

affirmative defense.

It is further ordered, That the initial decision as so modified be, and it hereby is, adopted as the decision and order of the Commission.

IN THE MATTER OF
ENTERPRISE STORES, INC., ET AL.

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

Docket 8028. Complaint, June 27, 1960—Decision, Oct. 5, 1962

Order requiring the Boston operators of chains of department stores selling electrical appliances and other merchandise to the public, to cease their practice of using amounts designated as "list", "mfr's list", "orig. list", and "reg.", together with lesser amounts in their advertising, representing falsely thereby that the higher amounts were the usual retail prices in their trade areas and that the difference represented a saving to the purchaser.

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 Enterprise Stores, Inc., a Massachusetts corporation, J. M. Fields of Orlando, Inc., a Delaware corporation, J. M. Fields of Worcester, Inc., a Massachusetts corporation, J. M. Fields of Holyoke, Inc., a Massachusetts corporation, J. M. Fields of Tampa, Inc., a Delaware corporation, J. M. Fields of Hartford, Inc., a Massachusetts corporation, J. M.

Complaint

61 F.T.C.

Fields of Rochester, Inc., a Massachusetts corporation, and Frank G. Feldman, Frank M. Beckerman and Hyman S. Glass, individually and as officers of said corporations, hereinafter referred to as respondents, have 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. Respondents Enterprise Stores, Inc., J. M. Fields of Worcester, Inc., J. M. Fields of Holyoke, Inc., J. M. Fields of Hartford, Inc., and J. M. Fields of Rochester, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Massachusetts. Respondents J. M. Fields of Orlando, Inc., and J. M. Fields of Tampa, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Delaware. The corporate respondents maintain their principal office and place of business at 1050 Commonwealth Avenue, Boston, Mass.

The individual respondents Frank G. Feldman, Frank M. Beckerman and Hyman S. Glass are officers of the corporate respondents. They formulate, direct and control the acts and practices of the corporate respondents including the acts and practices hereinafter set forth. Their principal place of business is the same as that of the corporate respondent.

PAR. 2. Respondents are now and for some time last past have been engaged in operating chains of department stores and in the advertising, offering for sale, sale and distribution of electrical appliances and other merchandise to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said merchandise when sold to be shipped from their place of business in the states wherein their stores are located to purchasers thereof located in various other states of the United States and maintained, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents, for the purpose of inducing the purchase of their products, have engaged in the practice of using certain amounts designated as "list", "manufacturer's list" and "original list" together with lesser amounts in their advertising in connection with certain of their merchandise. Typical but not all inclusive of which are the following statements:

949

Complaint

The Wagner Stereo Hi-Fi

\$117

mfr's list \$199.

Admiral 21" Console TV

Reg. 529.95

\$299

Cooker Fryer

Save

12.07 6.88

list 19.95

Save 15.07 on 6 foot 7 inch

PLAYGYMS * * *

19.87

list price 34.94

RCA WHIRLPOOL WASHER

orig. list

\$259.95

\$99.

PAR. 5. Through the use in their advertising, as aforesaid, of the amounts in connection with the words "mfr's list," "orig. list," "list price" and "list" respondents represent that said amounts were and are the prices at which the merchandise referred to was usually and customarily sold in their trade area. Through the use of said amounts and lesser amounts respondents represent that the difference between the said amounts represented a savings to a purchaser from the price at which said merchandise was usually and customarily sold in said trade area.

Through the use in their advertising, as aforesaid, of various amounts in connection with the words "reg." price respondents represented that said amounts were the prices at which they usually and customarily sold the merchandise referred to in their recent regular course of business, and, through the use of said amounts and the lesser amounts, that the difference between said amounts and the lesser amounts represented savings from the price at which the merchandise referred to had been sold by respondents in the recent regular course of their business.

PAR. 6. The aforesaid statements and representations were false, misleading and deceptive. In truth and in fact, the amounts set out in connection with the words "mfr's list," "orig. list," "list price" and "list" were in excess of the prices at which the article of merchandise referred to was usually and customarily sold in respondents' trade area and the differences between such amounts and the lesser amounts did not represent savings from prices at which the merchandise had been usually and customarily sold in respondents' trade area.

Initial Decision

61 F.T.C.

The amounts set out in connection with the words "reg." price were in excess of the prices at which the articles of merchandise referred to had been sold by respondents in the recent regular course of their business and the differences between the said amount and the lesser amount did not represent savings from the prices at which the merchandise had been sold by respondents in the recent regular course of their business.

PAR. 7. In the conduct of their business at all times mentioned herein, respondents have been in substantial competition in commerce with corporations, firms and individuals in the sale of merchandise of the same general kind and nature as that sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements and representations 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 respondents' merchandise by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Mr. Harry E. Middleton, Jr., of Washington, D.C., supporting the complaint.

Nathanson & Rudofsky, Mr. Arthur D. Altman, of Boston, Mass., for respondents.

INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER

All the respondents were charged with violations of the Federal Trade Commission Act, consisting of alleged misrepresentations in connection with the offering for sale of goods sold in the stores of the corporate respondents. They answered, denying generally the allegations contained in the complaint and alleging further that advertisements such as were the subject thereof were being used by their competitors in the trade areas in which they used such advertising, and that the public had not been misled or deceived thereby.

Some time after the filing of these pleadings, an agreement was made whereby the various businesses involved in this proceeding were taken over by a purchasing corporation acting on behalf of Food Fair Stores, Inc., a company operating a chain of supermarkets along the Eastern seaboard. In connection with this transaction and as a result of it, all the corporate respondents, except Enterprise Stores, Inc. (whose name had been changed to Enterprise-J. M. Fields, Inc.), were to be liquidated and dissolved. The proceeds of the various transfers, to the extent that any were not paid over directly to the individuals interested therein, were paid to Enterprise-J. M. Fields, Inc. This was to marshal the assets until such time as they could conveniently and advantageously be reduced to cash or other distributable form for payment over to the persons entitled thereto. The process of liquidation and marshaling of assets involved changes of corporate names as follows:

Enterprise Stores, Inc., to Enterprise-J. M. Fields, Inc.

J. M. Fields of Tampa, Inc., to Walcott of Tampa, Inc.

J. M. Fields of Orlando, Inc., to Walcott of Orlando, Inc.

J. M. Fields of Worcester, