

387

Complaint

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

ABBY KENT CO., INC., ET AL.

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

Docket C-328 et al. Complaint, March 1, 1963—Decision, Aug. 9, 1965

Consent orders requiring 55 wearing apparel manufacturers, respondents named in Appendix A attached hereto, Docket Numbers C-925 through C-979, to cease discriminating among their competing customers in the payment of advertising and promotional allowances, in violation of Sec. 2(d) of the Clayton Act; and setting effective date of 243 identical cease and desist orders previously issued, respondents named in Appendix B attached hereto.

COMPLAINT

The Federal Trade Commission, having reason to believe that each of the 55 respondents named in Appendix A, Docket Nos. 925-979 has violated and is 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), and it appearing to the Commission that a proceeding by it in respect thereto is in the interest of the public, the Commission hereby issues its complaints stating its charges as follows:

PARAGRAPH 1. Each of the respondents is a corporation engaged in commerce, as "commerce" is defined in the amended Clayton Act, and sells and distributes its wearing apparel products from one State to customers located in other States of the United States. The sales of respondents in commerce are substantial.

PAR. 2. Each of the respondents in the course and conduct of its business in commerce 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 and facilities furnished by or through such customers in connection with their sale or offering for sale of wearing apparel products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing with favored

customers in the sale and distribution of respondent's wearing apparel products.

PAR. 3. Included among, but not limited to, the practices alleged herein, each of the respondents has granted substantial promotional payments or allowances for the promoting and advertising of its wearing apparel products to certain department stores and others who purchase respondent's said products for resale. These aforesaid promotional payments or allowances were not offered and made available on proportionally equal terms to all other customers of respondent who compete with said favored customers in the sale of respondent's wearing apparel products.

PAR. 4. The acts and practices alleged in Paragraphs One through Three are all in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of each of the 55 respondents named in Appendix A, Docket Numbers C-925 through C-979, and subsequently having determined that complaints should issue, and each respondent having entered into an agreement containing an order to cease and desist from the practices being investigated and having been furnished a copy of a draft of complaint to issue herein charging it with violation of subsection (d) of Section 2 of the Clayton Act, as amended, and

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

The Commission, having considered the agreements, hereby accepts the same, issues its complaints in the form contemplated by said agreements, makes the following jurisdictional findings, and enters the following orders:

1. Each of the respondents named in Appendix A is a corporation organized and existing under the laws of the various States of the United States, with its office and principal place of business located as listed in Appendix A.
2. The Federal Trade Commission has jurisdiction of the subject matter of these proceedings and of the respondents.

393

Order

ORDER

It is ordered, That each of the respondents named in Appendix A, a corporation, its officers, directors, agents, representatives and employees, directly or through any corporate or other device, in the course of its business in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

(1) 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 advertising or promotional services, or any other service or facility, furnished by or through such customer in connection with the handling, sale or offering for sale of wearing apparel products 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 with such favored customer in the distribution or resale of such products.

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

APPENDIX A

Following is a listing of the 55 respondents named in cease and desist orders (New York City unless otherwise indicated):

- (C-925) Aansworth, Ltd., 1407 Broadway
- (C-926) Guttman Knitwear Creations, Inc., 1407 Broadway
- (C-927) Society Brand Division of Hart Schaffner & Marx, 36 S. Franklin St., Chicago, Ill.
- (C-928) House of Jamison, Inc., 498 Seventh Ave.
- (C-929) Alison Ayres, Inc., 1400 Broadway
- (C-930) Alper-Schwartz Co., Inc., 530 Seventh Ave.
- (C-931) Audrey Lee Classics, Inc., 1359 Broadway
- (C-932) Stanley Blacker, Inc., 2200 Arch St., Philadelphia, Pa.
- (C-933) Blouses By Vera, Inc., 417 Fifth Ave.
- (C-934) Brentwood Sportswear Co., 19th and Allegheny, Philadelphia, Pa.
- (C-935) Campus Casuals of California, 1200 S. Hope St., Los Angeles, Calif.
- (C-936) Christian Dior-New York, 498 Seventh Ave.
- (C-937) Arthur Cole Associates, Inc., 498 Seventh Ave.
- (C-938) Davenshire, Inc., 930 S. Rolff St., Davenport, Iowa
- (C-939) Diane Young Sportswear, Inc., 525 Seventh Ave.
- (C-940) Handmacher-Vogel, Inc., 533 Seventh Ave.
- (C-941) Huntington Mfg. Co., Inc., 312 W. Randolph St., Chicago, Ill.
- (C-942) Joseph & Feiss Co., 2149 W. 53rd St., Cleveland, Ohio
- (C-943) Junior Sophisticates Co., Inc., 498 Seventh Ave.
- (C-944) Junior Theme, Inc., 1400 Broadway

Order

68 F.T.C.

APPENDIX A—Continued

- (C-945) R. Kolodney & Co., Inc., 450 Capitol Ave., Hartford, Conn.
- (C-946) Lamm Brothers, Inc., Gleneagles Court, Baltimore, Md.
- (C-947) Leslie Fay, Inc., 1400 Broadway
- (C-948) Linker & Herbert, Inc., 205 W. 39th St.
- (C-949) New York Manufacturing Corp., 214 W. 39th St.
- (C-950) Mam'selle Dress, Inc., 498 Seventh Ave.
- (C-951) Marlene Industries Corp., 141 W. 36th St.
- (C-952) Mister Pants, Inc., 550 Seventh Ave.
- (C-953) Modelia, Inc., 205 W. 39th St.
- (C-954) Old Colony Knitting Mills, Inc., 40 Glen Ave., Newton Centre, Mass.
- (C-955) Pat Fashions, Inc., 1370 Broadway
- (C-956) Petrocelli Clothes, Inc., 28 W. 23rd St.
- (C-957) Publix Shirt Corp., 350 Fifth Ave.
- (C-958) Queen Knitting Mills, Inc., 2701 N. Broad St., Philadelphia, Pa.
- (C-959) Rosanna Knitted Sportswear, Inc., 1410 Broadway
- (C-960) Russ Togs, Inc., 1372 Broadway
- (C-961) H. A. Seinsheimer Co., 400 Pike St., Cincinnati, Ohio
- (C-962) Shipmates Sportswear, Inc., 1307 Washington Ave., St. Louis, Mo.
- (C-963) Jerry Silverman, Inc., 530 Seventh Ave.
- (C-964) Smart-Maid Coat & Suit Corp., 545 Eighth Ave.
- (C-965) Stern-Slegman-Prins Co., Inc., 3122 Gillham Plaza, Kansas City, Mo.
- (C-966) Susan Laurie, Inc., 902 Broadway
- (C-967) T.P. Industries, Inc., 1375 Broadway
- (C-968) United Sheeplined Clothing Co., Inc., 804 Broadway, Long Branch,
N. J.
- (C-969) The Villager, Inc., 330 N. 12th St., Philadelphia, Pa.
- (C-970) Westbury Fashions, Inc., 1400 Broadway
- (C-971) M. Wile & Co., Inc., 77 Goodell St., Buffalo, N. Y.
- (C-972) Zelinka-Matlick, Inc., 512 Seventh Ave.
- (C-973) Mattique, Ltd., 1410 Broadway
- (C-974) Sporteens, Inc., 1407 Broadway
- (C-975) Gotham Knitting Mills, Inc., 1407 Broadway
- (C-976) Beacon Frocks, Inc., 1385 Broadway
- (C-977) Lady Carol Dresses, Inc., 1400 Broadway
- (C-978) George Small, Inc., 1375 Broadway
- (C-979) Boys Tone Shirt Co., Inc., 350 Fifth Ave.

