whether stricken or not.

The motion to strike is denied.

CONCLUSIONS OF LAW

I. Each of the respondents herein while engaged in commerce, and while subject to Section 2(d) of the Clayton Act, paid something of value to or for the benefit of a customer of said respondent, in the course of such commerce, as compensation or in consideration for services or facilities furnished by or through such customer in connection with the handling, sale, or offering for sale of products or commodities, manufactured, sold, or offered for sale by said respondent, without such payment or consideration being available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

II. The payments of value referred to above consisted of payments to certain toy catalog companies owned and controlled, in whole or in part, by said respondent's jobber customers, some of whom sell and distribute the toy catalogs to retailers for redistribution to the consuming public.

III. No proof has been submitted of the amounts of such payments, time or times of payments, names of customers, or other descriptive details. The proof submitted has been in the form of a stipulation of facts which does not contain such details.

IV. Each respondent also stipulated to the issuance of an appropriate cease and desist order, and stipulated that such an order may properly issue under Section 2(d) of the Clayton Act.

V. However, each respondent in stipulating the above expressly reserved the right to object to the scope of any cease and desist order which may be entered herein.

* * * * * * *

On all the facts and circumstances of the cases at bar the hearing examiner declines to issue an order merely following the general wording of the statute, or otherwise encompassing television advertising payments, as desired by counsel in support of the complaints.

On the other hand the hearing examiner declines to issue an order in the narrow form proposed by counsel for respondents.

Counsel for respondents, although willing to have the order go beyond toy catalogs and to apply to all printed publications, proposes this on the stated condition that the catalogs or other printed publications are owned or controlled, at least in part, by a respondent's jobbers. Thus a daily newspaper might be excluded, and perhaps as a practical matter only toy catalogs or their equivalent included.

Counsel for respondents also proposes, and quite strenuously, that the order should apply only in respect to payments made to jobbers, rather than to retailers as well. To be sure, there is no evidence of past violations other than with jobbers, but a cease and desist order is not to be limited to the precise act and conduct constituting the general violation. Respondents are admitted violators in the printed advertising field, and it is incidental whether unlawful payments were for the benefit of jobbers, or of retailers.

The question of payments for radio advertising has not come up in these cases, either in the pleadings, the stipulations, or even the oral hearing. The hearing examiner does not consider it of sufficient practical importance to have the order apply to radio or to Section 2(d) situations other than printed publications.

ORDER

This order is directed *individually and severally* against each of the respondents herein, each a respondent in a separate complaint, namely against each of the following corporations, as well as its officers, directors, agents, employees, etc.:

Kohner Bros., Inc.
Mattel, Inc.
Fisher-Price Toys, Inc.
The Hubley Manufacturing Company
Hassenfeld Bros., Inc.
Knickerbocker Toy Co., Inc.
Remco Industries, Inc.
The Porter Chemical Company
Wolverine Supply and Manufacturing Co.

It is ordered, That each of the respondent corporations aforenamed, and its officers, directors, representatives, agents, or employees, directly or through any corporate or other device, do forthwith *cease and desist* while engaged in commerce, as "commerce" is defined in the amended Clayton Act, from:

> Paying or contracting for the payment of anything of value to or for the benefit of a customer of such respondent in the course of such commerce as compensation or in consideration for any services or facilities consisting of advertising or other publicity, furnished by or through such customer, in a toy catalog, newspaper, tabloid, handbill, circular, any other printed publication, or paper of any kind, 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 such respondent, unless such payment or consideration is available, and is made available, on proportionally equal terms to all other customers competing in the distribution of such toy, game, or hobby products.

Mr. Jerome Garfinkel for the Commission.
Rogers, Hoge & Hills, of New York, N.Y., for respondent.

INITIAL DECISION AS TO RESPONDENT WEN-MAC CORPORATION BY HARRY R. HINKES, HEARING EXAMINER *

The complaint charges the respondent, Wen-Mac Corporation, with violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. Sec. 13), in the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of products sold to them by respondent, without making such payments or allowances available to all other competing customers on proportionally equal terms. As an example of this practice, the complaint alleges the respondent made payments to certain associations composed of respondent's wholesale customers for the advertising of its products in the catalogues of such associations without proportionally equal payments to respondent's wholesale customers who were not members of such associations.

Respondent's answer to the complaint, dated March 2, 1961, made partial admissions of the allegations of the complaint, but denied that any of these promotional payments constituted violations of the Clayton Act. On August 28, 1961, a stipulation was executed by the respondent and counsel for both parties, setting forth certain facts and waiving hearing. Argument was reserved on the scope of the cease and desist order to be entered. Proposed findings and order were submitted by both parties and on October 24, 1961, oral argument was held thereon.

FINDINGS OF FACT

1. Respondent Wen-Mac Corporation 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 11511 Tennessee Avenue, Los Angeles 64, California.

2. Respondent has been engaged, and is presently engaged, in the business of manufacturing toys, games and hobbies (hereinafter called "products"). These products are sold by respondent to jobbers located in various parts of the nation for resale to retailers.

3. Respondent has sold, and now sells, its products in commerce, as "commerce" is defined in the amended Clayton Act, to customers located throughout various States of the United States, and in the District of Columbia, some of whom are in competition with other of its customers.

*Docket No. 8245, filed December 21, 1961.

4. Prior to July 29, 1960, the products were manufactured and sold in commerce as aforesaid by Wen-Mac Corporation (hereinafter called Wen-Mac First) with offices located at 11511 Tennessee Avenue, Los Angeles 64, California. Said Wen-Mac First was dissolved on July 29, 1960; prior to its aforesaid dissolution, the assets and certain liabilities of Wen-Mac First were sold and assigned to American Machine & Foundry Company, a New Jersey corporation, and thereupon transferred to respondent Wen-Mac Corporation, a wholly-owned subsidiary of said American Machine & Foundry Company. The president and secretary-treasurer of Wen-Mac First became and are the Chairman of the Board and President, respectively, of respondent Wen-Mac Corporation. The said officers owned all the stock in Wen-Mac First but do not own any stock in respondent Wen-Mac Corporation.

5. In the course and conduct of its business in commerce, Wen-Mac First made payment to certain toy catalogue companies which companies were owned or controlled in whole or in part by jobber customers of Wen-Mac First. Some of Wen-Mac First jobber customers who own or control, in whole or in part, said toy catalogue companies, sell and distribute the toy catalogues to retailers for redistribution to the consuming public. In 1960, respondent Wen-Mac Corporation made such payments pursuant to contracts executed by Wen-Mac First prior to its dissolution and assumed by said respondent upon its incorporation. Such payments were made as compensation or in consideration for the illustration and distribution in such catalogues of one or more products sold by Wen-Mac First until its dissolution and by respondent Wen-Mac Corporation since its incorporation. Such payments were not offered or made available by Wen-Mac First prior to its dissolution, nor by respondent Wen-Mac Corporation since its incorporation on proportionately equal terms to all their other jobber customers who were in competition in the contemporaneous resale of their products of like grade and quality with those jobber customers who owned or controlled, in whole or in part, a toy catalogue company to which such advertising payments were made.

DISCUSSION

The findings enumerated above obviously warrant the issuance of a cease and desist order (see *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)), and, indeed, such an order has been proposed by the respondent. It argues, however, that the order to be entered should be limited to prohibiting the respondent's payment to jobber customers of the respondent or to any toy catalogue company which the respondent knows is owned or controlled by any jobber customer, and that, in addition, the payments prohibited should be those made as compensation or in consideration for illustration and description in any toy catalogue or other printed form which is distributed to retailers and which is furnished through such jobber customers or toy catalogue companies. It bases this argument upon the fact that the only specific practice found in violation of the Act is the respondent's practice of discriminatory promotional payments for advertising in the catalogues of the companies owned or controlled by some of its jobber customers. Counsel supporting the complaint, on the other hand, urges that the order be sufficiently broad to cover discriminatory payments by respondent to any of its customers for any services or facilities furnished by or through such customers.

In *F.T.C.* v. *Ruberoid Co.*, 343 U.S. 470 (1952), the Court upheld a cease and desist order which prohibited *all* price differentials between competing purchasers although the only differentials found were differentials of five cents or more. The Court noted that very small differences in price were material factors in competition. The Court, however, went on to state:

> We first consider the contentions of Ruberoid, which are mainly attacks upon the breadth of the order. Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. *In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.* Moreover, "[t]he Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" disclosed. *Jacob Siegel Co.* v. *Federal Trade Comm'n*, 327 U.S. 608, 611 (1946). Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices. Therefore we have said "the courts will not interfere *except where the remedy selected has no reasonable relation to the unlawful practices found to exist.*" (Emphasis added)

This sanction of broad orders has been followed by the Commission in a number of cases (See *In the Matter of Chestnut Farms Chevy Chase Dairy*, Docket 6465, 53 F.T.C. 1050, 1062, (1957); *In the Matter of Henry Rosenfeld, Inc., et al.*, Docket 6212, 52 F.T.C. 1535, 1544–1545 (1956); *In the Matter of P. Lorillard Company*, Docket 6600, Init. Dec. dated October 9, 1957, Init. Dec. adopted by Commission May 7, 1958, [54 F.T.C. 1550]; *In the Matter of Swanee Paper Corporation*, Docket 6927, Init. Dec. dated August 18, 1959, adopted by Commission March 22, 1960, [56 F.T.C. 1077]).

In *P. Lorillard Company* v. *Federal Trade Commission*, 267 F. 2d 439 (3d Cir., 1959), *cert. denied* 361 U.S. 923 (1959) the court stated:

> Petitioners' last objection relates to the "sweeping" nature of the cease and desist orders issued by the Commission. Clearly, the orders in the instant cases go no further than that issued against the Ruberoid Company and specifically approved by the Supreme Court in Federal Trade Commission v. Ruberoid Co., 1952, 343 U.S. 470, 72 S. Ct. 800, 96 L. Ed. 1081. Also see Moog Industries, Inc. v. Federal Trade Commission, 1958, 355 U.S. 411, 78 S. Ct. 377, 2 L. Ed. 2d 370, affirming Moog Industries, Inc. v. Federal Trade Commission, 8 Cir. 1956, 238 F. 2d 43. *The fact that these cases involved orders issued in the language of Section 2(a) of the amended Clayton Act should give us little pause, for Section 2(d) is much narrower in scope and therefore orders framed in its language would be well within the permissible ambit of the Commission's discretion.* (Emphasis added.)

Respondent argues, however, that the legislative history of the 1959 amendment to the Clayton Act renders the Ruberoid dicta inapplicable. The amendment, sometimes referred to as the Finality Act, deletes one of the three steps which formerly had to be complied with before a civil penalty could be imposed upon a violator of Section 2(d). When a Commission cease and desist order becomes final, a civil action may be instituted against a respondent who violates such order and money damages recovered by the United States. No intermediate steps between the issuance of the order and the imposition of a penalty is required as in the past when the court issued its own enforcement order, after the Commission order, which was the foundation for a civil penalty action.

The subjection of a respondent to immediate civil penalty, argues the respondent, makes greater specificity mandatory. It cites the testimony of members of Congress to that effect (see Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 1st Sess.; Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 85th Cong. 2d Sess.; and House debates at 105 Cong. Rec. 12734–5, where descriptive adjectives such as "definitive," "clear," and "specific" were used to describe the types of Clayton Act orders desired.

No one can argue seriously that cease and desist orders should not be as specific, clear, and definitive as is reasonably possible. Any other approach would violate ordinary standards of fairness which require orders to inform the respondent of what he may not do. This requirement of specificity, however, is not to be confused with respondent's proposal for a cease and desist order which is limited in scope. An order which is broad in scope and covers many activities may, nevertheless, be quite specific. By the same token, an order which may be very narrow in scope but which uses imprecise language may be quite lacking in specificity. The law is well settled that the order should be "adequate to cope with the unlawful practice."

Respondent stresses the recent case of *Swanee Paper Corp.* v. *Federal Trade Commission*, 291 F. 2d 833 (2d Cir., 1961), where the court held that the 2(d) order should be limited to the particular practice found to violate the statute. It is important to note, however, that, contrary to the respondent's argument, the court realized that under some circumstances the order could extend beyond the particular practice found:

. . . Administrative agencies have wide discretion in framing their orders and are empowered to enjoin *other related* unlawful acts which may occur in the future (e.g., *FTC* v. *Mandel Brothers Inc.*, 359 U.S. 385 (1959)), but *there must be some relation between the facts found and the breadth of the order*. . . . Nothing in the record here indicates flagrant or extensive violations of Section 2(d) by Swanee; the *single* violation found occurred in an *uncertain area of the law* and was *discontinued* before the complaint was filed. (Emphasis added.)

Although the court condemned the order which had been phrased in the language of Section 2(d), I find that case quite dissimilar from the instant case. Certainly the record before me does not meet the criteria laid down by the court in the *Swanee Paper* case. The stipulation does not refer to a single violation nor to any discontinuance of the practice.

Respondent cites *Swift and Company* v. *United States*, 196 U.S. 375 (1905), where the Court struck from an antitrust injunction the words "or by any other method or device," stating that the "defendants ought to be informed as accurately as the case permits, what they are forbidden to do." Similarly, in *Milk and Ice Cream Institute* v. *Federal Trade Commission*, 152 F. 2d 478 (7th Cir., 1946), the court, citing the Swift case, *supra*, struck from the Federal Trade Commission order the words "formulating or putting into operation any other practice or plan which has the purpose or effect of fixing or maintaining prices for metal milk or ice cream cans."

