

IN THE MATTER OF
GLADSTONE-ARCUNI, INC.

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

Docket 8664. Complaint, July 30, 1965—Decision, Nov. 2, 1967

Order requiring a New York City manufacturer of women's dresses to cease discriminating among its customers in the payment of promotional allowances.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter

more particularly described, has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Gladstone-Arcuni, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 71 Fifth Avenue, New York, New York, 10003.

PAR. 2. Respondent is now and has been engaged in the manufacture, sale and distribution of "women's and misses'" dresses under the trade names of "Hattie Leeds," "Miss Smith," "Diane Carter," and "Active Woman." Respondent sells its products to retail specialty and department stores located throughout the United States. Respondent's sales of its products are substantial having exceeded \$4,800,000 for the calendar year ending December 31, 1960.

PAR. 3. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondent sells and causes its products to be transported from its place of business located in the State of New York, to customers located in other States of the United States and in the District of Columbia. There has been at all times mentioned herein a continuous course of trade in commerce in said products across State lines between said respondent and its customers.

PAR. 4. In the course and conduct of its business in commerce, respondent 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 respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

PAR. 5. Included among the payments alleged in Paragraph Four were credits, or sums of money, paid either directly or indirectly by way of discounts, allowances, rebates or deductions, as compensation or in consideration for promotional services or facilities furnished by customers in connection with the offering for sale, or sale of respondent's products, including advertising in various forms, such as newspapers and catalogues.

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Illustrative of such practices, but not limited thereto, respondent, during the period 1961 through 1963, made payments and allowances to various customers in various cities, including Chicago, Illinois; Cleveland, Ohio, and Baltimore, Maryland, for, or for the purpose of, advertising its products as follows:

Chicago, Illinois

Customer	Amount of Allowance		
	1961	1962	1963
Carson, Pirie, Scott & Co.	\$8,565.00	\$5,250.00	\$5,350.00
Wieboldt Stores, Inc.	1,028.44	1,211.66	4,003.71

Cleveland, Ohio

Customer	Amount of Allowance		
	1961	1962	1963
The Halle Bros. Co.	\$500.00	\$350.00	\$1,050.00
The May Company	500.00	100.00	450.00

Baltimore, Maryland

Customer	Amount of Allowance	
	1961	1962
Hutzler Bros.	\$846.00	\$395.60
Stewart & Co.	96.00	60.00

Respondent did not offer or otherwise make available such promotional allowances on proportionally equal, or any, terms to all other customers in Chicago, Illinois; Cleveland, Ohio, and Baltimore, Maryland, competing with those who received such allowances.

PAR. 6. The acts and practices of respondent as alleged above are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Sec. 13).

Mr. Benjamin H. Vogler supporting the complaint.

Mr. Erwin Feldman, New York, N.Y., for the respondent.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

FEBRUARY 10, 1967

PRELIMINARY STATEMENT

This is a proceeding under Section 2(d) of the Clayton Act, as amended.¹ The complaint was issued July 30, 1965. Respondent's answer was filed August 30, 1965.

Respondent Gladstone-Arcuni, Inc., a New York corporation, is a manufacturer of "daytime" dresses that sell at wholesale for \$45, \$51 and \$69 per dozen. It seeks to defend its admittedly nonproportionalized advertising payments and promotional allowances to customers in Chicago, Illinois; Cleveland, Ohio; and Baltimore, Maryland, during the years 1961, 1962 and 1963, by asserting that its payments and allowances (1) in fact did not violate Section 2(d) of the amended Clayton Act; (2) were made in good faith to "meet competition";² and (3) were granted for the purpose of "defending respondent's position" with its customers. In addition, it asserts that this proceeding is not in the public interest.

Substantially the same defenses were asserted by the same counsel before the same hearing examiner in a similar Section 2(d) proceeding, *Rabiner & Jontow, Inc.*, Docket 8629 [70 F.T.C. 638]. These defenses were rejected by the hearing examiner and the Federal Trade Commission in *Rabiner & Jontow* (slip opinion dated September 19, 1966 [70 F.T.C. 638, 683]). *Rabiner & Jontow* is now on appeal to the United States Court of Appeals for the Second Circuit. At page 9 of its proposed findings in the instant proceeding, respondent states: "We are fully aware of the fact that a majority of the Commission has already decided this issue against the contentions of this respondent but this respondent takes the position that as long as the *Rabiner & Jontow, Inc.*, case is on appeal, it will adhere to its position until the matter is finally adjudicated."

¹ § 2(d) "That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

² Section 2(b) of the Clayton Act, as amended, provides:

"Provided * * * That nothing * * * shall prevent a seller * * * showing that his * * * furnishing of services or facilities * * * was made in good faith to meet * * * the services or facilities furnished by a competitor."