ORDERS SETTING EFFECTIVE DATE OF ORDERS TO CEASE AND DESIST
RESPONDENTS NAMED IN APPENDIX B

The respondents and counsel supporting the complaints having submitted to the Commission as a proposed settlement of these proceedings agreements containing orders to cease and desist, and the Commission having entered its decision accepting said agreements and issuing its complaints and orders to cease and desist in conformity with the terms and conditions thereof; and

It is ordered, That the orders, Docket Nos. C-328 through C-490, issued on May 1, 1963, 62 F.T.C. 1248, and modified by an order of

393

Order

June 28, 1963, which postponed the effective date until further order of the Commission, be, and they hereby are, effective on August 9, 1965;

It is ordered, That the orders, Docket Nos. C-540 through C-566, issued on August 12, 1963, 63 F.T.C. 443, be, and they hereby are, effective on August 9, 1965;

It is ordered, That the orders, Docket Nos. C-639 through C-671, issued on December 27, 1963, 63 F.T.C. 2067, be, and they hereby are, effective on August 9, 1965;

It is ordered, That the order, Docket No. C-717, issued on February 27, 1964, 64 F.T.C. 1016, be, and it hereby is, effective on August 9, 1965;

It is ordered, That the order, Docket No. C-769, issued on June 30, 1964, 65 F.T.C. 1248, be, and it hereby is, effective on August 9, 1965;

It is ordered, That the order, Docket No. C-770, issued on June 30, 1964, 65 F.T.C. 1251, be, and it hereby is, effective on August 9, 1965;

It is ordered, That the order, Docket No. C-771, issued on June 30, 1964, 65 F.T.C. 1253, be, and it hereby is, effective on August 9, 1965;

It is ordered, That the order, Docket No. C-772, issued on June 30, 1964, 65 F.T.C. 1255, be, and it hereby is, effective on August 9, 1965;

It is ordered, That the order, Docket No. C-773, issued on June 30, 1964, 65 F.T.C. 1258, be, and it hereby is, effective on August 9, 1965;

It is ordered, That the order, Docket No. C-774, issued on June 30, 1964, 65 F.T.C. 1260, be, and it hereby is, effective on August 9, 1965;

It is ordered, That the order, Docket No. C-775, issued on June 30, 1964, 65 F.T.C. 1262, be, and it hereby is, effective on August 9, 1965;

It is ordered, That the order, Docket No. C-794, issued on July 17, 1964, 66 F.T.C. 182, be, and it hereby is, effective on August 9, 1965;

It is ordered, That the order, Docket No. C-803, issued on August 3, 1964, 66 F.T.C. 421, be, and it hereby is, effective on August 9, 1965;

It is ordered, That the order, Docket No. C-834, issued on September 18, 1964, 66 F.T.C. 780, be, and it hereby is, effective on August 9, 1965;

Order

68 F.T.C.

It is ordered, That the order, Docket No. C-835, issued on September 18, 1964, 66 F.T.C. 782, be, and it hereby is, effective on August 9, 1965;

It is ordered, That the order, Docket No. C-836, issued on September 18, 1964, 66 F.T.C. 784, be, and it hereby is, effective on August 9, 1965;

It is ordered, That the order, Docket No. C-841, issued on September 29, 1964, 66 F.T.C. 916, be, and it hereby is, effective on August 9, 1965;

It is ordered, That the order, Docket No. 8633,* issued on November 10, 1964, 66 F.T.C. 1103, be, and it hereby is, effective on August 9, 1965;

It is ordered, That the orders, Docket Nos. 8625, 8626, and 8632, issued on January 18, 1965, 67 F.T.C. 62, be, and they hereby are, effective on August 9, 1965;

It is ordered, That the order, Docket No. C-882, issued on February 23, 1965, 67 F.T.C. 233, be, and it hereby is, effective on August 9, 1965;

It is ordered, That the order, Docket No. 8630, issued on April 9, 1965, 67 F.T.C. 449, be, and it hereby is, effective on August 9, 1965.

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

Commissioner Elman dissenting.

APPENDIX B

Following is a listing of the 243 respondents cited in the previously issued but postponed orders which the Commission put into effect on this date (addresses are New York City unless otherwise stated):

(C-328) Abby Kent Co., Inc., 1400 Broadway

(C-329) Adelaar Bros., Inc., 525 7th Ave.

(C-330) All State Garment Corp., 205 W. 39th St.

(C-331) Alps Sportswear Manufacturing Co., Inc., 65 Bedford St., Boston, Mass.

(C-332) The Bernhard Altmann Corp., 100 W. 40th St.

(C-333) Aquascutum Imports, Inc., 2 E. 37th St.

(C-334) Aquascutum Co., Ltd., 2 E. 37th St.

(C-335) Andrew Arkin, Inc., 530 Seventh Ave.

(C-336) Aronoff & Richling, Inc., 1400 Broadway

(C-337) Cay Artley Apparel, Inc., 232 Levergood St., Johnstown, Pa.

*The Commission adopted the initial decision of the hearing examiner in this matter.