Here, too, the cases are not analogous. In the *Swift* case, the injunction was issued under Section 1 of the Sherman Act which covers a variety of acts wholly unrelated to each other. In the *Milk and Ice Cream Institute* case, where the order was issued pursuant to Section 5 of the Federal Trade Commission Act, the statutory authorization also covers a variety of acts which may be wholly unrelated to each other. Section 2(d) is quite dissimilar to Section 1 of the Sherman Act or Section 5 of the Federal Trade Commission Act. It is limited to a specified practice and, as the court stated in the *P. Lorillard Company* case, it is even much narrower in scope than Section 2(a) of the amended Clayton Act under which section orders phrased in the statutory language have been upheld.

Of even greater significance, in my opinion, is the Federal Trade Commission decision in the matter of *Shulton, Inc.*, Docket No. 7721, dated July 25, 1961, [59 F.T.C. 106]. Although more than a month had elapsed since the court's decision in *Swanee Paper*, a broad Section 2(d) cease and desist order in the language of that section was upheld by the Commission despite proof of only one type of discriminatory payment (i.e., newspaper advertising). Following the dicta of that opinion requires the issuance of a broad cease and desist order here.

In the *Shulton* decision, the Commission adopted the position that the specific practice found to be illegal under Section 2(d) was the granting of discriminatory payments to certain customers for services and facilities furnished by such customers:

> Respondent's argument confuses the discriminatory practice alleged in the complaint with the acts by which this practice may have been manifested. Respondent is charged in this connection with violating Section 2(d) of the Clayton Act. The specific practice declared illegal by this subsection is the making of discriminatory payments by a seller to a buyer for advertising or promotional services or facilities rendered by the latter. The record shows that respondent has engaged in this practice and the order merely prohibits it from doing so again.

The limitations proposed by the respondent cannot be reconciled with the decision in *Shulton*, even though the acts of the respondent involved its jobber customers only and dealt with catalogue advertising only. The practice enjoined is the discriminatory payment to a buyer for services and facilities furnished by that buyer regardless of the form in which such discrimination takes place. The prohibiting of discriminatory advertising or promotional payments or allowances, if limited to catalogues, would leave respondent free to accomplish virtually the same results through the many other forms of advertising or promotion available such as television, radio, bill boards, demonstrators, displays, etc. A broad cease and desist order is mandatory because of the relationship existing among the almost limitless variety of advertising and promotional media available to a respondent who has violated the Act in perhaps only one medium. In that sense, therefore, such order does have "a reasonable relation to the unlawful practices found to exist" as stated in the *Ruberoid* case. Even according to the *Swanee Paper* case, there is "some relation between the facts found and the breadth of the order." Similarly, an order limited to jobber customers would leave respondent free to discriminate against his retail and other customers, a distinction which is hardly supportable.

Finally, it should be noted that the order issued herein departs from the words of the statute in one respect. Whereas Section 2(d) prohibits discriminatory payments "for any services or facilities furnished," the instant order prohibits such payments "for any advertising or other promotional services or facilities furnished." This modification is, in my opinion, necessary in view of the language used by the Commission in its *Shulton* opinion where it said:

> The specific practice declared illegal by this subsection is the making of discriminatory payments by a seller to a buyer for *advertising or promotional services or facilities* rendered by the latter. The record shows that respondent has engaged in this practice and the order merely prohibits it from doing so again. (Emphasis added)

Although the order in the *Shulton* case contained no such modification, it must be read in connection with the opinion which makes it clear that advertising or promotional services or facilities are intended by the order.

CONCLUSIONS OF LAW

The foregoing Findings of Fact, as stipulated, support the following conclusion:

The respondent, Wen-Mac Corporation, which is engaged in commerce, has paid or contracted for the payment of something of value to or for the benefit of a customer of the respondent in the course of such commerce as compensation or in consideration for services or facilities furnished by or through such customers in connection with the handling, sale or offering for sale of a product manufactured, sold, or offered for sale by respondent, without such payment being available on proportionally equal terms to all other customers competing in the distribution of such products.

ORDER

It is ordered, That respondent Wen-Mac Corporation, a corporation, its officers, directors, representatives, agents, or employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of toy, game, or hobby products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation or in consideration for any advertising or other promotional services or facilities furnished by or through such customer 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 respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such toy, game, or hobby product.

Mr. Jerome Garfinkel for the Commission.
Rogers, Hoge & Hills, of New York, N.Y., for respondent.

INITIAL DECISION AS TO RESPONDENT AMERICAN MACHINE & FOUNDRY COMPANY BY HARRY R. HINKES, HEARING EXAMINER*

The complaint charges the respondent, American Machine & Foundry Company, with violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. Sec. 13), in the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of products sold to them by respondent, through its AMF Wheel Goods Division, without making such payments or allowances available to all other competing customers on proportionally equal terms. As an example of this practice, the complaint alleges the respondent made payments to a certain association composed of respondent's wholesale customers for the advertising of its products in the catalogues of such association without proportionally equal payments to respondent's wholesale customers who were not members of such association.

Respondent's answer to the complaint, dated September 26, 1960, made partial admissions of the allegations of the complaint, but denied that any of these promotional payments constituted violations of the Clayton Act. On August 29, 1961, a stipulation was executed by the respondent and counsel for both parties, setting forth certain facts and waiving hearing. Argument was reserved on the scope of the cease and desist order to be entered. Proposed findings and order were submitted by both parties and on October 24, 1961, oral argument was held thereon.

*Docket No. 7977, filed December 21, 1961.

FINDINGS OF FACT

1. Respondent American Machine & Foundry Company 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 261 Madison Avenue, New York 16, New York.

2. Respondent has been engaged, and is presently engaged, in the business of manufacturing toys, games and hobbies (hereinafter called "products"). These products are sold by respondent to jobbers located in various parts of the nation for resale to retailers. Respondent's sales of products for 1959 exceeded $8,000,000.

3. Respondent has sold, and now sells, its products in commerce, as "commerce" is defined in the amended Clayton Act, to customers located throughout various States of the United States, and in the District of Columbia, some of whom are in competition with other of its customers.

4. In the course and conduct of its business in commerce, respondent made payments to certain toy catalogue companies, which companies are owned or controlled, in whole or in part, by jobber customers of respondent. Some of respondent's jobber customers who own or control, in whole or in part, said toy catalogue companies sell and distribute the toy catalogues to retailers for redistribution to the consuming public. Such payments were made as compensation or in consideration for the illustration and description in such catalogues of one or more products sold by respondent to some or all of such jobber customers. Such payments were not offered or made available by respondent on proportionally equal terms to all of its other jobber customers who were in competition in the contemporaneous resale of its products of like grade and quality with those jobber customers who owned or controlled, in whole or in part, a toy catalogue company to which such an advertising payment was made.

DISCUSSION

The findings enumerated above obviously warrant the issuance of a cease and desist order (see *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)), and, indeed, such an order has been proposed by the respondent. It argues, however, that the order to be entered should be limited to prohibiting the respondent's payment to jobber customers of the respondent or to any toy catalogue company which the respondent knows is owned or controlled by any jobber customer, and that, in addition, the payments prohibited should be those made as compensation or in consideration for illustration and description in any toy catalogue or other printed form which is distributed to retailers and which is furnished through such jobber customers or toy catalogue companies. It bases this argument upon the fact that the only specific practice found in violation of the Act is the respondent's practice of discriminatory promotional payments for advertising in the catalogues of the companies owned or controlled by some of its jobber customers. Counsel supporting the complaint, on the other hand, urges that the order be sufficiently broad to cover discriminatory payments by respondent to any of its customers for any services or facilities furnished by or through such customers.

In F.T.C. v. *Ruberoid Co.*, 343 U.S. 470 (1952), the Court upheld a cease and desist order which prohibited *all* price differentials between competing purchasers although the only differentials found were differentials of five cents or more. The Court noted that very small differences in price were material factors in competition. The Court, however, went on to state:

> We first consider the contentions of Ruberoid, which are mainly attacks upon the breadth of the order. Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. *In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be bypassed with impunity.* Moreover, "[t]he Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" disclosed. *Jacob Siegel Co.* v. *Federal Trade Comm'n*, 327 U.S. 608, 611 (1946). Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices. Therefore we have said "the courts will not interfere *except where the remedy selected has no reasonable relation to the unlawful practices found to exist.*" (Emphasis added.)

This sanction of broad orders has been followed by the Commission in a number of cases (See *In the Matter of Chestnut Farms Chevy Chase Dairy*, Docket 6465, 53 F.T.C. 1050, 1062 (1957); *In the Matter of Henry Rosenfeld, Inc., et al.*, Docket 6212, 52 F.T.C. 1535, 1544–1545 (1956); *In the Matter of P. Lorillard Company*, Docket 6600, Init. Dec., dated Oct. 9, 1957, Init. Dec. adopted by Commission May 7, 1958, [54 F.T.C. 1550]; *In the Matter of Swanee Paper Corporation*, Docket 6927, Init. Dec. dated August 18, 1959, adopted by Commission March 22, 1960 [56 F.T.C. 1077]).

In *P. Lorillard Company* v. *Federal Trade Commission*, 267 F. 2d 439 (3d Cir., 1959), *cert. denied* 361 U.S. 923 (1959), the court stated:

Petitioners' last objection relates to the "sweeping" nature of the cease and desist orders issued by the Commission. Clearly, the orders in the instant cases go no further than that issued against the Ruberoid Company and specifically approved by the Supreme Court in *Federal Trade Commission* v. *Ruberoid Co.*, 1952, 343 U.S. 470, 72 S. Ct. 800, 96 L. Ed. 1081. Also see *Moog Industries, Inc.* v. *Federal Trade Commission*, 1958, 355 U.S. 411, 78 S. Ct. 377, 2 L. Ed. 2d 370, affirming *Moog Industries, Inc.* v. *Federal Trade Commission*, 8 Cir. 1956, 238 F. 2d 43. *The fact that these cases involved orders issued in the language of Section 2 (a) of the amended Clayton Act should give us little pause, for Section 2(d) is much narrower in scope and therefore orders framed in its langauge would be well within the permissible ambit of the Commission's discretion.* (Emphasis added)

Respondent argues, however, that the legislative history of the 1959 amendment to the Clayton Act renders the Ruberoid dicta inapplicable. The amendment, sometimes referred to as the Finality Act, deletes one of the three steps which formerly had to be complied with before a civil penalty could be imposed upon a violator of Section 2(d). When a Commission cease and desist order becomes final, a civil action may be instituted against a respondent who violates such order and money damages recovered by the United States. No intermediate steps between the issuance of the order and the imposition of a penalty is required as in the past when the court issued its own enforcement order, after the Commission order, which was the foundation for a civil penalty action.

The subjection of a respondent to immediate civil penalty, argues the respondent, makes greater specificity mandatory. It cites the testimony of members of Congress to that effect (see Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 1st Sess.; Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 85th Cong. 2d Sess.; and House debates at 105 Cong. Rec. 12734–5, where descriptive adjectives such as "definitive," "clear," and "specific" were used to describe the types of Clayton Act orders desired.)

No one can argue seriously that cease and desist orders should not be as specific, clear, and definitive as is reasonably possible. Any other approach would violate ordinary standards of fairness which require orders to inform the respondent of what he may not do. This requirement of specificity, however, is not to be confused with respondent's proposal for a cease and desist order which is limited in scope. An order which is broad in scope and covers many activities may, nevertheless, be quite specific. By the same token, an order which may be very narrow in scope which uses imprecise language may be quite lacking in specificity. The law is well settled that the order should be "adequate to cope with the unlawful practice."

Respondent stresses the recent case of *Swanee Paper Corp.* v. *Federal Trade Commission*, 291 F. 2d 833 (2d Cir., 1961), where the court held that the 2(d) order should be limited to the particular practice found to violate the statute. It is important to note, however, that, contrary to the respondent's argument, the court realized that under some circumstances the order could extend beyond the particular practice found:

> . . . Administrative agencies have wide discretion in framing their orders and are empowered to enjoin *other related* unlawful acts which may occur in the future (e.g., *FTC* v. *Mandel Brothers Inc.*, 359 U.S. 385 (1959)), but *there must be some relation between the facts found and the breadth of the order*. . . . Nothing in the record here indicates flagrant or extensive violations of Section 2(d) by Swanee; the *single* violation found occurred in an *uncertain area of the law* and was *discontinued* before the complaint was filed. (Emphasis added.)

Although the court condemned the order which had been phrased in the language of Section 2(d), I find that case quite dissimilar from the instant case. Certainly the record before me does not meet the criteria laid down by the court in the *Swanee Paper* case. The stipulation does not refer to a single violation nor to any discontinuance of the practice.

Respondent cites *Swift and Company* v. *United States*, 196 U.S. 375 (1905), where the Court struck from an antitrust injunction the words "or by any other method or device," stating that the "defendents ought to be informed as accurately as the case permits, what they are forbidden to do." Similarly, in *Milk and Ice Cream Institute* v. *Federal Trade Commission*, 152 F. 2d 478 (7th Cir., 1946), the court, citing the *Swift* case, *supra*, struck from the Federal Trade Commission order the words "formulating or putting into operation any other practice or plan which has the purpose or effect of fixing or maintaining prices for metal milk or ice cream cans."

Here, too, the cases are not analogous. In the *Swift* case, the injunction was issued under Section 1 of the Sherman Act which covers a variety of acts wholly unrelated to each other. In the *Milk and Ice Cream Institute* case, where the order was issued pursuant to Section 5 of the Federal Trade Commission Act, the statutory authorization also covers a variety of acts which may be wholly unrelated to each other. Section 2(d) is quite dissimilar to Section 1 of the Sherman Act or Section 5 of the Federal Trade Commission Act. It is limited to a specified practice and, as the court stated in the

P. Lorillard Company case, it is even much narrower in scope than Section 2(a) of the amended Clayton Act under which section orders phrased in the statutory language have been upheld.