On page 11 of his proposed findings, respondent's counsel asserts:

It is the duty of the Commission to go to Congress and point out the inequities created by its inability to enforce the Act and in the case of industry-wide action should have the right to issue an order, after a single public hearing, against the entire industry which it could enforce without having to take up each case individually.

Under such circumstances, no one would be heard to complain as the Act would then be uniformly enforceable against all persons in the industry. But to single out a handful because the Commission does not know of any other way of handling the situation is hardly an appropriate answer.

Implicit in this argument are assumptions that are not supported by this record. There is no evidence of "inequities" nor of the Commission's "inability" to enforce Sec. 2(d) of the Clayton Act against daytime dress manufacturers who violate the law. If respondent's counsel knows of any manufacturer who is violating the law, such information would be welcomed by the Commission. If, on the other hand, respondent's counsel feels that the present law should be changed, his long association with the daytime dress industry should assure him a respectful hearing by the Congress.

His suggestion that Congress authorize the Federal Trade Commission to issue a blanket cease and desist order against the "more than 500" manufacturers of daytime dresses without according each manufacturer his "day in court" is novel to say the least. The appropriate place to urge such a proceeding is before the Congress of the United States or the Federal Trade Commission, not before this hearing examiner.

The Commission has adequately dealt with all of this respondent's arguments in its opinion in *Rabiner & Jontow*, and no useful purpose would be served by repeating here *in extenso* what the Commission said in that case.

In confirming a Section 2(d) cease and desist order in *Ace Books, Inc., et al*, Docket 8557 (slip opinion of June 18, 1965, 67 F.T.C. 1073, 1129-1130), the Federal Trade Commission, *inter alia*, said:

It has been recognized that the burden of establishing the Section 2(b) defense is upon the proponent. *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505 (1963). Since the defense has the effect of exculpating a discrimination which would otherwise be forbidden, the evidence upon which the defense is predicated must be of sufficient preciseness to permit an informed determination. [citing cases] We think the evidence presented here does not permit such a determination. The evidence does not show when respondents' competitors began granting allowances * * * or when respondents themselves initiated

the practice. The record fails to establish the rates used by respondents' competitors to compute their allowances or the amounts of such allowances. No conclusive determination can be made with regard to the rates used by respondents. Respondents failed to show any of the circumstances surrounding the initiation of their allowances to these retailers and made no effort to establish that their allowances did not in fact exceed those of competitors, by reference either to the rates or the total amounts of these allowances. Without evidence of a more specific nature, the Commission is unable to make an informed determination on the various questions which must be resolved and, as a result, is compelled to reject respondents' contention that they have met their burden in establishing the defense.

In *Exquisite Form Brassiere Inc. v. Federal Trade Commission*, 360 F. 2d 492 (D.C. Cir. 1965), *certiorari denied*, 384 U.S. 959, a Section 2(d) proceeding wherein a meeting competition defense was rejected, the Court, *inter alia*, said:

Exquisite Form in the present case essentially premises its position upon the proposition that in a Section 2(d) case, if the accused company establishes that its competitors have plans or systems whereby they make advertising allowances to their customers, any company in the industry can combat such systems by inventing and operating a system or plan of its own. Exquisite Form states a number of points, but all of them arise from or are enveloped in the proposition just stated. This, as it phrases the matter, is the crux of the case. Admittedly the Supreme Court has held [*F.T.C. v. A. E. Staley Co.*, 324 U.S. 746 (1945).] that in a price discrimination case (a Section 2(a) case) it is not an effective protection for an accused company to show that it operated a plan or system in order to combat its competitors' plans or systems; in other words, that in those cases a plan to combat other plans is not an effective defense under the proviso in Section 2(b). The Court held that in such cases the combative act had to be a specific act aimed at a lower price on the part of a competitor in "individual competitive situations, rather than * * * [in] a general system of competition." Exquisite Form argues that that rule cannot apply to the advertising allowance practices in the brassiere industry, because of the factual characteristics of that industry and the practices in it.

We think the doctrine of *Staley* must be applied here. There are differences, of course, between a price discrimination (Section 2(a)) case and a case involving advertising allowances. But we are not shown that any such difference goes to the basic thesis involved in the statute or to the rationale of *Staley*. We are not shown any compelling reason for different treatment.

Exquisite Form also contends that, even if the doctrine of *Staley* applies, its proof satisfied the requirements of that case. The only evidence which related to individual competitive situations consisted of a table which set forth the dates of retailers' advertisements of Exquisite Form products and competitors' products. There was no testimony which explained how this table related to company policy. The Commission found that Exquisite Form's evidence was insufficient to support its contention. We agree with the Commission.

The first prehearing conference³ in this proceeding, set for

³ Prehearing conferences were held on October 11, 1965, December 1, 1965, and January 25, 1966.

