

Order

IN THE MATTER OF

KAY WINDSOR FROCKS, INC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2 (D) OF THE CLAYTON ACT AS AMENDED*Docket 5735. Complaint, Jan. 25, 1950—Decision, Aug. 18, 1954*

Order requiring two associated corporate manufacturers of women's and misses' dresses, with factories in Boston and Fall River, Mass., respectively, and common New York show rooms and a common manager, to cease violating Sec. 2 (d) of the Clayton Act as amended, by granting credits to certain customers as compensation for advertising services without advising their competitors that any advertising credit plan was in effect, and by granting credits to other customers at disproportionate unit rates and upon unequal minimum purchases.

Before *Mr. Clyde M. Hadley*, hearing examiner.

Mr. William H. Smith, *Mr. Peter J. Dias*, and *Mr. Richard E. Ely* for the Commission.

Mr. Bernard E. Singer, of New York City, and *Mr. J. J. Spiegel*, of Boston, Mass., for respondents.

ORDER ADOPTING INITIAL DECISION AS THE DECISION OF THE
COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This case having come on for hearing before the Commission upon the appeal filed by the respondents from the initial decision of the hearing examiner; and

The Commission, for reasons stated in its opinion which is separately issuing herein, having determined that the appeal should be denied and that the findings as to the facts, conclusion and order contained in the initial decision are appropriate:

It is ordered that the respondents' appeal be, and it hereby is, denied.

It is further ordered that the initial decision of the hearing examiner, a copy of which is attached, be, and it hereby is, adopted as the decision of the Commission.

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

Commissioner Carretta not participating.

Said initial decision, thus adopted by the Commission as its decision, follows:

INITIAL DECISION BY CLYDE M. HADLEY, TRIAL EXAMINER

Pursuant to the provisions of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by the Robinson-Patman Act, approved June 19, 1936 (15 U. S. C., Sec. 13), the Federal Trade Commission on January 25, 1950, issued and subsequently served its complaint in this proceeding upon Kay Windsor Frocks, Inc., a corporation, Aaron Shapiro, individually and as its president and treasurer, Winnie Peck, Inc., a corporation, and Lou Swartz, individually and as its president and treasurer, charging them with violation of subsection (d) of Section 2 of said Act as amended. After the filing of answer to the complaint, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before the above-named trial examiner theretofore duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by said trial examiner on the complaint, answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions presented by counsel, oral argument not having been requested; and said trial examiner, having duly considered the record herein makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. (a) Respondent Kay Windsor Frocks, Inc., is a Massachusetts corporation, with its office and principal place of business located at 75 Kneeland Street, Boston, Massachusetts.

(b) Respondent Aaron Shapiro, an individual, is the President and Treasurer of said respondent Kay Windsor Frocks, Inc., at the same address; and directs, controls and is responsible for its acts and practices.

(c) Respondent Winnie Peck, Inc., is a Massachusetts corporation, with its office and principal place of business located at Eddy Mill No. 1, Fall River, Massachusetts.

(d) Respondent Lou Swartz, an individual, is the President and Treasurer of said respondent Winnie Peck, Inc., at the same address; and during the time mentioned herein, has directed, controlled, and been responsible for its acts and practices.

PAR. 2. During the period of time from about September, 1948, to the present, respondents, have engaged in the business of manu-

facturing women's dresses in factories located in Massachusetts and of selling them to customers with places of business located in various States of the United States and in the District of Columbia, for resale within the United States. In the conduct of their business such dresses were shipped and caused to be transported by respondents from their factories to the places of business of said customers.

PAR. 3. During said period of time, Kay Windsor Frocks, Inc., owned 50% of the stock of respondent Winnie Peck, Inc., and acted as selling agent for that respondent. Both corporate respondents shared the same showrooms at 1350 Broadway and later 1400 Broadway, New York, N. Y., and employed the same individual as sales manager. Kay Windsor Frocks, Inc., manufactured misses' sizes and Winnie Peck, Inc. manufactured ladies' sizes in the same or similar styles of dresses. The corporate respondents sold their merchandise to the same customers, at the same prices, and granted some customers advertising credits, based upon the size of the purchase of merchandise of either or both corporate respondents. The respondents proportionalized between themselves the credits so granted. In thus conducting their business, respondents jointly engaged in the acts and practices hereinafter found.

