

The Commission having found a luggage manufacturer of Trenton, N.J., and its sales subsidiary in violation of Sec. 2(d) of the Clayton Act by failing

Complaint

to make its advertising and promotional allowances available to all competing customers on proportionally equal terms, but having suspended the issuance of a formal order by an order dated Dec. 13, 1963, 63 F.T.C. 2237, pending an industrywide investigation into such practices in the luggage industry, the Commission now orders respondents to file within sixty days of the service of this order a report of compliance "as if a cease and desist order was being entered."

COMPLAINT

The Federal Trade Commission, having reason to believe that the party 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, as amended by the Robinson-Patman Act (U.S.C., Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondents Atlantic Products Corporation and Atlantic Products Sales Corporation are corporations organized, existing and doing business under and by virtue of the laws of the State of New Jersey, both with offices and principal place of business located at 1 Johnston Avenue, Trenton, New Jersey. Respondent Atlantic Products Sales Corporation is a wholly owned subsidiary of respondent Atlantic Products Corporation, and the latter formulates, directs and controls all acts, practices and policies of the former.

PAR. 2. Respondents are now and have been for some time engaged in the manufacture, distribution, and sale of various types of luggage and golf bags. Respondent Atlantic Products Corporation has been responsible for the manufacture of above products, while sale and distribution of said products have been carried out by its wholly owned subsidiary, Atlantic Products Sales Corporation.

PAR. 3. Respondents sell and cause their products to be transported from their principal place of business in the State of New Jersey to customers located in other States of the United States. There has been at all times mentioned herein a continuous course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 4. In the course and conduct of their business in commerce, respondents 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 by or through such customers in connection with their offering for sale or sale of products sold to them by respondents, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondents' products.

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PAR. 5. For example, for some time since 1953 respondents have made available to certain of their customers a cooperative advertising plan whereby respondents will grant advertising allowances of 5% on net purchases of luggage, when net purchases for a specified six month period are \$1,500 or greater. Respondents have paid and continue to pay such 5% allowance to many of their customers qualifying under said plan. Such allowance or compensation has not and is not made available on proportionally equal terms to all other customers competing with said customers who have been and are recipients of such compensation and allowance in the sale and distribution of respondents' luggage.

PAR. 6. The acts and practices of respondents, as alleged, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. Alvin D. Edelson, for the Commission.

Geiger, Harmel & Schuchat and Wald, Harkrader & Rockefeller, Washington, D.C., for the respondents.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

MARCH 18, 1963

The complaint herein issued on June 25, 1962, charges respondents Atlantic Products Corporation and Atlantic Products Sales Corporation with violating Section 2(d) of the Clayton Act, as amended, through the failure to make advertising and promotional allowances available on proportionally equal terms to all competing customers. Specifically, the complaint alleges that for some time since 1953 respondents have made available to certain of their customers a cooperative advertising plan under which they grant an advertising allowance of 5 percent on luggage purchases of \$1,500 or more for a specified six-month period, and have paid such 5 percent allowance to many customers qualifying under the plan, but have not made such allowance available on proportionally equal terms to all other competing customers. Counsel supporting the complaint acknowledges the \$1,500 minimum-purchase requirement is the only practice alleged to violate Section 2(d):¹

Respondents' answer admits paying advertising allowances to certain customers, but denies failing to make such allowances available on proportionally equal terms to all other customers competing with those who received allowances. Additionally, as an affirmative de-

¹ Tr. 551.

fense, respondents assert that their good faith discontinuance of the single practice alleged to be illegal, prior to issuance of the complaint, accompanied by sworn assurances that the practice would not be resumed, has accomplished everything that could be accomplished by a cease and desist order and, accordingly, that there is no public interest in maintaining this proceeding.

Hearings were held at New York, New York, on November 19, 20, 21, 26 and 28, 1962, and in Trenton, New Jersey, on November 27, 1962. Proposed findings of fact, conclusions of law, and order, with reasons therefor, have been submitted by both parties.