Of even greater significance, in my opinion, is the Federal Trade Commission decision in the matter of *Shulton, Inc.*, Docket No. 7721, dated July 25, 1961 [59 F.T.C. 106]. Although more than a month had elapsed since the court's decision in *Swanee Paper*, a broad Section 2(d) cease and desist order in the language of that section was upheld by the Commission despite proof of only one type of discriminatory payment (i.e., newspaper advertising). Following the dicta of that opinion requires the issuance of a broad cease and desist order here.

In the *Shulton* decision, the Commission adopted the position that the specific practice found to be illegal under Section 2(d) was the granting of discriminatory payments to certain customers for services and facilities furnished by such customers:

> Respondent's argument confuses the discriminatory practice alleged in the complaint with the acts by which this practice may have been manifested. Respondent is charged in this connection with violating Section 2(d) of the Clayton Act. The specific practice declared illegal by this subsection is the making of discriminatory payments by a seller to a buyer for advertising or promotional services or facilities rendered by the latter. The record shows that respondent has engaged in this practice and the order merely prohibits it from doing so again.

The limitations proposed by the respondent cannot be reconciled with the decision in *Shulton*, even though the acts of the respondent involved its jobber customers only and dealt with catalogue advertising only. The practice enjoined is the discriminatory payment to a buyer for services and facilities furnished by that buyer regardless of the form in which such discrimination takes place. The prohibiting of discriminatory advertising or promotional payments or allowances, if limited to catalogues, would leave respondent free to accomplish virtually the same results through the many other forms of advertising or promotion available such as television, radio, bill boards, demonstrators, displays, etc. A broad cease and desist order is mandatory because of the relationship existing among the almost limitless variety of advertising and promotional media available to a respondent who has violated the Act in perhaps only one medium. In that sense, therefore, such order does have "a reasonable relation to the unlawful practices found to exist" as stated in the *Ruberoid* case. Even according to the *Swanee Paper* case, there is "some relation between the facts found and the breadth of the order." Similarly, an order limited to jobber customers would leave respondent free to discriminate against his retail and other customers, a distinction which is hardly supportable.

Finally, it should be noted that the order issued herein departs from the words of the statute in one respect. Whereas Section 2(d) prohibits discriminatory payments "for any services or facilities furnished," the instant order prohibits such payments "for any advertising or other promotional services or facilities furnished." This modification is, in my opinion, necessary in view of the language used by the Commission in its *Shulton* opinion where it said:

> The specific practice declared illegal by this subsection is the making of discriminatory payments by a seller to a buyer for *advertising or promotional services or facilities* rendered by the latter. The record shows that respondent has engaged in this practice and the order merely prohibits it from doing so again. (Emphasis added)

Although the order in the *Shulton* case contained no such modification, it must be read in connection with the opinion which makes it clear that advertising or promotional services or facilities are intended by the order.

CONCLUSIONS OF LAW

The foregoing Findings of Fact, as stipulated, support the following conclusion:

The respondent, American Machine & Foundry Company, which is engaged in commerce, has paid or contracted for the payment of something of value to or for the benefit of a customer of the respondent in the course of such commerce as compensation or in consideration for services or facilities furnished by or through such customers in connection with the handling, sale, or offering for sale of a product manufactured, sold, or offered for sale by respondent, without such payment being available on proportionally equal terms to all other customers competing in the distribution of such products.

ORDER

It is ordered, That respondent American Machine & Foundry Company, a corporation, its officers, directors, representatives, agents or employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale, or distribution of toy, game, or hobby products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation or in consideration for any advertising or other promotional services or facilities furnished by or through such customer 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 respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such toy, game, or hobby product.

Mr. Jerome Garfinkel for the Commission.

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

INITIAL DECISION AS TO RESPONDENT IDEAL TOY CORPORATION BY HARRY R. HINKES, HEARING EXAMINER*

The complaint charges the respondent, Ideal Toy Corporation, with violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. Sec. 13), in the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of products sold to them by respondent without making such payments or allowances available to all other competing customers on proportionally equal terms. As an example of this practice, the complaint alleges the respondent made payments to a certain association composed of respondent's wholesale customers for the advertising of its products in the catalogues of such association without proportionally equal payments to respondent's wholesale customers who were not members of such association. As another example of this practice, the complaint alleges the respondent made payments to a certain wholesale customer for the advertising of its products on television without proportionally equal payments to other customers competing with that favored customer.

Respondent's answer to the complaint, dated September 29, 1960, made partial admissions of the allegations of the complaint, but denied that any of these promotional payments constituted violations of the Clayton Act. On June 12, 1961, a stipulation was executed by the respondent and counsel for both parties, setting forth certain facts and waiving hearing. Argument was reserved on the scope of the cease and desist order to be entered. Proposed findings and order were submitted by both parties and on October 26, 1961, oral argument was held thereon.

*Docket No. 7979, filed January 3, 1962.

FINDINGS OF FACT

1. Respondent Ideal Toy Corporation is a corporation organized and doing business under the laws of the State of New York, with its principal offices and places of business located at 200 Fifth Avenue, New York 10, New York, and 184–10 Jamaica Avenue, Hollis 23, New York.

2. Respondent has been engaged, and is presently engaged, in the business of manufacturing toys, games and hobbies (hereinafter called "products"). These products are sold by respondent to jobbers located in various parts of the Nation for resale to retailers. In 1959, respondent's sales to such jobbers and to all other customers exceeded $20,000,000.

3. Respondent has sold, and now sells, its products in commerce, as "commerce" is defined in the amended Clayton Act, to customers located throughout various States of the United States and in the District of Columbia, some of whom are in competition with other of its customers.

4. In the course and conduct of its business in commerce, respondent made payments to certain toy catalogue companies, which companies are owned or controlled, in whole or in part, by jobber customers of respondent. Some of respondent's jobber customers who own or control, in whole or in part, said toy catalogue companies sell and distribute the toy catalogues to retailers for redistribution to the consuming public. Such payments were made as compensation or in consideration for the illustration and description in such catalogues of one or more products sold by respondent to some or all of such jobber customers. Such payments were not offered or made available by respondent on proportionally equal terms to all of its other jobber customers who were in competition in the contemporaneous resale of its products of like grade and quality with those jobber customers who owned or controlled, in whole or in part, a toy catalogue company to which such an advertising payment was made.

5. The record contains no evidence of any act or practice by the respondent in connection with television advertising or any other type of advertising except the catalogue advertising referred to in paragraph 4 above.

DISCUSSION

The findings enumerated above obviously warrant the issuance of a cease and desist order (see *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)), and, indeed, such an order has been proposed by the respondent. It argues, however, that the order to be entered should be limited to prohibiting the respondent's discriminatory payments made as compensation or in consideration for the advertising of its products in any toy catalogue or other similar publication. It bases this argument upon the fact that the only specific practice found in violation of the Act is the respondent's practice of discriminatory promotional payments for advertising in the catalogues of the companies owned or controlled by some of its customers. Counsel supporting the complaint, on the other hand, urges that the order be sufficiently broad to cover discriminatory payments by respondent for any services or facilities furnished by or through such customers.

In *F.T.C.* v. *Ruberoid Co.*, 343 U.S. 470 (1952), the Court upheld a cease and desist order which prohibited *all* price differentials between competing purchasers although the only differentials found were differentials of five cents or more. The Court noted that very small differences in price were material factors in competition. The Court, however, went on to state:

> We first consider the contentions of Ruberoid, which are mainly attacks upon the breadth of the order. Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. *In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be bypassed with impunity.* Moreover, "[t]he Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" disclosed. *Jacob Siegel Co.* v. *Federal Trade Comm'n*, 327 U.S. 608, 611 (1946). Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices. Therefore we have said "the courts will not interfere *except where the remedy selected has no reasonable relation to the unlawful practices found to exist.*" (Emphasis added)

This sanction of broad orders has been followed by the Commission in a number of cases (See *In the Matter of Chestnut Farms Chevy Chase Dairy*, Docket 6465, 53 F.T.C. 1050, 1062 (1957); *In the Matter of Henry Rosenfeld, Inc., et al.*, Docket 6212, 52 F.T.C. 1535, 1544–1545 (1956); *In the Matter of P. Lorillard Company*, Docket 6600, Init. Dec., dated Oct. 9, 1957, Init. Dec. adopted by Commission May 7, 1958 [54 F.T.C. 1550]; *In the Matter of Swanee Paper Corporation*, Docket 6927, Init. Dec. dated August 18, 1959, adopted by the Commission March 22, 1960 [56 F.T.C. 1077]).

In *P. Lorillard Company* v. *Federal Trade Commission*, 267 F. 2d 439 (3d cir., 1959), *cert. denied* 361 U.S. 923 (1959), the court stated:

> Petitioners' last objection relates to the "sweeping" nature of the cease and desist orders issued by the Commission. Clearly, the orders in the instant cases go no further than that issued against the Ruberoid Company and specifically approved by the Supreme Court in *Federal Trade Commission* v. *Ruberoid Co.*, 1952, 343 U.S. 470, 72 S. Ct. 800, 96 L. Ed. 1081. Also see *Moog Industries, Inc.* v. *Federal Trade Commission*, 1958, 355 U.S. 411, 78 S. Ct. 377, 2 L. Ed. 2d 370, affirming *Moog Industries, Inc.* v. *Federal Trade Commission*, 8 Cir. 1956, 238 F. 2d 43. ***The fact that these cases involved orders issued in the language of Section 2 (a) of the amended Clayton Act should give us little pause, for Section 2(d) is much narrower in scope and therefore orders framed in its language would be well within the permissible ambit of the Commission's discretion.*** (Emphasis added.)

Respondent argues, however, that the legislative history of the 1959 amendment to the Clayton Act renders the *Ruberoid* dicta inapplicable. The amendment, sometimes referred to as the Finality Act, deletes one of the three steps which formerly had to be complied with before a civil penalty could be imposed upon a violator of Section 2(d). When a Commission cease and desist order becomes final, a civil action may be instituted against a respondent who violates such order and money damages recovered by the United States. No intermediate steps between the issuance of the order and the imposition of a penalty is required as in the past when the court issued its own enforcement order, after the Commission order, which was the foundation for a civil penalty action.

The subjection of a respondent to immediate civil penalty, argues the respondent, makes greater specificity mandatory. It cites the testimony of members of Congress to that effect (see Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 1st Sess.; Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 85th Cong. 2d Sess.; and House debates at 105 Cong. Rec. 12734–5, where descriptive adjectives such as "definitive," "clear," and "specific" were used to describe the types of Clayton Act orders desired.)

No one can argue seriously that cease and desist orders should not be as specific, clear, and definitive as is reasonably possible. Any other approach would violate ordinary standards of fairness which require orders to inform the respondent of what he may not do. This requirement of specificity, however, is not to be confused with respondent's proposal for a cease and desist order which is limited in scope.

An order which is broad in scope and covers many activities may, nevertheless, be quite specific. By the same token, an order which may be very narrow in scope but which uses imprecise language may be quite lacking in specificity. The law is well settled that the order should be "adequate to cope with the unlawful practice."

Respondent stresses the recent case of *Swanee Paper Corp.* v. *Federal Trade Commission*, 291 F. 2d 833 (2d Cir., 1961), where the court held that the 2(d) order should be limited to the particular practice found to violate the statute. It is important to note, however, that the court realized that under some circumstances the order could extend beyond the particular practice found:

> . . . Administrative agencies have wide discretion in framing their orders and are empowered to enjoin *other related* unlawful acts which may occur in the future (e.g., *FTC* v. *Mandel Brothers Inc.*, 359 U.S. 385 (1959), but *there must be some relation between the facts found and the breadth of the order*. . . Nothing in the record here indicates flagrant or extensive violations of Section 2(d) by Swanee; the *single* violation found occurred in an *uncertain area of the law* and was *discontinued* before the complaint was filed. (Emphasis added)

Although the court condemned the order which had been phrased in the language of Section 2(d), I find that case quite dissimilar from the instant case. Certainly the record before me does not meet the criteria laid down by the court in the *Swannee Paper* case. The stipulation does not refer to a single violation nor to any discontinuance of the practice.

Of even greater significance, in my opinion, is the Federal Trade Commission decision in the matter of *Shulton, Inc.*, Docket No. 7721, dated July 25, 1961, [59 F.T.C. 106]. Although more than a month had elapsed since the court's decision in *Swanee Paper*, a broad Section 2(d) cease and desist order in the language of that section was upheld by the Commission despite proof of only one type of discriminatory payment (i.e., newspaper advertising). Following the dicta of that opinion requires the issuance of a broad cease and desist order here.

In the *Shulton* decision, the Commission adopted the position that the specific practice found to be illegal under Section 2(d) was the granting of discriminatory payments to certain customers for services and facilities furnished by such customers:

> Respondent's argument confuses the discriminatory practice alleged in the complaint with the acts by which this practice may have been manifested. Respondent is charged in this connection with violating Section 2(d) of the Clayton Act. The specific practice declared illegal by this subsection is the making of discriminatory payments by a seller to a buyer for advertising or promotional services or facilities rendered by the latter. The record shows that

respondent has engaged in this practice and the order merely prohibits it from doing so again.