PAR. 4. In the course of their business in commerce, respondents sold their garments direct to retailers. In some cases such retailers placed their orders with respondents through buying syndicates and resident buyers, for whose services the retailer paid. In all instances the retailers were invoiced directly by the respondents; in all instances the merchandise was shipped directly to the retailer by the respondents, and in all instances payments were made directly by the retailers to the respondents. In those instances where credits were granted, they were granted directly by the respondents to the retailers. It is therefore found that all retailers to whom respondents sold their garments were customers of the respondents.

PAR. 5. During said period of time, in the course of selling their dresses in commerce, respondents granted or contracted to grant credits to various customers in consideration or as compensation for advertising services furnished or to be furnished by or through said customers in connection with their handling, offering for resale or resale of said dresses. Such credits were in reduction of the purchase prices of respondents' dresses which they sold to their customers.

PAR. 6. During the same period of time, in the course of selling their dresses in commerce, respondents did not offer or otherwise make available any advertising credits to other customers engaged in the resale of respondents' dresses.

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PAR. 7. Respondents offered advertising credits to certain of their customers on the following basis: for off-season initial purchases of a minimum of 600 units, an advertising allowance of 25 cents per unit when advertised by the customer; or half the cost of the advertising, whichever was less. Notwithstanding the terms of this offer, such advertising credits were granted by respondents to customers who purchased much less, in varying amounts, than the so-called requisite 600-unit minimum initial purchase; the credits as granted by respondents varied in amount and percentage, often exceeding the prescribed 25-cent maximum, as, for example, 31, 33, 43, 44 and 50 cents per unit; and the stated limitation of such credits to off-season purchases was not enforced by respondents.

PAR. 8. It is found that such payment or consideration was not available to all customers on proportionally equal terms, in that respondents failed to advise some customers of the fact that any advertising credit plan was in effect, while to other customers, respondents granted credits at disproportionate unit rates, and upon unequal minimum purchases.

PAR. 9. Those customers of respondents to whom advertising credits were granted, offered or made available, were in competition in the sale of respondents' dresses with other customers of respondents to whom no advertising credits were granted, offered, or made available; and various customers of respondents to whom advertising credits were granted at disproportionate unit rates and for unequal minimum purchases were in competition with each other.

CONCLUSION

The acts and practices of the respondents as herein found violate subsection (d) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (U. S. C. Title 15, Sec. 13).

ORDER

It is ordered, That the respondents, Kay Windsor Frocks, Inc., Aaron Shapiro, individually and as president and treasurer thereof, Winnie Peck, Inc., and Lou Swartz, individually and as president and treasurer thereof, their representatives, agents, and employees, jointly or severally, directly or through any corporate or other device, in connection with the sale of any of respondents' dresses in commerce, as "commerce" is defined in the Clayton Act as amended, do forthwith cease and desist:

From paying or contracting to pay, or granting or contracting to grant, or allowing anything of value, including credits for advertising

services, to or for the benefit of any customer as compensation or in consideration of any newspaper advertising or other services or facilities furnished by or through said customer in connection with the sale or offering for sale of respondents' dresses, unless such payments, credits, or allowances are available on proportionally equal terms to all other customers competing in the distribution of such dresses.

OPINION OF THE COMMISSION

Per Curiam:

This case comes before us upon the appeal of respondents from the initial decision of the hearing examiner, which held that respondents have engaged in acts and practices in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

The respondent corporations have engaged in the manufacture of cotton dresses which have been sold in commerce by the respondents to department stores, specialty shops and other retailers for resale to the public. The initial decision held, in effect, that the respondents had granted to some customers credits or payments in consideration for advertising services furnished by those stores in offering respondents' garments for sale and that credits or payments for such services were not available on proportionally equal terms or available at all to others competing in the distribution of respondents' dresses with the customers to whom payments were granted. Representatives of the respondents testified to the effect that the respondents' program of granting compensation for newspaper advertising was limited to crediting customers at the rate of 25¢ per garment purchased or one-half the cost of that advertising, whichever happened to be the lesser amount, in the event the customer (a) purchased on an initial order a minimum of 600 cotton dresses, and (b) made such purchase during certain off-season periods for sales promotions in January or immediately after Easter. As the initial decision in effect found however, the respondents did not adhere to those terms but, on the contrary, granted credits or compensation for advertising services to customers who bought much less than the requisite 600 minimum initial purchase and as granted by respondents these credits, in instances, varied in amount and percentage often exceeding the prescribed 25¢ maximum. Neither was the stated limitation to off-season purchases adhered to.