September 15, 1965, was continued to October 5, 1965, at the request of respondent's counsel. In the meantime, on September 18, 1965, Joseph P. Arcuni, the sole stockholder and chief executive officer of Gladstone-Arcuni, was critically injured in an automobile accident. He suffered such severe injuries that he was unable to confer for any extended period of time with his counsel concerning the defense of this proceeding and was unable to be present at the hearings. After the first prehearing conference was held, respondent's counsel himself was confined to the hospital on two separate occasions for surgery. Because of Mr. Joseph P. Arcuni's state of health and the health of respondent's counsel, generous extensions of time have been granted to respondent.

The evidentiary record in this proceeding consists of a stipulation filed on April 13, 1966, the stenographic transcript of hearings in New York, New York, on September 26 and 27, 1966, and the exhibits received in evidence at such hearings.

Proposed findings, conclusions, and order have been submitted to and given careful consideration by the hearing examiner. Findings that are not made in this initial decision in the form proposed, or in substantially that form, are hereby rejected. Any motions heretofore made but not ruled upon are hereby denied. Respondent's proposed findings contain few findings of fact that are relevant to its "meeting competition" or "no public interest" defenses. Respondent's extensive quotations from the dissenting opinion in *Rabiner & Jontow, Inc.* (respondent's proposed findings, pp. 8-9, 13) merely reiterate arguments that had been considered by the majority of the Commission and had been rejected.

Based upon the stipulation filed herein on April 13, 1966, the hearing examiner makes the following:

FINDINGS OF FACT

1. Respondent, Gladstone-Arcuni, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 71 Fifth Avenue, New York, New York, 10003.⁴

2. Respondent is now and has been engaged in the manufacture, sale and distribution of women's and misses' dresses under the trade names of "Hattie Leeds," "Miss Smith," "Diane Carter," and "Active Woman." These products sell for \$45, \$51 and \$69 per dozen. The style numbers identifying respondent's dresses gen-

⁴ Findings 1-9 constitute the stipulation of counsel *in haec verba*.

erally refer to differences in color and print design rather than style. Further, respondent's dresses that sell for \$51 per dozen are only larger sizes of the identical dresses selling for \$45 per dozen. Respondent, Gladstone-Arcuni, Inc., sells its products to retail specialty and department stores located throughout the United States. The sales of its products are substantial having exceeded \$4,800,000 for the calendar year ending December 31, 1960.⁵

3. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondent sells and causes its products to be transported from its place of business located in the State of New York, to customers located in other States of the United States and in the District of Columbia. At all times mentioned in the complaint in this matter there has been a continuous course and conduct of trade in commerce in respondent's products across State lines between the respondent and its customers.⁶

4. During the years 1961, 1962, and 1963, respondent, in the course and conduct of its business in commerce as described above, paid the following promotional payments, allowances or extended credits or discounts to or for the benefit of the following retail department store customers of respondent located in the cities of Chicago, Illinois, Cleveland, Ohio, and Baltimore, Maryland, as compensation or in consideration for newspaper advertising of respondent's products:

Chicago, Illinois

Customer	Date Of Ad	Amount Paid	Date of Credit Memo
1961			
Carson, Pirie, Scott & Company	2/19/61	\$1,500.00	3/16/61
	2/19/61	500.00	3/16/61
	3/26/61	1,500.00	3/22/61
	5/21/61	1,500.00	5/18/61
	5/10/61	315.00	6/26/61
	3/19 & 22/61	250.00	6/26/61
	7/9/61	1,500.00	7/10/61
	12/3/61	1,500.00	12/18/61
Total 1961 Allowances		\$8,565.00	

⁵ See footnote 4, *supra*.

⁶ See footnote 4, *supra*.

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Chicago, Illinois—Continued

Customer	Date Of Ad	Amount Paid	Date of Credit Memo
1962			
Carson, Pirie, Scott & Company.....	1/22/62	\$ 500.00	2/16/62
	2/25/62	1,500.00	3/20/62
	4/8/62	1,500.00	5/21/62
	5/27/62	1,750.00	6/15/62
Total 1962 Allowances		\$5,250.00	
1963			
	7/12/62	\$1,500.00	3/18/63
	4/28/63	1,750.00	5/6/63
	7/12/63	350.00	8/14/63
	8/25/63	1,750.00	9/30/63
Total 1963 Allowances		\$5,350.00	
Wieboldt Stores, Inc.	Note: Only total allowance payments to Wieboldt Stores, Inc. are presently available. Detailed information concerning dates of advertisements and credit memos not furnished by respondent.		
Total 1961 Allowances		\$1,028.44	
" 1962 "		1,211.66	
" 1963 "		4,003.71	