The limitations proposed by the respondent cannot be reconciled with the decision in *Shulton*, even though the acts of the respondent dealt with catalogue advertising only. The practice enjoined is the discriminatory payment to a buyer for services and facilities furnished by that buyer regardless of the form in which such discrimination takes place. The prohibiting of discriminatory advertising or promotional payments or allowances, if limited to catalogues would leave respondent free to accomplish virtually the same results through the many other forms of advertising or promotion available such as television, radio, bill boards, demonstrators, displays, etc. A broad cease and desist order is mandatory because of the relationship existing among the almost limitless variety of advertising and promotional media available to a respondent who has violated the Act in perhaps only one medium. In that sense, therefore, such order does have "a reasonable relation to the unlawful practices found to exist" as stated in the *Ruberoid* case. Even according to the *Swanee Paper* case, there is "some relation between the facts found and the breadth of the order."

It thus becomes immaterial that the discriminatory television advertising, cited as an example in the complaint, has not been proven. It is sufficient that the Commission has proven, albeit by stipulation, that the respondent has violated Section 2(d) in the granting of discriminatory payments to some of its customers for advertising or other promotional services. It follows that all discriminatory advertising and promotional allowances must be prohibited. There is no basis for carving out an exception to the prohibition for television advertising. Such advertising stands in no peculiar position vis-a-vis the other media of advertising, such as bill boards, displays and radio. I am not unmindful of respondent's argument that its "almost sole means of reaching the ultimate consumer of its product now lies in television advertising" where choice time periods are owned by some of the respondent's customers. The fact that this media of advertising is available to the respondent only if it chooses to engage in discriminatory payments does not make such behavior legal under Section 2(d). If the practice is illegal, respondent need not engage in it. The fact that its competitors, not presently subject to a restraining order, may temporarily engage in such illegal practice is no warrant for expressly permitting the respondent to violate the law.

Finally, it should be noted that the order issued herein departs from the words of the statute in one respect. Whereas Section 2(d) prohibits discriminatory payments "for any services or facilities furnished," the instant order prohibits such payments "for any advertising or other promotional services or facilities furnished." This modification is, in my opinion, necessary in view of the language used by the Commission in its *Shulton* opinion where it said:

> The specific practice declared illegal by this subsection is the making of discriminatory payments by a seller to a buyer for *advertising or promotional services or facilities* rendered by the latter. The record shows that respondent has engaged in this practice and the order merely prohibits it from doing so again. (Emphasis added)

Although the order in the *Shulton* case contained no such modification, it must be read in connection with the opinion which makes it clear that advertising or promotional services or facilities are intended by the order.

CONCLUSION OF LAW

The foregoing Findings of Fact, as stipulated, support the following conclusion:

The respondent, Ideal Toy Corporation, which is engaged in commerce, has paid or contracted for the payment of something of value to or for the benefit of a customer of the respondent in the course of such commerce as compensation or in consideration for services or facilities furnished by or through such customers in connection with the handling, sale, or offering for sale of a product manufactured, sold, or offered for sale by respondent, without such payment being available on proportionally equal terms to all other customers competing in the distribution of such products.

ORDER

It is ordered, That respondent Ideal Toy Corporation, a corporation, its officers, directors, representatives, agents or employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale, or distribution of toy, game, or hobby products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

> Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation or in consideration for any advertising or other promotional services or facilities furnished by or through such customer in connection with the processing, or handling, sale, or offering for sale of any toy, game, or hobby product manufactured, sold, or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all

other customers competing in the distribution of such toy, game, or hobby product.

Mr. Jerome Garfinkel supporting the complaint.

Weber, Schwartz & Alschuler for respondent, of Beverly Hills, Calif.

INITIAL DECISION AS TO RESPONDENT REVELL, INCORPORATED, BY JOSEPH W. KAUFMAN, HEARING EXAMINER*

The question in this case is whether a broad or narrow order should be issued, under Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, against respondent, a large toy manufacturer in California, by reason of discriminatory payments in favor of jobbers in toy catalogs.

The case has been submitted on a stipulation of facts, which also contains a provision that respondent agrees not to oppose the issuance of a cease and desist order, although reserving the right to contend that the order should be limited to a prohibition of further acts of the type described in the stipulation.

The main question in this case seems to be whether the order should be limited to payments of toy catalog advertising, and similar printed advertising, or whether it should be cast in a broad form which would include television advertising.

A secondary question is whether the order should apply to payments in behalf only of respondent's jobbers, or of its retailers as well. The case is almost identical with *Kohner Bros., Inc.*, Docket No. 8226, decided by the undersigned hearing examiner, with other consolidated cases, on December 4, 1961.

STATEMENT OF PROCEEDINGS

Paragraph 4 of the complaint herein, issued December 22, 1960, alleges violation in the general words of the statute, to wit, Section 2(d) of the Clayton Act.

Paragraph 5 alleges, as an "example," violation by payments, specifying some of the payments, to wholesale customers who publish toy catalogs individually, or in combination, or through wholesaler associations—said payments not being offered on proportionally equal terms to all other competing wholesale customers. It is also alleged that the catalogs are sold and distributed by the favored wholesale customers to retail outlets for redistribution to the public. The allegations in both paragraphs of the complaint are denied in all respects by respondent's answer.

*Docket No. 8224, filed January 25, 1962.

There is no allegation in the complaint as to television advertising, a point which is emphasized in respondent's brief.

As pointed out in respondent's brief, the stipulation of facts, dated November 14, 1961, makes no reference to television advertising, but refers only to toy catalog advertising, more fully described in item IV of the stipulation. The facts in the stipulation are stated generally and without any details whatever such as time, place, amount of payments, or names of payees.

The stipulation is that if witnesses were called by counsel supporting the complaint, the testimony and documentary evidence introduced "would constitute substantial evidence" supporting the stipulated facts; that neither side "shall offer any testimony or other evidence" except the stipulation; and that if the Commission or the hearing examiner permits the "introduction in this proceeding of any testimony or evidence" the stipulation shall be null and void.

However, there is, of course, nothing in the stipulation depriving the Commission or the hearing examiner of the right to take official notice of the facts or to exercise expertise, particularly in determining the scope of an order.

The proposed findings herein, based on the stipulation, are virtually identical—except that respondent submitted the following additional proposed finding:

> Respondent in making such payments made them openly and not secretly or covertly and it was the practice in the toy industry for all manufacturers to make such payments to toy catalog companies owned or controlled, in whole or in part, by jobbers and customers during the period of time when respondent made such payments and said practice has existed openly in the toy industry for a period in excess of 30 years.

The hearing examiner declines to make this additional proposed finding, although he does not disallow it. However, the Commission in exercising its expertise may well take official notice of the 30-year industry practice, as claimed, without interference by enforcement agencies except in very recent years. Counsel supporting the complaint herein, who also appeared in the *Kohner* and consolidated cases, did not deny in the oral argument held in those cases the existence of this 30-year practice alleged there also, although he did state that the toy industry has been on notice since 1958 of disapproval of the practice.

As to the part of the proposed findings stating that respondent made the payments openly and not secretively or covertly, this, in the hearing examiner's opinion, is reasonably implied in the stipulation of facts, as incorporated in the findings, as well as all the circumstances.

The proposed order submitted by counsel supporting the complaint is a broad order and in general follows the wording of the statute, although it is limited to the sale or distribution of toy, game or hobby products.

The proposed order submitted by respondent is limited to payments for advertising in illustrations and description of products in toy catalogs or other publications published by jobber customers for publication companies owned, or controlled, in whole or in part, by jobber customers, and is limited to payments for the benefit of jobber customers. It is also limited to the sale or distribution of toy, game, or hobby products.

The findings of fact now set forth follow the stipulation of facts almost literally. All proposed findings not expressly found or implied are denied.

The findings here made are precisely those made in the *Kohner* and consolidated cases, except for facts identifying the respective respondents concerned. In other words, Paragraph IV of the findings, which is the controlling paragraph of this case, is identical with Paragraph IV in the prior cases.

FINDINGS OF FACT

I

Revell, Incorporated, 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 4223 Glencoe Avenue, Venice, California.

II

Respondent Revell, Incorporated, has been engaged, and is presently engaged, in the business of manufacturing toys, games and hobbies (hereinafter called "products"). These products are sold by respondent to jobbers located in various parts of the Nation for resale to retailers. Respondent's sales in 1959 exceeded $10,000,000.

III

Respondent has sold, and now sells, its products in commerce, as "commerce" is defined in the amended Clayton Act, to customers located throughout various states of the United States, and in the District of Columbia, some of whom are in competition with other of its customers.

IV

(a) In the course and conduct of its business in commerce, respondent made payments to certain toy catalog companies, which companies are owned or controlled, in whole or in part, by jobber customers of respondent. Some of respondent's jobber customers who own or control, in whole or in part, said toy catalog companies sell and distribute the toy catalogs to retailers for redistribution to the consuming public.

(b) Such payments were made as compensation or in consideration for the illustration and description in such catalogs of one or more products sold by respondent to some or all of such jobber customers.

(c) Such payments were not offered or made available by respondent on proportionally equal terms to all of its other jobber customers who were in competition in the contemporaneous resale of its products of like grade and quality with those jobber customers who owned or controlled, in whole or in part, a toy catalog company to which such an advertising payment was made.

DISCUSSION

The decision of this hearing examiner in *Kohner*, under the heading Discussion, is almost entirely applicable to the present case.

Here, as in *Kohner*, payments are not only not specified but not even described as "substantial" nor is even the year of any payment specified. True, as in *Kohner*, it may properly be presumed, in view of the stipulation to the issuance of a cease and desist order, that the facts are not *de minimis* or too remote. But this does not mean that the facts support the most drastic order the Commission may have the power to issue. Here, too, there is no allegation in the complaint as to television, nor any reference to television in the stipulation and findings.

Moreover, here, too, the past tense of the word used in the stipulation, and findings, in connection with the payments, as contrasted with the present tense of other verbs, permits of the inference that the unlawful toy catalog payments practices have been discontinued—a fact which is pertinent at least as to the scope of the order.

Ruberoid, 343 U.S. 470 (1952), and *Morton Salt* 334, U.S. 37 (1948), were both decided long before the *Finality Act*, of 1959. Its backers—leaders in both the House and Senate—said that passage could be expected to lead to more precise agency orders. The House Report stated that the "Committee intends that the commissions and boards affected by the bill will make a continuous effort to issue orders that are as definitive as possible". House Report 580, 86th Cong., 1st Session —p. 6.

Moreover, both *Ruberoid* and *Morton Salt* were under Section 2(a) of the Clayton Act—not under Section 2(d), which introduces into an order the "proportionally equal terms" clause with its obvious imprecision, particularly here if the order to be issued were broad enough to apply to a different advertising medium such as cooperative television advertising.

Finally, the broad order in *Ruberoid* was based on the Commission's finding of fact that even small differentials in price were material factors in competition. Similarly, the broad order in *Morton Salt* must be understood in the context of the quantity discount system involved in that case and the continuation thereof "by simply altering the discount percentables" (pp. 52, 53); see also *Broch*, U.S. Supreme Court (January 15, 1962).

On the other hand, *Swanee*, 291 F. 2d 833 (CA 2d, June 23, 1961) seems to have more unquestioned authority than at the time of the *Kohner* decision, since no petition for *certiorari* has been filed, although the time for filing has passed. That case, which struck down a broad order of the Commission, was under Section 2(d) and is the only court case since the *Finality Act* directly in point here. Although cited only in the minority opinion of *Broch*, supra, its reasoning, particularly as to the effect of the *Finality Act*, is followed in the majority opinion. Among other things, *Swanee* states: "nothing in the record here indicates flagrant or extensive violations of Section 2(d)" (pp. 837, 838), which is the situation in the case at bar. The Third Circuit also has recently narrowed a Commission order.*

Two NLRB cases, the first of them cited by *Swanee* as well as by *Broch*, supra, make much of the observation that there was "nothing in the record" indicating likelihood of future violation. *Express Publishing*, 312 U.S. 426, 434 (1941) makes this observation as to "any indication that in the future the respondent would engage in all or any of the numerous other unfair labor practices. *Armour*, 154 F. 2d 570, 578 (CA 10, 1945), makes the same observation as to anything indicating that respondent "entertains an attitude of opposition to the purposes of the Act".

The burden of proof, in connection with the record, would clearly seem to be on counsel supporting the complaint. Moreover, where a complaint alleges factually one type of violation, as here in connection with catalogs, it is a doubtful proposition that a respondent has the burden to go on to show that it did not commit another type of violation, as here in connection with television. Otherwise a complaint, by limiting itself to one type of violation relatively easy to prove, and perhaps of minor consequence and discontinued, could put on a respondent the burden of showing that other violations, here discrimi-

**Bankers Securities Corporation* (CA 3, September 19, 1961).

natory television advertising payments, were not committed. One of the contentions of respondents in these toy cases has been that allegations as to television violations have been deliberately avoided because they could not be proved.

Finally, it is the hearing examiner's opinion, as in *Kohner*, that if a devastatingly broad order may properly issue on the paucity of facts stipulated and found, there would be no gain to statutory enforcement, at least in the long run, since private attorneys would no longer stipulate in the manner followed here.

In *Colgate-Palmolive Co.*, Docket No. 7736, [59 F.T.C. 1452] (December 29, 1961) the Commission was careful in exercising its discretion as to the scope of a cease and desist order, issued under Section 5 of the Federal Trade Commission Act. Indeed, the second part of the dual order was limited so as to apply only to shaving cream, and not even to tooth paste, cold cream, or kindred products.

The first part of the order is directed against false mock-ups and demonstrations, although not against misrepresentations generally—and does apply to "any product", even non-related products, not merely to shaving cream as alleged and proved. The second part is directed against misrepresentation in general—but relating only to shaving cream, although not the particular shaving cream proved. It could be used as an argument here for an order directed against Section 2(d) preferential payments—but relating only to printed advertising, although not restricted to the catalog advertising alleged and proved. This happens to be the form of the order issued in *Kohner*. In omitting a reference to other products from this part of the order, the Commission stated:

So broad and indefinite a command would be most difficult to obey, even in the best of faith, and it will be omitted from the order. We think a more narrow and specific prohibition should suffice here.