The evidence presented in this proceeding which is pertinent to the matters raised under the appeal relates primarily to sales made by respondents to stores located in New York City, Newark, New Jersey, and Hartford, Connecticut, and respondents, among other things, con-

tend that the hearing examiner erroneously rejected certain findings proposed for his adoption and that he erred in those connections also in ruling that the practices engaged in by respondents in each of such areas were unlawful. Turning first to the New York City area, the evidence shows that the respondents' deliveries of their garments to one of their customers, Franklin Simon, upon its purchases extended from January 13, 1949, when an initial shipment exceeding 1400 garments was made, to June 30 of that year. During such period, Franklin Simon received in excess of \$3,500 as credits toward their advertising of respondents' dresses and of this amount two credits totaling approximately \$900 were accorded in June of that year. Two of the newspaper advertisements for respondents' lines of garments, as inserted by Franklin Simon, appeared on April 24, 1949, and May 22, 1949, both dates being subsequent to Easter of that year. Respondents' deliveries to R. H. Macy & Company, Inc., a retailer competing in the resale of their dresses, extended from April 18, 1949, the day following Easter, to June 17 of that year on its purchase of approximately 300 garments. The record clearly shows that R. H. Macy & Company, Inc., received no advertising allowances or credits, that none was offered to it and that the respondents did not inform that concern's representative as to any terms or conditions under which the customer might receive compensation or allowances for services in advertising respondents' garments.

In this connection, the respondents urge that it cannot be properly found that credits or compensation for advertising services were not available on proportionally equal terms to these two competing customers for the reason that R. H. Macy & Company, Inc., made no off-season purchases. However, the circumstance that one store may have made one or more off-season original purchases of more than 600 dresses prior to the time when its competitor did its buying and perhaps placed various reorders thereon does not justify the respondents' failure to inform as to the conditions under which credits would be granted or to offer allowances to R. H. Macy & Company, Inc., on terms proportionally equal to those being granted to its competitor.

We accordingly conclude that the hearing examiner correctly rejected those of respondents' proposed findings which were to the effect that the record fails to support conclusions that respondents' credits were not available among its New York City customers as required under the Act. Rejected also is the respondents' contention that the hearing examiner erred in concluding in effect that the Act requires that sellers must inform customers as to the terms under which they may receive compensation for services or otherwise offer

such credits when they have been made available to resellers competing with such customers. Although the word "available" rather than "offered" appears in the relevant subsection of the Act, the statute contemplates that customers competing in the resale of a seller's merchandise be afforded equal opportunity to share in payments for promotional services in the event the seller elects in the first instance to provide it to one of their competitors. A course of conduct under which a seller fails to inform respecting such compensation or make known his terms or otherwise to offer them to one customer while granting payment for services to his rival reseller essentially represents concealment. In such case, the credit or allowance is not "available" to the unfavored competitor, for all practical purposes a withholding and denial of opportunity to share occur, and the law is violated.

In Newark, the respondents were selling their merchandise to three retailers. Of the two to whom no advertising credits were offered and who were not informed by respondents of conditions under which advertising credits could be received, one purchased directly from respondents and the other purchased through a resident buyer. The third, Kresge-Newark, made its purchases through Mutual Purchasing Syndicate. Illustrative of the respondents' several transactions with this concern was the group or bulk purchase made on March 18, 1949, for April 18th delivery which was placed by Mutual's subsidiary for 6,386 dresses. Respondents agreed to grant \$1,645 in advertising credits and permitted Mutual to allocate that amount among the retailers whose names appeared on the distribution sheets. Kresge-Newark received an advertising credit of \$150 on its purchase of 300 dresses representing a portion of that bulk purchase. To it and the other participating retailers, respondents shipped the merchandise directly and in all instances billed them for the merchandise and granted them credits directly. Payment for their dresses likewise came to respondents from the stores and not through Mutual. Respondents, however, contend that Mutual alone was the customer in these transactions and that the credits or payments made to Kresge-Newark have not been paid to a "customer" of respondents within the meaning of the Act.