The hearing examiner has carefully reviewed and considered the proposed findings of fact and conclusions of law, with reasons therefor. Such proposed findings and conclusions as are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters. Upon the entire record in the case, the hearing examiner makes the following findings of fact and conclusions:

1. Respondents Atlantic Products Corporation and Atlantic Products Sales Corporation are corporations organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with their principal offices and place of business located at 1 Johnston Avenue, Trenton, New Jersey.²

2. Respondents are now and for several years have been engaged in the business of manufacturing, offering for sale, selling and distributing throughout the United States a number of machine-sewn products including golf bags, picnic cases, cosmetics bags, bowling ball bags, flight bags, and a "regular" line of soft, zippered luggage. This proceeding involves only the regular luggage line bearing the brand name "Atlantic", which is manufactured by Atlantic Products Corporation and distributed by its wholly owned subsidiary Atlantic Products Sales Corporation. The regular luggage line is distinctly different merchandise from respondents' other products. It is generally marketed through different channels of commerce and is sold to different customers throughout the United States. Atlantic Products Corporation has been a manufacturer of luggage since ³ 1928, has always been a leader in this highly competitive industry.⁴

3. In the years 1950 to 1953, respondents' evidence indicates they encountered competition from other manufacturers who were offer-

² Complaint, admitted in respondents' answer.

³ Tr. 296, 63; Pollak, Tr. 85, 100, 135; McNeil, Tr. 292, 296.

⁴ See Girardi, Tr. 156; Kerner, Tr. 247; Pollak, Tr. 461.

ing cooperative advertising allowance "deals" to large retailers if they agreed to discontinue purchasing respondents' products and carry their lines. In addition, certain of respondents' competitors also offered graduated cooperative advertising allowances designed to favor large accounts: that is, allowances of progressively larger percentages were offered to larger buyers as their volume of purchases increased. Although importuned by their luggage customers to enter into such individually negotiated arrangements or to offer discriminatory allowances based on increasing percentages as purchase volume increased, respondents declined to do so. As a result, respondents lost a substantial number of customers.⁵

4. In the course and conduct of their business in commerce, respondents 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 advertising services furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondents. In this connection, respondents adopted in October 1953, a cooperative advertising plan known as "A.C.A.P." According to the testimony of respondents' witnesses this was the first time in the history of the luggage industry that an offer of advertising allowances was not made privately to selected large-volume customers, but was openly published and tendered to every customer regardless of size. It was the first such plan to be published in the industry. The A.C.A.P. plan, as promulgated in October 1953, provided that retailers who purchased respondents' registered trademarked luggage would receive a credit of 5 percent on net purchases of \$1,500 or greater during a specified six-month period. This credit could be expended during the following six-month period on advertising the company's products by newspapers, radio or television, billboards or car cards, billing enclosures or seasonal catalogs.⁶

5. The evidence establishes that the \$1,500 minimum-purchase requirement was incorporated in the A.C.A.P. plan for the following reasons:⁷

(a) Respondents' business experience and research demonstrated to them that retailers purchasing less than \$1,500 during a six-month period did not stock a sufficient inventory of respondents' merchandise to back up an advertising campaign, and thus were not interested in advertising their luggage.⁸

⁵ See Cart, Tr. 336-338; Pollak, Tr. 460, 461; Marsh, Tr. 595-605.

⁶ See Atlantic's Cooperative Advertising Plan, CX-1; Cart, Tr. 320; Pollak, Tr. 528.

⁷ In accord with respondents' proposed findings.

⁸ See Pollak, Tr. 471-474.

(b) The allowance that would have been earned on a smaller amount of purchases—less than \$75⁹ for a six-month period—would have been inadequate to purchase an effective amount of advertising, and thus would have been a waste for both respondents and their customers.¹⁰

(c) The cost of keeping A.C.A.P. accounting records for the under \$1,500 purchasers would have been prohibitive. During the first few years following adoption of the plan, respondents disbursed \$50,000–\$80,000 annually in advertising allowances. Under respondents' then existing manual accounting system, the administrative expense of keeping A.C.A.P. accounting records for the customers who purchased less than \$1,500 semi-annually and who did not want and could not use the allowance, would have added \$29,000–\$30,000 annually to the cost of administering the plan.¹¹

6. Respondents offered their plan and the allowance to all of their customers, without regard to the amount of their past purchases, by notifying them of the existence and terms of the plan in a descriptive booklet mailed to each of them. Thus, all of the respondents' customers were given the opportunity to obtain the allowance if they purchased the required dollar quantity of respondents' products.¹²

7. The \$1,500 purchase requirement was beyond the reach of some of respondents' customers, since the plan was tailored to the advantage of customers that could indulge in substantial advertising. This is demonstrated by the testimony of Theodore S. Cart, Chairman of the Board of Directors of the Atlantic Products Corporation:

This was an advertising plan that could only be indulged in by those people who had enough money to spend in advertising in any given community, and we will take New York which is closest to us. An advertisement by B. Altman & Company, Lord & Taylor, for instance, lends much more dignity to the product than even a national advertisement that doesn't indicate where the product is on sale. And the small dealer who paid precisely the same amount of money for the merchandise and has it on sale, whether he be on Eighth, Seventh or Sixth Avenue or what-have-you, was in a position to offer his customer the same piece of merchandise that had been offered by a

⁹ This amount appears questionable since CX 15-B shows that the respondents paid to Victoria Luggage for various newspaper advertisements the following amounts:

\$72.45	January 1961
32.20	January 1961
29.90	February 1961
27.60	April 1961
33.85	April 1961

¹⁰ See Pollak, Tr. 473, 474; Cart, Tr. 339; Kerner, Tr. 231–233.

¹¹ See Murray, Tr. 369–372, 388; Pollak, Tr. 473, 474. This evidence was not offered under any theory of cost justification. The evidence is clearly insufficient in this respect. However, (a), (b) and (c) demonstrate the plan was tailored to meet the needs of respondents and the more substantial advertisers in disregard of small dealers whose advertising was meager.

¹² CX 1; Pollak, Tr. 64, 482.

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prestige store such as those stores who had sufficient funds to advertise the product.¹³

Respondents' argument that the plan indirectly benefited the small dealer is without substance as a defense in law and in fact. Factually, there is no specific evidence of such benefits in the market areas at issue, and even if there were it would have no legal significance in the face of any plan realistically made available only to those "who had enough money to spend in advertising in any given community" (e.g., large department stores, etc.)¹⁴ as distinguished from small dealers who do not advertise on so grandiose a scale, if at all.¹⁵ In determining the proportionally equal terms upon which a seller shall make available any payment or consideration referred to in Section 2(d), the act requires a frank recognition of the business limitations of each buyer. An offer to make a service available to one, the economic status of whose business renders him unable to accept the offer, is tantamount to no offer to him.¹⁶

Corroborative of the fact that the purpose of the plan had the expected exclusionary effect as suggested by Mr. Cart is the testimony of Victor S. Pollak, respondents' president, that 85 percent to 90 percent of the customers to whom the plan was offered did not seek its benefits. Although 10 percent or 15 percent, largely composed of stores who did advertise extensively, did take advantage of the plan in accordance with its purpose of being tailored to satisfy the needs of substantial advertisers, it was unusable by small dealers who did not advertise extensively, if at all.¹⁷ Under FTC interpretations, a supplier's cooperative promotional program should afford all competing customers an opportunity to participate on some suitable basis. They must not be arbitrarily excluded by eligibility requirements related to their type of business or purchasing volume, or by the limitation of promotional arrangements to types which they cannot use or perform.

¹³ Tr. 327.

¹⁴ Tr. 327.

¹⁵ Rowe, Price Discrimination Under the Robinson-Patman Act, page 401. Cf. Initial Decision in *Exquisite Form Brassiere, Inc.*, FTC Dkt. 6966 (Jan. 28, 1960), adopted by FTC (Oct. 31, 1960) [57 F.T.C. 1036], modified, 1961 CCH Trade Cas. par. 70,157 (D.C. Cir. 1961); *Brown & Williamson Tobacco Corp.*, FTC Dkt. 6908 (Sept. 9, 1959) [56 F.T.C. 275] (displays unsuitable for some customers); *State Wholesale Grocers v. Great Atlantic & Pacific Tea Co.*, 258 F.2d 831 (7th Cir. 1958), cert. denied sub nom. *General Foods Corp. v. State Wholesale Grocers*, 358 U.S. 947 (1959).

¹⁶ *State Wholesale Groc. v. Great Atl. & Pac. Tea Co.*, 258 F.2d. 831 at 839. Accord: *Exquisite Form Brassiere, Inc.*, FTC Dkt. 6966, Initial Decision, p. 6 (Jan. 28, 1960) [57 F.T.C. 1040], adopted by FTC (Oct. 31, 1960) [57 F.T.C. 1036], modified, 1961 CCH Trade Cas. par. 70,157 (D.C. Cir. 1961); Initial Decision, *J. A. Folger & Co.*, FTC Dkt. 8094 (Jan. 10, 1962) [61 F.T.C. 1166].

¹⁷ Tr. 95-96; see Appendix for some of respondents' favored customers (to whom the plan was available because of their capacity to take advantage of respondents' A.C.A.P. plan) and respondents' unfavored customers (to whom the plan was not available because of their apparent incapacity to take advantage of the plan).

As stated by the FTC's 1960 Guides:

The plan must allow all types of competing customers to participate. It must not be tailored to satisfy the needs of a favored customer or class, but must be suitable and usable under reasonable terms by all competing customers * * *. The seller cannot either expressly, or by the way the plan operates, eliminate some competing customers.¹⁸

Thus the supplier should not restrict his promotional program to large-volume or other selected accounts. In the *Elizabeth Arden* case, the Court of Appeals upheld the FTC's invalidation of a "tailored" plan for furnishing paid cosmetics "demonstrators" to a select number of its large retail accounts which "cooperated" with the supplier by window displays and other aggressive promotional efforts. Similarly, the Commission in several other industries has proscribed advertising and promotional plans which channeled benefits only to selected larger accounts or a favored customer class. In the same way, an eligibility requirement which conditions participation on a minimum purchase volume by the customer is vulnerable when it operates in practice to exclude customers competing with participating recipients. According to the Commission's 1960 Guides, illegality may result if such a limit "is beyond the reach" of competing accounts. Furthermore, participation may not be thwarted by a supplier's promotional requirements which customers cannot reasonably use or meet.¹⁹

¹⁸ Rule 9, 1 CCH Trade Reg. Rep., pp. 6072, 6075 (1960).

¹⁹ 39 F.T.C. 288 (1944), aff'd, 156 F.2d 132 (2d Cir. 1946), cert. denied, 331 U.S. 806 (1947). See also *Esquisite Form Brassiere, Inc.*, FTC Dkt. 6968 (Oct. 31, 1960) [57 F.T.C. 1036] ("stylists" to larger accounts) modified, 1961 CCH Trade Cas. par. 70,157 (D.C. Cir. 1961). For examples of special allowances to large customers or classes, see *John B. Stetson Co.*, 41 F.T.C. 244 (1945) (allowances to three large customers); *Holzbeckerlein & Sons, Inc.*, 39 F.T.C. 82 (1944) (allowances to DGS and large chains only); *Alfonso Gioia & Sons, Inc.*, FTC Dkt. 7790 (Oct. 22, 1960) [57 F.T.C. 964] (allowances to Stop-N-Shop); *Berout-Richards Packing Co.*, FTC Dkt. 7651 (April 27, 1960) [56 F.T.C. 1313] (allowance to Seeman Bros., Inc.); *Herst Allen Co.*, FTC Dkt. 7867 (Aug. 31, 1960) [57 F.T.C. 530], and *Midwest Biscuit Co.*, FTC Dkt. 7868 (Sept. 3, 1960) [57 F.T.C. 540] (allowance to Benner Tea Co.); *Bayuk Cigars, Inc.*, FTC Dkt. 7395 (Feb. 12, 1960) [56 F.T.C. 881] (allowances to Union News Co.); *Longines-Wittnauer Watch Co.*, 55 F.T.C. 731 (1958), and *Trifari, Krussman & Fishel, Inc.*, 55 F.T.C. 397 (1958) (allowances to Associated Barr Stores, Inc., for special newspaper and TV promotion). E.g., *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959) (catalogues and cabinets for Red Front stores); *American Tobacco Co.*, FTC Dkt. 6830 (Sept. 9, 1959) [56 F.T.C. 263]; *Liggett & Myers Tobacco Co.*, FTC Dkt. 6642 (Sept. 9, 1959) [56 F.T.C. 221]; *R. J. Reynolds Tobacco Co.*, FTC Dkt. 6848 (Sept. 9, 1959) [56 F.T.C. 269] (allowances to cigarette vending machine operators); the numerous publishers cases, FTC Dkts. 7384 et seq., 7612 et seq. (June 30, 1960) (paperbacks, comics, magazine publishers' allowances to Union News chain retail outlets in railroad stations, bus and air terminals, hotels, and office buildings). Rule 9, Example 3, 1 CCH Trade Reg. Rep., pp. 6072, 6076 (1960). E.g., *Bulova Watch Co.*, 48 F.T.C. 971, 977 (1952); *Elgin National Watch Co.*, 48 F.T.C. 990, 997 (1952). See also *Jantzen, Inc.*, 55 F.T.C. 1065 (1959) (initial seasonal order of \$5000); *North American Philips Co.*, 55 F.T.C. 682 (1958) (ninety-six shavers); complaints in *Sunbeam Corp.*, FTC Dkt. 7409 (March 27, 1959) [p. 20 herein] (minimum quantity for direct shipment); *United Biscuit Co. of America*, FTC Dkt. 7817 (Mar. 10, 1960) [64 F.T.C. 586] (monthly minimum purchases).

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8. Respondents appear to take the position in their proposed findings that their plan was to meet competition generally. If this is asserted as an affirmative defense, it is, of course, without merit. The standards of a meeting competition defense have been established in *Standard Oil v. F.T.C.*, 355 U.S. 396 (1958). The Supreme Court held therein that one cannot meet general competition under Section 2(b) of the Clayton Act, as amended, but must meet specific competition, and further, it must be apparent *lawful* competition. This same principal was enunciated previously by the Supreme Court in *F.T.C. v. Staley*, 324 U.S. 746 (1945). Respondents have completely failed to adduce evidence of meeting competition in good faith in individual competitive situations as required.

9. Respondents also urge that a cease and desist order would not be in the public interest since the evidence establishes that the minimum-purchase requirement was voluntarily discontinued by respondents immediately and with retroactive effect, as soon as they learned that the Commission was challenging it. This discontinuance occurred four and one-half months prior to issuance of the complaint. Furthermore, there is no evidence that any violation by respondents was willful. The hearing examiner was impressed with the integrity of the officials of the respondent corporations when they testified and of their desire to avoid any violations of law pursuant to the interpretation thereof by the Federal Trade Commission and the courts. This, however, and their voluntary discontinuance of the A.C.A.P. plan does not insure a non-likelihood of a resumption of this plan or some similar plan in the future. The respondents are corporations subject to normal changes in management and stockholdings. These corporations are continuing in the same business. There is no evidence that any special controls have been established to guard against and preclude similar future violations by management such as was established in the *Mason, Au Magenheimer* case, Docket 7733 [66. F.T.C. 1219], decided by this hearing examiner, and in connection with which the Commission has issued a suspense order, although denying present dismissal.²⁰ Each case must be decided upon its own merits. Mere discontinuance of challenged practices does not, in and of itself, justify dismissing a proceeding as a matter of law. However, if it is shown that the discontinuance was made in good faith as distinguished from a mere promise,²¹ and there exist other factors that negate any reasonable possibility of the renewal of the activities in

²⁰ See Pollak, Tr. 551, 553-555; RX-3; RX-4.

²¹ *Ward Baking Company*, D. 6833, 54 F.T.C. 1919.

issue, there would seem to be no justification for continuing the proceeding. This result would seem to be persuasive if the practices complained of were terminated prior to the commencement of proceedings (i.e., investigative and adjudicative), or if the corporate concern charged with violations of the law had come under the control of new management who have demonstrated a clear intention to comply with the law corroborated by such compliance and the establishment of controls to insure nonviolation.²² Such facts are not present here, although there is an absence of willfulness.

10. It must be concluded, therefore, that respondents, through their A.C.A.P. plan have, since 1953, made available and paid advertising allowances to some of their customers while not making such advertising allowances available on proportionately equal terms, or paying such advertising allowances on proportionately equal terms to other of their customers competing in the resale of respondents' products of like grade and quality, or commingled products of respondents which were generally competitive.

11. It must also be concluded that the payments by the respondents, pursuant to their A.C.A.P. plan, as hereinbefore set forth, constitute violations of subsection 2(d) of the amended Clayton Act, 15 U.S.C. sec. 13 (as amended June 19, 1936), and that the issuance of a cease and desist order is in the public interest.

12. In the event a cease and desist order is issued, respondents urge a narrower order than that proposed by the Commission. The Commission's complaint contains a broad-scale proposed order to cease and desist that paraphrases the statutory language of section 2(d) of the Clayton Act and covers *all* of the products sold by respondents in commerce and *all* payments to customers "for advertising or any other services or facilities."

Although respondents manufacture and sell a large variety of products, this proceeding involves only their regular line of luggage. This line, which was the only merchandise covered by the cooperative advertising plan at issue, is distinct from respondents' other products, is marketed through other channels of commerce, and is sold to different customers. The Commission has held in circumstances similar to the instant case that a limitation in an order to the one product involved was "fully justified." *Quaker Oats Co.*, D. 8119 (April 25,

²² *Federal Trade Commission v. Civil Service Training Bureau*, *supra*; *Stokely-Van Camp, Inc., et al. v. Federal Trade Commission*, *supra*; *Matter of Grocery Distributors Association of Northern California*, *supra*; *Matter of the LeBlanc Corp.*, *supra*; *Matter of Consolidated Retail Stores, Inc.*, *supra*; *Matter of Chester H. Roth Co., et al.*, *supra*; *Matter of Huber Baking Co.*, *supra*; *Matter of Paxton and Gallagher Co.*, *supra*.

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1962) [60 F.T.C. 798]. There the Commission said that because of the "many differences in the distribution system" of the respondent's grocery products, it saw "no reason for extending the scope of the order" to products other than the one involved.²³

The only promotional activities compensated under the A.C.A.P. plan from its inception in 1953 to the present are advertising or promotional services pursuant to a minimum-purchase requirement plan.

In *Transogram Company, Inc.*, D. 7978 (September 19, 1962) [61 F.T.C. 629], a section 2(d) matter involving payments made by toy manufacturers for advertising in catalogs controlled by their jobber-customers, counsel demanded substantially the same broad order as that sought by counsel supporting the complaint in the case at bar. The Commission, however, approved an order responsive to the "single, peculiar, industry-wide violation" found there.

The Commission's opinion stated that "the facts surrounding the violation are relevant, and may even be decisive," in framing an appropriate order. This is so because:

Granted that the Commission has undoubted power to formulate a remedy adequate to prevent repetition of the violation found, an analysis of the nature of the violation is still necessary to a decision of how that power should be exercised.

* * * * *

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 need is satisfied, the Commission held, "by narrow and precise definition of the practice involved."²⁴

The instant matter, like *Transogram*, involves a single, narrow practice (the minimum-purchase requirement), which is capable of precise definition and which can be permanently and effectively prevented by an order limited to the practice involved.

In the instant case, however, it does not appear, as respondents' counsel would seem to suggest, that the cease and desist order should limit itself to compensation for certain modes of advertising or pro-

²³ Tr. 63; see Pollak, Tr. 85, 100, 135; McNeil, Tr. 292.

²⁴ Thus, the Commission's decision was properly responsive to the standard set forth in *F.T.C. v. Henry Broch & Company*, 368 U.S. 360, 367-368 (1962), where the Supreme Court emphasized that "the severity of possible penalties . . . for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application." (This opinion cites *N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426.) See also *Swanee Paper Corp. v. F.T.C.*, 291 F.2d 833 (2d Cir. 1961).

motion since the scope of the media as evidenced and conceded in this case is extensive.

13. Respondents seek a suspension of any cease and desist until further order of the Commission. However, prior to the hearings in this matter, on November 9, 1962, respondents moved the Commission to suspend adjudicative proceedings and institute an industry-wide investigation of cooperative advertising practices in the luggage industry. This motion was denied by Commission's order dated November 19, 1962. The order stated:

The Commission having determined that a suspension of this proceeding at the present time would not be in the public interest, and that the question of whether a final order to cease and desist should be issued in this proceeding, the scope of such an order, and its effective date, may be more appropriately considered after the Commission has determined whether a violation of law has occurred * * *

It would appear from the foregoing that, even if the hearing examiner had authority to suspend, it is foreclosed by the Commission's ruling. Furthermore, there is insufficient evidence before the hearing examiner concerning the industry-wide practices involved upon which a ruling or recommendation to the Commission could be made.

Accordingly, since the Federal Trade Commission has jurisdiction of the subject matter and respondents herein, the following cease and desist order shall issue:

ORDER

It is ordered, That respondents Atlantic Products Corporation, a corporation, and Atlantic Products Sales Corporation, a corporation, and their officers, employees, agents and representatives, directly or through any corporate or other device, in the course of business in commerce, as "commerce" is defined in the Clayton Act, as amended, 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 respondents as compensation or in consideration for any advertising or promotional services (pursuant to a minimum-purchase requirement plan) furnished by or through such customer in connection with the sale or offering for sale of respondents' regular line of luggage, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

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APPENDIX

Purchaser	Purchases of registered trade-marked luggage	Payments and dates on which made	Service performed
PROVIDENCE, RHODE ISLAND			
FAVORED ¹			
The Outlet Co., 176 Weybosset St., Providence, R.I.	6-1-60—11-30-60, \$2,813.33.	5-21-61, \$140-----	Newspaper advertising.
FAVORED ²			
T. W. Rounds, 52 Washington St.	6-1-60—11-30-60, \$2,124.36.	3-26-61, \$106.22--	Newspaper advertising.
UNFAVORED ³			
Louis & Company, 44 Weybosset St.	6-1-60—11-30-60, \$255.34. Year of 1959 purchases of \$951.13.	-----	-----
NEW HAVEN, CONNECTICUT			
FAVORED ⁴			
Bohan-Landorf, 964 Chapel Street.	6-1-60—11-30-60, \$1,709.59.	1-2-61, \$52.80. Since 1953 has never received less than \$50 a year pursuant to A.C.A.P.	Newspaper advertising.
FAVORED ⁵			
Temple Luggage, 172 Temple St.	6-1-60—11-30-60, \$1,987.01.	1-11-61, 2-15-61, 3-21-61, \$79.20; 4-20-61, \$20.15.	Newspaper advertising.
UNFAVORED ⁶			
A. H. Brown, 204 College St.	7-1-59—11-30-59, \$420.88. 6-1-60—11-30-60, \$853.26.	-----	-----
New Haven Luggage, 137 Orange St.	6-1-59—11-30-59, \$460.59. 6-1-60—11-30-60, \$486.90.	-----	-----

See footnotes at end of table.

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Purchaser	Purchases of registered trade-marked luggage	Payments and dates on which made	Service per- formed
WHITE PLAINS, NEW YORK			
FAVORED ⁷			
Victoria Luggage, 155 Mamaroneck Ave., White Plains, N. Y.	6-1-60—11-30-60, \$3,945.43.	1-3-61, \$72.45; 1-18-61, 32.20; 2-1-61, 29.90; 4-12-61, 27.60; 4-28-61, 33.35.	Newspaper adver- tising.
FAVORED AND UNFAVORED ⁸			
Deene's Luggage Shop, 124 Mamaroneck Ave., White Plains, N. Y.	7-1-58—11-30-58, \$2,384.00. 6-1-60—11-30-60, \$177.00.	Sometime between 12-1-58 and 5-31-59, \$183.20.	Newspaper adver- tising.
UNFAVORED ⁹			
Genung's, Inc.-----	6-1-60—11-30-60, \$319.00.	-----	-----
		Purchases 6-1—11-30-60	A. C. A. P. Credit
			Amount Used
ROCHESTER, NEW YORK			
FAVORED ¹⁰			
Likely Stores-----		\$1, 862. 97	\$93. 15
Sibley, Lindsay & Curr-----		7, 625. 77	381. 29
UNFAVORED ¹¹			
Kreiger's-----		702. 11	-----
MT. VERNON, NEW YORK			
FAVORED ¹²			
Gibraltar Luggage Corp-----		\$1, 786. 27	\$89. 31
Uttal's Leather Store, Inc-----		1, 556. 26	77. 81
UNFAVORED ¹³			
Genung's, Inc.-----		228. 60	-----

See footnotes at end of table.

Final Order		67 F.T.C.	
	Purchases 6-1-11-30-60	A. C. A. P. Credit	Amount Used
SYRACUSE, NEW YORK			
FAVORED			
Wilson's Leading Jewelers-----	\$1, 642. 38	\$82. 12	
UNFAVORED ¹⁴			
Henry Frank Leather Co.-----	1, 103. 68		
BRIDGEPORT, CONNECTICUT			
FAVORED			
Fried's Luggage-----	\$2, 534. 32	\$126. 72	\$126. 72
S. Silver, Inc.-----	2, 227. 89	111. 39	111. 39
UNFAVORED ¹⁵			
D. M. Read-----	422. 84		

¹ CX 16A, 18, 16B, 16D.² CX 18, 17B, D, E, F, G.³ CX 18; Tr. 66, 166.⁴ CX 9A, 20A, 20F; Tr. 181; CX 20B.⁵ CX 21H-I-J-K-L 19A, 21A.⁶ CX 34A, 35, 36A, 38A, 19A.⁷ CX 15 D-E-M-Z-GG, A, B.⁸ Tr. 254, 253; CX 38.⁹ CX 38.¹⁰ Tr. 284.¹¹ Tr. 284.

Likely has gotten credits since 1952, except for the period 12-1-60-5-31-61.

Sibley, Lindsay & Curr has gotten A.C.A.P. credits since 1952, except for the period 12-1-54-5-31-55.

¹² Tr. 285.¹³ Tr. 286.¹⁴ Tr. 286-288.¹⁵ Tr. 288-289.

FINAL ORDER DIRECTING FILING OF COMPLIANCE REPORT

On December 13, 1963 [63 F.T.C. 2237], the Commission, having heard the above-captioned case on appeal from the initial decision of the hearing examiner, rendered a decision in which it found that respondents, a manufacturer of luggage and its sales subsidiary, had violated Section 2(d) of the Clayton Act (by failing to make its advertising and promotional allowances available to all competing customers on proportionally equal terms). However, in view of the apparent industry-wide incidence of the unlawful practice, and the sworn assurances of respondents that they had discontinued their

unlawful conduct and would not resume it in the future, the Commission decided to withhold entry of a cease and desist order against respondents pending the outcome of a proceeding by the Commission to eliminate violations of Section 2(d) in the luggage industry on an industry-wide basis.

In the year since the Commission rendered its decision, substantial progress has been made toward achieving widespread compliance with the requirements of Section 2(d) in the luggage industry, and the Commission's efforts along these lines will continue. We believe the time is now appropriate to enter a final order in this case.

Section 5(d) of the Administrative Procedure Act authorizes the Commission, "in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty." The Commission's decision of December 13, 1963, declaring the requirements of Section 2(d) with respect to the challenged acts and practices of these respondents, has effectively terminated this controversy: Such acts and practices have been discontinued, have not been resumed, and, we believe and expect, will not be resumed in the future. In the circumstances, the entry of a formal cease and desist order at this time is not required to prevent recurrence of the unlawful conduct. *Chesebrough-Ponds, Inc.*, F.T.C. Docket 8491 (decided July 27, 1964) [66 F.T.C. 252].

To assure respondents' compliance with the declaratory findings and conclusions made in its decision of December 13, 1963 [63 F.T.C. 2237], the Commission is requiring respondents to file a report of compliance as if a cease and desist order was being entered. And we emphasize that while this order does not contain a formal command to cease and desist, the proceeding may, if warranted by changed conditions or the public interest, be reopened and the order enlarged to include such a command. Accordingly,

It is ordered, That respondents shall, within sixty (60) days after service of this order upon them, file with the Commission a signed report in writing describing in detail the manner and form in which they have complied and are complying with the requirements of law set forth in the Commission's decision of December 13, 1963 [63 F.T.C. 2237], in the above-captioned matter.

Commissioner MacIntyre not participating.

Complaint

67 F.T.C.

IN THE MATTER OF

MR. ROMANO, INC., ET AL.

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

Docket C-877. Complaint, Feb. 8, 1965—Decision, Feb. 8, 1965

Consent order requiring three affiliated Beverly Hills, Calif., clothing retailers to cease violating the Textile Fiber Products Identification Act by falsely advertising the fiber content of men's apparel, by using generic names of fibers and fiber trademarks in an improper manner on labels and in newspaper advertisements, and failing to set forth other required information.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Mr. Romano, Inc., and Malibu Clothes, Ltd., corporations, and Bel-Air Clothes, Ltd., a corporation, trading as Malibu Clothes and William Firestone and Stanley Firestone individually and as officers of said corporations, 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 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 Mr. Romano, Inc., Malibu Clothes, Ltd., and Bel-Air Clothes, Ltd., are corporations organized, existing and doing business under and by virtue of the laws of the State of California.

Respondents William Firestone and Stanley Firestone are officers of corporate respondents. They formulate, direct and control the acts and practices of corporate respondents, including the acts and practices hereinafter set forth.

Respondents are engaged in retail selling of textile fiber products and their office and principal place of business is located at 228 South Beverly Drive, Beverly Hills, California.

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 transporta-