Moreover, to support its view of the broader scope of the order in *Colgate*, the Commission exercised its right to consider matters outside the record. It considered the "increasing frequency" of the type of deceptive advertising involved and the "growing seriousness of the problem," to be contrasted here with the apparent discontinuance by toy manufacturers of cooperative toy catalog advertising payments. The Commission also considered the past litigation record with the Commission of the respondents in that case, to be contrasted with the lack of any litigation with the Commission of the present respondent, or of the *Kohner* respondents.

In *Broch*, supra, the Supreme Court did uphold, although with a strong dissent, a broad order issued by the Commission. But the order was under Section 2(c), perhaps the most peremptory subsection of Section 2 of the Clayton Act. Moreover, the majority made it abundantly clear by repeated statements that the result might have been different if the case had been late enough to be subject to the *Finality Act* instead of the old procedures. The decision closes by stating that the new penalty provision

underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising questions as to their meaning and application.

It is the hearing examiner's opinion here, as in *Kohner*, that the extension of a cease and desist order to television advertising would throw on the overloaded courts the problem of "proportionally equal" terms for cooperative television advertising in the toy industry, as well as the other resulting problems of the industry in entering this field. This problem would seem to be one primarily for the Commission, and one to be determined by experience rather than by exposing respondents to possible court penalties.

Accordingly, the order signed below follows the wording of the *Kohner* order.

First, it applies to preferential payments only for catalog advertising or other printed publications, and not for television advertising as comprehended by the broad order proposed by counsel in support of the complaint.

Secondly, it applies to payments for the benefit of all customers, not merely jobbers as proposed by counsel for respondent.

CONCLUSIONS

I. The respondent herein while engaged in commerce, and while subject to Section 2(d) of the Clayton Act, paid something of value to or for the benefit of a customer of said respondent, in the course of such commerce, as compensation or in consideration for services or facilities furnished by or through such customer in connection with the handling, sale, or offering for sale of products or commodities manufactured, sold, or offered for sale by said respondent, without such payment or consideration being available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

II. The payments of value referred to above consisted of payments to certain toy catalog companies owned and controlled, in whole or in part, by said respondent's jobber customers, some of whom sell and distribute the toy catalogs to retailers for redistribution to the consuming public.

III. No proof has been submitted of the amounts of such payments, time or times of payments, names of customers, or other descriptive details. The proof submitted has been in the form of a stipulation of facts which does not contain such details.

IV. The respondent also stipulated to the issuance of an appropriate cease and desist order, and stipulated that such an order may properly issue under Section 2(d) of the Clayton Act.

V. However, the respondent in stipulating the above expressly reserved the right to object to the scope of any cease and desist order which may be entered herein.

ORDER

It is ordered, That respondent Revell, Incorporated, and its officers, directors, representatives, agents, or employees directly or through any corporate or other device, do forthwith *cease and desist* while engaged in commerce, as "commerce" is defined in the amended Clayton Act, from:

> Paying or contracting for the payment of anything of value to or for the benefit of a customer of such respondent in the course of such commerce as compensation or in consideration for any services or facilities consisting of advertising or other publicity, furnished by or through such customer, in a toy catalog, newspaper, tabloid, handbill, circular, any other printed publication, or paper of any kind, 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 such respondent, unless such payment or consideration is available, and is made available, on proportionally equal terms to all other customers competing in the distribution of such toy, game, or hobby products.

Mr. Jerome Garfinkel supporting the complaint.
Mr. Dow W. Harter, of Washington, D.C., for respondent.

INITIAL DECISION AS TO RESPONDENT MILTON BRADLEY COMPANY BY JOSEPH W. KAUFMAN, HEARING EXAMINER*

This case is almost identical with other cases decided by this hearing examiner, hereinafter referred to as "prior toy cases"—namely, *Kohner Bros., Inc.*, Docket No. 8226, and other consolidated cases, decided on December 4, 1961, and with *Revell Incorporated*, Docket No. 8224, decided on January 23, 1962.

*Docket No. 8256, filed January 31, 1962.

The question in this case is whether a broad or narrow order should be issued, under Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, against respondent, a large toy manufacturer, by reason of discriminatory payments, in favor of jobbers, for advertisements in toy catalogs.

The case has been submitted on a stipulation of facts which contains, in the pertinent part, language identical to that used in the stipulations of the prior toy cases.

The stipulation contains the provision that respondent agrees not to oppose the issuance of a cease and desist order but only the scope thereof. Nothing is stated forbidding the exercise of expertise or reasonable resort to nonrecord facts in determining the scope of the order.

The main question in this case seems to be whether the order should be limited to payments of toy catalog advertising, and similar printed advertising, or whether it should be cast in a broad form which would include television advertising or other advertising media.

A secondary question is whether the order should apply to payments in behalf only of respondent's jobbers, or of its retailers as well.

The complaint herein relates only to catalog advertising, as pointed out in respondent's brief, and does not mention television advertising.

The stipulation also relates only to catalog advertising, and makes no reference to television or other advertising media.

As in the prior toy cases the facts stipulated are so general in form—the payment not even being described as "substantial"* or identified as to time—that only a pro forma violation is spelled out, with the help of respondent's stipulation to the issuance of some kind of cease and desist order.

Also, there is not the slightest suggestion (and indeed the opposite inference is possible, particularly in view of past unchallenged practices in the industry, referred to below) that there was any deliberate flouting of the law.

Furthermore, by reason of the past tense of the verb used in connection therewith, it may be inferred that the discriminatory payments were discontinued, that is, after the complaint was filed.

These mitigating elements were corroborated and not contested in the oral argument herein, which also brought out the lack of a prior violation record of respondent with the Commission.

The findings made herein are precisely those made in prior toy cases except facts identifying and describing the respective respondents in each case.

As in the prior toy cases, it is believed that the Commission may well take official notice of the 30-year practice in the toy industry for

*As distinguished from *Transogram*, Docket No. 7978, now before the Commission.

suppliers to make the type of catalog advertising payments here complained of, without receiving any challenge from enforcement agencies, except in very recent years.

The law as to scope of order as applicable to the rather meager facts presented in the type of stipulation submitted here has been discussed in the decisions of the prior toy cases.

Colgate-Palmolive Co., Docket No. 7736 (December 29, 1961) [59 F.T.C. 1452]—where one part of the order was strictly limited so as to apply only to shaving cream—indicates the Commission's regard, in determining scope of order, for the particular facts in a case, including appropriate facts outside the record.

Swanee, cited in respondent's brief, 291 F. 2d 833 (CA 2d June 23, 1961), is authority for a limited Section 2(d) order shaped to the particular facts. *Broch* (decided January 15, 1962) also cited in respondent's brief, contains rather strong dicta for more precise orders if, as here, issued under the *Finality Act*.—The below order, as well as the conclusions, follow those in the prior toy cases.

FINDINGS OF FACT

I

Milton Bradley Company is a corporation organized and doing business under the laws of the State of Massachusetts, with its principal office and place of business located at 74 Park Street, Springfield 2, Massachusetts.

II

Respondent Milton Bradley Company has been engaged, and is presently engaged, in the business of manufacturing toys, games and hobbies (hereinafter called "products"). These products are sold by respondent to jobbers located in various parts of the nation for resale to retailers. Respondent's sales in 1959 exceeded $7,500,000.

III

Respondent has sold, and now sells, its products in commerce, as "commerce" is defined in the amended Clayton Act, to customers located throughout various states of the United States, and in the District of Columbia, some of whom are in competition with other of its customers.

(a) In the course and conduct of its business in commerce, respondent made payments to certain toy catalog companies, which companies are owned or controlled, in whole or in part, by jobber customers of respondent. Some of respondent's jobber customers who own or control, in whole or in part, said toy catalog companies sell and distribute the toy catalogs to retailers for redistribution to the consuming public.

(b) Such payments were made as compensation or in consideration for the illustration and description in such catalogs of one or more products sold by respondent to some or all of such jobber customers.

(c) Such payments were not offered or made available by respondent on proportionally equal terms to all of its other jobber customers who were in competition in the contemporaneous resale of its products of like grade and quality with those jobber customers who owned or controlled, in whole or in part, a toy catalog company to which such an advertising payment was made.

CONCLUSIONS

I. The respondent herein while engaged in commerce and while subject to Section 2(d) of the Clayton Act, paid something of value to or for the benefit of a customer of said respondent, in the course of such commerce, as compensation or in consideration for services or facilities furnished by or through such customer in connection with the handling, sale, or offering for sale of products or commodities manufactured, sold, or offered for sale by said respondent, without such payment or consideration being available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

II. The payments of value referred to above consisted of payments to certain toy catalog companies owned and controlled, in whole or in part, by said respondent's jobber customers, some of whom sell and distribute the toy catalogs to retailers for redistribution to the consuming public.

III. No proof has been submitted of the amounts of such payments, time or times of payments, names of customers, or other descriptive details. The proof submitted has been in the form of a stipulation of facts which does not contain such details.

IV. The respondent also stipulated to the issuance of an appropriate cease and desist order, and stipulated that such an order may properly issue under Section 2(d) of the Clayton Act.

V. However, the respondent in stipulating the above expressly reserved the right to object to the scope of any cease and desist order which may be entered herein.

ORDER

It is ordered, That respondent Milton Bradley Company, and its officers, directors, representatives, agents, or employees, directly or through any corporate or other device, do forthwith *cease and desist* while engaged in commerce, as "commerce" is defined in the amended Clayton Act, from:

Paying or contracting for the payment of anything of value to or for the benefit of a customer of such respondent in the course of such commerce as compensation or in consideration for any services or facilities consisting of advertising or other publicity, furnished by or through such customer, in a toy catalog, newspaper, tabloid, handbill, circular, any other printed publication, or paper of any kind, 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 such respondent, unless such payment or consideration is available, and is made available, on proportionally equal terms to all other customers competing in the distribution of such toy, game, or hobby products.

Mr. Jerome Garfinkel for the Commission.

Mr. Leon Silverman, of *Strasser, Spiegelberg, Fried & Frank* of New York, N.Y., for respondent.

INITIAL DECISION AS TO RESPONDENT EMENEE INDUSTRIES, INC., BY RAYMOND J. LYNCH, HEARING EXAMINER*

The complaint charges the respondent, Emenee Industries, Inc., with violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. Sec. 13), in the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of products sold to them by respondent, without making such payments or allowances available to all other competing customers on proportionally equal terms. As an example of this practice, the complaint alleges the respondent made payments to certain wholesale customers for the advertising of its products in the catalogs of these wholesale customers, without proportionally equal payments to the rest of respondent's customers competing with the recipients of the promotional payments.

Respondent's answer to the complaint, dated September 28, 1960, made partial admissions of the allegations of the complaint, in particular catalog advertising, but denied that any of its promotional payments constituted violations of the Act.

*Docket No. 7974, filed February 2, 1962.

On June 3, 1961, a stipulation was executed by the respondent and counsel for both parties, setting forth certain facts and waiving hearing. Argument was reserved on the scope of the cease and desist order to be entered. Proposed findings and order were submitted by both parties and, on November 6, 1961, oral argument was allowed thereon.

The hearing examiner has considered the proposed findings of fact and conclusions submitted by counsel representing the parties, and all findings of fact and conclusions of law not hereinafter specifically found or concluded are herewith rejected and the hearing examiner having considered the entire record makes the following findings as to the facts, conclusions drawn therefrom and order.

FINDINGS OF FACT

I

Respondent Emenee Industries, 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 41-06 De Long Street, Flushing 55, Long Island, New York.

II

Respondent has been engaged, and is presently engaged, in the business of manufacturing toys, games and hobbies (hereinafter called "products"). These products are sold by respondent to jobbers located in various parts of the nation for resale to retailers. Respondent's sales in 1958 approximated $4,000,000.

III

Respondent has sold, and now sells, its products in commerce, as "commerce" is defined in the amended Clayton Act to customers located throughout various States of the United States, and in the District of Columbia, some of whom are in competition with other of its customers.

IV

In the course and conduct of its business in commerce, respondent made payments to certain toy catalog companies, which companies are owned or controlled, in whole or in part, by jobber customers of respondent. Some of respondent's jobber customers who own or control, in whole or in part, said toy catalog companies, sell and distribute the toy catalogs to retailers for redistribution to the consuming public. Such payments were made as compensation or in consideration for the illustration and description in such catalogs of one more products sold by respondent to some or all of such jobber customers. Such payments were not offered or made available by respondent on proportionally equal terms to all of its other jobber customers who were in competition in the contemporaneous resale of its products of like grade and quality with those jobber customers who owned or controlled, in whole or in part, a toy catalog company to which such an advertising payment was made.

CONCLUSION

The acts and practices of the respondent as herein found were in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C., Sec. 13) in the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with the handling, sale, or offering for sale of products sold to them by respondent, without making such payments or allowances available to all other competing customers on proportionally equal terms.

Based upon the above findings, the public interest requires the issuance of a cease and desist order. The only question before the examiner is a determination of the type order that should issue—Counsel supporting the complaint requests a broad order [1] while counsel representing respondent argues that the order should be limited to the specific violations admitted by the stipulation.[2] The examiner is of the opinion that the *Ruberoid* case can be distinguished from the *Swanee Paper Co.*, case and that the former sets forth the policy established by the Commission in a number of cases.[3]

In addition the most recent decision by the Supreme Court, January 15, 1962, in *FTC* v. *Broch*, FTC Docket No. 6484 although involving a Section 2(c) violation of the Clayton Act follows the reasoning in the Ruberoid case endorsing a broad order and concludes that this type order is necessary to stop the illegal practice regardless of the form it takes whether it be a vehicle such as that used in the present case, or any other type, such as radio, television, newspaper or other media. In the *Shulton* decision, Docket No. 7721, dated July 25, 1961, [59 F.T.C. 106] the Commission adopted the position that the specific

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[1] *F.T.C.* v. *Ruberoid Co.*, 343 U.S. 470 (1952).

[2] *Swanee Paper Co.* v. *F.T.C.* (CCH Trade Case Par. 70,054 p. 78, 235) (June 22, 1961).

[3] (See *In the Matter of Chestnut Farms Chevy Chase Dairy*, Docket 6465, 53 F.T.C. 1050, 1062 (1957); *In the Matter of Henry Rosenfeld, Inc., et al.*, Docket 6212, 52 F.T.C. 1535, 1544–1545 (1956); *In the Matter of P. Lorillard Company*, Docket No. 6600, Init. Dec., dated Oct. 9, 1957, Init. Dec., adopted by Commission May 7, 1958 [54 F.T.C. 1550]; *In the Matter of Swanee Paper Corporation*, Docket 6927, Init. Dec. dated Aug. 18, 1959, adopted by Commission March 22, 1960) [56 F.T.C. 1077].

practice found to be illegal under Section 2(d) was the granting of discriminatory payments to certain customers for services and facilities furnished by such customers. As previously stated, the practice involved is the discriminatory payment to a buyer regardless of the form in which such discrimination takes place. Based upon the above precedents, the examiner concludes a broad order as recommended by CSC is required in this proceeding.

ORDER

It is ordered, That respondent Emenee Industries, Inc., a corporation, its officers, directors, representatives, agents or employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale, or distribution of toy, game, or hobby products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation or in consideration for any advertising or other promotional services or facilities furnished by or through such customer 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 respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such toy, game, or hobby product.

OPINION OF THE COMMISSION *

By Elman, *Commissioner:*

Sixteen cases, all arising out of complaints that respondents have violated Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act (38 Stat. 730, as amended 15 U.S.C. 13(d)), are here consolidated for decision.[1] One of them, *Transogram Company, Inc.*, Docket 7978, was heard on oral argument January 9, 1962; the remaining fifteen were consolidated for argument and heard

*In the following related cases: Transogram Company, Inc., Docket 7978; Ideal Toy Corporation, Docket 7979; Emenee Industries, Inc., Docket 7974; Milton Bradley Company, Docket 8256; American Machine & Foundry Company, Docket 7977; Wen-Mac Corporation, Docket 8245; Revell, Inc., Docket 8224; Kohner Bros., Inc., Docket 8226; Mattel, Inc., Docket 8227; Fisher-Price Toys, Inc., Docket 8243; The Hubley Manufacturing Company, Docket 8254; Hassenfeld Bros., Inc., Docket 8258; Knickerbocker Toy Co., Inc., Docket 8101; Remco Industries, Inc., Docket 8103; The Porter Chemical Company, Docket 8228; and Wolverine Supply and Manufacturing Co., Docket 7972.

[1] Eleven related cases are either in earlier stages of litigation or are subject to consent settlement pending the outcome of certain of the cases under consideration on these appeals.

June 13, 1962. The sole question in all the cases concerns the scope of the cease and desist orders to be issued.

I

The complaints in these matters are in many respects virtually identical. Each identifies the respondent's principal office and place of business, and states that the respondent manufactures toys which it distributes in interstate commerce to customers who compete in their resale. Each then alleges, in language closely paralleling Section 2(d), that the respondent has paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of products sold to them by the respondent. Such payments or allowances, it is asserted, were not offered or made available on proportionally equal terms to all other customers of the respondent who competed with the favored customers in the distribution of the respondent's products.

Next, the complaints allege that:

> As an example of the practices alleged herein, respondent has granted, and is presently granting, promotional payments or allowances for the promoting and advertising of its products to certain wholesale customers who publish toy catalogues either in combination with each other through toy wholesaler associations and groups, or in an individual capacity. The payments or allowances are granted by respondent to said wholesale customers in connection with their advertising respondent's products in their toy catalogues. These catalogues are sold and distributed by said favored wholesale customers to retail outlets for redistribution to the consuming public.
>
> The aforesaid promotional payments or allowances were not offered or granted on proportionally equal terms to all other customers of respondent who compete with said favored customers in the distribution of respondent's products. . . .[2]

In most instances, references are made to specific sums paid to particular catalogue publishers.

In three of the cases—*Transogram Company, supra; Ideal Toy Corp.*, Docket No. 7979; and *Mattel, Inc.*, Docket No. 8227—it is charged that respondents also granted allowances to certain named favored customers to finance television advertising of respondents' products, and that these allowances were not made available on proportionally equal terms to respondents' other competing customers. The other thirteen complaints contain no such allegations. None of

[2] This language is taken from paragraph 5 of the complaint in *Transogram Company, Inc.*, Docket No. 7978. Variations in the wording of the complaints issued in the other cases are slight and inconsequential.

the sixteen complaints contains any additional specific allegation of violation of Section 2(d).

With minor exceptions not important here, respondents admitted to marketing toys of their own manufacture in interstate commerce, and to advertising in various toy catalogues, but denied violating Section 2(d). Subsequently, however, counsel for respondents and counsel for the Commission entered into stipulations, the pertinent provisions of which conform substantially to the following example:

A. If, subject to all of the terms and conditions contained in this Stipulation, competent witnesses 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 evidence which counsel supporting the Complaint would introduce and the Hearing Examiner would receive in evidence at such hearings, would constitute substantial evidence in support of the following matters:

I

Respondent Transogram Company, Inc. . . ., is a corporation organized and doing business under the laws of the State of Pennsylvania, with its principal office and place of business located at 200 Fifth Avenue, New York 10, New York.

II

Respondent has been engaged, and is presently engaged, in the business of manufacturing toys. . . . These products are sold by Respondent to jobbers located in various parts of the Nation for resale to retailers. Respondent's gross sales in 1959 exceeded $10,000,000.

III

Respondent has sold, and now sells, its products in commerce, as 'commerce' is defined in the amended Clayton Act, to customers located throughout various States of the United States, and in the District of Columbia, some of whom are in competition with other of its customers.

IV

In the course and conduct of its business in commerce, Respondent made payments . . . to certain toy catalog companies, which companies are owned or controlled, in whole or in part, by jobber customers of Respondent. Some of Respondent's jobber customers who own or control, in whole or in part, said toy catalog companies sell and distribute the toy catalogs to retailers for redistribution to the consuming public. Such payments were made as compensation or in consideration for the illustration and description in such catalogs of one or more products sold by Respondent to some or all of such jobber customers. Such payments were not offered or made available by Respondent on proportionally equal terms to all of its other jobber customers who were in competition in the contemporaneous resale of its products of like grade and quality with those jobber customers who owned or controlled, in whole or in part, a toy catalog company to which such an advertising payment was made.

B. . . . .

(2) For the purposes of this proceeding only, the record may be taken as if counsel supporting the Complaint has proved the matters set forth in subparagraphs I to IV, inclusive, of paragraph A of this Stipulation. . . .

(3) Counsel supporting the Complaint shall be entitled to request the issuance of an appropriate cease and desist order, and counsel for Respondent shall not contest the issuance of such an order, but shall reserve the right to contend that such order should be limited to a prohibition of further acts of the type described in subparagraph A (IV) of this Stipulation.

* * * * * * *

Despite the allegations of unlawful payments for television advertising made against Transogram, Ideal, and Mattel, the stipulations in those proceedings omit any reference to such payments. They thus form no part of the agreed statements of fact which comprise the record before the Commission.

II

As one would expect, the Findings of Fact entered by the hearing examiners in these proceedings either quote or paraphrase the factual provisions of the stipulations. However, the conclusions and orders of the examiners differ.

Eleven of the cases were decided by Hearing Examiner Kaufman, nine in a single opinion filed December 7, 1961,[3] and the other two separately shortly thereafter.[4] The question, in the examiner's view, was whether the cease and desist orders should be limited to payments for toy catalogue advertising or should be drafted broadly to include advertising payments in general. He concluded that the stipulations of facts presented "a barren record of evidence" (*Kohner Bros., Inc.*, Docket No. 8226, initial decision filed December 7, 1961, at p. 647) upon which to base a broad order. The examiner recognized that, as Commission counsel contended, prior cases have established that the Commission has considerable discretion as to the scope of orders issued by it. However, he believed that reasonable exercise of that discretion required careful consideration of the facts and circumstances of the particular case. Since the record showed only a single, peculiar, industry-wide violation, the examiner determined that the facts would not justify an order encompassing all violations of Section 2(d).

On the other hand, the examiner was also unwilling to issue an order drafted to cover only advertising in toy catalogues published

[3] These include *Kohner Bros., Inc.*, Docket No. 8226; *Mattel, Inc.*, Docket No. 8227; *Fisher-Price Toys, Inc.*, Docket No. 8243; *The Hubley Manufacturing Company*, Docket No. 8254; *Hassenfeld Bros., Inc.*, Docket No. 8258; *Knickerbocker Toy Co., Inc.*, Docket No. 8101; *Remco Industries, Inc.*, Docket No. 8103; *The Porter Chemical Company*, Docket No. 8228; *Wolverine Supply and Manufacturing Co.*, Docket No. 7972.

[4] *Revell, Inc.*, Docket No. 8224, initial decision filed January 25, 1962; *Milton Bradley Company*, Docket No. 8256, initial decision filed January 31, 1962.

by companies owned or controlled by jobber customers. The gist of the violation, he thought, was unlawful discriminatory payment for printed advertising sponsored by a customer. Restriction to catalogues indirectly published by jobbers would be artificially narrow. Accordingly, the examiner issued orders prohibiting payments in consideration for advertising services or facilities furnished by or through any customer of a respondent "in a toy catalog, newspaper, tabloid, handbill, circular, any other printed publication, or paper of any kind, 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 such respondent," unless made available on proportionally equal terms to competing customers.[5]

Four of the cases were decided by Hearing Examiner Hinkes in separate opinions filed between August 31, 1961, and January 3, 1962.[6] The results in these cases are directly contrary to those reached by Examiner Kaufman. Examiner Hinkes agreed that there must be a reasonable relation between the order and the unlawful practices found to exist, but he found such a relation. He explained:

> [T]here is an obvious relationship in methods of promotional payments. The advertising media are many and varied. Catalog advertising, which was the practice found here, is only one of such ways. It would take but little imagination to continue discriminatory promotional payments in other media were the order to be limited to catalog advertising.[7]

For this reason, the examiner issued orders prohibiting discriminatory payments to customers for "advertising or other promotional services or facilities" furnished by them in connection with the processing, handling, sale, or offering for sale of any of respondents' toy, game, or hobby products, without restriction as to the type of medium through which the advertising was disseminated.[8]

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[5] The quoted language is identical in all three orders issued to dispose of the eleven cases heard by Examiner Kaufman. In the *Mattel* case, note 3 *supra*, respondent moved to strike the allegation of unlawful television advertising payments. The examiner denied the motion on the ground that *Mattel* was not prejudiced by the existence of the unproved allegation. His order treats *Mattel* no differently from the ten respondents against whom no television advertising charge was made.

[6] *Transogram Company, Inc.*, Docket No. 7978, initial decision filed August 31, 1961; *American Machine & Foundry Company*, Docket No. 7977, initial decision filed December 21, 1961; *Wen-Mac Corporation*, Docket No. 8245, initial decision filed December 21, 1961; *Ideal Toy Corp.*, Docket No. 7979, initial decision filed January 3, 1962.

[7] *Transogram Company, Inc.*, note 6 *supra*.

[8] In the *Ideal Toy* case, note 6 *supra*, respondent offered to prove that it had committed no television advertising violations. The examiner declined this offer but specifically found that "The record contains no evidence of any act or practice by the respondent in connection with television advertising or any other type of advertising except the catalogue advertising referred to in [Finding of Fact 4]." (Initial decision, at p. 673.) When respondent argued that this finding militated against entry of a broad order, the examiner stated:

"It is sufficient that the Commission has proven albeit by stipulation, that the respondent has violated Section 2(d) in the granting of discriminatory payments to some of its

In the last of the sixteen cases, *Emenee Industries, Inc.*, Docket No. 7974, initial decision filed February 2, 1962, Hearing Examiner Lynch reasoned that "the practice involved is the discriminatory payment to a buyer regardless of the form in which such discrimination takes place." (Initial decision, at p. 693.) Hence, he concluded that the order should extend beyond the specific violations admitted in the stipulation, and he issued an order identical in scope to those issued by Examiner Hinkes.

III

The issues presented on appeal vary with the dispositions below.

In the eleven cases decided by Examiner Kaufman,[9] counsel supporting the complaint argued in his brief that the order entered should have been drafted substantially in the language of Section 2(d), without limitation to advertising via printed publications. On oral argument he receded somewhat from this position, agreeing that an order restricted to advertising and promotional services or facilities would be adequate. All eleven respondents cross-appeal. In nine of the cases,[10] they request that the orders be modified to apply solely to respondents' jobber customers, rather than to their customers in general. Respondent Milton Bradley Company asks that the prohibition against it be confined to advertising in jobber customers' toy catalogues. Respondent Revell, Inc., waived oral argument, electing to rely on the arguments made by respondents in the related cases.

Counsel supporting the complaint takes no appeal from the orders issued by Examiner Hinkes,[11] but all four respondents appeal. The Transogram Company asserts that an order "forbidding payments to toy catalog companies owned or controlled by jobber customers is entirely adequate to prevent a recurrence of the violation on which this proceeding is based. . . ."[12] Ideal Toy Corp. requests issuance of an order limited to printed media,[13] or, in the alternative, remand

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customers for advertising or other promotional services. It follows that all discriminatory advertising and promotional allowances must be prohibited." (Initial decision, at p. 677.)