Cleveland, Ohio

1961			
The May Co.	1/16/61	\$ 204.21	1/24/61
	7/23/61	100.00	7/19/61
	*	100.00	7/13/61
	7/24/61	100.00	8/21/61
	Sept. '61	100.00	10/13/61
	10/27/61	100.00	11/9/61
Total 1961 Allowances		\$ 704.21	
1962			
	8/15/62	\$ 100.00	9/10/62
	Xmas Cat.	250.00	1/22/63
Total 1962 Allowances		\$ 350.00	
1963			
	6/3/63	\$ 100.00	7/16/63
	6/3/63	100.00	6/27/63
Total 1963 Allowances		\$ 200.00	
1961			
The Halle Bros. Co.	4/30/61	\$ 200.00	6/20/61
	12/3/61	300.00	12/28/61
Total 1961 Allowances		\$ 500.00	

*See footnote on p. 813.

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Cleveland, Ohio—Continued

Customer	Date Of Ad	Amount Paid	Date of Credit Memo
1962			
The Halle Bros. Co.	3/11/62	\$ 350.00	4/30/62
	5/17/62	250.00	*
	9/26/62	250.00	*
Total 1962 Allowances		\$ 850.00	
1963			
	2/25/63	\$ 350.00	3/21/63
	4/1/63	350.00	5/6/63
	4/18/63	100.00	
	5/15/63	250.00	6/7/63
	7/26/63 or	200.00	8/30/63
	7/27/63		
	11/6/63	150.00	*
	12/4/63	350.00	*
	12/26/63	200.00	*
Total 1963 Allowances		\$1,950.00	
Baltimore, Maryland			
1961			
Stewart & Company	12/5/61	\$ 60.00	12/1/61
	12/5/61	36.00	1/17/61
Total 1961 Allowances		\$ 96.00	
1962			
	12/13/62	\$ 60.00	1/16/63
Total 1962 Allowances		\$ 60.00	
1961			
Hutzler Bros. Co.	3/16/61	\$ 60.90	3/24/61
	4/11/61	123.90	5/10/61
	4/25/61	123.90	5/12/61
	5/4/61	123.90	6/21/61
	10/22/61	414.00	10/12/61
Total 1961 Allowances		\$ 846.60	
1962			
	10/21/62	\$ 395.60	11/9/62
Total 1962 Allowances		\$ 395.60 ⁷	

5. The promotional payments, allowances, credits or discounts listed in paragraph four, *supra*, were made by respondent to its favored customers on a continuing, regular basis and in the normal

* Whenever blanks appear, the information has not been furnished by respondent.

⁷ See footnote 4, *supra*.

course of respondent's business throughout each of the years 1961, 1962, and 1963.⁸

6. Respondent's employees negotiated with its favored customers, listed in paragraph four, *supra*, for the stated promotional payments, allowances, credits or discounts on an individual basis and without any reference to competing customers or to any standards for proportionalizing said promotional compensation. Said promotional payments, allowances, credits or discounts were made as compensation or in consideration for advertising services or facilities furnished by them in connection with their offering for sale or the sale of products sold to them by respondent. Further, they, the favored customers, selected the dress styles to be promoted and the advertising was designed to promote the entire line of respondent's products rather than just the particular dress style depicted.⁹

7. During the period 1961, 1962, and 1963, the respondent did not offer or otherwise make available on proportionally equal terms, or on any terms, the aforesaid promotional payments, allowances, credits or discounts to all other customers located in Chicago, Illinois, Cleveland, Ohio, and Baltimore, Maryland, competing in the resale of respondent's products of like grade and quality with those customers who received said allowances and listed in paragraph four, *supra*. Further, respondent's said promotional payments, allowances, credits or discounts were not offered or made available to all of its favored customers on proportionally equal terms. Respondent during the period 1961, 1962, and 1963, did not grant or offer any promotional payments, allowances, credits or discounts of any kind to the following retail department and/or specialty store customers:

Chicago, Illinois

Wolke and Kolter, Inc.,
4811 North Milwaukee Avenue.
The Home Store Co.,
11800 South Michigan Avenue.
Gassmans Incorporated,
3014 East 92nd Street.
Peoples Store of Roseland Inc.,
112-01 South Michigan Ave.
Friedman's Department Store,
5321 North Clark Street.
Cragin Department Store,
5018 Armitage Avenue.
Shulman's Apparel Shop,
5100 West Madison Street.

⁸ See footnote 4, *supra*.

⁹ See footnote 4, *supra*.

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The 12th Street Store,
3939 North Cicero Avenue.
Goodman's,
6242-44 South Kedzie Avenue.
Kaden's Department Store,
1942 West Monterey Avenue.
Walsdorf's Department Store,
3811 West Fullerton Avenue.