APPENDIX B—Continued

- (C-338) S. Augstein & Co., 15 - 58 127th St., College Point, Long Island, N. Y.
- (C-339) Ballantyne Sweaters, Ltd., 40 E. 34th St.
- (C-340) Barmen Brothers Co., Inc., 893 Broadway, Buffalo, N. Y.
- (C-341) Ben Barrack Dresses, Inc., 498 Seventh Ave.
- (C-342) Ben Barrack Petites, Inc., 498 Seventh Ave.
- (C-343) The Beaumart Co., 498 Seventh Ave.
- (C-344) Beaver Shirt Manufacturing Co., Inc., 350 Fifth Ave.
- (C-345) Beldoch Popper, Inc., 1410 Broadway
- (C-346) Bermuda Knitwear Corp., 1410 Broadway
- (C-347) Biltwell Co., Inc., 1128 Washington Ave., St. Louis, Mo.
- (C-348) Biltwell Slacks, Inc., 1324 Santee, Los Angeles, Calif.
- (C-349) Blairmoor Knitwear Corp., 33-00 Northern Blvd., Long Island City, N. Y.
- (C-350) Braemar Knitwear (U.S.A.) Ltd., 1407 Broadway
- (C-351) Sue Brett, Inc., 1400 Broadway
- (C-352) British Vogue, Inc., 1410 Broadway
- (C-353) Robert Bruce, Inc., 2867 E. Allegheny Ave., Philadelphia, Pa.
- (C-354) Candy Frocks, Inc., 501 Seventh Ave.
- (C-355) Streamline Garment Corp., 530 W. 1st St., Greensburg, Ind.
- (C-356) Casualcraft, Inc., 350 Fifth Ave.
- (C-357) David A. Church Co., Inc., 47 Greenpoint Ave., Brooklyn, N. Y.
- (C-358) Climatic, Inc., 1 Jackson Place, Yonkers, N. Y.
- (C-359) Martha Clyde, Inc., 525 Seventh Ave.
- (C-360) Joseph H. Cohen, Inc., 71 Fifth Ave.
- (C-361) Cotton Club Frocks, Inc., 275 Seventh Ave.
- (C-362) Country Set, Inc., 1520 Washington Ave., St. Louis, Mo.
- (C-363) Carol Crawford, Inc., 1400 Broadway
- (C-364) David Crystal, Inc., 498 Seventh Ave.
- (C-365) Dalton of America, Inc., 6611 Euclid Ave., Cleveland, Ohio
- (C-366) Darlene Knitwear, Inc., North Commercial St., Manchester, N. H.
- (C-367) H. Daroff & Sons, Inc., 2300 Walnut St., Philadelphia, Pa.
- (C-368) Davidow Suits, Inc., 550 Seventh Ave.
- (C-369) Defiance Manufacturing Co., Inc., 350 Fifth Ave.
- (C-370) Jacques deLux, Inc., Sellersville, Pa.
- (C-371) Derby Sportswear, Inc., 1333 Broadway
- (C-372) Donmoor-Isaacson, 1115 Broadway
- (C-373) Donwood, Ltd., 1407 Broadway
- (C-374) Dorset Knitwear, Ltd., 381 Park Avenue South
- (C-375) Dotti Original, Inc., 525 Seventh Ave.
- (C-376) Eagle Clothes, Inc., 1107 Broadway
- (C-377) Eagle-Freedman-Rodelheim Co., 5th & Juniper Sts., Quakertown, Pa.
- (C-378) Elder Manufacturing Co., 13th & Lucas Ave., St. Louis, Mo.
- (C-379) Esquire Sportswear Mfg. Co., 43 W. 23rd St.
- (C-380) Excellor Shirts, Inc., 390 Fifth Ave.
- (C-381) Exmoor Knitwear Co., Inc., 40 Spring St., Haverstraw, N. Y.
- (C-382) Stanley M. Feil, Inc., 2073 E. Fourth St., Cleveland, Ohio
- (C-383) Fordham-Bardell Shirt Corp., 212 Fifth Ave.
- (C-384) French Knitwear Co., Inc., 1407 Broadway
- (C-385) Gant of New Haven, Inc., 162 James St., New Haven, Conn.

APPENDIX B—Continued

- (C-386) Garland Knitting Mills, 117 Bickford St., Jamaica Plain, Mass.
- (C-387) Jerry Gilden Fashions, Inc., 498 Seventh Ave.
- (C-388) Globe Knitwear Co., Inc., 831 Arch St., Philadelphia, Pa.
- (C-389) Gordon & Ferguson Co., 250 E. Fifth St., St. Paul, Minn.
- (C-390) Grunwald-Marx, 932 Wall St., Los Angeles, Calif.
- (C-391) Harper Shirt Co., Inc., 350 Fifth Ave.
- (C-392) B. W. Harris Manufacturing Co., 396 Sibley St., St. Paul, Minn.
- (C-393) Haspel Brothers, Inc., 2527 St. Bernard St., New Orleans, La.
- (C-394) Hayette, Inc., 498 Seventh Ave.
- (C-395) Haymaker Sports, Inc., 498 Seventh Ave.
- (C-396) Helga, 722 Los Angeles St., Los Angeles, Calif.
- (C-397) Highlander Sportswear, Inc., 135 Monroe St., Newark, N. J.
- (C-398) Hochenberg & Gelb, Inc., 915 Broadway
- (C-399) Jane Holly, Inc., 525 Seventh Ave.
- (C-400) Henry I. Siegel Co., Inc., 16 E. 34th St.
- (C-401) Hortex Manufacturing Co., Inc., 100 S. Cotton St., El Paso, Tex.
- (C-402) House of Perfection, Inc., 45 W. 36th St.
- (C-403) House of Worsted-Tex, Inc., 2300 Walnut St., Philadelphia, Pa.
- (C-404) F. Jacobson & Sons, Inc., 390 Fifth Ave.
- (C-405) Juniorite, Inc., 1407 Broadway
- (C-406) Kadet, Kruger & Co., 216 W. Adams St., Chicago, Ill.
- (C-407) The Kaynee Co., Greenville, S. C.
- (C-408) William B. Kessler, Inc., Pleasant and Tilton Sts., Hammonton, N. J.
- (C-409) Lackawanna Pants Manufacturing Co., Inc., 300 Brook St.,
Scranton, Pa.
- (C-410) Lawrence of London, Ltd., 512 Seventh Ave.
- (C-411) The H. D. Lee Co., Inc., 117 W. 20th St., Kansas City, Mo.
- (C-412) Rhoda Lee, Inc., 525 Seventh Ave.
- (C-413) Lehigh Trouser Co., 514 S. Main St., Wilkes-Barre, Pa.
- (C-414) Levin & Co., Inc., 1350 Broadway
- (C-415) Londontown Manufacturing Co., 3600 Clipper Mill Road,
Baltimore, Md.
- (C-416) Loomtogs, Inc., 1410 Broadway
- (C-417) MacShore Classics, Inc., 1410 Broadway
- (C-418) Majestic Specialties, Inc., 340 Claremont Ave., Jersey City, N. J.
- (C-419) Major Blouse Co., Inc., 525 Seventh Ave.
- (C-420) The Majer Brand Co., Inc., 200 Fifth Ave.
- (C-421) Masket Bros. Sport Wear, Inc., 498 Seventh Ave.
- (C-422) Lynne Manufacturing Co., 27-01 Bridge Plaza N.,
Long Island City, N. Y.
- (C-423) Abby Michael, Ltd., 1407 Broadway
- (C-424) Michaels Stern & Co., Inc., 87 N. Clinton Ave., Rochester, N. Y.
- (C-425) Miller Manufacturing Co., Inc., 915 Main St., Joplin, Mo.
- (C-426) Morrison Knitwear, Inc., 130 Palmetto St., Brooklyn, N. Y.
- (C-427) Nelly De Grab, 533 Seventh Ave.
- (C-428) Nelly Don, Inc., 3500 E. 17th St., Kansas City, Mo.
- (C-429) Nelson-Caine, 1400 Broadway
- (C-430) Newman & Newman, 11 E. 26th St.
- (C-431) Palm Beach Co., 426 E. 4th St., Cincinnati, Ohio
- (C-432) Park-Storyk Corp., 1407 Broadway