In the circumstances here, however, whatever legal relationship and rights were created as between Mutual Purchasing Syndicate and the respondents as a result of their negotiations is not controlling to a determination as to whether the retail stores named at the outset to receive the merchandise and designated as future recipients of respondents' advertising credits were customers of the respondents.

Consummation of the transactions, as contemplated by Mutual Buying Syndicate and the respondents, necessarily entailed a course of direct dealing between the respondents and the merchants identified in the distribution sheets with respect to all essential phases of the transactions. In a very real sense therefore, each of the stores for which this group buyer was acting must be regarded as a "customer" of the respondents and the Commission accordingly is of the opinion that the challenged rulings of the hearing examiner relating to the practices engaged in by respondents in the Newark area are free from prejudicial error and that the objections thereto as interposed by the respondents in support of their appeal are without merit.

With respect to the Hartford area, several retailers were competitively engaged in the resale of the respondents' garments. Of the two customers who received advertising credits, one bought his merchandise from the respondents directly, the other made his purchases through Mutual, and in February, 1949, they were accorded credits of \$77.24 and \$75.00, respectively. Another of the respondents' Hartford customers was Blue Bird Shops, Inc. This purchaser received no credits or payments, it was not informed by the respondents of any program under which credits would be accorded by them and none was offered. Respondents contend that it cannot be properly concluded that credits were not available to this customer for the reason that it made no purchases in January. Although the record indicates that this customer made no January purchases, on its purchases it received March and early April deliveries prior to Easter, the date when one of the respondents' so-called off-season promotions was effective. Everything considered, it is evident from the record that credits and compensation for advertising services were not available on any terms to one competing customer in the Hartford area and that as between the two others which received payments, they received credits at differing or proportionally unequal rates per garment, neither of which rates reflected the 25¢ per unit amount which respondents have stated represented their unit rate. Respondents' objections to the conclusions reached by the hearing examiner in reference to these matters must be rejected.

The respondents contend that the order to cease and desist as contained in the initial decision is too broad in scope and that it is not sufficiently specific and they propose certain language of limitation for adoption into the order. It is not correct, as respondents in effect contend, that the order is deficient in specificity because of the similarity of its language and import to that of the subsection of the Act to which the respondents' violations of law relate. Since they

are intended to prevent occurrence in the future of illegal activities and are prospective in their operation, the Commission's orders necessarily must be somewhat general in scope. To be effective, such orders must proscribe the unlawful practice or course of conduct typified by the acts performed in the past. Inasmuch as the prohibition of the order is directed to the respondents' practice of failing to make compensation for services or facilities available on proportionally equal terms during the course of their performance of the acts referred to in the initial decision and this commercial practice is the one with which the subsection here pertinent is concerned, the order is not to be regarded as unduly broad in its scope. It would not be in the public interest, however, to restrict the order as requested by respondents so that it would be applicable only to credits for advertising services. To do so, would exclude therefrom any payments in lieu of the aforesaid ones which the respondents might elect to provide in the future for other types of facilities or services similarly furnished by or through customers. With respect to respondents' additional request that a definition of the term "customer," as defined by the hearing examiner, be included in the order, it is to be noted that the initial decision has not undertaken to enumerate all situations under which the relationship of seller and customer may arise but instead sets forth the reasons why the retail stores which purchased through Mutual Buying Syndicate or through resident buyers must be regarded as customers of the respondents in the circumstances here. There appears no necessity, however, for incorporating in our order definitive language in general reference to seller-customer relationships. Moreover, the difficulties attendant to an undertaking to define all conditions of commercial dealing through which such relationship may be created are obvious. These requests of the respondents are not being granted.