Cleveland, Ohio

Rosenbluth's Incorporated,
11616 Buckeye Road.
Buckeye Shopping Center,
9007 Buckeye Road.
Belmont Department Store,
13309 Miles Avenue.
Rosenblum's Incorporated,
321 Euclid Avenue.
The Higbee Company,
Public Square.

Baltimore, Maryland

Brager-Gutman, Inc.,
Lexington and Park Avenues.
Lee's, Inc.,
3424-26 Eastern Avenue.¹⁰

8. In each of the respective metropolitan trading areas the favored and nonfavored customers as listed in paragraphs four and seven, *supra*, purchased from respondent identical products at or about the same time throughout each of the years 1961, 1962 and 1963. Further, respondent's unfavored customers made purchases of dresses from respondent at or about the same time the favored customers were receiving promotional payments, allowances, credits or discounts from respondent for advertising such dresses.¹¹

9. All of the unfavored customers listed in paragraph seven above compete in the resale of respondent's products of like grade and quality with all of the favored customers, listed in paragraph four, *supra*, in the metropolitan trading areas in which they are located.¹²

10. The Federal Trade Commission has jurisdiction over the respondent and the subject matter of this proceeding. This proceeding is in the public interest.

¹⁰ See footnote 4, *supra*.

¹¹ See footnote 4, *supra*.

¹² See footnote 4, *supra*.

Two witnesses, Theodore Arcuni and Erwin Feldman, testified on behalf of respondent. Based upon this testimony the following additional findings are made:

11. Theodore Arcuni, the brother of Joseph P. Arcuni, testified that he has been in the garment business since 1931, in the "production end" and that he "styles" respondent's line. He said that Joseph P. Arcuni, who is the president of respondent, Gladstone-Arcuni, Inc., and the sole stockholder since he bought out Mr. Gladstone several years ago, has "headed up" the company for the last 25 years (Tr. 123, *et. seq.*).

12. Theodore Arcuni testified that he came with Gladstone-Arcuni, Inc., in September 1963, after Mr. Gladstone sold his interest, and that he took over Mr. Gladstone's functions.

13. Respondent, Gladstone-Arcuni, Inc., has a stockroom and shipping point at 71 Fifth Avenue and a showroom at 1350 Broadway, both in New York, New York. The company employs Joseph P. Arcuni, its president; Theodore Arcuni, its production manager; Kenneth Kupersmidt, a sales manager; Joseph Arcuni's son, Jon, who is in sales; three girls who do filing and light bookkeeping in the uptown showroom, and between 12 and 15 traveling salesmen. The company employs an accountant on a full time basis (Tr. 175).

14. Respondent sells its garments throughout the United States. Its sales for the years 1960-1966 were:

1960	\$4,477,000
1961	\$3,699,000
1962	\$3,828,000
1963	\$3,879,000
1964	\$4,047,000
1965	\$4,219,000
1966	\$4,589,000

The company's fiscal year ends June 30 (Tr. 158-159).

15. Respondent's Exhibit 5(a)-(b) and respondent's Exhibit 7(a)-(g), which are Federal Trade Commission news releases, dated January 3, 1964, and August 12, 1965, respectively, and respondent's Exhibit 8 list the names of garment manufacturers that have signed agreements containing consent orders to cease and desist with the Federal Trade Commission. Based on his examination of these exhibits, Theodore Arcuni testified that 22 of the listed manufacturers made garments of the same general style, character and price as does Gladstone-Arcuni (Tr. 161). The 22 manufacturers named by him are:

Cay Artley
Barmon Brothers

Sy Frankl
Mayflower Dress Company

Cotton Club Frocks	Kathi Originals
House of Perfection	Smoler Brothers
Shelby Manufacturing Company	Cotton City Wash Frocks
Sorority Frocks	Audrey Lee
Wentworth Manufacturing	Diane Young
Gail Byron Frocks	Huntington Manufacturing
Boris Smoler & Sons	Leslie Fay
Sunnyvale, Inc.	Marlene Industries
Adele Fashions	T. P. Industries (Tr. 161.)

16. Although Theodore Arcuni characterized these 22 manufacturers as "competitors" of respondent, the reliable, substantial, and probative evidence in this record does not support a finding that the 22 manufacturers named above did in fact compete with respondent in 1961, 1962 and 1963, in Chicago, Illinois; Cleveland, Ohio; or Baltimore, Maryland, in the sale of respondent's garments. Mr. Arcuni has been with Gladstone-Arcuni only since September 1963, and was not and is not in the selling end of the business. As production manager, he has had no direct contact with respondent's customers (Tr. 172), and he has had no personal knowledge of any of the transactions that are set forth in findings 1-9, inclusive (Tr. 185). Therefore, he was not in a position to testify concerning respondent's practices and procedures in granting the advertising allowances that are the subject matter of this proceeding (Tr. 166, 169-172).

