

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT

Docket 7773. Complaint, Feb. 4, 1960—Decision, July 31, 1962

Order requiring a large chain store distributor of food and other merchandise,
with more than 50 retail outlets in Maryland, Virginia, and the District

Complaint

of Columbia, to cease representing falsely in advertising, by means of comparative price claims—such as setting forth a higher “Reg. Price” or “Mfr.” or “Mfg. List” price together with a lower offered price—that the higher amounts were the usual retail prices in the trade area and that customers buying at the lower amounts were afforded savings in the amount of the difference between the two.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Giant Food, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Giant Food, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 6900 Sheriff Road, Landover, Md.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of food and other merchandise to the public.

PAR. 3. Respondent operates a chain of over 40 retail stores located in the States of Maryland and Virginia and in the District of Columbia. Most of said retail stores are designated as “Giant Food” stores, however, a number of the stores are designated as “Super Giant” stores. The “Super Giant” stores differ from the other stores operated by respondent only in size and in the proportion of non-food items carried. The “Super Giant” stores are all located in the States of Maryland and Virginia; none being located in the District of Columbia.

In the course and conduct of its business respondent now causes, and for some time last past has caused, said food and other merchandise to be shipped from its place of business located in the State of Maryland to its retail stores located in the State of Virginia and in the District of Columbia. Said retail stores are engaged in the sale of said products to purchasers located in a State other than that in which the shipments have, or had, their origin and to customers residing within the District of Columbia.

Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as “Commerce” is defined in the Federal Trade Commission Act.

Complaint

61 F.T.C.

PAR. 4. In the course of conduct of its business, and for the purpose of inducing the sale of its said products, respondent has made certain statements with respect to the pricing of said products, in advertisements in The Washington Post, The Evening Star, and The Daily News, newspapers having a wide circulation in the District of Columbia, the States of Maryland and Virginia, and the various other States of the United States. Among and typical, but not all inclusive, of said statements are the following:

- (1) Regina Twin Brush Waxer #400 Reg. Price \$66.00. Adv. Price \$35.47
- (2) Regina Electric Broom #600 Reg. Price \$49.95. Adv. Price \$25.97
- (3) Proctor Steam & Dry Iron #10010 Reg. Price \$15.95. Adv. Price \$8.47
- (4) G.E. Steam, Spray & Dry Iron #F61 Reg. Price \$21.95. Adv. Price \$12.97
- (5) Sunbeam #12 Mixmaster Less Juicer Reg. Price \$46.95. Adv. Price \$29.97
- (6) Sunbeam Large Fry Pan Reg. Price \$23.97. Adv. Price \$14.97
- (7) G. E. Spray Steam Iron—\$13.97—Mfg. List \$21.95
- (8) G.E. Automatic Toaster—\$13.27—Mfg. List—\$19.95
- (9) G.E. Portable Mixer—\$13.27—Mfg. List \$19.95
- (10) G.E. Peek-A-Brew Coffee Maker \$13.47—Mfg. List \$19.95
- (11) Regina Twin Brush Waxer—\$35.47—Mfg. List \$66.00
- (12) Regina Electric Broom—\$25.97—Mfg. List \$49.95
- (13) Regina Polisher & Floor Waxer—\$34.97—Mfg. List \$64.50
- (14) Borg Bathroom Scales—\$4.97—Mfr. List \$7.95.
- (15) Sunbeam Automatic Electric Percolator—\$18.97—Mfr. List \$27.95
- (16) Sunbeam—Medium Fry Pan—\$13.37—Mfr. List \$19.95—Large Size—\$15.97—Mfr. List \$23.95
- (17) Sunbeam Hand Mixer—\$13.97—Mfr. List \$21.00
- (18) Sunbeam Mixmaster \$24.88—Manufacturer List Price \$37.95
- (19) Sunbeam Toaster—Mfr. List \$29.95—19.97
- (20) Revere Ware Complete Selection 35% off You Buy For Cash & Save:

	Regular Price	Super Low	Giant Price
A. 1 qt. Covered Sauce Pan.....	\$5. 25		\$3. 41
A. 1½ qt. Covered Sauce Pan.....	6. 25		4. 06
A. 2 qt. Covered Sauce Pan.....	7. 50		4. 87
B. Revere Egg Poacher.....	10. 95		7. 11
C. 1½ qt. Double Boiler.....	10. 50		6. 82
C. 2 qt. Double Boiler.....	11. 75		7. 63
D. 8 in. Covered Skillet.....	7. 75		5. 03
D. 10 in. Covered Skillet.....	10. 75		6. 98
D. 12 in. Covered Skillet.....	13. 50		8. 77
E. 2½ qt. Tea Kettle.....	4. 95		3. 21
F. 6 cup Coffee Maker.....	11. 50		7. 47
F. 8 cup Coffee Maker.....	12. 50		8. 12
G. 6 qt. Dutch Oven.....	13. 95		9. 06

In other advertisements the same prices are set forth in connection with the above Revere Ware with the higher prices designated as "Mfg. List" instead of "Regular Price".

PAR. 5. Through the use of the aforesaid statements, and others similar thereto not included herein, respondent represented that:

1. The amounts designated as "Reg. Price" and "Regular Price" were the prices at which the products advertised had been sold at retail by respondent in the recent, regular course of its business.

2. The amounts designated as "Mfg. List", "Mfr. List" and "Manufacturer List Price" were the prices at which the products advertised were usually and customarily sold at retail.

3. The purchasers of the products advertised are afforded savings equal to the differences between the higher and lower prices listed in said statements.

PAR. 6. Said statements and representations were false, misleading and deceptive. In truth and in fact:

1. Said products had not been customarily and usually sold at retail by respondent in the recent, regular course of its business for the amounts set out in the advertisements as "Reg. Price" and "Regular Price".

2. The amounts designated as "Mfg. List", "Mfr. List" and "Manufacturer List Price" were, and are, substantially in excess of the prices at which said products were, and are, usually and customarily sold at retail.

3. The purchasers of said products are not afforded savings equal to the differences between the higher and lower prices listed in said statements.

PAR. 7. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as those sold by respondent.

PAR. 8. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondent from its competitors and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the injury and prejudice of the public and of respondent's competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competi-

tion, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Ames W. Williams for the Commission.

Danzansky & Dickey, by *Mr. Raymond R. Dickey*, *Mr. Bernard Gordon*, and *Mr. Robert F. Rolnick*, of Washington, D.C., for respondent.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

Giant Food, Inc., respondent, has used false, misleading and deceptive advertising in violation of the Federal Trade Commission Act, as charged in the complaint. This deception should be stopped. A cease and desist order is being issued for that purpose.

PRELIMINARY STATEMENT

The complaint, issued February 4, 1960, charges respondent Giant Food, Inc., with violating the Federal Trade Commission Act by the publication in its advertisements of Manufacturer's List Prices, or "Regular Prices" as a comparative price in close proximity to and juxtaposition to its actual sales price for housewares, electrical appliances and other merchandise in such a manner as to mislead and deceive the purchasers as to the actual savings to be made by purchasing at Giant's sales price. Respondent's answer to the complaint asserted several special affirmative defenses, any one of which, if proven, would have required the hearing examiner to dismiss the proceeding.

In formal hearings Giant presented in full all of its evidence in support of the affirmative defenses. Thereafter, the hearing examiner, on July 15, 1960, in a formal written ruling rejected and denied all such affirmative defenses. The July 15, 1960, ruling is incorporated herein by reference and made a part hereof as though fully set forth.

Giant's defense to its deceptive advertising practices is that the use of a "regular" price as a comparative price has been abandoned and the use of Manufacturer's List Prices in the advertisements are for identification purposes only, and *in fact* do not mislead the prospective purchaser. A small print disclaimer to this effect was published in some of Giant's advertisements and will be discussed later in this decision.

Counsel supporting the complaint completed his evidence in support of the case-in-chief almost a year ago. The proceeding has been protracted by two interlocutory appeals of respondent's counsel. These appeals were an asserted attempt to obtain a subpoena duces tecum

which would have permitted Giant to examine confidential business records of Woodward & Lothrop, the Hecht Company, and S. Kann Sons Co. The evidence was, for the most part, irrelevant to the chief issue in this case. After the Commission had ruled favorably on these stores' motions to quash and limit the subpoena, Giant, at a hearing on September 18, 1961, refused to take a return of the subpoenas and to examine witnesses and papers which had been brought into the hearing room in response to the subpoena.

Giant's overall tactics in this proceeding, its abuse of the subpoena power of the Commission, and attempts to obtain confidential information from its competitors to which it is not entitled require no extensive comment.

Giant has also reasserted in this proceeding a defense which it had unsuccessfully asserted on several previous occasions, and which was rejected by the Federal Trade Commission, namely that Giant is a packer under the Packers & Stockyards Act of 1921, as amended, and therefore exempt from Federal Trade Commission jurisdiction. At the time that it presented the "Packer" defense, Giant knew that the same defense had been rejected previously by the hearing examiner and the Federal Trade Commission in Docket No. 6459, *Giant Food, Inc.* Giant's subterfuge in purchasing 100 shares of Armour & Company stock to lend color to its claimed exclusion from Federal Trade Commission jurisdiction under the Packers & Stockyards Act is apparent.

The complaint alleges that Giant's use in its advertisements of "Regular" or "Manufacturer's List" prices as a basis for comparison with its actual sales price stated in such advertisements is false, misleading and deceptive under the Federal Trade Commission Act. Counsel supporting the complaint has proven the material and essential allegations thereof by a preponderance of reliable, probative and substantial evidence in this record. This decision is based upon a consideration of the whole record.

Counsel have filed proposed findings, conclusion and order in accordance with Commission rules. The findings of fact and conclusions of law stated in this opinion are based upon a consideration of the entire record including the exhibits which have been received. Any findings or conclusions proposed by the parties which are not made in the precise form in which they were proposed, or in substantially that form, hereby are rejected. The fact that no finding or conclusion in this opinion summarizes the evidence in the precise manner in which either of the parties has requested such facts to be summarized does not mean that the hearing examiner has not considered such evidence. It means merely that the examiner deems the

evidence which has been summarized in the findings of facts to be sufficiently preponderant, probative, substantial and material when viewed in the light of the relevant law to dispose of the issues. All motions made by the parties which have not heretofore been ruled upon hereby are overruled and denied. Based upon the entire record, the hearing examiner makes the following:

FINDINGS OF FACT

1. Respondent Giant Food, Inc., a Delaware corporation, with its principal office at 6900 Sheriff Road, Landover, Maryland, operates a chain of more than 50 retail grocery stores and supermarkets concentrated chiefly in the District of Columbia and in the adjoining counties in the States of Maryland and Virginia, but it has stores as far north as Baltimore, Maryland, and as far south as Richmond, Virginia. Its annual sales for the fiscal year ended April 29, 1961, were \$146,877,679. Respondent's earnings per share of common stock increased from \$1.08 for the fiscal year ending April 29, 1960 to \$1.46 for the fiscal year ending April 29, 1961.

2. Giant is principally engaged in the sale at retail of food and non-food merchandise to the consuming public in the Washington Metropolitan Area, Tidewater Virginia, southern Maryland and the Baltimore Metropolitan Area. The Washington Metropolitan Area generally means in this decision the District of Columbia, Arlington and Fairfax Counties, and Alexandria in the State of Virginia, and Montgomery and Prince Georges Counties in the State of Maryland.

3. Giant sells at retail food and food products including meat, meat food products, sausages, beef dinners, pot pies, meat loaf, dairy products (including ice cream), poultry, poultry products, including turkey and chicken dinners and turkey and chicken pot pies, eggs, and all of the other food and non-food items which are usually and customarily sold in the modern chain grocery store or supermarket in the Washington Metropolitan Area. Giant also sells at retail a variety of small durable consumer goods generically described as small housewares and electrical appliances. These include, among other things, radios, toasters, waxers, irons, ironing boards, electric mixers, pots and pans, percolators, and assorted varieties of coffee makers, brooms, skillets, electric clocks, glassware, flatware, dinnerware, and items in similar and related categories. Giant also sells other durable goods and a variety of soft goods, including men's, women's and children's clothing, household linens, cosmetics, drugs, soaps and detergents.

4. Respondent Giant is engaged in commerce as "commerce" is defined in the Federal Trade Commission Act as amended. This pro-

ceeding is in the public interest. Counsel supporting the complaint has proven all of the material and essential allegations of the complaint by a preponderance of reliable, probative and substantial evidence in this record. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding.

5. Giant maintains, and at all times relevant to this proceeding has maintained, a substantial course of trade in its products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

6. In the course and conduct of its business, and for the purpose of inducing the sale of its electrical appliances and kitchen utensils, Giant has made certain statements with respect to the pricing of said products, in advertisements in the Washington Post, the Washington Evening Star, and the Washington Daily News, newspapers having a wide interstate circulation in the Washington Metropolitan Area. Among and typical, but not all inclusive, of said statements are the following:

- (1) Proctor Steam & Dry Iron #10010 Reg. Price \$15.95. Adv. Price \$8.47
- (2) G-E Steam, Spray & Dry Iron #F61 Reg. Price \$21.95. Adv. Price \$12.97
- (3) Sunbeam #12 Mixmaster Less Juicer Reg. Price \$46.95. Adv. Price \$29.97
- (4) Sunbeam Large Fry Pan Reg. Price \$23.97. Adv. Price \$14.97
- (5) G.E Automatic Toaster \$13.27. Mfg. List \$19.95
- (6) G.E. Portable Mixer—\$13.27. Mfg. List \$19.95.
- (7) G.E. 'Peek-A-Brew' Coffee Maker \$13.47. Mfg. List \$19.95
- (8) Regina Twin Brush Waxer Adv. price \$35.47. reg. price \$66.00
- (9) Regina Electric Broom #600—24.97 Adv. price. Reg. Price \$49.95
- (10) Regina Polisher & Floor Waxer—\$34.97. Mfg. list \$64.50
- (11) Borg Bathroom Scales—\$4.97. Mfg. List \$7.95
- (12) Sunbeam Automatic Electric Percolator—\$18.97. Mfr. list \$27.95
- (13) Sunbeam Handmixer—\$13.65. mfr. list \$21.00
- (14) Sunbeam Mixmaster \$24.88—mfr. List 37.95
- (15) Sunbeam Toaster—mfr. list \$29.95. \$19.97
- (16) Revere Ware Complete Selection 35% off You Buy For Cash & Save:

	Regular Price	Super Low Price	Giant Price
A. 1 qt. Covered Sauce Pan.....	\$5.25		\$3.41
A. 1½ qt. Covered Sauce Pan.....	6.25		4.06
A. 2 qt. Covered Sauce Pan.....	7.50		4.87
B. Revere Egg Poacher.....	10.95		7.11
C. 1½ qt. Double Boiler.....	10.50		6.82
C. 2 qt. Double Boiler.....	11.75		7.63
D. 8 in. Covered Skillet.....	7.75		5.03
D. 10 in. Covered Skillet.....	10.75		6.98
D. 12 in. Covered Skillet.....	13.50		8.77
E. 2½ qt. Tea Kettle.....	4.95		3.21
F. 6 cup Coffee Maker.....	11.50		7.47
F. 8 cup Coffee Maker.....	12.50		8.12
G. 6 qt. Dutch Oven.....	13.95		9.06

In other advertisements the same prices are set forth in connection with the above Revere Ware with the higher prices designated as "Mfg. List" instead of "Regular Price."

7. In Giant's aforementioned advertisements in which it used the manufacturer's list price as a means of comparison, the following disclaimer appeared at the bottom of the ad in fine print:

The manufacturer's list prices referred to in this advertisement are inserted to assist you in identification of the products and to allow you to compare accurately the selling prices offered here and elsewhere. The use of the term "manufacturer's list" or similar terminology in our advertising is not to imply that Giant has ever sold the advertised products at such list prices or that the products are being offered for sale generally in the area at such list price. Many reputable national brand manufacturers issue to retailers, from time to time, suggested retail list prices that are intended to afford reasonable profits to all retailers based upon their traditional cost of marketing. Giant's employment of self-service, supermarket techniques enables it usually to sell below suggested list prices. Consumers, however, have come to recognize most brand merchandise by the list prices, rather than by model numbers. Consequently Giant includes these manufacturer's list prices so that you may make simple, intelligent comparisons between our selling prices and those of others.

The evidence in this record fails to prove many of the statements made by Giant in the above disclaimer. Commission witnesses testified and the examiner finds as a fact that very few if any of the persons who would read Giant's advertisements would take the trouble to, or did, read the fine print disclaimer. Moreover, there is no proof in this record that the manufacturer's list price furnished a means and was used by the purchasing public as identification of the articles offered for sale. There is consumer evidence to the contrary, *infra*. The evidence proves and the examiner finds that there are non-deceptive identification designations such as model numbers and catalog descriptions which could have been used by Giant in its advertisements. All of Giant's items of merchandise advertised in the exhibits in this record were not usually and customarily sold for the manufacturer's list price or the suggested retail price in its trade area in the recent regular course of business but were in fact sold for less than such list price.

8. Through the use of the aforesaid advertisements and others similar thereto, respondent represented, contrary to the fact, that:

(a) The amounts designated as "regular," "former" or "usual" prices were the prices at which the products advertised had been sold at retail by Giant in the recent, regular course of its business in the Washington Metropolitan Area;

(b) The amounts designated as "Mfg. List," "Mfr. Suggested List" and "Manufacturer List Price" were the prices at which the products

advertised were usually and customarily sold by other retailers in the recent, regular course of business in the trade area involved; and

(c) Giant's customers would save the difference between the sales price and the comparative price by purchasing the advertised articles from Giant in preference to any other retailer in Giant's trade area.

9. Giant's own employees have admitted the deception inherent in its challenged advertisements. At page 357 the following colloquy between counsel supporting the complaint and Mr. Will Y. Belote (a buyer for Giant) took place:

Q. I think you testified with respect to respondent's Exhibit No. 10, that the comparable value stated on there was the manufacturer's list price of those particular items?

A. I think I stated that the prices shown as comparable value and the manufacturer's—

Q. Are the same?

A. Yes, sir.

Q. Do you equate comparable value with manufacturer's prices or suggested list prices, or suggested retail list prices?

A. Well, my opinion—if that is what you are asking for—show *this type of advertising is more misleading*—.

Q. I didn't ask you that, I ask if you—

Mr. DICKEY: Just a minute. He has a right to answer that question. He asked if he equates it, and that is an opinion, and he has a right to give his answer.

HEARING EXAMINER: He may answer.

THE WITNESS: My opinion is that *this type of advertising is more misleading* than if they had put the manufacturer's suggested list. You compare with what? Comparable value. Mrs. Consumer doesn't know what comparable value is in my way of thinking.

By Mr. Williams:

Q. But your answer is that you do equate it with list price?

A. As an expert in the field, I do, yes. (*Italic supplied.*)

10. The record contains substantial evidence in the form of testimony of consumer witnesses, which is uncontradicted, to the effect that Giant's advertisements containing the manufacturer's list price of household electrical appliances placed in juxtaposition to the respondent's lower offering prices for the same merchandise, lead readers of such advertisements to believe that the higher price is the price at which the merchandise is usually and customarily sold by the respondent or others in the recent regular course of business in the trade area involved.

Witness Carroll D. Wade testified (Tr. 181 *et seq.*) with reference to an advertisement of a "toastmaster toaster, \$14.47, Manufacturer's list, \$21.00." "Well, by this I would think that you are selling it for

\$14.47 where it normally sells for \$21. That this is a bargain, it is a savings."

The witness further indicated that he had not previously noticed the disclaimer in the advertisement (CX-8). After reading the disclaimer, the witness repeated that he thought the advertisement still meant a savings between the two prices given (Tr. 192).

Donald L. Leavitt testified (Tr. 202) that the manufacturer's list price of \$64.50 appearing in CX-4 "implied the normal selling price of the article." This price appears in juxtaposition to respondent's offering price of \$34.97. Upon cross-examination, this witness stated that the disclaimer of respondent's advertisement was not the kind of thing one would notice and that its meaning was "unclear" (Tr. 210).

Mrs. Barbara Dilley (T. 216) testified that the advertisement for the Cory Jewel Knife Sharpener, \$8.97, Manufacturer's Suggested List \$19.95 (CX-8) meant that Giant sells knife sharpeners at a lower price than any other retailer would sell them. After reading Giant's disclaimer, Mrs. Dilley was of the opinion that the advertisement meant to her that other retailers sold the knife sharpeners at approximately the manufacturer's list price and Giant sold it for less than the other retailers. "But on the bottom it said that you compare Giant's prices with those of others which to me still suggests that they sell close to the manufacturer's list price but Giant still sells lower."

Mrs. Vera Davis (Tr. 237) testified that Giant's advertisement meant to her that the lower prices would be what she would pay if she went to Giant, and the manufacturer's list prices would be what she would pay if she went to other stores to buy the same article. After having been shown Giant's disclaimer at the bottom of the ad, Mrs. Davis testified (Tr. 245): "I can't answer that because I don't understand what that means." She testified on cross-examination that in her opinion Giant's disclaimer does not in any way ameliorate the deception in the advertisements.