In the *Transogram* case, note 6 *supra*, there is an apparent variance between pleadings and proof in that the complaint encompasses playroom furniture while the stipulation does not. However, counsel agreed, in argument before the hearing examiner, that playroom furniture was included in the general category of toys.

[9] Cited in notes 3 and 4, *supra*.

[10] Cited in note 3, *supra*.

[11] Cited in note 6, *supra*.

[12] Appeal brief of Transogram Company, Inc., at p. 32. However, on oral argument, counsel for Transogram conceded that an order thus limited should be interpreted to apply whether the payments were made to jobber-owned catalogue companies or to the jobbers themselves.

[13] This was Ideal's position at the oral argument. Its brief sought limitation of the order to toy catalogue advertising.

for the purpose of taking evidence on the television advertising allegation made in the complaint against it. American Machine and Foundry Company and Wen-Mac Corp. seek limitation of their orders to discriminatory payments to or for the benefit of jobber customers, or to toy catalogue companies known by them to be owned or controlled by jobber customers, for advertising in toy catalogues or other printed forms of toy, game, or hobby products marketed domestically.

Respondent Emenee Industries, Inc., appeals from Examiner Lynch's broad order, requesting that it be restricted to dealings with toy catalogue companies owned or controlled by jobber customers, or, in the alternative, that the case be remanded to the examiner for consideration of other possible formulations of the order. Again, counsel supporting the complaint takes no cross-appeal.

IV

Only rarely have contested cases been submitted to the Commission on such slender "bare-bones" records as we have here. In these cases the ordinarily useful device of factual stipulation was carried to an unusual extreme. In each case we are told this much, and no more, about the respondent's violation: Respondent made payments to certain toy catalogue companies, owned or controlled by jobber customers, in compensation for their illustrating and describing respondent's products in the catalogues. In some instances respondent's jobber customers distributed the catalogues to retailers for redistribution to the consuming public. Respondent did not make these advertising payments available on proportionally equal terms to jobber customers competing with those that owned or controlled toy catalogue companies.

Apparently recalling that nature abhors a vacuum, counsel rush to fill this void with strained inferences and unsubstantiated assertions. Unfortunately they are no substitute for the facts we do not have. The record permits no determination of the duration of the practice, or of the amounts spent, or of the number of toy catalogue companies and jobbers involved. Nor does it tell us whether any respondent has made discriminatory payments for advertising through any other medium. Indeed, we do not even know the extent to which respondents advertise in other media. Each has stipulated to violating Section 2(d) in a narrowly defined way, and their stipulations, in the aggregate, show that the described practice was industry-wide. Nothing else is proven.

This dearth of information is particularly regrettable in a proceeding devoted solely to consideration of the appropriate scope of a cease and desist order, since the facts surrounding the violation are relevant, and may even be decisive, in determining the area which an order's prohibitions should cover. For this reason, the extensive argument made to us concerning the breadth of the Commission's discretion in framing orders can at best resolve only part of the problem. Granted that the Commission has undoubted power to formulate a remedy adequate to prevent repetition of the violation found,[14] an analysis of the nature of the violation is still necessary to a decision of how that power should be exercised. What the Commission may do—*i.e.*, has authority to do—and what it ought to do in a particular case are related, but nonetheless different, questions. Many courses may be open in the sense that, if followed, they will not be reversed on appeal. Choosing the best of these courses is not merely the Commission's statutory prerogative; it is also the Commission's statutory duty.

Recent Commission cases make it clear that, rather than adopting any mechanical test for defining the "practice" to be prohibited by an order, the Commission has in large part based its determination concerning the necessary scope of the order upon an analysis of the record. For example, in *Vanity Fair Paper Mills, Inc.*, Docket No. 7720, decided March 21, 1962 [60 F.T.C. 568], the Commission limited the coverage of the order to paper products on the grounds that the record failed to reveal that respondent made or sold any other product and no reason was apparent for applying the order generally to other merchandise. In refusing to restrict the order to a particular type of advertising, the Commission's opinion observed that the violation consisted of granting customers' requests for participation in special promotions, regardless of their form.

Similarly, the order issued in *Quaker Oats Co.*, Docket No. 8119, [60 F.T.C. 798] decided April 25, 1962, was also related by the Commission to the facts. There the Commission confined the order to the cat food produced by one division of respondent because that division was operated separately from the rest of respondent's business. Further, the Commission's refusal to draw a line between special and regular promotions was based on a finding that there was "no showing of any meaningful distinction" between them. (Opinion, 60 F.T.C. 808.) And, in limiting the order to "advertising, promotion or display" services or facilities, the Commission said, "the order will apply

[14] *E.g., Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608; *Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S. 470; *Federal Trade Commission* v. *Henry Broch & Co.,* 368 U.S. 360.

only as to certain services and facilities, *but it is suited to the facts of this proceeding.*" (*Id.*, at p. 810; emphasis added.)

The reason for the Commission's reference to the facts in each case is simple. The purpose of an order is to prevent statutory violations, the occurrence of which in the future appears likely on the basis of reasonable inference from events that have already taken place. This does not mean that the Commission is so tightly bound to the facts that it must disregard accumulated experience, or that it must draft its prohibitions so narrowly that only the precise acts previously undertaken by a respondent are proscribed for the future.[15] It does mean that our objective in drafting orders must be to restrain unlawful acts and practices "whose commission in the future, unless enjoined, may fairly be anticipated from the [respondent's] conduct in the past." *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 435.

As indicated earlier, what we know of such past conduct is, in the instant cases, meager. We do know that catalogue advertising has been common practice in the industry. We know also that it involves a single rather special type of advertising activity, quite unusual by comparison with the mine run of advertising allowance cases continually passing before the Commission. This case is thus unlike *Vanity Fair* and *Quaker Oats* in which the practice, as found by the Commission, consisted of acceding to special requests, regardless of their form. In such a situation, there is a danger of the violation manifesting itself in an indefinable variety of ways in the future. This factor is not present in the case of a consistent practice of a peculiar and readily distinguishable class.

Hence, to infer, without more, that there exists a serious danger of general violation of Section 2(d) by respondents is not warranted by the record. Indeed, in several cases additional allegations, relating to television advertising, went unproved, and in one of these the respondent even offered to disprove them. In these cases an order applicable to television advertising would run contrary to the record. And fairness to other industry members likewise requires that the orders as to them omit television advertising, proof not being present here of the need for its inclusion.

On the other hand, we are not prepared to say, in view of the paucity of facts presented, that respondent's practice of advertising by catalogue is entirely unique and unrelated to other forms of promotional

[15] See, *e.g.*, *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470; *Federal Trade Commission* v. *National Lead Co.*, 352 US. 419; *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385.

and advertising activity falling within the ambit of Section 2(d). As counsel have on occasion suggested, the catalogue performs the general function of a printed buying guide distributed by or through respondents' wholesale and retail outlets. Such buying guides need not be prepared in catalogue style; they may take the form of handbills, circulars, or other printed matter. Thus, to borrow the Supreme Court's language, the practice which "may fairly be anticipated" from respondents' past conduct, and which must therefore be covered by our order, encompasses advertising by means of any type of printed buying guide distributed by respondents' outlets or their publishing instrumentalities. To include less would be to overlook reasonably foreseeable variations on a proven theme.

The argument, advanced by some of the respondents, that the order should apply only to publications of jobber customers is untenable. The distinctive feature in this case is the mode of advertising, not the class of customer by whom that advertising facility was provided. There is no basis, either in logic or in the record, for supposing that an offer by, say, a retail customer, or group of retail customers, to furnish respondents with space in an advertising catalogue would have been turned down on the ground that it came from retailers rather than from jobbers. Nor is there merit to the claim that a limitation to jobber customers is required by the need for specificity in the order's provisions. This need is satisfied by narrow and precise definition of the practice involved. An offer to engage in that practice will be recognizable no matter what kind of customer makes it.[16]

The appeals of counsel supporting the complaint are denied. The extent to which the appeals of the various respondents are granted or denied is reflected in the order, identical in terms, which will be entered for all cases.

Commissioner Anderson concurred in the result of the decision of this matter.

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[16] *Cf., Federal Trade Commission* v. *Henry Broch & Co.,* 368 U.S. 360. There the respondent, a broker, carried a variation of the customer-limitation argument to the extreme of requesting that the order be applied to two named buyer and seller clients. The Supreme Court rejected this contention, stating that the Commission did not exceed its discretion in banning repetitions of the violation in connection with transactions involving *any* seller and buyer.

FINDINGS OF FACT, CONCLUSIONS AND FINAL ORDER *

FINDINGS OF FACT

The findings of fact contained in the initial decisions in the above-captioned proceedings are adopted as those of the Commission.

CONCLUSIONS

Each of the respondents in the above-captioned proceedings, while engaged in commerce, has violated Section 2(d) of the Clayton Act, as amended, by making payments to certain toy catalogue companies, owned or controlled, in whole or in part, by jobber customers, as compensation or in consideration for illustration and description, in toy catalogues sold and distributed to retailers for redistribution to the consuming public, of products sold by respondents to some or all of such jobber customers, without such payment or consideration being made available on proportionally equal terms to all other customers competing in the distribution of such products.

FINAL ORDER

It is ordered, That each respondent named in the above-captioned proceedings, and its officers, directors, employees, agents, and representatives, directly or through any corporate or other device, in, or in connection with, the offering for sale, sale, or distribution in commerce, as "commerce" is defined in the Clayton Act, as amended, of any toy, game, or hobby products, do forthwith cease and desist from:

> Paying or contracting for the payment of anything of value to or for the benefit of any customer of such respondent as compensation or in consideration for any services or facilities consisting of advertising or other publicity, furnished by or through such customer, in a toy catalogue, 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 customer, 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 such respondent, unless such

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payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

It is further ordered, That each respondent named in the above-captioned proceedings 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.

By the Commission, Commissioner Anderson concurring in the result.

IN THE MATTER OF

BLUM'S VOGUE, 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-238. Complaint, Sept. 20, 1962—Decision, Sept. 20, 1962

Consent order requiring a Chicago furrier to cease violating the Fur Products Labeling Act by attaching to fur products labels containing fictitious prices represented thereby as regular retail prices; by advertising in newspapers which failed to show the true animal name of furs, to disclose when fur products contained artificially colored fur, and to describe as "natural," furs which were not artificially colored; and by failing to maintain adequate records as a basis for price and value claims.

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 Blum's Vogue, Inc., a corporation, and Irving Eisen 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. Blum's Vogue, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 624 South Michigan Avenue, Chicago, Ill. Respondents retail women's clothing and manufacture and retail fur products.

Individual respondent Irving Eisen is an officer of the corporate respondent and controls, directs and formulates the acts, practices and policies of the corporate respondent. His office and principal place of business is the same as that of the corporate respondent.

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 misbranded in that labels affixed thereto contained fictitious prices and misrepresented the regular retail selling prices of such fur products in that the prices represented on such labels as the regular prices of the fur products were in excess of the retail prices at which the respondents usually and regularly sold such fur products in the recent regular course of business, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were falsely or deceptively advertised in that said fur products were not advertised as required under the provisions of Section 5(a) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Said advertisements were intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of said fur products.

Among and included in the advertisements as aforesaid but not limited thereto were advertisements of respondents which appeared in issues of the Chicago Daily Tribune, a newspaper published in the city of Chicago, State of Illinois and having a wide circulation in said State and various other States of the United States.

Among such false and deceptive advertisements of fur products, but not limited thereto, were advertisements which failed:

1. To show the true animal name of the fur used in the fur product, in violation of Section 5(a)(1) of the Fur Products Labeling Act.

2. To disclose that fur products contained or were composed of bleached, dyed or otherwise artificially colored fur when such was the fact, in violation of Section 5(a)(3) of the Fur Products Labeling Act.

PAR. 5. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that they were not advertised in accordance with the Rules and Regulations promulgated thereunder inasmuch as the fur products were not described as natural where such fur products were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

PAR. 6. Certain of said fur products were falsely or deceptively advertised in that labels affixed thereto contained fictitious prices and misrepresented the regular retail selling price of such fur products in that the prices represented on such labels as the regular prices of the fur products were in excess of the retail prices which respondents usually and regularly sold such fur products in the recent regular course of business, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of said Rules and Regulations.

PAR. 7. Respondents in advertising fur products for sale as aforesaid made claims and representations respecting prices and values of fur products. Said representations were of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act.

The respondents in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such claims and representations were based, in violation of Rule 44(e) of said Rules and Regulations.

PAR. 8. 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 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 Blum's Vogue, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 624 South Michigan Avenue, Chicago, Ill.

Respondent Irving Eisen 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 Blum's Vogue, Inc., a corporation and its officers, and Irving Eisen, 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 fur products; or in connection with the sale, manufacture for sale, advertising, offering for sale, transportation or distribution of fur products which have been made in whole or in part of fur which had 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. Misbranding fur products by:

A. Falsely or deceptively labeling or otherwise identifying such products as to the regular prices or values thereof by any representation that the regular or usual prices of such products are any amount in excess of the prices at which respondents have usually and customarily sold such products in the recent regular course of business.

2. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement or notice which is intended to aid, promote or assist, directly or indirectly, in the sale, or offering for sale of fur products, and which:

A. Fails to set forth in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(a) of the Fur Products Labeling Act.

B. Fails to describe fur products as natural, when such is the fact.

C. Represents directly or by implication that the regular or usual price of any fur product is any amount which is in excess of the price at which respondents have usually and customarily sold such products in the recent regular course of business.