17. Theodore Arcuni admitted that he was not familiar with the advertising allowance practices of respondent either before or after he came with the business (Tr. 166), and his knowledge of advertising allowance practices in the industry generally is based upon "hearsay" (Tr. 166). He does not, and did not, participate in granting respondent's advertising allowances. It was Theodore Arcuni's opinion, not otherwise proven, that "five hundred or more" dress manufacturers made the same general line of dresses as respondent. (See also Mr. Feldman's similar estimate, Tr. 222.)

18. Respondent does not sell to chain stores, mail order houses, or discount houses. It sells to department stores and specialty shops.

19. Theodore Arcuni's testimony fails to support any findings of fact relevant to respondent's defenses that the public interest is not best served by a proceeding such as this one and that Gladstone-Arcuni's nonproportionalized advertising allowances, as found in paragraph four, were given to meet or match identical or similar advertising allowances by specifically identified competitors

of respondent in Chicago, Illinois; Cleveland, Ohio; and Baltimore, Maryland, during the years 1961, 1962 and 1963.

20. In addition to Theodore Arcuni, respondent's other witness, Erwin Feldman, its counsel, testified as an expert. Complaint counsel strenuously objected to Mr. Feldman's being a witness in a proceeding in which he is also the attorney.¹³ It was and is the hearing examiner's conclusion that neither party to this proceeding has been prejudiced by Mr. Erwin Feldman's being allowed to testify. Mr. Feldman was and is knowledgeable concerning the history, evolution, and trade practices of the daytime dress manufacturing industry, of which Gladstone-Arcuni is a part. But his testimony does not prove any facts that constitute a good defense to Gladstone-Arcuni's admitted unlawful advertising allowances paid to its favored customers in Chicago, Illinois; Cleveland, Ohio; and Baltimore, Maryland, during the years 1961, 1962, and 1963.

21. Respondent's two witnesses did not identify any specific manufacturer who had competed with respondent during the relevant period for the business of Carson Pirie Scott & Co. and the Wieboldt Stores, Inc., in Chicago; The May Company and Halle Brothers Company in Cleveland; and Stewart & Company and Hutzler Brothers Company in Baltimore.

22. Mr. Feldman's testimony does not support a finding that during the years 1961, 1962, and 1963, Gladstone-Arcuni's discriminatory promotional payments and advertising allowances to its six favored customers were made to meet or match identical or similar advertising allowances or promotional payments paid by any identified Gladstone-Arcuni competitor to the above-named retail establishments.

23. The testimony of respondent's two witnesses did not prove that the 22 daytime dress manufacturers, named in finding 15, *supra*, or any other specifically identified dress manufacturer, competed with Gladstone-Arcuni. The examiner does not mean that Gladstone-Arcuni did not have competition. Gladstone-Arcuni's competition has not been identified with the particularity required in *Ace Books* (p. 808, *supra*).

24. Mr. Feldman, who has practiced law in Maryland and the District of Columbia since 1927, and in New York State since 1935 (Tr. 193), has been director and counsel of the National Association of Daytime Dress Manufacturers since 1934 (Tr. 193). The

¹³ Canon 19 of the *Canons of Professional Ethics of the American Bar Association* states:

"When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client."

National Association of Daytime Dress Manufacturers has approximately 50 members¹⁴ at the present time (Tr. 244). Mr. Feldman has handled industry matters involving the litigation of textile disputes and has appeared before governmental legislative and administrative bodies in behalf of members of the industry (Tr. 194).

25. As counsel for the National Recovery Administration Code Authority of the Cotton Garment Industry, he took part in drafting the code regulations with particular reference to the cotton garment industry (Tr. 194). In 1939, he participated in the preparation of a code of fair competition "approved by the Federal Trade Commission" for the apparel trades (Tr. 195). At that time Mr. Feldman also represented the industry before the Department of Labor in connection with the establishment of minimum rates (Tr. 195). He handled disputes in the textile industry involving working conditions and inspection. He represented the industry before the War Production Board in connection with the establishment of priorities and he represented the industry before the Office of Price Administration (Tr. 196).

26. Mr. Feldman testified that he "handled labor relations extensively" (Tr. 197). He lectured as an expert for the Philadelphia Textile Institute on apparel fabrication (Tr. 197).

27. Around 1940, the press began to refer to the garments as daytime dresses rather than as "housedresses" because they were becoming better styled all the time (Tr. 203). About four or five years ago the "National Association of Housedress Manufacturers" changed its name to "National Association of Daytime Dress Manufacturers" (Tr. 198).