393

Order

APPENDIX B—Continued

- (C-433) Pattullo-Jo Copeland, Inc., 498 Seventh Ave.
- (C-434) Pauker Boyswear Corp., 25 W. 31st St.
- (C-435) Peerless Robes and Sportswear, Inc., 350 Fifth Ave.
- (C-436) Fashions by Blauner, Inc., 134 W. 37th St.
- (C-437) Pickwick Knitting Mills, Inc., 49 Junious St., Brooklyn, N. Y.
- (C-438) Plymouth Manufacturing Co., 500 Harrison Ave., Boston, Mass.
- (C-439) Milton Saunders Co., 525 Seventh Ave.
- (C-440) Princess Peggy, Inc., 1001 S. W. Adams St., Peoria, Ill.
- (C-441) Rabhor Robes, Inc., South Norwalk, Conn.
- (C-442) Ratner Manufacturing Co., 730 Thirteenth St., San Diego, Calif.
- (C-443) Rona Dresses, 1400 Broadway
- (C-444) S. Rudofker's Sons, Inc., 22nd & Market Sts., Philadelphia, Pa.
- (C-445) Rugby Knitting Mills, Inc., 1490 Jefferson Ave., Buffalo, N. Y.
- (C-446) Sagner, Inc., South Wisner St., Frederick, Md.
- (C-447) Savoy Knitting Mills Corp., 801 Meadow St., Allentown, Pa.
- (C-448) Abe Schrader Corp., 530 Seventh Ave.
- (C-449) Alfred Shapiro, Inc., 240 Madison Ave.
- (C-450) Shelby Manufacturing Co., 1350 Broadway
- (C-451) M & D Simon Co., 700 St. Clair Ave., West, Cleveland, Ohio
- (C-452) Miss Smart Frocks, Inc., 501 Seventh Ave.
- (C-453) Smartee, Inc., 45 E. 12th St.
- (C-454) Sorority Frocks, Inc., 120 W. 28th St.
- (C-455) Sport Kraft, Inc., 413 W. Third St., Lewes, Del.
- (C-456) Sportsville Men's Wear, Inc., 16 E. 34th St.
- (C-457) Sigma Fashions, Inc., 1400 Broadway
- (C-458) Talbott, Inc., 1407 Broadway
- (C-459) Tellshire, Inc., 270 W. 38th St.
- (C-460) Thomson Co., 405 Park Ave.
- (C-461) Timely Clothes, Inc., 1415 Clinton Ave., North, Rochester, N. Y.
- (C-462) Towncliffe, Inc., 512 Seventh Ave.
- (C-463) Triton Mfg. Co., Inc., 18 Pocasset St., Fall River, Mass.
- (C-464) Troy Shirt Makers Guild, Inc., 71 Lawrence St., Glen Falls, N. Y.
- (C-465) Usona Shirt Co., 230 Fifth Ave.
- (C-466) Weber and Lott, Inc., 525 Seventh Ave.
- (C-467) Weber Originals, Inc., 525 Seventh Ave.
- (C-468) Margo Walters, Inc., 1400 Broadway
- (C-469) Wentworth Manufacturing Co., Blanding St., Lake City, S. C.
- (C-470) White Stag Manufacturing Co., 5100 S. E. Harney Drive,
Portland, Oreg.
- (C-471) Wolfson & Greenbaum, Inc., 132 W. 36th St.
- (C-472) Wright Manufacturing Co., Toccoa, Ga.
- (C-473) Ben Zuckerman, Inc., 512 Seventh Ave.
- (C-474) The Enro Shirt Co., Inc., 4300 Leghorn Drive, Louisville, Ky.
- (C-475) Famous-Sternberg, Inc., 950 Poeyfarre St., New Orleans, La.
- (C-476) Glen Mfg., Inc., 320 E. Buffalo St., Milwaukee, Wis.
- (C-477) Ilene Manufacturing Co., Inc., 525 Seventh Ave.
- (C-478) Jolee, Inc., 250 W. 39th St.
- (C-479) M. J. Levine, Inc., 250 W. 39th St.
- (C-480) Kelita, Inc., 1407 Broadway
- (C-481) Malcolm Kenneth Co., 11 Leon St., Boston, Mass.

APPENDIX B—Continued

- (C-482) Kimberly Knitwear, Inc., 1410 Broadway
- (C-483) Leathermode Sportswear, Inc., 357 Kossuth St., Bridgeport, Conn.
- (C-484) Mode de Paris, Inc., 58 Second St., San Francisco, Calif.
- (C-485) New Era Shirt Co., 316 N. 18th St., St. Louis, Mo.
- (C-486) Raab-Meyerhoff Co., 350 Fifth Ave.
- (C-487) Ronnie Fashions, Inc., 1400 Broadway
- (C-488) M. C. Schrank Co., 17-21 Broad St., Bridgeton, N. J.
- (C-489) Norman Wiatt Co., 124 E. Olympic Blvd., Los Angeles, Calif.
- (C-490) Wonderknit Corp., 112 W. 34th St.
- (C-540) Baracuta, Inc., 16 E. 40th St.
- (C-541) Blue Jeans Corp., 130 W. 34th St.
- (C-542) College-Town Sportswear, 35 Morrissey Blvd., Boston, Mass.
- (C-543) Davis Sportswear Co., Inc., 5 Franklin St., Lawrence, Mass.
- (C-544) Gail Byron Frocks Co., Inc., 463 Seventh Ave.
- (C-545) Girltown, Inc., 35 Morrissey Blvd., Boston, Mass.
- (C-546) C. F. Hathaway Co., 10 Water St., Waterville, Me.
- (C-547) Junior Accent, Inc., 498 Seventh Ave.
- (C-548) Century Sportswear Co., Inc., 20 Boylston St., Boston, Mass.
- (C-549) Jonathan Logan, Inc., 3901 Liberty Ave., North Bergen, N. J.
- (C-550) The Manhattan Shirt Co., 1271 Avenue of the Americas.
- (C-551) Novelty Veiling Co., Inc., 675 Sixth Ave.
- (C-552) Petite Lady Dress Co., Inc., 1374 Broadway
- (C-553) Phillips-Van Heusen Corp., 417 Fifth Ave.
- (C-554) Rosecrest, Inc., 24 Binford St., Boston, Mass.
- (C-555) Boris Smoler & Sons, Inc., 3021 N. Pulaski, Chicago, Ill.
- (C-556) Alice Stuart, Inc., 525 Seventh Ave.
- (C-557) Sunnyvale, Inc., 1350 Broadway
- (C-558) Tanner of North Carolina, Inc., Rutherfordtown, N. C.
- (C-559) Warshauer and Franck, Inc., 75 Kneeland St., Boston, Mass.
- (C-560) Westover Fashions, Inc., 1400 Broadway
- (C-561) Boston Maid, Inc., 560 Harrison Ave., Boston, Mass.
- (C-562) Devonbrook, Inc., 1400 Broadway
- (C-563) R. and M. Kaufman, Inc., 41 Holbrook St., Aurora, Ill.
- (C-564) Linsk of Philadelphia, Inc., 3111 W. Allegheny Ave., Philadelphia, Pa.
- (C-565) Modern Juniors, Inc., 1407 Broadway
- (C-566) D. F. Rodgers Mfg. Co., Inc., 1350 Broadway
- (C-639) Adele Fashions, Inc., 1407 Broadway
- (C-640) Blume Knitwear, Inc., 30-02 48th Ave., Long Island City, N. Y., and a subsidiary at the same address, Impromptu Casuals, Inc.
- (C-641) Cluett, Peabody & Co., Inc., 530 Fifth Ave.
- (C-642) Country Tweeds, Inc., 250 W. 39th St.
- (C-643) Litt-Gluck Co., 111 W. 19th St.
- (C-644) Sy Frankl, Inc., 1350 Broadway
- (C-645) Glensder Corp., 417 Fifth Ave.
- (C-646) The Hadley Corp., Weaverville, N. C.
- (C-647) Larry Levine, Inc., 252 W. 37th St.
- (C-648) Lord Jeff Knitting Co., Inc., 58-30 64th St., Maspeth, N. Y.
- (C-649) Miss Maude, Inc., 1311 Park Ave., Hoboken, N. J.
- (C-650) Mayflower Dress Co., Inc., 1350 Broadway
- (C-651) Munsingwear, Inc., 718 Glenwood Ave., Minneapolis, Minn.