Respondents contend also in connection with the foregoing matters that the order should specify in what fashion the respondents' allowances were not "available" and the manner in which they were not granted on proportionally equal terms. Counsel supporting the complaint do not oppose these particular requests and in the brief additionally offer for our consideration certain statements bearing on these matters which they suggest be appended to the order. First to be considered in these connections is the request, among others, of counsel supporting the complaint that the order to cease and desist as issued by the Commission be supplemented to the end that it in effect contain a description of the allowances not available heretofore from the respondents on proportionally equal terms and include in such

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category credits for services granted only upon initial minimum purchases of 600 garments. It is evident from the record that the respondents essentially had no uniform terms with respect to purchases and credits but granted credits to some and withheld offering them to competing retailers to accommodate their own purposes. On the other hand, the decision and rulings below have not determined whether this minimum purchase requirement, had it been uniformly imposed as a condition to the granting of credits to competing customers, would or would not have constituted proportionally equal terms among customers in the light of conditions prevailing in the women's apparel industry. The issues as framed by the pleadings and otherwise cannot be deemed to permit or require a decision on that question at this time. The requests of counsel supporting the complaint are not being granted.

Reverting now to the respondents' request for specificity, an instance previously noted in which allowances were not granted on proportionally equal terms by the respondents is revealed by the evidence which relates to the payments reflecting different rates per garment unit as accorded to two of the Hartford customers. The initial decision clearly identifies the competitive situations in which allowances were not "available" at all as being those in which customers in competition with grantees of respondents' credits were not offered credits or wherein there was a failure to inform as to terms under which they likewise could receive compensation for services. In connection with these situations, it is apparent that in instances unfavored customers (a) engaged in in-season resale of garments while in-season discounts were being granted to competing customers, or (b) made some purchases before Easter or during the course of one of the respondents' out-of-season promotional periods and resold competitively with other retailers who were contemporaneously receiving or who previously had been granted out-of-season credits on similar quantities purchased in the course of another sales promotion period. Having determined that an order broad enough to proscribe the unlawful course of conduct engaged in is fully warranted here, we likewise conclude that it would not be appropriate to restrict its application unduly and that no useful purpose would be served by granting the requests to supplement the order by adding reference to the specific acts from which respondents' violations of law have stemmed.

Subsequent to the date upon which the oral arguments of counsel were held before the Commission in this case, changes in the membership of the Commission have occurred. The determinations as made

here are based on our consideration of the entire record and the Commissioners participating, who were not members at the time when such arguments were presented, have duly considered the official transcript of those arguments. The decision, as separately issuing here, adopts the initial decision as the decision of the Commission.

Commissioner Carretta did not participate in this case.

IN THE MATTER OF
PUREX CORPORATION, LTD.

Docket 6008. Complaint, July 14, 1952—Decision, Aug. 24, 1954

Dismissal for lack of substantial evidence of complaint charging a manufacturer in California with discriminating in price in violation of subsec. 2 (a) of the Clayton Act as amended in the sale of its "Purex" household bleach and "Trend" detergent through offering deals, allowances, rebates, and other special discounts in certain sales territories which were not offered in other contiguous areas.

Before *Mr. John Lewis*, hearing examiner.

Mr. Austin H. Forkner, *Mr. William C. Kern*, *Mr. Andrew C. Goodhope*, *Mr. Eldon P. Schrup* and *Mr. Francis C. Mayer* for the Commission.

Gibson, Dunn & Crutcher, of Los Angeles, Calif., and *Halfpenny, Hahn & Cassedy*, of Washington, D. C., for respondent.

ORDER OF THE COMMISSION

The hearing examiner having filed his initial decision herein and counsel supporting the complaint having seasonably filed a notice of their intention to appeal from said initial decision, and the time within which counsel supporting the complaint could file their appeal brief having been extended by orders of the Commission to and including August 23, 1954; and

Counsel supporting the complaint having filed on August 23, 1954, a notice of their determination not to perfect their said appeal; and

No appeal brief having been filed within the time so provided:

Now therefore, pursuant to Rules XXII and XXIII of the Commission's Rules of Practice, the attached initial decision of the hearing examiner did automatically, on August 24, 1954, become the decision of the Commission.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

STATEMENT OF THE CASE

The Federal Trade Commission issued its complaint against the above-named respondent on July 14, 1952, charging it with having violated Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, by discriminating in price between different customers of its product, Purex bleach, with resultant injury to competition in both the primary and secondary lines of commerce. Said re-