28. Mr. Feldman described the evolution of the daytime dress industry from the time it made only blue denim "Mother Hubbards" through the period in which it made "housedresses" (Tr. 201), and down to and including the present period in which housedresses are styled and worn for all daytime occasions (Tr. 202).

29. Cotton gradually became accepted as a fabric for high-priced garments as well as for the lower priced lines (Tr. 202). Cotton textiles and cotton mixtures have been accepted as fabric for garments of all styles, and "a banker's wife, in an ordinary middle-class town, could wear one of our dresses to the bank, to go shopping in. She could wear it to play golf in. She could wear

¹⁴ If there are, as respondent contends, over 500 daytime dress manufacturers similar to Gladstone-Arcuni (finding 17, *supra*), how valid are generalizations based upon the activities and observations of an organization comprising only 10% of that number?

it around the house. It was never worn as a matter of formal wear, in the evening; but it was during the entire day, the activities permitted the use of our articles" (Tr. 203).

30. Today, daytime dresses are worn by college girls while attending school and by many professional people while at work (Tr. 204). A majority of the daytime dresses are made of cotton (Tr. 204).

31. Housedresses were originally priced and sold by the dozen, whereas other more expensive dresses were priced by the unit (Tr. 206). Today the International Ladies Garment Workers Union makes different labor contracts for the daytime dress industry than it does for the unit price industry (Tr. 207). The manufacturing technique for the daytime dress industry was different from that of the higher priced dresses, but the daytime dress technique (*i.e.*, the sectional system)¹⁵ is now more generally used in the manufacture of higher priced dresses (Tr. 208).

32. Retail establishments that sell daytime dresses today frequently have a separate daytime dress department (Tr. 209). In some stores daytime dresses are displayed alongside other dresses in competition for the consumers' dollars (Tr. 210).

Mr. Feldman testified (Tr. 210-213):

A buyer, however, entering the store, would visit all departments, because there would be a similarity in price lines, and because the same fabrics and fibers [*sic* fibers] are used. There could be said to be very active competition between the two groups, and today they are mixed up together in some department stores entirely, you know.

There is no distinction between [a] budget and daytime dress. In other words, some stores divide their departments up by the wholesale—their retail price levels, and they put in there unit-price dresses they buy and dozen-priced dresses, depending on what relationships they have to the seller.

Now, during my upwards of thirty-some years in this industry, the problem of advertising allowances and the Robinson-Patman Act have played a great role.

In 1939, when we applied to and obtained from the Commission a code of fair trade practice regulations, there was included in there a reference to the Robinson-Patman Act, particularly in connection with advertising allowances.

The sections of the Robinson-Patman Act were spelled out by the Commission and placed into the regulations, because we—I must say flatly and for the record, without fear of any contradiction from anybody, that the practice of giving advertising allowances in the women's apparel trade, and particularly the dress industry, in all divisions—unit-priced as well as dozen-priced—was rampant.

I would say that ninety-five percent of every manufacturer who sells to

¹⁵ Each operator makes only one section of a garment, and the sections are then sewed together to form the completed dress.

department and specialty shops has granted, on one occasion or another, allowances of a non—what is the word I want to use?—a non—on a discriminatory basis, on an unregulated—

HEARING EXAMINER GROSS: In other words, the discriminatory—if I understand you, sir, what you are testifying to is that it has been a uniform practice throughout the industry, as to which you are testifying, for the manufacturers to make discriminatory advertising allowances?

THE WITNESS: Yes. In other words, they are not subject to any plan and not done on a uniform basis.

This practice was developed long before I came with the industry in 1936—1935, and it continued straight through up to the present day. The reason for it is simple.

Because everybody gave these allowances, the one who didn't give it was not likely to get the business from the one who wanted the allowance. Retailers had trained their buyers to ask for and receive the allowance, and the manufacturers gave it because they knew it was part of doing business.

The retailers' reasons were rather clear—and my information comes from dealing with retailers and serving on retail advisory committees where we discussed the question of just how far we are going to go with this allowance problem.

Indeed, I appeared in Washington, many years before the present investigation, to discuss with representatives of the Federal Trade Commission the problems arising out of the demands for these allowances from retailers and how we handled the problem, because the cost of doing business had increased to a point where the granting or giving of allowances was so substantial a part of the manufacturer's operations that, when business wasn't very good, the question of whether he made money or not depended on how much allowance he gave.

The manufacturer's reasons for giving an allowance were two-fold:

His first reason was to meet the competition of those who were giving it. His second reason was that it would increase the popularity of his own garment and increase his own sales. In a sense, he was gaining—while he was not advertising as a national advertiser would, he was nevertheless getting local acceptance of his garments.

It was for that reason that most daytime dress houses sold under brand names, so that the brand system began thirty-five to forty years ago in the daytime dress industry.