APPENDIX B—Continued

- (C-652) Puritan Skirt & Dress Co., Inc., 144 Moody St., Waltham, Mass.
- (C-653) The Puritan Sportswear Corp., 813 25th St., Altoona, Pa.
- (C-654) Rainfair, Inc., 1501 Albert St., Racine, Wisc.
- (C-655) Sportswear Corporation of America, 6516 Page Blvd., St. Louis.
- (C-656) Serbin, Inc., 1280 S.W. First St., Miami, Fla.
- (C-657) Sir James, Inc., 910 S. Los Angeles St., Los Angeles, Calif.
- (C-658) Kandahar Sportswear Co., Inc., 8 W. 30th St.
- (C-659) Bobbie Brooks, Inc., 3839 Kelley Ave., Cleveland, Ohio
- (C-660) Gay Gibson, Inc., 2617 Grand Ave., Kansas City, Mo.
- (C-661) The Grove Co., 8300 Manchester Road, St. Louis, Mo.
- (C-662) Irwill Knitwear Corp., 1407 Broadway
- (C-663) Kathi Originals, Inc., 1350 Broadway
- (C-664) Lofties Knitting Mills, Inc., 85 DeKalb Ave., Brooklyn, N. Y.
- (C-665) Mademoiselle Modes, Inc., 520 Eighth Ave.
- (C-666) Donkenny, Inc., 1407 Broadway, and a subsidiary at the same address, Melray Blouse Co., Inc.
- (C-667) Albert Rosenblatt & Sons, Inc., 1400 Broadway
- (C-668) Economy Blouse Corp., 1407 Broadway
- (C-669) E. D. Winter & Co., Inc., 525 Seventh Ave.
- (C-670) Jack Winter, Inc., 233 E. Chicago St., Milwaukee, Wisc.
- (C-671) Young Timers, Inc., 520 Eighth Ave.
- (C-717) L'Aiglon Apparel, Inc., Fifteenth and Mount Vernon Sts., Philadelphia, Pa.
- (C-769) The Alligator Co., 4153 Bingham Ave., St. Louis, Mo.
- (C-770) Sportswear By Revere, Inc., 11 Lake St., Wakefield, Mass.
- (C-771) Sportempos, Inc., 525 Seventh Ave.
- (C-772) Teal Traina, Inc., 550 Seventh Ave.
- (C-773) Max Wiesen & Sons, Inc., 463 Seventh Ave.
- (C-774) Lanz Originals, Inc., 6150 Wilshire Blvd., Los Angeles, Calif.
- (C-775) Smoler Bros., Inc., 2300 Wanansia Ave., Chicago, Ill.
- (C-794) Fashion Park, Inc., 432 Portland Ave., Rochester, N. Y.
- (C-803) National Togs, Inc., 1370 Broadway
- (C-834) Cotton City Wash Frocks, Inc., 1350 Broadway
- (C-835) Premier Knitting Co., Inc., 1410 Broadway
- (C-836) Regal Knitwear Co., Inc., 1333 Broadway
- (C-841) Chestnut Hill Industries, Inc., 2025 McKinley St., Hollywood, Fla.
- (C-882) The Kramer Co., 1405 Broadway
- (D. 8625) Branford Co., Inc., 1410 Broadway
- (D. 8626) Brownie Knitting Mills, Inc., 120 E. 23rd St.
- (D. 8630) Nancy Greer, Inc., 1400 Broadway
- (D. 8632) Barclay Knitwear Co., Inc., 1239 Broadway
- (D. 8633) Boepple Sportswear Mills, Inc., 1410 Broadway

OPINION ACCOMPANYING ORDER SETTING
EFFECTIVE DATE OF ORDERS TO CEASE AND DESIST

In early 1961, following the receipt of many complaints from small apparel retailers, small manufacturers and apparel salesmen, the Commission addressed Orders to File Special Reports to some

232 of the nation's leading buying offices and chain department and specialty store complexes. The orders required the buyers to submit, among other things, the names of apparel suppliers who had granted advertising and promotional allowances during a given twelve-month period, together with the amounts and purposes of the payments. The orders were limited specifically to outerwear categories of "women's and misses' dresses, suits, coats, sweaters and blouses and men's and boys' suits, coats, slacks, shirts and sweaters," the areas in which the vast majority of complaints had been submitted.

A tabular sheet for each supplier was prepared from the buyers' Special Reports. They indicated the customers each favored and the amounts paid. In February 1962 the Commission unanimously decided to address Orders to File Special Reports to the 250 sellers who granted the largest amounts of allowances to the greatest number of buyers. Later that year when it was discovered that certain significant sellers had been omitted, some 60 additional orders were transmitted.

A majority of the Special Reports filed provided sufficient documentation to give the Commission reason to believe that violations of Section 2(d) of the amended Clayton Act existed. Based upon the information provided, the Commission transmitted to 248 firms a form complaint and order, an agreement containing consent order and a letter explaining that the agreement, if accepted, would dispose of the matter without a formal proceeding.

On May 1, 1963, 163 consent orders were issued requiring apparel manufacturers to stop discriminating among their competing customers in the payment of advertising and promotional allowances. The orders required each respondent to file a report of compliance within 60 days. However, on June 28, 1963, a modification was issued postponing until further order the effective date of all outstanding orders. That action was precipitated by the fact that 85 suppliers, including several industry leaders, had not accepted the opportunity to sign a consent agreement, and the Commission wished "to proceed simultaneously, insofar as practicable against all of the large manufacturers and distributors" of wearing apparel.

During fiscal 1964, Orders to File Special Reports were sent to some 112 additional apparel producers, including parent corporations of previously investigated subsidiaries; leading manufacturers who had not been included in the buyers' Special Reports, but whose size compelled investigation of their promotional activities; significant suppliers whose payments were not as great as those

included in the first group, but who were apparently continuing to grant discriminatory allowances, and several companies against whom formal and informal complaints had been received.

From late 1963 through the first months of 1965, the Commission continued to receive signed agreements from apparel manufacturers.¹ When its consent was accepted, the manufacturer was notified that the effective date of the Commission's order was postponed until further order.