D. Misrepresents in any manner the savings available to purchasers of respondents' fur products.

3. Making claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Regulations promulgated under the Fur Products Labeling Act unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based.

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

HAROLD A. MOORE ALSO KNOWN AS HAL MOORE, ET AL., TRADING AS MAYFAIR APPLIANCE, ETC.

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

Docket C-239. Complaint, Sept. 20, 1962—Decision, Sept. 20, 1962

Consent order requiring franchised dealers for Morse sewing machines in Spokane, Wash., to cease unfair practices they utilized under their "Morse Owner/Advertiser Program", including representations by their salesmen that they were employed by manufacturers of the sewing machines, were not salesmen but were merely seeking to induce favorable word-of-mouth advertising by witnesses of their demonstrations, that participants in their program would acquire a machine free or for only a down payment, could easily earn enough to offset installment payments by referring leads to dealers, etc.

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 Harold A. Moore, also known as Hal Moore, and Larry Moore, as individuals and as copartners trading as Mayfair Appliance and as Morse Advertising Associates, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Harold A. Moore, also known as Hal Moore, and Larry Moore are individuals and have been copartners trading and doing business as Mayfair Appliance and as Morse Advertising Associates, with their office and principal place of business located at 1925 Northwest Boulevard, in the city of Spokane, State of Washington. Respondent Harold A. Moore's present address is East 8009 Sprague Street, Spokane, Wash.

PAR. 2. Respondents for several years last past have been engaged in advertising, offering for sale, selling and distributing sewing machines and other products to the public.

PAR. 3. In the course and conduct of their business, respondents for some time last past have caused said products, when sold, to be shipped from their place of business in the State of Washington to purchasers therof located in various other States of the United States, and at all times mentioned herein have maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents have been franchised dealers for the sale and distribution of Morse sewing machines and, in the course and conduct of their business, have utilized a so-called "Morse Owner/Advertiser Program" as a method of developing leads to prospective purchasers thereof and of inducing the sale of said sewing machines to members of the public.

PAR. 5. Under the aforesaid program a prospective purchaser, whose name has been referred to the franchised dealer by a purchaser-participant, is given a small sum of money, such as $5.00, or other gift of similar value by the dealer or his salesman for permitting a demonstration of said sewing machine in the prospect's home. The prospect may participate in the program by purchasing a machine and, in turn, referring the names of friends and acquaintances whom he can induce to permit similar home demonstrations in their respective homes. The purchaser-participant is paid a stipulated amount, such as $30.00, for each such lead who purchases one of said sewing machines from the dealer.

In the main, purchaser-participants obligate themselve to a conditional sales contract which provides for monthly payments over a period of time, such as two years, and they are entitled to refer leads to the dealer for a similar period of time. The installment obligations are treated as separate and distinct from such earnings as may accrue under the lead referral aspects of the program.

PAR. 6. In the course and conduct of their business, respondents and their salesmen have made certain representations, directly or indirectly, to prospective purchasers, of which the following are typical but not all inclusive:

(a) That they are representatives of, or are employed by, the manufacturer of said sewing machines.

(b) That they are not salesmen but are merely seeking to induce favorable word-of-mouth advertising by those members of the public to whom the machines are to be demonstrated.

(c) That they have a program under which participants will acquire a sewing machine free of cost; or for no cost in addition to a down payment.

(d) That they will sell a sewing machine to 10, or to 14, out of 24 (also expressed in various other terms such as 53%, or as 73%) of the leads referred to them from among the participants' friends or acquaintances.

(e) That by purchasing a machine a participant, by referring a minimum of one lead per month to respondents, will experience little or no difficulty in earning enough to offset his monthly installment payments and with additional leads can easily earn considerably in excess of his installment obligations during the terms thereof.

PAR. 7. In truth and in fact:

(a) Respondents, as franchised dealers, and their salesmen were neither representatives nor employees of the manufacturer of said sewing machines.

(b) Respondents and their salesmen were engaged in direct selling for the purpose of inducing the immediate purchase of such machines by persons to whom they were being demonstrated.

(c) Relatively few, if any purchaser-participants acquired their machines without making additional payments in substantial amounts therefor.

(d) Substantially fewer leads than represented resulted in completed sales.

(e) In the overwhelming majority of instances purchaser-participants did not offset their installment obligations by lead referral earnings. Furthermore, many of those whose lead referral earnings offset some of their monthly payments did so only after expending considerably more time and effort thereat than was represented by respondents and their salesmen.

Therefore, the representations referred to in paragraph 6 were false, misleading and deceptive.

PAR. 8. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of sewing machines or other products of the same general kind and nature as those sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were true and into the purchase of substantial quantities of respondents' product by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were all to the prejudice and injury of the public and of respondents' competitors and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

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 respondents having been notified thereof and furnished 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. Respondents Harold A. Moore, also known as Hal Moore, and Larry Moore are individuals and have been copartners trading and

doing business as Mayfair Appliance and as Morse Advertising Associates, with their office and principal place of business located at 1925 Northwest Boulevard, in the city of Spokane, State of Washington. Respondent Harold A. Moore's present address is East 8009 Sprague Street, Spokane, Wash.

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 Harold A. Moore, also known as Hal Moore, and Larry Moore, as individuals and as copartners trading as Mayfair Appliance, Morse Advertising Associates, or under any other trade name or names, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of sewing machines or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

1. They are representatives of, or are employed by, the manufacturer of such products; or misrepresenting in any other manner the identity, nature or status of their business.

2. They are engaged in an advertising program; are seeking favorable word-of-mouth advertising; or that they are not engaged in direct selling; or misrepresenting in any other manner their status as salesmen.

3. Any such product will be acquired free, or without cost other than a down payment; or misrepresenting in any other manner how, or the conditions under which, any such products may be acquired.

4. They have in the past, or may in the future, sell such products to 10 out of 24, 53%, or any other amount or proportion, however expressed, which is not in accord with the facts, of the leads referred to them; or misrepresenting in any other manner the frequency of sales to leads, or the probability of selling such products to persons whose names are to be referred or submitted by their customers.

5. Installment payments will be offset by referring one lead per month to respondents; or that such payments will easily or customarily be offset or exceeded by lead-referral earnings; or misrepresenting in any other manner the effort which will be necessary to achieve earnings by submitting names to respondents.

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

TAYLOR & ART, INC., ET AL.

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

Docket C-240. Complaint, Sept. 20, 1962—Decision, Sept. 20, 1962

Consent order requiring Oakland, Calif., distributors of a plastic metal mender designated "Flex Bond" to automotive paint jobbers and others for resale, to cease labeling their said product as a "plastic solder", and to set forth clearly and conspicuously on labels possible dangers in use thereof and directions for safe handling.

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 Taylor & Art, Inc., a corporation, and Arthur L. Whitehead, Gilbert G. Taylor, and Peter K. Arpin, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Taylor & Art, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 1710 East Twelfth Street, in the city of Oakland, State of California.

Respondents Arthur L. Whitehead, Gilbert G. Taylor, and Peter K. Arpin are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of, among other things, plastic metal menders designated "Flex Bond" and "Flex Bond C" to automotive paint jobbers and other distributors for resale to the consumer.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of California to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of their plastic metal mender designated "Flex Bond", respondents on labels have described said product as a "plastic solder".

PAR. 5. By and through the use of the aforesaid descriptive statement, respondents represented, directly or by implication, that the metal mender designated "Flex Bond" is a solder.

PAR. 6. In truth and in fact, the metal mender designated "Flex Bond" does not have the characteristics and effectiveness of a solder. Its effectiveness depends principally on its organic and nonmetallic ingredients. Therefore, the statement and representation set forth in paragraph 4 was, and is, false, misleading and deceptive.

PAR. 7. The label on the respondents' cream hardener contains only cautionary statements as to the flammability of the product, as to keeping the product out of reach of children and as to the steps to be taken if the product is ingested or gets into the eyes. However, the benzoyl peroxide contained in the cream hardener may through prolonged or repeated contact with the skin irritate or sensitize the skin and, therefore, in case of contact should be flushed from the skin. The label on the respondents' cream hardener is misleading in that it fails to reveal this material fact with respect to the consequences which may result from the use of said product as directed on the label for the putty used in the plastic metal mender designated "Flex Bond C". The label on the respondents' putty used in the plastic metal mender designated "Flex Bond C" is misleading in that it fails to reveal the material fact that after it is mixed with the cream hardener the product resulting therefrom may through prolonged or repeated contact with the skin irritate or sensitize the skin and, therefore, in case of contact should be flushed from the skin. The label on the respondents' liquid hardener contains only cautionary statements as to the flammability of the product and as to flushing the skin with water in the event the product comes in contact with the skin. Because it contains methyl ethyl ketone peroxide and cyclohexanone peroxide, the liquid hardener is toxic if taken internally and, therefore, should be kept out of reach of children. If the liquid hardener is ingested, vomiting should be induced and a physician consulted. The vapors from the methyl ethyl ketone peroxide and the cyclohexanone peroxide contained in the liquid hardener may be harmful if inhaled and, therefore, the product should be used in a well ventilated area and the vapors avoided. The label on the respondents' liquid hardener is misleading in that it fails to reveal these material facts with respect to the consequences which may result from the use of said product as directed on the putty used in the plastic metal mender designated "Flex Bond" and with respect to conditions of storage of the liquid hardener. The cobalt naphthenate contained in the putty used in the metal mender designated "Flex Bond" may through prolonged or repeated contact with the skin irritate or sensitize the skin and, therefore, in case of contact should be flushed from the skin. Because it contains cobalt naphthenate, the putty used in the metal mender designated "Flex Bond" is toxic if taken internally and, therefore, should be kept out of reach of children. If said putty containing cobalt naphthenate is ingested, vomiting should be induced and a physician consulted. After the putty used in the plastic metal mender designated "Flex Bond" is combined with the liquid hardener, the vapors from the methyl ethyl ketone peroxide and the cyclohexanone peroxide contained in the liquid hardener may be harmful if inhaled and, therefore, the plastic metal mender, should be used in a well ventilated area and the vapors avoided. The label on the respondents' putty used in the plastic mender designated "Flex Bond" is misleading in that it fails to reveal these material facts with respect to the consequences which may result from the use of the product as directed on its label and with respect to conditions of storage of the product.

PAR. 8. In the course of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of plastic metal menders of the same general kind and nature as those sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statement, representation and practice and failure to warn the purchasing public on the labels of the products of the dangers attendant to the use of the products have had, and now have, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statement and representation was and is true and that there is no danger in use of the products and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken beliefs.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of the respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the corporation named above, and the respondent named in the caption hereof having been furnished thereafter with a copy of a draft of complaint which the Bureau of Deceptive Practices proposed to present to the Commission for its consideration and which, if issued by the Commision, would charge the respondents with violation of 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 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, Taylor & Art, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1710 East Twelfth Street in the city of Oakland, State of California.

Respondents Arthur L. Whitehead, Gilbert G. Taylor and Peter K. Arpin are officers of said corporation and their 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 respondent Taylor & Art, Inc., a corporation, and its officers, and respondents Arthur L. Whitehead, Gilbert G. Taylor and Peter K. Arpin, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of plastic metal menders designated "Flex Bond" and "Flex Bond C", or any other product or products of similar composition or possessing substantially similar properties, under whatever name or names sold, do forthwith cease and desist from:

1. Using the word "solder" to designate, describe or refer to any product which is not a metallic compound or otherwise misrepresenting the composition of the product.

2. Using a label on the container for the cream hardener which does not set forth in a clear and conspicuous manner the following statements:

"CAUTION: Keep away from heat or flame. Keep out of reach of children. If taken internally, induce vomiting; consult physician. Avoid prolonged or repeated contact with skin. In case of contact, flush skin with water."

3. Using a label on the container for the putty used in the plastic metal mender designated "Flex Bond C", or any other product of similar composition or possessing substantially similar properties, which does not set forth in a clear and conspicuous manner the folowing statements:

"CAUTION: After mixing with cream hardener, avoid prolonged or repeated contact with skin. In case of contact, flush skin with water."

4. Using a label on the container for the liquid hardener which does not set forth in a clear and conspicuous manner the following statements:

"CAUTION: Keep away from heat or flame. Keep out of reach of children. If taken internally, induce vomiting; consult physician. Avoid prolonged or repeated contact with skin. In case of contact, flush skin with water. Use in well ventilated area; avoid vapors."

5. Using a label on the container for the putty used in the plastic metal mender designated "Flex Bond", or any other product of similar composition or possessing substantially similar properties,

which does not set forth in a clear and conspicuous manner the following statements:

"CAUTION: Keep out of reach of children. If taken internally, induce vomiting; consult physician. Avoid prolonged or repeated contact with skin. In case of contact, flush skin with water. After mixing with liquid hardener, use in well ventilated area; avoid vapors."

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

RADIATOR SPECIALTY COMPANY ET AL.

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

Docket 7662. Complaint, Nov. 24, 1959—Decision, Sept. 21, 1962*

Order requiring Charlotte, N.C., manufacturers of non-metallic sealing compounds designed for repairing and sealing leaks in automobile radiators and in steam and hot water heating systems, to cease representing falsely in advertising in magazines, by circulars distributed to the trade and the general public, and by use of their trade name "Solder Seal", that their products were solders, were metallic, and formed a metallic seal or bond.

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 Radiator Specialty Company, a corporation and I. D. Blumenthal, Herman Blumenthal and J. J. Duckworth, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Radiator Specialty Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its principal office and place of business located at 1400 West Independence Boulevard, in the city of Charlotte, State of North Carolina.

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*As amended March 8, 1961.