When he gave an allowance to a retailer, the retailer featured an ad in which he mentioned the brand name of the maker, and if enough ads appeared throughout the year, and enough dresses were purchased, after a period of time there was universal acceptance of that product in the community and then—to use the expression of the manufacturers—the manufacturer, in that instance, had a position which compelled the store frequently to buy his goods and continue to purchase from him on a regular basis because they had taken part in establishing his name to the local public.

33. Mr. Feldman testified (Tr. 224):

The fact remains, as an expert having been a director of this Association since 1934, I know as a matter of fact that there were virtually no plans of a *legalized* character in existence prior to the issuance of these complaints. (Italic supplied.)

34. Mr. Feldman's testimony will not support any finding that Gladstone-Arcuni's nonproportionalized promotional payments and advertising allowances to its favored customers in Chicago, Illinois; Cleveland, Ohio; and Baltimore, Maryland, during the years 1961, 1962 and 1963, were made to meet or match similar identified or identifiable payments or allowances by specifically identified competitors to the favored customers named in finding 4, pages 811-813, *supra*.

35. Counsel supporting the complaint has proven the material allegations of the complaint by a preponderance of reliable, probative, and substantial evidence in this record.

36. Respondent has failed to prove by reliable, probative, and substantial evidence in this record any facts which constitute good defenses in fact, or in law, to the facts proven by complaint counsel, and the conclusions to be drawn from said facts.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the parties to and the subject matter of this proceeding. This proceeding is in the public interest.

2. Gladstone-Arcuni, Inc., a New York corporation with its principal office and place of business at 71 Fifth Avenue, New York, New York, manufactures, distributes, and sells women's and misses daytime dresses in interstate commerce for resale at retail by department stores and specialty shops throughout the United States. It now is, and at all pertinent times has been, engaged in commerce as "commerce" is defined in the Clayton Act, as amended.

3. In the course and conduct of its business in commerce, in the cities of Chicago, Illinois; Cleveland, Ohio; and Baltimore, Maryland, during the years 1961, 1962, and 1963, respondent made nonproportionalized discriminatory advertising allowances and promotional payments to certain of its customers without making such allowances and payments available on proportionally equal terms to other customers who, in fact, competed with those customers to whom respondent had made its aforesaid payments.

4. Respondent's nonfavored customers in the cities named purchased respondent's merchandise of like grade and quality as did the favored customers at or about the same time that respondent's favored customers were receiving the promotional payments and advertising allowances set forth in finding 4, pages 811-813, *supra*.

5. During 1961, 1962, and 1963, all of respondent's favored customers competed in the cities named with respondent's non-favored customers in the resale at retail of respondent's products of like grade and quality in their respective trade areas.

6. Respondent's promotional payments and advertising allowances were not granted or offered on proportionally equal terms to all of its favored customers.

7. Respondent's discriminatory promotional payments and advertising allowances, as herein found, were not made to meet or match an identified or identifiable similar payment or allowance by an identified or identifiable manufacturer who did, in fact, compete with respondent in the cities named during the years 1961, 1962, and 1963.

8. Respondent's discriminatory promotional payments and advertising allowances, as herein found, constituted and now constitute violations of Section 2(d) of the amended Clayton Act, and should be enjoined.

ORDER

It is ordered, That respondent Gladstone-Arcuni, Inc., a corporation, its officers, directors, agents, representatives and employees, directly or through any corporate or other device, in the course and conduct of its 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 the respondent as compensation for or in consideration of 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.

OPINION OF THE COMMISSION

This matter is before the Commission on the appeal of respondent, Gladstone-Arcuni, Inc., from an initial decision of the hearing examiner holding that respondent had violated Section 2(d) of the amended Clayton Act and ordering respondent to cease and desist from the practices found to be unlawful.

Respondent does not contest the finding that it granted discriminatory advertising allowances nor does it challenge the examiner's ruling rejecting its "meeting competition" defense. It contends, however, that it would be disadvantaged by an order to cease and desist unless all other industry members are placed under a similar restriction. We have previously considered and rejected the same argument made by the same counsel in the matter of *Rabiner & Jontow, Inc.*, Docket 8629 (1966) [70 F.T.C. 638]. The argument is again rejected for the reasons given in our decision in that matter.

The hearing examiner's initial decision will be adopted as the decision of the Commission. An appropriate order will be entered.

Commissioner Elman dissented for the reasons set forth in his dissenting opinion in Docket 8629—*Rabiner & Jontow, Inc.* [70 F.T.C. 638, 690].

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission having rendered its decision denying the appeal:

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent 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 the order to cease and desist.

Commissioner Elman dissenting for the reasons set forth in his dissenting opinion in Docket 8629—*Rabiner & Jontow, Inc.* [70 F.T.C. 638, 690].