Today, the Commission has accepted 55 additional recently received agreements, and orders have issued against each consenter. This action brings the total apparel orders to 298.²

After having given notice over two years ago that it intended to do so, the Commission is making all outstanding orders against apparel manufacturers effective on this date. For the most part this phase of the wearing apparel inquiry is terminated. The few unresolved matters do not involve suppliers who constitute a force capable of competitively disadvantaging those industry members who will be under order.³

The Commission's action is bottomed upon an accumulation of many years experience in the apparel industry. It is felt that compliance with Section 2(d) will be most effectively obtained through combining enforceable orders against manufacturers with aggressive litigation against selected buyers who have knowingly induced or received discriminatory allowances.

The Commission has continuously scrutinized the anti-competitive activities of buyers and it will continue to do so. A large portion of the staff has been assigned to assemble evidence concerning acts of inducement or receipt of payments for promoting a number of products by several large buying complexes. It is anticipated that the resolution of those matters, necessarily only representative, will consume far more staff time and Commission funds than the nearly 300 uncontested supplier consent agreements and orders.

¹ Out of the 85 matters remaining open on May 1, 1963, only six are currently active. Two of that number have necessitated formal evidentiary hearings (House of Lord's, Inc., Docket No. 8631, and Rabiner & Jontow, Inc., Docket No. 8629).

² Some 110 matters have been closed for an assortment of reasons such as "insubstantiality of violation"; "insufficient evidence of a violation"; "out of business"; "consolidation with the file of a parent or subsidiary"; "transfer of ownership and control," and the like.

³ While it is certainly true that department and specialty store chains to a large extent have been responsible for discriminatory allowances in the industry, it is also true that in many instances the discriminations have been initiated by the manufacturers who have signed consent agreements. They did so to the detriment of their small retail customers, their salesmen, who often were forced to distribute earned commissions for cooperative advertising, and their very small, single product manufacturing competitors.

The decision to issue enforceable cease-and-desist orders was not made without due consideration of other enforcement methods. Trade Practice Conference Rules issued in the apparel industry had failed to reduce discriminatory advertising allowances significantly.⁴ The several cases brought against apparel suppliers similarly had no broad salutary effects.⁵ Nor did the Commission's Guides.⁶

The Trade Regulation Rule procedure has been proposed in only one Section 2(d) matter.⁷ However, no rule issued, for the procedure did not appear to be a very practical law enforcement method in the luggage industry where, as in apparel, the discriminations were sporadic and secretive.⁸

The suggestion that the Commission should abdicate its enforcement responsibility to another agency is completely unacceptable. The likelihood of obtaining injunctive relief against a supplier who has not been specifically found to have violated an act and an order seems highly remote, particularly in a Section 2(d) matter which requires no showing of injury. Moreover, it is questionable whether the courts would take jurisdiction even in the unlikely event that the Office of the United States Attorneys was inclined to assist the Commission.⁹

Fear that the issuance of effective orders will result in the discontinuance of cooperative advertising by members of the industry is unfounded. Out of the 132 manufacturers submitting compliance reports in response to the Commission's order of May 1, 1963, only three small suppliers, whose sales were each less than \$1 million, indicated they intended to abandon widely distributed cooperative advertising.¹⁰

⁴ *Popular Priced Dress Manufacturing Industry*, 16 C.F.R. 125; *House Dress and Wash Frock Manufacturing Industry*, 16 C.F.R. 126; *Infants' and Children's Knitted Outerwear Industry*, 16 C.F.R. 137; *Corset, Brassiere, and Allied Products Industry*, 16 C.F.R. 21.

⁵ *Kay Windsor Frocks, Inc.*, 51 F.T.C. 89 (1954); *Jonathan Logan, Inc.*, 51 F.T.C. 1229 (1955); *Henry Rosenfeld, Inc.*, 52 F.T.C. 1535 (1956); *Jantzen, Inc.*, 55 F.T.C. 1065 (1959); *Day's Tailor-D Clothing, Inc.*, 55 F.T.C. 1584 (1959).

⁶ *Guides for Advertising Allowances and Other Merchandising Payments and Services*, adopted May 19, 1960.

⁷ *Atlantic Products Corp.*, F.T.C. Docket 8513 (Opinion accompanying Order Modifying and Adopting Hearing Examiner's Findings of Fact and Conclusions of Law, and Deferring Other Relief, issued Dec. 13, 1963) [63 F.T.C. 2237].

⁸ *Atlantic Products Corp.*, F.T.C. Docket 8513 (Final Order Directing Filing of Compliance Report, issued Jan. 26, 1965) [67 F.T.C. 84].

⁹ *Marquette Cement Mfg. Co. v. Federal Trade Commission*, 147 F.2d 589, 593 (7th Cir. 1945).

¹⁰ Mr. Edward C. Crimmins, director of planning and sales for the Advertising Checking Bureau reported that "approximately 50 firms that signed consent orders have availed themselves of our facilities to get help in planning their future course of action. Exactly one firm has decided to drop co-op; all the others are setting up formal programs, and, almost without exception, they will be spending more—and considerably more—than they did previously." Quoted in Day, "Why Co-op Advertising Will Surge Ahead," *Sales Management*, Oct. 4, 1963, p. 48.

The apparel investigation included the nation's most significant, large, and, in many cases, multiproduct, outerwear manufacturers.¹¹

The Commission does not claim to have accomplished a universe. It is certainly possible that complaints will be received concerning competing apparel manufacturers thus far not under order, for our history is replete with instances of continued Section 2 violations by industry members, no matter how many were enjoined.¹² If it develops that certain suppliers are accused, apparently justifiably, of engaging in discriminatory advertising practices, they can be transmitted Orders to File Special Reports, and invited to join their associates in consent settlements. In such fashion, complete industry compliance may perhaps be achieved at minimal public expense.

DISSENTING STATEMENT

AUGUST 9, 1965

BY ELMAN, *Commissioner*:

Re: *Wearing Apparel Orders*

I must respectfully dissent from the Commission's action in making final, at this time and without any prior notice to the industry or the affected firms, the 298 consent orders to cease and desist which it has obtained from wearing apparel manufacturers. The Commission's action seems to me precipitate, unwise, and inequitable.

I

Four years ago, the Federal Trade Commission conducted an investigation which revealed that the practice of suppliers in granting discriminatory and illegal advertising allowances to their customers was rife in the wearing apparel industry. On the selling side the industry is fragmented and decentralized, consisting of a great many manufacturers (estimates run as high as 30,000) most of

¹¹ An exhaustive study of the apparel inquiry indicated that for the most part those companies which were investigated were industry leaders having annual sales of \$2 million or more. The significant industry members who were excluded from the inquiry had not evidenced violations of law during the investigative period. They were thought to have engaged in buyer advertising without discriminating or to have done no cooperative advertising whatsoever.