Mrs. Mary K. Hunt testified (Tr. 250) that Giant advertisements meant to her that Giant sells the Toastmaster toaster for \$14.47 and other stores sell it for the manufacturer's list price of \$21 (CX-8).

Miss Dorothy Bonsall (Tr. 258) testified with respect to the Toastmaster toasters advertisement in CX-8 that the \$14.47 price is the sales price and that the article is supposed to sell for the \$21.00 list price. Mrs. Bonsall stated on cross-examination that she would not ordinarily, in reading Giant's ad, pay any attention to the fine print disclaimer on CX-8, and that the disclaimer was, as far as she was concerned, "double talk" (Tr. 266).

Miss Elsie Wilkerson (Tr. 269) testified with respect to CX-8 that the advertisement for the toaster for \$14 by Giant was "a great saving over the regular price that it sold for of \$21-something." Miss Wilkerson, on cross-examination, testified (Tr. 283): "Well, on an ad, if I see the two figures and it has the manufacturer's list price or suggested list price I would think that it was normally sold at that price and whatever the other figure was, the lower figure, was my saving by buying it through the Giant Food Store."

The testimony of each and all of the above witnesses makes it abundantly clear that the public was deceived by Giant advertisements into believing that the prices at which articles were sold by Giant represent a saving from the manufacturer's list price which was published in close proximity to the sales price.

Lawrence Solomon of Giant's staff, admitted (Tr. 9-17) that Giant had used the term "regular price" as a comparative price in its advertisement when in fact this was not the price at which that article had been sold by Giant in the recent, regular course of its business. Around October 1, 1959, the use of the term was abandoned. There is no evidence in this record to justify a finding that the deceptive use of the words "regular," "former" or "usual" or synonyms therefor, by Giant as a comparative price in its advertisements will not be resumed unless the practice is proscribed by a cease and desist order.

It is probable even though irrelevant, and not proven in this record, that a few retailers in Giant's trade area do and did sell the advertised articles at the manufacturer's list price. The greater weight and preponderance of the evidence is to the contrary.

11. Giant has placed in the record as exhibits certain items of housewares, electrical appliances (and sales slips therefor). A representative of Giant testified that he purchased from The B. F. Goodrich Store, 3500 North Fairfax Drive, Arlington, Virginia, and the Firestone Stores, 1100 North Highland Street, Arlington, Virginia, during the course of this proceeding such items for the prices stated opposite the item:

1-14C36 Mixer S.B.	\$46.95
1-14C35 Mixer S.B.	37.95
1-14A162 Coffee Maker S.B.	27.95
1-14A364 Fry Pan, SB Large	23.95
1-14C38 G.E. Mixer	19.95
1-14A168 G.E. Peek Brew	19.95
1-14A17 SU Beam Toaster	29.95

Giant offered this evidence to prove that it was possible to buy the articles advertised by it for the manufacturer's list price. However,

Giant's evidence does not support such finding. The best evidence would have been to produce for interrogation representatives from Goodrich and Firestone who could have testified from their own knowledge as to its sales practices and who would have been available for cross-examination.

12. Representatives for the Hecht Company, S. Kann's and Woodward & Lothrop (whom the examiner hereby finds to be competent and qualified to testify thereon) have testified, and that testimony is not contradicted, that the items advertised by Giant were not usually and customarily sold at retail in the recent, regular course of business in the trade area involved at the manufacturer's list prices advertised by Giant, but were sold for less. Allen Schweitzer, small appliance buyer for the Hecht Company, Mrs. Ethel Pillsbury, buyer of small appliances for Kann's, Maurice L. Shofnos, buyer of housewares for Kann's, Renato De Vito, electrical appliance buyer for Woodward & Lothrop, and Elmer N. Cornwell, buyer of household goods and kitchen utensils for Woodward & Lothrop, all testified to this effect. The examiner takes judicial notice of the fact and finds that Woodward & Lothrop, Hecht's, and Kann's operate in the aggregate more than 12 large modern department stores in the Washington Metropolitan Area. These stores sold at less than manufacturer's list price the same items of electrical appliances and housewares which were advertised and sold by Giant.

The merchandise here involved was not sold at the "regular" or "manufacturer's list prices" used in Giant's advertisements in the recent, regular course of business in the trade area involved either by Giant or by most of its competitors.

13. Giant acquired 100 shares of the common capital stock of Armour & Company on March 21, 1958, and continues to hold said shares. Armour & Company is a meat packer, as defined by the Packers & Stockyards Act of 1921, as amended.

There is nothing in this record to indicate that Giant operates its meat departments any differently from the manner in which other large grocery chains and supermarkets (including but not limited to Kroger, Safeway, A & P, Acme, Grand Union, Food Fair, etc.) operate their meat departments in Giant's trade area.

14. Giant has voluntarily filed with the U.S. Department of Agriculture certain forms which are prescribed by that Department for business concerns seeking to register with that Department pursuant to the Packers & Stockyards Act of 1921, as amended (7 U.S.C. 191 et seq.).

15. Giant is not a packer under the Packers & Stockyards Act of 1921, as amended, so as to be exempt from jurisdiction of the Federal Trade Commission in connection with the false, misleading and deceptive acts and practices charged against it in this complaint. (See Examiner's Ruling dated July 15, 1960, on Respondent's Special Defenses; also the Commission's Opinion in Docket No. 6459, Giant Food, Inc., which is incorporated herein by reference and specifically made a part hereof.)

16. Giant competes with many other business establishments in its trade area in the sale of durable consumer goods, small housewares and electrical appliances. Among Giant's competitors are: George's, Todd's, Western Auto, Firestone, Goodyear, Montgomery Ward, Sears Roebuck, Peoples Hardware, Kay-Frank-Ross, Hecht's (May Dept. Stores Company), Woodward & Lothrop, S. Kann & Sons Co., Lansburgh's, Dalmo's, Slattery's, Drug Fair, Peoples Drug Stores, W. Bell & Company, Fields & Company, Spiegel's. Giant also competes with wholesale distributors who retail small housewares and electrical appliances to employees of business firms through private arrangements with such firms. Giant competes with small independent neighborhood business concerns in the sale of small housewares and electrical appliances.

17. Manufacturers of durable goods, including small housewares and electrical appliances, publish documents which they distribute to customers in which they designate the price at which such manufacturers suggest that their merchandise be sold at retail. These prices are interchangeably referred to as "manufacturer's list price," "manufacturer's suggested retail price," "suggested retail price," "list price," or some abbreviations or synonyms therefor. These list prices are sometimes made known to retailers by means of catalogues, price sheets, and price lists. They are also in many instances attached by the manufacturer to the article to be sold by preticketing such article with the suggested retail price. Except in those jurisdictions in which Fair Trade laws are in effect and are enforced by the courts, the establishment and publication of a manufacturer's list price creates no legal obligation upon the retailer to sell the article at the manufacturer's suggested list price, whether that price is stated in a list, catalogue, or by preticketing.

18. The manufacturers advertised the merchandise here involved in the Washington Metropolitan Area with the manufacturer's list price stated, in publications of national circulation such as Life, McCall's, Look and The Saturday Evening Post.

19. The Electric Institute of Washington maintains a display room at Tenth & E Streets, N.W., Washington, D.C., in which many types

of electrical appliances are displayed and demonstrated to the consuming public in the Washington Metropolitan Area. The Institute is a trade association, the members of which include all segments of the electrical appliance industry, that is, manufacturers and distributors as well as retailers, Giant is not a member of the Institute. Attached to the appliances displayed at the Institute there is ordinarily a tag upon which there is inscribed, among other things, a description of the article, the model number, catalogue number, and identifying marks other than the manufacturer's list price of such article. The manufacturer's list prices shown upon the appliances displayed in the Institute are higher than the prices at which such articles are usually and customarily sold in the Washington Metropolitan Area, and the Institute does not in any way represent that the list price shown is the usual and customary retail price in the Washington Metropolitan Area.

20. Many of Giant's retail customers and many of the customers of its competitors live or work in Maryland, Virginia, or the District of Columbia but shop outside of the area in which they live or work.

21. In the conduct of its business at all times relevant to this proceeding, Giant has been in substantial competition in commerce with corporations, firms and individuals in the sale of products of the same general kind and character as those items of housewares and electrical appliances which are the subject matter of this proceeding.

22. Giant's use of false, misleading and deceptive statements and representations in its advertisements has had, and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true; and into the purchase of a substantial quantity of Giant's products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to Giant from its competitors and substantial injury has thereby been, and is being done to competition in commerce.

23. The deceptive acts and practices of Giant which are described in this opinion were, and are, prohibited by the Federal Trade Commission Act and the public interest requires that they should be proscribed by an appropriate cease and desist order.

DISCUSSION

Two separate price deceptions are involved in Giant's advertisements in this record, and they require the application, in part, of slightly differing ratio decidendi:

The words "usual," "regular," or "formerly," or even the words "our price" all imply that the price to which these words are applied is the price at which Giant usually and customarily sold the identical merchandise in the recent, regular course of its business in the trade area involved. See Commission's Opinion of January 17, 1961, in Docket No. 7657, *Arnold-Constable Corp.; Bankers Securities Corp.*, Docket No. 7039; *FTC v. Mandel Bros., Inc.*, 359 U.S. 355 (1959); *The Fair v. FTC*, 272 F. 2d 609 (C.A. 7); and *Bond Stores, Inc.*, Docket No. 6789, Commission's Opinion of January 7, 1960. The record in this case is undisputed that these words were deceptively used by Giant in the light of the relevant legal precedents. However, Giant seeks to avoid the consequences of this deceptive advertising saying, "We'll never do it again." This is characterized as a plea of abandonment. In order for such plea to be allowed, there must be evidence in the record which would support a finding that the respondent will not resume such practices at a later date. There is no evidence in this record to support such a finding and the plea of abandonment is rejected because the facts do not support such a plea, nor do the accepted legal precedents. See *Argus-Camera, Inc.*, 51 F.T.C. 405 (1954); *Dietzgen Co. v. FTC*, 142 F. 2d 321 (C.A. 7, 1944); *Firestone Tire and Rubber Co.*, Docket No. 7020; *Wildroot Co., Inc.*, 49 F.T.C. 1578 (1953); *Bell & Howell Co.*, Docket No. 6729; *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953). See also Commission's Opinion of March 9, 1961, in Docket No. 7660, *Colgate-Palmolive Co.*

A decision by another hearing examiner of this Commission on June 28, 1961, in Docket No. 8134, *George's Radio & Television Co., et al.*, concludes:

The use of a manufacturer's suggested retail price in advertising in commerce when such price is placed in juxtaposition with a lower price, constitutes an unfair or deceptive act or practice where such suggested retail price is neither the usual and customary price at which the advertiser sold in the recent regular course of business nor the usual and customary price of a fair cross section of other comparable stores in the trade area * * *.

