

IN THE MATTER OF

TOYS "R" US, INC.

FINAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9278. Complaint, May 22, 1996—Final Order, Oct 13, 1998*

This final order prohibits, among other things, the nation's largest toy retailer from continuing, entering into, or attempting to enter into, vertical agreements with its suppliers to limit the supply of, or refuse to sell, toys to a toy discounter. The order also prohibits Toys "R" Us from facilitating, or attempting to facilitate, an agreement between or among its suppliers relating to the sale of toys to any retailer, and from urging or coercing suppliers to restrict sales to any toy discounter.

Participants

For the Commission: *L. Barry Costilo, Richard Dagen, Patrick Roach, Sarah Allen, James Frost, Michael Antalics, William Baer, Richard Ludwick, David Glasner, and Jonathan Baker.*

For the respondent: *Michael Tumolo, in-house counsel, Paramus, N.J., Michael Feldberg, Schulte, Roth & Zabel, New York, N.Y. and Irving Scher, Weil, Gotshal & Manges, New York, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Toys "R" Us, Inc., a corporation (sometimes referred to as "TRU" or "respondent"), has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Toys "R" Us, Inc. ("TRU") is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal office and place of business at 461 From Road, Paramus, New Jersey.

PAR. 2. TRU is the largest toy retailer in the United States. It has approximately 600 stores located throughout the United States and 300 stores in foreign countries, which sell toys, infant supplies and

equipment, juvenile sporting goods and related items ("products"). In 1995 its total sales were approximately \$9.4 billion.

PAR. 3. TRU's acts and practices, including the acts and practices alleged herein, are in or affect commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. TRU's importance as a provider of distribution to manufacturers of toys and related products has given it the ability to exercise market power over those manufacturers, and TRU has exercised this power.

PAR. 5. Warehouse clubs ("clubs") charge a membership fee and retail a broad variety of products, including toys and other products sold by TRU. The clubs operate on lower margins than TRU or other national chain discounters. During the late 1980's and early 1990's, club sales were growing at a much faster rate than other retailers. During that period, the toy manufacturers wanted to increase their sales to this relatively new channel of distribution because of the growth potential of the clubs and the manufacturers' desire to have additional outlets for their merchandise. Before TRU engaged in the conduct described in paragraphs seven through nine below, the clubs generally were able to buy popular individual toys from open stock (*i.e.*, any toys sold by the manufacturer without restriction) from most of the major manufacturers, which they generally sold at lower prices than TRU and other retailers. The clubs needed the option to buy the same toys from the manufacturers that TRU and the other major retailers were carrying in order to compete effectively.

PAR. 6. TRU has cultivated the image with the public as a toy discounter that has everyday low prices. However, it does not have the lowest retail prices among national toy retailers, and it generally does not lead prices down. In the early 1990's the clubs' low prices were putting competitive pressure on TRU. TRU feared that consumers would draw unfavorable and embarrassing comparisons between the clubs' prices and its prices, and that its image for everyday low prices could be eroded.

PAR. 7. Beginning at least as early as 1989, TRU used its power to gain agreements or understandings with various suppliers relating to toy sales to the clubs. These agreements or understandings included the following:

- (a) The suppliers agreed not to sell to the clubs the same individual toys that TRU carried;

(b) In the event a supplier wanted to sell to the clubs some toys carried by TRU, TRU and the suppliers agreed upon toy products that could be sold to the clubs. These generally were "club specials" consisting of combination packs of two or more different items, or other product that was differentiated from regular open stock items. The items in the club specials could not be readily price-compared to products sold by TRU, the club specials generally cost more to produce, and the club specials raised the clubs' prices to consumers; and

(c) The suppliers agreed to advise TRU in advance of the specific products, including club specials, that the suppliers wanted to sell to the clubs. If after reviewing the products TRU determined that they did not pose a competitive conflict with the products sold by TRU, the supplier could sell the product to the clubs.

PAR. 8. Some major manufacturers were reluctant to give up their sales of individual toys to the clubs so long as their competitors were selling them to the clubs. To secure the agreements or understandings alleged in paragraph seven, TRU facilitated understandings among competing manufacturers to achieve substantial unity of action among them relating to their dealings with the clubs.

PAR. 9. TRU sought, received, and negotiated agreements or understandings with manufacturers with respect to the toys they would not sell to the clubs. TRU policed the manufacturers' sales and repeatedly brought any infractions to their attention. When it deemed necessary, TRU enforced its policy by taking product off its shelves or not buying product that manufacturers had sold to the clubs.

PAR. 10. By 1994 and continuing to the present, most of the major U.S. toy manufacturers had stopped selling popular individual toys to the club channel of distribution that were carried by TRU.

PAR. 11. The purpose and effect of the agreements and understandings described in paragraphs seven through ten was to restrain competition among toy retailers and among toy manufacturers.

PAR. 12. By engaging in the acts or practices described in paragraphs four through eleven of this complaint, TRU has unreasonably restrained competition in the following ways, among others:

(a) Retail price competition has been restrained, and toy prices to consumers are higher than they would have been absent TRU's conduct;

(b) Competition among toy manufacturers, including competition with respect to their distributional practices and their dealings with TRU's competitors, has been restrained;

(c) The clubs' costs were increased, which impeded the growth of a new method of toy distribution in its incipiency; and

(d) Information that would enable consumers to make informed price comparisons has been suppressed.

PAR. 13. The acts or practices of TRU alleged herein were and are to the prejudice and injury of the public. The acts or practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. These acts or practices are continuing and will continue, or may recur, in the absence of the relief requested.

Commissioner Azcuenaga and Commissioner Starek dissenting.