¹² For example, the discriminatory promotional practices of the members of the cosmetic industry have been challenged continuously since the early days of the Robinson-Patman Act. *Luxor, Ltd.*, 31 F.T.C. 658 (1940); *Elizabeth Arden, Inc.*, 39 F.T.C. 288 (1944); *Hudnut Sales Co., Inc.*, 52 F.T.C. 1064 (1956); *Helena Rubinstein, Inc.*, 52 F.T.C. 1267 (1956); *Yardley of London, Inc.*, 52 F.T.C. 1086 (1956); *Elmo, Inc.*, 52 F.T.C. 929 (1956); *Revlon Products Corp.*, 53 F.T.C. 127 (1956); *Bourjois, Inc.*, 53 F.T.C. 751 (1957); *Shulton, Inc.*, 59 F.T.C. 106 (1961), F.T.C. Docket 7721, July 22, 1964 [66 F.T.C. 184]; *Max Factor & Co.*, F.T.C. Docket 7717, July 22, 1964 [66 F.T.C. 184]; *Chemway Corp.*, F.T.C. Docket 8502, July 27, 1964; *Hazel Bishop, Inc.*, F.T.C. Docket 8504, July 27, 1964 [66 F.T.C. 252]; *Chesebrough-Ponds, Inc.*, F.T.C. Docket 8491, July 27, 1964 [66 F.T.C. 252]; *Lanolin Plus, Inc.*, F.T.C. Docket 7722, July 31, 1964 [66 F.T.C. 326]; *Nestle-Lemur Co.*, F.T.C. Docket 7716, July 31, 1964 [66 F.T.C. 326].

whom are small businessmen operating on a narrow margin of profit. On the buying side the industry is more concentrated, and there are powerful buyers—the large department store chains. In view of the disparity of bargaining power between sellers and buyers in this industry, it is not surprising that some large buyers may have been able to obtain discriminatory concessions, in the form of illegal advertising payments, from many sellers.

On October 17, 1962, the Commission held a public conference, at which representatives of the industry appeared, to help decide how best to cope with the enormous practical problems of law enforcement posed by an industry where hundreds, and perhaps thousands, of firms were apparently violating the law. A number of remedial approaches were suggested. The Commission determined to follow its traditional approach of issuing individual complaints and cease and desist orders, in the hope that most of the law violators in the industry would accept consent orders.

Commissioner Higginbotham and I, as explained in our statement of January 2, 1963, disagreed with this approach. We believed that trying to put everybody in the industry under a cease and desist order would prove unwise and impractical, and that instead an administrative approach should be taken to the unique enforcement problems raised by the wearing apparel investigation. Among other possibilities, we suggested that the Commission should set a target date for simultaneous, uniform, and industry-wide discontinuance of unlawful promotional allowances and invite the members of the industry to submit revised cooperative advertising plans to the Commission, before the target date, for advice on their legality.

The first batch of complaints was sent at the end of 1962 to 248 wearing apparel manufacturers, charging violations of Section 2(d) of the Clayton Act. Each firm was invited to avoid litigation by executing a consent agreement attached to the complaint, and was advised that all consent orders against wearing apparel companies would become effective simultaneously on July 1, 1963. Later, however, the Commission announced that it was postponing the effective date indefinitely. During 1963, 19 more complaints, with consent agreements attached, were sent out. Early in 1965 the Commission sent out another batch of 62. And just the other day the Commission decided to send out two more complaints. Whatever the Commission may say, we cannot be sure that no more complaints will be issued. It may be significant in this connection that no complaint has yet been issued against any of the department store chains that allegedly received unlawful advertising payments

from wearing apparel manufacturers, although the knowing inducement of payments violative of Section 2(d) of the Clayton Act is an unfair method of competition, forbidden by Section 5 of the Federal Trade Commission Act. See, e.g., *Grand Union Co. v. F.T.C.*, 300 F.2d 92 (2d Cir. 1962).

It has become apparent that the alleged violations of Section 2(d) in the wearing apparel industry are not limited to 248 suppliers, as the staff originally advised us, or 267, or 329, or even 331; and it is not likely that making orders final against 298 members of the industry will enable the Commission to close its books on 2(d) violations by wearing apparel manufacturers. Very probably, the latest firms that have signed consent orders or received complaints will complain to the Commission about violations by their competitors, just as the earlier respondents did, and thus a new cycle of investigation and complaint may soon be under way; this process may receive an additional stimulus as a result of the Commission's action in making the outstanding orders final. How many more violators of Section 2(d) there are in this industry (which new firms are constantly entering), and how long it will take to bring them under order, I do not know. It would not surprise me if there turned out to be scores, if not hundreds, of additional violators and if it took many years to bring most of them under order. We were recently advised that the Commission has failed even to investigate a number of the very largest wearing apparel manufacturers, all with annual sales of more than \$10 million. This omission has not been explained. Hundreds of smaller firms have not been investigated, even though many of their competitors, firms no larger than they, have been served with complaints by the Commission.

But until cease and desist orders against all of the substantial violators, at least, in the industry are obtained, I cannot agree that the Commission is justified in making final the consent orders it has obtained from cooperating suppliers. The Commission is not obliged to proceed against all of the firms in an industry, even all competing firms, before it may enter final orders against one or a few. *Moog Industries, Inc. v. F.T.C.*, 355 U.S. 411, 413. But here there are very special circumstances. The Commission engaged in the most assiduous solicitation of consent settlements by suppliers to whom complaints were sent. By announcing that all orders would become effective simultaneously, and later by postponing their effective date indefinitely, the Commission virtually assured the consenting suppliers that no order would become effective until all of the industry members who were violating the

law, including the non-consenters who chose to litigate, were under order. To obtain consent orders, and thereby avert an avalanche of litigation, the Commission in effect promised that the consent-settlement method would be used to achieve the uniform, equitable, and simultaneous elimination of violations in the industry. I question, therefore, whether the Commission should, without prior notice, make these orders final against the consenting suppliers while many of their competitors, still not under investigation or order, can continue to violate the law with impunity. The unfairness of such action is aggravated by the fact that many of the firms sued by the Commission are still not subject to any order. Thus the Commission is penalizing just those firms that have been most cooperative with it. Cf. *Bernard Lowe Enterprises, Inc.*, 59 F.T.C. 1485, 1486-87 (dissenting opinion).

Besides the equities of the matter, I am concerned with whether entry of cease and desist orders is an effective method of preventing discriminatory advertising allowances, even by the firms subject to the orders, where many of their competitors are not under order and continue to make such payments. The effect of orders in these circumstances may simply be to divert business to the firms not under order. If this is the result, powerful buyers in this industry will continue to enjoy unimpaired an unfair advantage over weaker competitors, notwithstanding the entry of orders against some suppliers. Further, since the defense of good faith meeting of competition will probably be read into every order (cf. *Mueller Co. v. F.T.C.*, 323 F.2d 44, 47 (7th Cir. 1963)), they may well prove ineffective to prevent the respondents from matching allowances offered by competitors not under order. Cf. *Callaway Mills Co.*, F.T.C. Docket 7634 (decided February 10, 1964), dissenting opinion, p. 4 [64 F.T.C. 746].