That examiner issued a cease and desist order and the matter is now on appeal to the Commission. This examiner concurs in the ratio decidendi in the *George's* case, and adopts it legal yardsticks for measuring the deception in the use of manufacturer's list prices as a comparative price in advertising.

It is helpful to measure the deception in using manufacturer's list prices for comparison in advertising by restating certain legal shibboleths:

It is in the public interest to prevent the sales of commodities by the use of false and misleading statements and representations.¹ Capacity to deceive and not actual deception is the criteria by which practices are tested under the Federal Trade Commission Act.² To tell less than the whole truth is a well-known method of deception; and he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which it has been accomplished.³ "A statement may be deceptive even if the words may be literally or technically construed so as to not constitute a misrepresentation * * *. The buying public does not weigh each word in an advertisement or misrepresentation. It is important to ascertain the impression that is likely to be created upon the prospective purchaser."⁴ Advertisements are not to be judged by their effect upon the scientific or legal mind, which will dissect and analyze each phrase, but rather by their effect upon the average member of the public who more likely will be influenced by the impression gleaned from a first glance.⁵

There is ample testimony in this record as to the meaning of the representations in the Giant advertisements but even had there not been any such consumer testimony such omission would not materially affect the results.⁶ The law is violated if the first contact or interview is secured by deception,⁷ even though the true facts are made known to the buyer before he enters into the contract for purchase.⁸

In *Clinton Watch Co., et al. v. FTC*, 291 F. 2d 838 (June 19, 1961, C.A. 7), which was a preticketing case, the court, *inter alia*, stated:

Misrepresentation as to the retail value of merchandise by means of an attached, fictitious price and deception as to savings afforded by the purchase of the product at a substantially lower price than that indicated thereon constitute unfair methods of competition. *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F. 2d 337, 340 (7th Cir. 1960), cert. denied 364 U.S. 883; *Harsam Distributors, Inc. v. Federal Trade Commission*, 263 F. 2d 396, 397 (2d Cir. 1959).

The explosive growth of "Discount" establishments in our national business life has, along with other drastic changes in retailing methods, posed as never before the importance of maintaining truthful advertising, particularly in the area of the use of comparative prices.

¹ *Parke, Austin & Lipscomb v. FTC*, 142 F. 2d 437, citing *L. & E. Mayer Co. v. FTC*, 97 F. 2d 365, 367.

² *Goodman v. FTC*, 244 F. 2d 584, 604 (C.A. 9th 1957).

³ *P. Lorillard Co. v. FTC*, 186 F. 2d 52, 58 (C.A. 4th 1950).

⁴ *Kalwajtys v. FTC*, 237 F. 2d 654, cert. den. 352 U.S. 1025.

⁵ *Ward Laboratories, Inc., et al. v. FTC*, 276 F. 2d 952, 954 (C.A. 2d 1960).

⁶ *Charles-of-the-Ritz v. FTC*, 143 F. 2d 676 at 680.

⁷ *FTC v. Standard Education Society*, 302 U.S. 112, 25 F.T.C. 1715.

⁸ *Progress Tailoring Co., et al. v. FTC*, 153 F. 2d 103, 104, 105 (7th Cir.).

The entire thrust of the "Discount" idea is that the 180 million average Americans who buy at discount houses are getting a discount from Something. Just what is being discounted? The same legal principles which have been restated above will eventually have to be applied with meticulous care to discount house advertising if the Congressional intent with reference to deceptive practises is to be carried out. But that is not before us at this time. It serves only to emphasize the basic problems posed by the use of comparative pricing in advertising, regardless of whether the comparative prices are designated as "regular," "usual," "formerly," or manufacturer's list."

It should be further noted that there is presently pending before a hearing examiner of this Commission, Docket No. 8232, The Regina Corporation, et al., in which the companion problem is presented of whether the manufacturers who promulgate manufacturers' list prices do not furnish the means and instrumentalities by which the retailer is able to practice the deception which has been proved against Giant in this record.

The facts in this record measured against the applicable law justify the following:

CONCLUSIONS

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

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

3. Giant's advertising practices as proven in this record are false, misleading and deceptive within the intent and meaning of the Federal Trade Commission Act as amended, and ought to be proscribed.

It is ordered, That respondent, Giant Food, Inc., a Delaware corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of household electrical appliances, kitchen utensils, or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing in any manner that certain amounts are the regular and usual retail prices of merchandise when such amounts are in excess of the prices at which such merchandise has been usually and regularly sold by the respondent at retail, in the recent, regular course of its business;

(2) Representing, through the use of the words "manufacturer's list price," "suggested list price," "factory suggested retail price" or words of similar import and meaning, or in any other manner that any amount is the usual and customary retail price of merchandise, when such amount is in excess of the price at which said merchandise is usually and customarily sold in the trade area or areas where the representation is made;

(3) Representing, directly or by implication, in its advertisements, or otherwise, that any of its prospective retail customers can save the difference between respondent's stated sales price and any other price used for comparison with said sales price unless the comparative price used represents the price at which said merchandise is usually and customarily sold at retail in the trade area involved, or is the price at which respondent sold said merchandise in the recent, regular course of its business.

OPINION OF THE COMMISSION

By ELMAN, *Commissioner*:

This is an appeal from a hearing examiner's initial decision that respondent, a corporation engaged in the sale of food and other merchandise through a chain of more than 50 retail stores in Maryland, Virginia, and the District of Columbia, has violated Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. 45) by publishing advertisements setting forth comparative prices in such a way as to mislead and deceive prospective purchasers as to the savings to be made by purchasing at respondent's stated prices.

Among many other products, respondent markets a variety of electrical appliances and kitchen utensils. In advertising these products in newspapers having a wide interstate circulation in the Washington, D.C., metropolitan area, respondent has frequently compared its actual selling prices with other prices styled by the designations "Regular," "Manufacturer's List," and words of similar import. For example:

G-E Steam, Spray & Dry Iron #F61 Reg. Price \$21.95. Adv. Price \$12.97.
Sunbeam Large Fry Pan Reg. Price \$23.97. Adv. Price \$14.97
Regina Electric Broom #600—24.97 Adv. Price. Reg. Price \$49.95
G.E. Automatic Toaster \$13.27. Mfg. List \$19.95
Sunbeam Handmixer—\$13.65. mfr. list \$21.00
Regina Polisher & Floor Waxer—\$34.97. Mfg. list \$64.50

In the advertisements in which respondent used a "manufacturer's list price" as the basis for comparison, the following disclaimer appeared at the bottom of the ad in fine print:

The manufacturer's list prices referred to in this advertisement are inserted to assist you in identification of the products and to allow you to compare accurately the selling prices offered here and elsewhere. The use of the term manufacturer's list or similar terminology in our advertising is not to imply that Giant has ever sold the advertised products at such list prices or that the products are being offered for sale generally in the area at such list prices. Many reputable national brand manufacturers issue to retailers, from time to time, suggested retail list prices that are intended to afford reasonable profits to all retailers based upon their traditional costs of marketing. Giant's employment of self-service, supermarket techniques enables it usually to sell below suggested list prices. Consumers, however, have come to recognize most brand merchandise by the list prices, rather than model numbers. Consequently Giant includes these manufacturer's list prices so that you may make simple, intelligent comparisons between our selling prices and those of others.

The hearing examiner found that through the use of the advertising described above, and other similar representations, respondent had created the erroneous impression that amounts designated "regular," "former," or "usual" were prices at which respondent had sold the products in the recent, regular course of business; that amounts designated "Mfg. List," "Mfr. Suggested List," and "Manufacturer's List Price" were prices at which the products were usually and customarily sold by other retailers in the recent, regular course of business in the trade area; and that, by purchasing the advertised articles from respondent, its customers would save the difference between its current prices and the higher comparative prices. The examiner rejected respondent's claim that its lengthy disclaimer cured any tendency that its "manufacturer's list price" advertising might deceive the reader, and he denied respondent's defense of abandonment in connection with its "regular price" representations.

I.

The principal issue contested is the meaning of the term "Manufacturer's Suggested List Price" and expressions of similar import. Respondent contends that they mean simply "list price suggested by the manufacturer;" and that to interpret them, as the examiner did, to mean "usual and customary retail price" in the trade area is "a curious and absurd concept" involving revision or redefinition of "words which have a commonly accepted meaning in the English language." (Respondent's Brief, p. 3)

The Commission agrees with the examiner and adopts his finding as to what "Manufacturer's Suggested List Price" and similar expressions may be understood by many members of the public to mean. In attempting to ascertain the impression which advertising makes on the general public, the Commission does not sit in an ivory tower,

perusing dictionaries and encyclopedias for literal or technical definitions. We try to put ourselves, as much as possible, in the position of those to whom the advertising is addressed. Some may read the advertisement carefully; others may give it no more than a glance, reading as they run. More than two centuries ago Addison observed that "The great art in writing advertisements is the finding out a proper method to catch the reader's eye" (*The Tatler*, No. 224). The art may perhaps have been perfected since then, but its essence remains the same.

Accordingly, as we have recently stated, "The Commission is concerned with protecting the trusting as well as the suspicious, the casual as well as the vigilant, the naive as well as the sophisticated." *Colgate-Palmolive Co.*, Docket 7736 [59 F.T.C. 1452], decided December 29, 1961, opinion, p. 1464. The Commission may insist "upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein.'" *General Motors Corp. v. Federal Trade Commission*, 114 F. 2d 33, 36 (C.A. 2), cert. denied, 312 U.S. 682. The likely impact on those who view the advertising even casually or distracted by other activities must be taken into account. *Colgate-Palmolive Co.*, *supra*, opinion, p. 1463.

Thus it is immaterial here that, as respondent contends, the words "Manufacturer's Suggested List Price" might be taken literally as meaning that the price is merely one suggested by the manufacturer and having no relation at all to that actually charged by retailers. What matters is the meaning which that expression and others like it have to the man in the street or the housewife scanning the ads as she prepares her shopping list. For the Commission this is not a new problem. In a long series of decisions which have been incorporated in "Guides Against Deceptive Pricing," adopted October 2, 1958, we have held that the meaning which many consumers nowadays ascribe to the term "Manufacturer's Suggested List Price" and the like is that it represents the "normal," the "going," the "generally prevailing," or the "usual and customary" price at which the product is being sold in the area.¹

¹ See *National Silver Company*, 27 F.T.C. 596; *Firestone Tire & Rubber*, 33 F.T.C. 282; *Goodyear Tire and Rubber Co.*, 33 F.T.C. 298; *B. F. Goodrich Co.*, 33 F.T.C. 312; *Sears, Roebuck & Co.*, 33 F.T.C. 334; *Western Auto Supply Co.*, 33 F.T.C. 356; *Plaza Luggage & Supply Co.*, 44 F.T.C. 443; *Maxwell Distributing Co.*, 54 F.T.C. 260; *Morris Lober & Associates, Inc.*, 55 F.T.C. 209.