There is another problem that the Commission, in its haste to wind up the wearing apparel project, has evidently overlooked. The Commission's proceedings so far have been limited chiefly to manufacturers of outer garments (thereby excluding most manufacturers of gloves, footwear, underwear, and many other items of wearing apparel), which represent only a fraction of the products sold in department stores. From all indications, the practice of granting unlawful advertising allowances to large retailers may not be limited to manufacturers of outer garments, or even to manufacturers of wearing apparel generally, but may extend to a great many of the products sold by such stores. Though it is obvious that preventing discriminatory allowances on only one type of

merchandise would not eliminate, but at most only slightly reduce, any unfair competitive advantage of large buyers who received such concessions across the board, no attempt has been made to broaden the investigation to other industries selling to department store chains.

Finally, I am deeply concerned by a problem that has plagued this project from the outset—the problem of the motives and objectives of the industry representatives who have been so eager for the Commission to place hundreds of wearing apparel manufacturers under very broad Section 2(d) cease and desist orders. As Commissioner Higginbotham and I pointed out in our statement of January 2, 1963 (p. 5):

The Commission's take-it-or-leave-it-by-February 15, 1963, approach and the broad form of order which it proposes may perhaps be preferred by those manufacturers who wish to eliminate all cooperative advertising, lawful as well as unlawful, and who wish to have the Commission, rather than themselves, held responsible for such action. But the evil which the Commission is seeking here to eliminate is the granting of discriminatory advertising allowances to certain favored customers. Non-discriminatory cooperative advertising is a legitimate business practice which the Commission has neither the authority nor the purpose to prohibit. The Commission should not, therefore, propose the issuance of consent orders which, because of their large and uncertain breadth, could be used as the pretext for discontinuing lawful cooperative advertising payments.

Subsequent events have tended to confirm this fear. The alacrity with which industry members have accepted the proffered boilerplate orders suggests, although it does not prove, that members of the industry may be using, or rather misusing, the Commission as an instrumentality to obtain what the Sherman Act prohibits them from obtaining by agreement or conspiracy: uniform industry-wide curtailment or discontinuance of *all* advertising allowances, legal and illegal alike, which in this industry constitute an important, and except to the extent forbidden by Section 2(d) a fair and salutary, method of competition. The Commission has a duty to ensure the integrity of its processes. It ought not allow itself to be manipulated by industry members whose objectives are inconsistent with the policy of the antitrust laws—which I fear may be the case here. Before it makes these orders final, I again urge the Commission to take all necessary steps to assure itself that lawful competition will not unwittingly be stifled as a result of its action.

II

For the foregoing reasons, I cannot agree that the Commission's action in abruptly making the outstanding orders final promises

a fair and effective solution of the wearing apparel problem. It is not as if our only alternatives were to abandon the project altogether, suspend the outstanding orders indefinitely, or make these orders final while at the same time plunging ahead with more complaints and more consent orders. There are other approaches to the problem, which the Commission should explore even at the cost of thereby admitting that its earlier efforts have not been successful.

There are at least three practical approaches which the Commission could pursue, alternatively or concurrently, instead of routinely issuing more and more complaints against wearing apparel manufacturers. The first would be to develop pilot cases against buyers who have knowingly induced discriminatory allowances forbidden by Section 2(d). In a situation where, though there may be thousands of firms in many industries violating the Act, the basis cause of the violations lies in the activity of a relatively few powerful buyers, it is the fairer, more economical, and more expeditious method of law enforcement to proceed against the few buyers rather than the many sellers. Cf. *Max Factor & Co.*, F.T.C. Docket 7717 (decided July 22, 1964) [66 F.T.C. 184]. We are now advised that that is precisely the situation in the wearing apparel industry. It is in retrospect regrettable that the Commission should have attempted to sue hundreds of small firms before beginning to investigate seriously the few large firms that may be the real wrongdoers; but the Commission's present action in now making final the consent orders against these small firms only compounds the error.

Second, the Commission could use its Trade Regulation Rule procedure to deal with the problem of unlawful advertising allowances in the wearing apparel industry on a genuinely industry-wide basis. This would not be a novelty in Section 2(d) enforcement. See *Atlantic Products Corp.*, F.T.C. Docket 8513 (Order of December 13, 1963) [63 F.T.C. 2237]. I have tried to explain elsewhere how a Trade Regulation Rule proceeding can be an effective method for bringing about prompt, simultaneous, and uniform discontinuance of industry-wide discriminatory practices. See *Callaway Mills Co.*, *supra*, dissenting opinion, pp. 16-18 [64 F.T.C. 756-758]. I believe it would be an effective method in the present circumstances—at least it could be tried.

Third, along the lines Commissioner Higginbotham and I originally suggested, the Commission could try a less formal approach to achieving industry-wide compliance, as it has recently begun to do in other industries. The first steps in such an approach

might be (1) to express the Commission's intention to obtain industry-wide compliance with Section 2(d) without exacting any penalty for past violations; (2) to encourage each wearing apparel supplier to submit a detailed outline of his plans for conforming to the requirements of the law; (3) to make the assistance of the staff, as well as the Commission's advisory opinion procedures, available to suppliers who may be in doubt as to the elements of a proper plan of promotional allowances; and (4) to set a target date for simultaneous industry-wide abandonment of unlawful promotional allowances and require the suppliers to submit satisfactory evidence of compliance.

Even if such approaches should fail, it would not mean that the Commission must shoulder the perhaps impossible burden of attempting to police compliance with Section 2(d) in an industry consisting of thousands of small sellers. Once the Commission, through selective litigation, a Trade Regulation Rule proceeding, or some other means, has defined the requirements of Section 2(d) as applied to a particular industry, and the problem of law enforcement becomes the relatively simple and straightforward one of compelling adherence to clear and well-understood standards of legality, it might be appropriate for the Department of Justice to assume some of the burden of law enforcement. With its power to obtain preliminary injunctions against conduct in violation of the Clayton Act (see 15 U.S.C. § 25), including of course Section 2(d), the Department is in a better position than the Commission to enforce compliance with the requirements of the Act in a situation where the need is for policing rather than defining standards of legality; and there can be no question of its willingness to cooperate with the Commission in this as in other areas of concurrent responsibility for law enforcement.

But in any event our first move, before we take the drastic step of making 298 cease and desist orders final or make any major further commitments of Commission resources in this industry, should be to reconvene the public conference with industry representatives held back in October 1962. By its action today, the Commission seeks to create the impression that the wearing apparel project has now been successfully completed. But many questions remain unanswered, and until they are answered, no one can say with confidence whether we are at the project's end, or somewhere in the middle, or still at the beginning. A conference with industry would provide a means of illuminating some of these questions. What is the present state of compliance with the Clayton Act in the

Complaint

68 F.T.C.

wearing apparel industry? Have the Commission's complaints had a salutary effect, or are violations still rampant? Should the Commission press on with its complaint-and-order approach, perhaps concurrently with other steps, or abandon it and try a new approach? Does the Commission now have under order the principal violators, or has the coverage of our investigation been inadequate? Are the orders that have been obtained tailored to prevent only advertising allowances that are discriminatory and illegal—or has the Commission been made the unwitting tool of those industry members who desire the elimination of *all* advertising allowances? Sooner or later the Commission must face up to these questions; and the sooner the better.