The principle of this line of cases was recently reaffirmed in *George's Radio and Television Co.*, Docket 8134 [60 F.T.C. 179], January 19, 1962, pp. 192, 193, in which the Commission stated:

"The representation 'Mfr's Sug. List' creates the impression that there is a usual and customary retail price for the product in the trade area, and that that price is the specified 'Mfr's Sug. List' price. The soundness of this interpretation is settled law. See

Consumers, or at least a substantial number of them, naturally and justifiably presume that a manufacturer determines a "suggested" resale price not in the abstract but on some concrete basis related to the actual conditions existing in the retail market for his product. Rightly or wrongly, many people believe that a manufacturer's "suggested list price" expresses his considered and expert judgment as to the approximate retail value of his product, a judgment which necessarily would be inexpert and unsound if it did not in fact reflect his knowledge of what the product actually and generally does sell for in the area.

Accordingly, where the advertised "manufacturer's suggested list price" is not in fact the usual or regular price generally prevailing in the area, the public may be misled. As we recently had occasion to point out in *Rayex Corporation*, Docket No. 7346 [60 F.T.C. 664], decided April 2, 1962, opinion, p. 676, "In appraising the capacity of a business practice to deceive and mislead, it is not the understanding or purpose of the manufacturer or distributor or dealer that is of critical importance; rather, it is the public impression created by that practice."

In finding a public understanding that the term "Manufacturer's Suggested List Price" reflects the usual and customary retail price in the trade area, the examiner stated that this finding rested on "substantial evidence in the form of testimony of consumer witnesses." (Initial Decision, p. 335.) If anything, the examiner has engaged in understatement. The consumer testimony supporting his conclusion is not merely "substantial;" it is overwhelming.²

Olinton Watch Co. v. Federal Trade Commission, 291 F. 2d 838 (7th Cir. 1961); *Baltimore Luggage Co. v. Federal Trade Commission*, 296 F. 2d 608 (4th Cir. 1961.)"

The position taken in *George's* was reiterated in *Rayex Corp.*, Docket 7346 [60 F.T.C. 664], April 2, 1962, and *Regina Corp.*, Docket 8323 [p. 983 herein], Oct. 11, 1962.

The Commission's authority—indeed, its responsibility—to make the factual determination of the impression on the public that advertising creates is equally well settled. See, e.g., *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F. 2d 337 (C.A. 7); *Kalwajits v. Federal Trade Commission*, 237 F. 2d 654 (C.A. 7); *Rhodes Pharmacal Co. v. Federal Trade Commission*, 208 F. 2d 382 (C.A. 7). Further, it is not necessary to prove actual deception but only tendency or capacity to deceive. E.g., *Royal Oil Corp. v. Federal Trade Commission*, 262 F. 2d 741 (C.A. 4); *Charles of the Ritz Distributing Corp. v. Federal Trade Commission*, 143 F. 2d 676 (C.A. 2).

² In referring to the consumer testimony in the record here, we do not imply that it was either necessary or desirable that such evidence be adduced. On the contrary, the Commission's determination of the meaning of expressions in advertising like "manufacturer's list price" need not be based on specific supporting evidence in each proceeding that is brought. "This is an area of administration that has evolved to a point at which the accumulated experience and knowledge of the Commission may properly be invoked in exercising its fact-finding function. * * * Further, the requirement that such proof be adduced anew in each case entails, as it did here, the introduction of an abundance of consumer testimony, needlessly delaying the progress of the proceedings and taxing the resources of respondents as well as the Commission." *Manco Watch Strap Co.*, Docket 7785 [60 F.T.C. 495], decided March 13, 1962, opinion, pp. 511, 512.

One witness, for example, was asked what the advertisement "Toaster, \$14.47, Manufacturer's list \$21.00," meant to him. He replied, "Well, by this I would think that you are selling it for \$14.47 where it normally sells for \$21. That this is a bargain, it is a savings." Another witness was questioned with reference to a comparison between respondent's price of \$34.97 for an item and a manufacturer's list price of \$64.50. He stated, "To me it implies the normal selling price of the article." Counsel asked, "What is the normal selling price of the article?" The witness answered, "Well, the manufacturer's list as stated here as \$64.50."

A secretary testified that an advertisement for the Cory knife sharpener at \$8.97 with a manufacturer's suggested list of \$19.95 meant to her "that they sell it at a lower price than any other retailing company would." Another witness, when asked about the Toastmaster toaster ad previously mentioned, testified as follows:

Q. What is your impression from those prices?

A. That \$14 or whatever it was, would be what I would pay if I went to that store.

Q. And how about the manufacturer's list?

A. Some other place.

Concerning the same toaster ad, another woman expressed the belief that the manufacturer's list price "is the price that it sold at usual stores," while "\$14.00 is the one that Giant is selling it for." Another testified, as to this ad, that the \$21.00 list price is the price "the article is supposed to sell for * * * [e]verywhere." A typist, also asked about the toaster ad, answered:

Well, if I read the ad and was interested in the Toastmaster I would have thought that \$14, whatever the figure was, was a great saving over the regular price that it sold for of \$21—something. That would have been my interpretation of the ad.

Normally I would pay \$21 or \$22—whatever it was, and I was getting it at the Giant for \$14.

It is apparent, therefore, that the hearing examiner's interpretation of the disputed language was fully justified by both the precedents and the evidence of record.

II.

We also agree with the examiner that respondent's fine-print disclaimer, quoted above, was inadequate to correct the deceptive impression that may be created by its price representations. The examiner found that "very few if any of the persons who would read Giant's advertisements would take the trouble to, or did, read the fine print disclaimer." (Initial Decision, p. 334.) This finding is supported by

consumer testimony. For example, one witness stated that the disclaimer was "not the sort of thing I would notice." He said he believed the Commission investigator wanted him "to read it much as I read any advertisement in the newspaper, and I didn't read it word for word and didn't examine the fine print." Another witness, referring to the disclaimer in an ad shown her, said she "would not go reading real small print like down in that corner there."

Nor does respondent's disclaimer have the clarifying effect claimed for it even when carefully read. One witness stated that, even as qualified by the disclaimer, respondent's use of "manufacturer's list" would indicate that a saving was being made available. Another characterized the disclaimer as "a little unclear." A third agreed with respondent's counsel that the disclaimer says that the advertisement "does not mean that Giant has sold at the manufacturer's list price nor that the manufacturer's list price is the price generally prevailing in this area," but she also stated "on the bottom it said that you can compare Giant's prices with those of others which to me still suggests that they sell close to the manufacturer's list price but Giant still sells lower." Another witness testified that she did not "understand too much what it (*i.e.*, respondent's disclaimer) meant." Still another said of the disclaimer, "it was double talk to me."

The last-mentioned characterization of the disclaimer is not surprising. One may well sympathize with its draftsman, who had a herculean if not impossible assignment set before him, comparable to drafting a brief arguing that "black" does not necessarily mean "black" and can also mean "white." The draftsman's problem, of course, arose from the fact that the Commission had already made abundantly clear its view that the term "manufacturer's list price" may popularly be understood as meaning the generally prevailing price for the product in the area, and can truthfully be used as a basis for price comparison only when it is in fact that price. It was thus essential, for the draftsman's purposes, that the disclaimer should specifically disavow any such implication. And this it does, in the middle of the paragraph:

The use of the term "manufacturer's list" or similar terminology in our advertising is not to imply that Giant has ever sold the advertised products at such list prices or that the products are being offered for sale generally in the area at such list prices.

This statement—which, taken in itself, would be a *caveat* to the careful reader that he should not use the list prices as a basis for price comparison—is sandwiched, however, between two directly contradictory assertions in the same paragraph. At the beginning the reader

is told that the manufacturer's list prices are used in the ad "to allow you to compare accurately the selling prices offered here and elsewhere," and at the end that they are included "so that you may make simple, intelligent comparisons between our selling prices and those of others."

Thus, the disclaimer is indeed a curious composition, expressing *parvum in multo*. Written in what laymen would derisively call "lawyer's English," it is inconsistent and contradictory in substance, confusing if not unintelligible. Respondent states in one breath that it does not imply that the list prices are being charged by other retailers, and in the next that it is publishing them so that readers may make simple, accurate, and intelligent comparisons between its selling prices and those of others. Small wonder, therefore, that some readers thought it "a little unclear" and "double talk."

If price comparisons are to be made in advertising a product offered for sale, protection of the consuming public requires that they be clear and honest, not rigged or couched in equivocations. It may be that where "list prices" are so used in advertising, the drafting of an effective disclaimer is not an impossible task, but its enormous, if not insuperable, difficulties are certainly manifest. For one thing, such a disclaimer would have to be so lucid, simple, understandable, and complete as to prevent the advertising from supporting two interpretations, one of which is false and hence deceptive.³ Further, if the qualifying language contradicts, rather than merely modifies, the price and savings representations made, it will fail adequately to avoid the possibility of deception.⁴ In any event, it is apparent that disclaimers such as that here cannot alleviate the misleading tendency of list-price advertising, where the "list price" is not in fact a reliable and truthful index of price comparisons.

Respondent states in its disclaimer, and argues here, that list-price advertising has utility as a means of product identification. This may be so, although to what extent is unclear from the record. But there are obviously other, readily available ways of identifying products that do not contain the same potentialities for consumer deception. For example, respondent's own advertising, quoted at the outset of this opinion, shows the high degree of specificity that can be attained through description by name and model number. Not only are there various alternatives to "list price" as means of product identification,

³ Compare, e.g., *Rhodes Pharmacal Co.*, *supra*, note 1; *Ford Motor Co. v. Federal Trade Commission*, 120 F. 2d 175 (C.A. 6), *cert. denied*, 314 U.S. 668.

⁴ Compare, e.g., *United States Navy Weekly, Inc. v. Federal Trade Commission*, 207 F. 2d 17 (C.A.D.C.); *El Moro Cigar Co. v. Federal Trade Commission*, 107 F. 2d 429 (C.A. 4); *Federal Trade Commission v. Army and Navy Trading Co.*, 88 F. 2d 776 (C.A. D.C.).

they are obviously already in extensive commercial use. In view of the serious deceptive potential of "manufacturer's list price" and similar expressions, and the apparent ease of identifying products by other, nondeceptive methods, we think protection of the public requires that respondent be remitted to the latter course.⁵

III.

Respondent points out that proof of violation of Section 5 requires not only a showing that "manufacturer's suggested list price" is understood to mean "usual and customary retail price," but also that the manufacturer's list price advertised is not the usual and customary retail price. While this is true, it does not help respondent; for the record shows a consistent disparity between respondent's advertised manufacturer's list prices and actual selling prices in the trade area.

The testimony on this point was obtained from buyers of electrical appliances and housewares for the Hecht Co., S. Kann Sons Co., and Woodward & Lothrop, Inc., three large retail sales concerns operating department stores in Washington, D.C., and branch stores in nearby suburbs. These buyers testified that it was part of their job to compare the prices of their stores with those of competitive establishments, including major department and discount stores. All considered respondent a competitor. A sample of the evidence they gave concerning their prices on items advertised by respondent appears in the table below.

Item	Hecht Co.	S. Kann Sons Co.	Woodward & Lothrop, Inc.	Price advertised as mfr's list by respondent
G.E. spray, steam and dry iron, F-61	\$14. 79	\$14. 79	\$14. 97	\$21. 95
G.E. portable mixer	15. 79	13. 49	-----	19. 95
G.E. Peek-a-Brew coffeemaker	-----	15. 99	15. 99	19. 95
Sunbeam large frypan	17. 99	15. 97	15. 97	23. 95
Sunbeam hand mixer	16. 49	14. 97	13. 49	21. 00
Sunbeam automatic electric per- colator	-----	21. 49	18. 97	27. 95
Sunbeam toaster	-----	20. 97	22. 99	29. 95
*One-quart covered saucepan	4. 09	4. 13	4. 13	5. 25
Two-quart covered saucepan	5. 87	5. 96	5. 96	7. 50
One-and-one-half quart double boiler	7. 97	8. 21	8. 21	10. 50
Eight-inch covered skillet	5. 87	5. 96	5. 96	7. 75
Ten-inch covered skillet	7. 17	8. 21	8. 21	10. 75
Egg poacher	-----	8. 63	8. 63	10. 95
Six-cup coffeemaker	-----	8. 96	8. 96	11. 50
Six-quart dutch oven	-----	10. 88	10. 88	13. 95

*This item and all following are Revere-Ware.

⁵ It should be emphasized that neither in this case nor in previous decisions (see note 1, *supra*) does the Commission hold that list-price advertising is *per se* deceptive. As is

The striking contrast between the manufacturer's list prices published by respondent and these actual prices charged by competing stores speaks for itself. However, respondent attacks the significance and validity of these figures on two grounds. It contends, first, that this evidence proves no more than that some retailers in the Washington area sold the listed items for less than the manufacturer's suggested list prices. But it is difficult to know what more Commission counsel could have proved. Certainly, he did not have the burden of showing that no retailer in the trading area sold at the list prices.⁶ Commission counsel chose instead the eminently sensible course of questioning representatives of concerns competing with respondent on a large scale. Moreover, he took care to elicit from all of the five buyer witnesses an explanation that they continually study the prices of other retailers in order to keep their prices "competitive." If the prices set forth in the table were thus deemed "competitive" by these experts in the field, it is highly unlikely that a preponderant or even substantial segment of the Washington retailing community was charging the inflated manufacturer's list prices advertised by respondent. We are satisfied from the evidence, therefore, that the manufacturer's list prices used in respondent's advertising were not the usual and customary retail prices in the trading area.

IV.

Alternatively, respondent argues that the evidence of all of the buyer witnesses should have been stricken from the record. A proper understanding of this contention requires a brief excursion into the chronology of the case.

Examination of the five buyer witnesses took place on November 8, 1960. After the first witness had testified, counsel for respondent

also true of the comparable practice of manufacturer price preticketing, its legal significance "depends on the factual setting into which it is introduced." *Rayex Corp.*, note 1, *supra*, opinion [60 F.T.C. 675]. "The danger inherent in [list-price advertising] is that, whatever other purpose it may serve, it gives many consumers the impression that the stated price is the retail price generally prevailing in the area. * * * It may be, for example, that the industry in which the practice is undertaken is characterized by price rigidity or uniformity. That is to say, all dealers of a particular product may be content to sell at the same price. If a manufacturer of such a product preticketets [or lists] it at what is in fact the uniform retail price in the area, he is not engaging in false or misleading pricing." *Id.*, p. 675.

⁶ *Cf.*, *Consumer Sales Corp. v. Federal Trade Commission*, 198 F. 2d 404 (C.A. 2) in which the court rejected respondent's argument that the Commission's case was incomplete because only fourteen housewives were called to testify although thousands of sales were made.

contended that he could not cross-examine effectively because he had not been given time to secure background information. Subject to this objection, however, he agreed to cross-examine to the extent that he was able to do so without further outside investigation. He ascertained that all of the buyer witnesses had obtained their information by reviewing company records, such as "ad books" and "order files." He therefore asked that such records be subpoenaed for use in cross-examining the witnesses. The examiner denied this request.

Subsequently, respondent submitted a written motion to the examiner, asking that the originals or copies "of all documents, books, records, memoranda or other documents in the possession, custody, or control" of the companies employing the buyer witnesses "from which may be computed the prices at which the following items (*i.e.*, those covered in their testimony) were advertised and/or sold" in their respective stores during the period November 1, 1958, to December 31, 1960, be subpoenaed. The motion was denied by an order of the hearing examiner dated February 13, 1961. However, respondent appealed this ruling to the Commission and, by order of April 20, 1961, the appeal was granted as to those records of the three department stores "which would disclose the prices at which certain merchandise had been sold by such stores."

The hearing examiner issued the subpoenas requested by respondent, but the Hecht Co. (and its parent, The May Department Stores Co.) and Woodward & Lothrop filed motions to limit them, claiming that they were in part irrelevant and unduly burdensome. The examiner granted these motions, stating that since the buyer witnesses had testified for the limited purpose of proving that the published manufacturer's list prices were higher than prices usually charged in the vicinity, respondent was entitled only to records bearing on that point.

Again respondent appealed to the Commission. By order of August 4, 1961, the appeal was denied. The order recited that "the only issue to which said records are relevant is whether specific articles of merchandise were usually and customarily sold by the [department stores] at prices less than certain amounts designated in respondent's advertising as 'Mfg. List', 'Mfr. List' and 'Manufacturer List Price,'" and the subpoenas as limited "require the production of documents disclosing the prices at which said articles of merchandise were sold by the [department stores]."

When the hearing reconvened on September 18, 1961, the three department stores had witnesses on hand to produce the material called for by the subpoenas, but counsel for respondent declined to take the return of the subpoenas on the ground that he had not been afforded adequate opportunity to cross-examine the buyer witnesses. He moved to strike the testimony of these witnesses and shortly thereafter rested his case.

The position taken by counsel for respondent had been debated at perhaps excessive length at a hearing before the examiner on June 19, 1961. Counsel for respondent repeatedly protested that he should be able to confront the buyer witnesses with their companies' records, not as witnesses of his own but as Commission witnesses whom he could cross-examine. Time and again the examiner responded by assuring counsel that it did not matter to him whose witnesses they were in form. He explained that he was interested only in determining the truth and that, to that end, he would allow counsel to employ leading questions and otherwise treat his interrogation as cross-examination. He also stated that there was no basis for counsel's concern that he would be "bound" by what the witnesses said if he called them as his own, since the case was being tried not before a jury but before an examiner whose sole interest was in an objective appraisal of the value of their testimony. These assurances were repeated at the September 18 hearing.

In summary, the matter comes down to this. When the five buyer witnesses were examined by Commission counsel, counsel for respondent argued that he needed company records to conduct adequate cross-examination. The examiner denied this request but allowed such other cross-examination as counsel wished. The record shows that, as to four of the five, counsel thereupon made full and thorough use of this opportunity. Only such light as could be provided by the department store sales records remained to be shed. Subsequently the Commission ordered the necessary records made available, but the examiner had hitherto ruled cross-examination closed. When respondent's counsel protested, the examiner explicitly offered him all the privileges of cross-examination but he refused to proceed.

We cannot escape the conclusion that respondent's objection, viewed in the context and perspective of the entire record, is an insignificant quibble over a matter not affecting substantial rights or impairing the fairness of the proceedings. Respondent was accorded the usual right of cross-examination in every respect save one, and in that respect it was accorded every right except the right to call it "cross-examination." It is perhaps difficult to see why the hearing examiner balked at using

the label "cross-examination" to describe the procedure he was allowing respondent to follow, when he was in fact withholding from it none of the substance of the right of cross-examination. But it is far more difficult to see why respondent refused to conduct such cross-examination when the opportunity to do so was made available to it in all except name. Accordingly, the contention that the testimony of the buyer witnesses should have been stricken, because respondent was denied adequate opportunity to impeach or controvert it, is insubstantial and must be rejected.

V.

Respondent argues that the Commission cannot restrict its use of "manufacturer's list price" and similar language to indicate only usual and customary price in the trading area while at the same time allowing another respondent to use "manufacturer's list price" if "it is the current list price of the manufacturer for the identical merchandise to which such price is applied." *Filderman Corp.*, Docket No. 7572 [56 F.T.C. 685], December 30, 1959, p. 688. The contention is that "The Commission's action in *Filderman* estops the Commission from entering the Examiner's order against respondent." (Respondent's Brief, p. 5.) This argument has no merit, for a number of reasons.

First, it erroneously assumes that the Commission's concern with the *Filderman* proceeding has ended. In fact, the Commission has issued another complaint (Docket No. 7878) against that firm dealing, *inter alia*, with the same problem of "manufacturer's list price" representations. Second, the gravamen of the complaint in the first *Filderman* proceeding was that the "manufacturer's list" prices published were higher than the actual list prices obtained from the manufacturers. That is not the issue in dispute here. Third, the first *Filderman* proceeding ended in a consent order. It thus lacks the precedent value of a litigated case. Fourth, respondent cannot claim to have relied to its detriment upon the Commission action in first *Filderman*, because the Commission decision was issued on December 30, 1959, and many of the advertisements here in evidence were published months before that date. Finally, even if the facts were otherwise, respondent's argument would be without basis in law. "The administrator is expected to treat experience not as a jailer but as a teacher. *Shawmut Ass'n v. Securities & Exchange Commission*, 146 F. 2d 791, 796-797. (C.A. 1). The Commission is not "bound * * * to deal with all cases at all times as it has dealt with some that seem

comparable." *Federal Communications Commission v. WOKO, Inc.*, 329 U.S. 223, 228.⁷

VI.

The hearing examiner's order also prohibits respondent from representing "that certain amounts are the regular and usual retail prices of merchandise when such amounts are in excess of the prices at which such merchandise has been usually and regularly sold by respondent at retail, in the recent, regular course of its business." (Initial Decision, p. 343). Respondent protests neither the finding that it has misused the term "regular" in the past nor the appropriateness of the form of order drafted to prevent future violations.⁸ Rather, it contends that since it has abandoned the term and promised never again to use it except in conformity with the Commission's standards, this provision of the order is not in the public interest and should not issue.

"That discontinuance of an unlawful practice, of itself, does not necessarily preclude the issuance of a cease and desist order is so well settled as to preclude further argument." *Marlene's Inc. v. Federal Trade Commission*, 216 F. 2d 556, 559 (C.A. 7). This being so, it was incumbent upon respondent to show something more. It has failed to do so. It has not, to take examples from cases cited by respondent, demonstrated that the order prohibits "practices long discontinued, and as to which there is no reason to apprehend renewal," *Federal Trade Commission v. Civil Service Training Bureau*, 79 F. 2d 113, 116 (C.A. 6), or that respondent "is no longer engaged in the industry in which the unlawful practice occurred * * *." *National Lead Co. v. Federal Trade Commission*, 227 F. 2d 825, 840 (C.A. 7).

The discontinuance relied on by respondent here did not occur until after it became aware that its use of the term "regular" was being investigated by the Commission. Moreover, we are not assured by respondent that it will never use the term again, but only that it will not use it deceptively. When the very practice that has, until recently, been pursued in an illegal manner may otherwise be freely

⁷ And see, e.g., *National Labor Relations Board v. National Container Corp.*, 211 F. 2d 525, 534 (C.A. 2); *Davis, Administrative Law Treatise*, vol. 2, pp. 526-527 (1958).

The cases cited by respondent—*United States v. Willard Tablet Co.*, 141 F. 2d 141 (C.A. 7); *George H. Lee Co. v. Federal Trade Commission*, 113 F. 2d 583 (C.A. 8); *United States v. Piuma*, 40 F. Supp. 119 (D.C.S.D. Cal.), aff'd, 126 F. 2d 601 (C.A. 9), cert. denied, 317 U.S. 637— are inapposite. All involve successive suits against the same party and are therefore concerned with the entirely different problem of *res judicata*, as to which see *Manco Watch Strap Co.*, Docket 7785 [60 F.T.C. 495], decided March 13, 1962, opinion, pp. 505-507, and authorities there cited.

⁸ See, e.g., *Bankers Securities Corp. v. Federal Trade Commission*, No. 13,538, Dec. 18, 1961 (C.A. 3), upholding an order couched in substantially similar terms.

resumed at any time, it is not only appropriate but necessary in the public interest to require by order that its future manifestations be fully in accordance with law. Finally, we note that the publication of "regular" prices in the past has been only one facet of a general comparative-price advertising program conducted by respondent. That form of advertising continues, and an order designed to prevent deception of the public involved in such a program would be inadequate and incomplete without a specific provision dealing with improper advertising of "regular" prices. Unlike the cases cited by respondent, here "no assurance is in sight that [respondent], if it could shake [the Commission's] hand from its shoulder, would not continue its former course." *Sears, Roebuck & Co. v. Federal Trade Commission*, 258 Fed. 307, 310 (C.A. 7). Respondent's plea of abandonment is thus out of place on the facts presented.⁹

VII.

Of respondent's specific exceptions to findings of the hearing examiner, only two of significance have not yet been discussed. The first is that the policy of the Commission in regard to deceptive use of manufacturer's list prices runs counter to that underlying Congressional enactment of the Automobile Information Disclosure Act (72 Stat. 325, 15 U.S.C. 1231), which requires automobile manufacturers to put stickers on new cars showing suggested retail prices. To this it is enough to answer, as the Court of Appeals for the Fourth Circuit recently did, that the indicated Act "is not a statute of general application, but applies solely and specifically to the sale of new automobiles. * * * *Baltimore Luggage Co. v. Federal Trade Commission*, 296 F. 2d 608, 611 (C.A. 4). After reviewing the pertinent legislative history, the court concluded, "It is quite obvious that the Automobile Information Disclosure Act was enacted in the effort to remedy a situation peculiar to the automobile industry brought about by wide-spread fraudulent or deceptive practices principally indulged in by retailers." (*Id.*, p. 612)

Secondly, respondent argues that it "is exempt from regulation by the Federal Trade Commission inasmuch as it is a packer as defined by the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. 181, et seq." (Respondent's Exceptions to Initial Decision, p. 5.) Respondent made the same argument in *Giant Food, Inc.*, Docket No. 6459 [58 F.T.C. 977] June 1, 1961. In two opinions canvassing the relevant ma-

⁹ To the same effect, see the Commission's recent decisions in *Art National Manufacturers Distributing Co.*, Docket No. 7286 [58 F.T.C. 719], May 10, 1961, p. 3; *Snap-On Tools Corp.*, Docket No. 7116 [59 F.T.C. 1035], Nov. 1, 1961, pp. 12-13.

Findings

61 F.T.C.

terials (Dec. 19, 1957, and Feb. 10, 1959), the Commission concluded that respondent "clearly is not a member of the industry group whose practices Congress sought to regulate" in the Packers and Stockyards Act. (Opinion of Dec. 19, 1957, 54 F.T.C. 1881, 1884.) We reaffirm that conclusion. Respondent is not exempt from Commission jurisdiction. *Giant Food, Inc. v. Federal Trade Commission*, No. 16,507 (C.A. D.C., June 14, 1962).

VIII.

Finally, respondent asserts that "The order proscribes conduct unrelated to that which the proof disclosed and to that extent is invalid." (Respondent's Brief, p. 6.) This assertion is not supported by the record. The proof shows that by the use of "regular" and similar terms respondent has misrepresented its own prior prices; that by the use of "manufacturer's list" and similar terms respondent has misrepresented the prices of others; and that by the use of these practices respondent has misrepresented to prospective purchasers the savings to be obtained by buying at respondent's advertised selling prices. These are precisely the misrepresentations prohibited by our order. A tailor-made order such as this is well within the bounds of the Commission's authority "to preclude the revival of the illegal practices," *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 430.¹⁰

For the reasons stated in this opinion, respondent's appeal is denied. The Commission is issuing its own findings as to the facts, conclusions, and order in accordance with the views set forth herein.

Commissioners Anderson and Kern concur in the result.

FINDINGS AS TO THE FACTS

1. Respondent Giant Food, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal office at 6900 Sheriff Road, Landover, Md.

2. Respondent is primarily engaged in the retail sale of food and other merchandise through a chain of more than fifty (50) retail stores concentrated chiefly in the District of Columbia and in nearby counties of the States of Maryland and Virginia, but extending as far north as Baltimore, Maryland, and as far south as Richmond, Virginia. In the course and conduct of its business, respondent maintains a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act, and is in competition in "commerce,"

¹⁰ And see, e.g., *Federal Trade Commission v. Mandel Bros., Inc.*, 359 U.S. 385, 393; *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473.

as defined in the Federal Trade Commission Act, with other firms selling similar products.

3. Included among the merchandise sold by respondent is a variety of small durable consumer goods known as housewares and electrical appliances, such as radios, toasters, waxers, irons, ironing boards, electric mixers, fry pans, percolators, coffee makers, skillets, clocks, pots and pans, and so forth. For the purpose of facilitating the sale of its housewares and electrical appliances, respondent has caused the publication in newspapers having a wide interstate circulation in the Washington, D.C., metropolitan area, of advertisements containing certain statements with respect to the pricing of its products. Among and typical, but not all inclusive, of such statements are the following:

G-E Steam, Spray & Dry Iron #F61 Reg. Price \$21.95. Adv. Price \$12.97
Sunbeam Large Fry Pan Reg. Price \$23.97. Adv. Price \$14.97
Regina Electric Broom # 600—24.97 Adv. price. Reg. price \$49.95
G.E. Automatic Toaster \$13.27. Mfg. List \$19.95
Sunbeam Handmixer—\$13.65. mfr. list 21.00
Regina Polisher & Floor Waxer—\$34.97 Mfg. list \$64.50

4. Through the use of these statements, and similar statements not here set out, respondent has created the impression that:

(a) Amounts designated by the terms "Reg. price," "Regular price," and words of similar import were the prices at which the products advertised had been sold at retail by respondent in the recent, regular course of business;

(b) Amounts designated by the terms "Mfg. List," "Mfr. List," "Manufacturer's List Price," and words of similar import were prices at which the products advertised were usually and customarily sold at retail in the recent, regular course of business in the trade area; and

(c) Purchasers of the products advertised were afforded savings amounting to the differences between the actual selling prices and the higher comparative prices set out in the advertisements.

5. In fact, the impressions created by respondent's comparative-price advertising are false, misleading and deceptive.

(a) Amounts designated by the terms "Reg. price," "Regular price," and words of similar import were not prices at which the products advertised had been sold at retail by respondent in the recent, regular course of business.

(b) Amounts designated by the terms "Mfg. List," "Mfr. List," "Manufacturer's List Price," and words of similar import were not prices at which the products advertised were usually and customarily sold at retail in the recent, regular course of business in the trade area.

(c) Purchasers of the products advertised were not afforded savings

Findings

61 F.T.C.

amounting to the differences between the actual selling prices and the higher comparative prices set out in the advertisements.

6. Respondent has offered an assurance that it will not henceforth use "Regular price" and words of similar import except in a lawful manner. Respondent did not abandon such terms until after it was aware of the investigation leading to the issuance of the complaint in this case. Further, respondent does not promise total discontinuance of regular-price advertising and it forms only one facet of its more general practice of comparative-price advertising. Respondent's assurance of discontinuance is inadequate to protect the public interest.

7. In conjunction with its advertisements containing pricing representations designated by "Mfg. List," and words of similar import, respondent publishes the following disclaimer in fine print at the bottom of each advertisement:

The manufacturer's list prices referred to in this advertisement are inserted to assist you in identification of the products and to allow you to compare accurately the selling prices offered here and elsewhere. The use of the term "manufacturer's list" or similar terminology in our advertising is not to imply that Giant has ever sold the advertised products at such list prices or that the products are being offered for sale generally in the area at such list prices. Many reputable national brand manufacturers issue to retailers, from time to time, suggested retail list prices that are intended to afford reasonable profits to all retailers based upon their traditional costs of marketing. Giant's employment of self-service, supermarket techniques enables it usually to sell below suggested list prices. Consumers, however, have come to recognize most brand merchandise by the list prices, rather than model numbers. Consequently Giant includes these manufacturer's list prices so that you may make simple, intelligent comparisons between our selling prices and those of others.

This disclaimer is inadequate to correct the misleading impression created by respondent's manufacturer's list price advertising. Many readers of the advertisements will neglect to read the disclaimer, and, among those who do read the disclaimer, many will find it unclear and confusing. Further, comparative-price advertising is not necessary to identify products advertised. Other means of nondeceptive product identification are readily available and are being used by respondent and other sellers.

8. Respondent was accorded ample opportunity in substance and effect to cross-examine witnesses offered by counsel supporting the complaint. Its failure to do so in some instances is attributable to its own choice rather than to unfairness or defect in the hearing procedure. No substantial rights have been denied respondent; nor was the proceeding in any respect unfair to it.

9. Respondent has taken steps—including voluntary registration with the United States Department of Agriculture and purchase of

one-hundred (100) shares of the capital stock of Armour & Company—intended to bring it within the Packers & Stockyards Act of 1921 (42 Stat. 159, as amended, 7 U.S.C. 181). However, respondent is not by reason of that Act exempt from the jurisdiction of the Commission.

10. In *Filderman Corp.*, Docket No. 7572 [56 F.T.C. 685], December 30, 1959, p. 688, the Commission prohibited the use of “manufacturer’s list price” unless “it is the current list price of the manufacturer for the identical merchandise to which such price is applied.” For the reasons stated in the accompanying opinion, the Commission is not estopped by the *Filderman* case to enter an order prohibiting respondent from using “manufacturer’s list price” and language of similar import except to indicate usual and customary price in the trade area.

11. Respondent’s use of false, misleading, and deceptive pricing representations in its advertisements has had, and now has, the capacity and tendency to mislead members of the purchasing public into the mistaken belief that those representations were, and are, true, and into the purchase of a substantial quantity of respondent’s products by reason of that mistaken belief. As a consequence, substantial trade in commerce has been, and is being, unfairly diverted to respondent from its competitors and substantial injury has been, and is being, done to competition in commerce.

CONCLUSIONS

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent. The aforesaid acts and practices of respondent, as herein found and as described in the accompanying opinion, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

FINAL ORDER*

It is ordered, That respondent Giant Food, Inc., a Delaware corporation, and its officers, directors, agents, representatives, and employees, directly or through any corporate or other device, in connec-

*NOTE—This order is issued subject to Section 4.22(c) of the Commission’s Rules of Practice, which provides as follows:

In any case where the Commission’s decision contemplates the entry of an order against a respondent broader in its prohibitions than those, if any, contained in the initial decision, or where the Commission’s decision differs from the initial decision in any substantial respect affecting the scope or content of the order which should properly be entered, the Commission will cause a copy of its decision, together with a proposed form of order, to be served upon all parties. Within twenty days after service upon it of the Commission’s decision and proposed order, the respondent may file with the Com-

Final Order

61 F.T.C.

tion with the offering for sale, sale, and distribution of household electrical appliances, kitchen utensils, or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Using the words "regular price," or words of similar import, to refer to any amount which is in excess of the price at which such merchandise has been usually and regularly sold by the respondent at retail in the recent, regular course of its business; or otherwise misrepresenting the respondent's usual and customary retail selling price of such merchandise;

(2) Using the words "manufacturer's list price," "suggested list price," "factory suggested retail price," or words of similar import, to refer to any amount which is in excess of the price or prices at which such merchandise is usually and customarily sold in the trade area where the representation is made; or otherwise misrepresenting the usual and customary retail selling price or prices of such merchandise in the trade area;

(3) Representing in any manner that, by purchasing any of its merchandise, customers are afforded savings amounting to the difference between respondent's stated selling price and any other price used for comparison with that selling price, unless the comparative price used represents the price at which the merchandise is usually and customarily sold at retail in the trade area involved, or is the price at which such merchandise has been usually and regularly sold by respondent at retail in the recent, regular course of its business.

It is further ordered, That respondent Giant Food, Inc., 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.

Commissioners Anderson and Kern concurring in the result.

ORDER ENTERING FINAL ORDER UNDER RULE 4.22(c)

Respondent having filed, under Rule 4.22(c) of the Commission's Rules of Practice for Adjudicative Proceedings, exceptions to the

mission its exceptions to any of the provisions of the proposed order, a statement of its reasons in support thereof, and a proposed alternative form of order appropriate to the Commission's decision. If no exceptions to the Commission's proposed order are filed within twenty days, such proposed order shall become the final order of the Commission. If exceptions to the proposed order are filed by the respondent, counsel supporting the complaint may within ten days after service of such exceptions upon him file a statement in reply thereto, supporting the proposed order. The Commission will thereafter enter its final order.

proposed order in this proceeding and a statement of its reasons in support of those exceptions; and

It appearing that respondent's exceptions and reasons in support thereof are without merit; and

It further appearing that respondent has failed to submit a proposed alternative form of order, as required by Rule 4.22(c),

It is ordered, That the proposed order issued with the decision of the Commission in this proceeding be, and it hereby is, entered and adopted as the Final Order of the Commission.

IN THE MATTER OF
ROYAL PUBLICATIONS, INC., ET AL.

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

Docket C-201. Complaint, Aug. 3, 1962—Decision, Aug. 3, 1962

Consent order requiring New York City publishers of "Cars" and "Swank" magazines and paperback books, to cease violating Sec. 2(d) of the Clayton Act by making payments—and on the basis of individual negotiation and not proportionally equal—to certain operators of chain retail outlets in railroad, airport, and bus terminals and outlets in hotels and office buildings, while not offering such allowances on proportionally equal terms to all competitors of such outlets, including drug and grocery chains and other newsstands.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Royal Publications, Inc., is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 26 West 47th Street, New York, N.Y. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including magazines under copyrighted titles including "Cars" and "Swank". Respondent's sales of publications during the calendar year 1960 exceeded three hundred fifty thousand dollars.

PAR. 2. Respondent Lancer Books, Inc., is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 26 West 47th Street, New York, N.Y. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including paperback books under copyrighted titles.

PAR. 3. Respondents Walter Zacharius, Irwin Stein and Seth J. Solomon, all individuals, are President, Vice President and Treasurer, respectively, of respondent Royal Publications, Inc., and Secretary, President and Treasurer, respectively, of respondent Lancer Books, Inc. They formulate, direct and control the acts and practices of said corporate respondents and their address is the same as that of the corporate respondents.

PAR. 4. Publications published by respondents Royal Publications, Inc., and Lancer Books, Inc., are distributed by said respondents to customers through their national distributor, Publishers Distributing Corporation, hereinafter referred to as PDC.

PDC has acted and is now acting as national distributor for the publications of several independent publishers, including respondent publishers. PDC, as national distributor of publications published by said corporate respondents and other independent publishers, has performed and is now performing various services for these publishers. Among the services performed and still being performed by PDC for the benefit of these publishers are the taking of purchase orders and the distributing, billing and collecting for such publications from customers. PDC also has negotiated various promotional and display arrangements with the retail customers of such publishers, with the knowledge and approval of such publishers, including said respondents.

In its capacity as national distributor for said respondents, in dealing with the customers of respondents, PDC served and is now serving as a conduit or intermediary for the sale, distribution and promotion of publications published by respondents.

PAR. 5. Respondent Royal Publications, Inc., and Lancer Books, Inc., through their conduit or intermediary, PDC, have sold and distributed and now sell and distribute their publications in substantial quantities in commerce, as "commerce" is defined in the Clayton Act, as amended, to competing customers located throughout various States of the United States and in the District of Columbia.

PAR. 6. In the course and conduct of their businesses in commerce, respondents Royal Publications, Inc., and Lancer Books, Inc., have paid or contracted for the payment of something of value to or for

the benefit of some of their customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of publications sold to them by respondents. Such payments or allowances were not made available on proportionally equal terms to all other customers of respondents competing in the distribution of such publications.

PAR. 7. As an example of the practices alleged herein, respondent Royal Publications, Inc., has made payments or allowances to certain retail customers who operate chain retail outlets in railroad, airport and bus terminals, as well as outlets located in hotels and office buildings. Such payments or allowances were not offered or otherwise made available on proportionally equal terms to all other customers (including drug chains, grocery chains and other newsstands) competing with the favored customers in the sale and distribution of the publications of said respondent. Among the favored customers receiving payments in 1960 which were not offered to other competing customers in connection with the purchase and sale of respondent's publications were:

Customer:	<i>Approximate Amount Received</i>
Greyhound Post Houses, Forest Park, Ill.....	\$1,030.00
ABC Vending Corp., Long Island City, N.Y.....	365.40
Fred Harvey, Chicago, Ill.....	¹ 150.30
Barkalow Bros., Omaha, Nebr.....	¹ 38.82

¹ Received in 1961.

Respondent made said payments to its favored customers on the basis of individual negotiations. Among said favored customers such payments were not made on proportionally equal terms.

As a further example of the practices alleged herein, respondent Lancer Books, Inc., has made payments or allowances to certain retail customers who operate drug chains. Such payments or allowances were not offered or otherwise made available on proportionally equal terms to all other customers (including newsstands, grocery chains and other drug chains) competing with the favored customers in the sale and distribution of the publications of respondent publisher. Among the favored customers receiving payments in 1961 which were not offered to other competing customers in connection with the purchase and sale of respondent's publications were:

Customer:	<i>Approximate Amount Received</i>
Drug Fair, Washington, D.C.....	\$501.66
Sun Ray Drug, Philadelphia, Pa.....	550.00

Decision and Order

61 F.T.C.

Respondent made said payments to its favored customers on the basis of individual negotiations.

PAR. 8. The acts and practices of respondents as alleged above are in violation of the provisions of subsection (d) of Section 2 of the Clayton Act, as amended.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of subsection (d) of Section 2 of the Clayton Act, as amended, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Royal Publications, 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 26 West 47th Street, in the city of New York, State of New York.

Respondent, Lancer Books, 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 26 West 47th Street, in the city of New York, State of New York.

Respondents, Walter Zacharius, Irwin Stein and Seth J. Solomon are officers of said corporations and their address is the same as that of said corporations.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

ORDER

It is ordered, That respondents Royal Publications, Inc., and Lancer Books, Inc., both corporations, their respective officers, and Walter

Zacharius, Irwin Stein and Seth J. Solomon, individually and as officers of said corporations, and respondents' employees, agents and representatives, directly or through any corporate or other device, in connection with the distribution, sale or offering for sale of publications including magazines and paperback books in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Paying or contracting for the payment of an allowance or anything of value to, or for the benefit of, any customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the handling, offering for sale, sale or distribution of publications including magazines and paperback books, published, sold or offered for sale by respondents unless such payment or consideration is affirmatively offered and otherwise made available on proportionally equal terms to all of their other customers competing with such favored customer in the distribution of such publications including magazines and paperback books.

The word "customer" as used above shall be deemed to mean anyone who purchases from a respondent, acting either as principal or agent, or from a distributor or wholesaler where such transaction with such purchaser is essentially a sale by such respondent, acting either as principal or agent.

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.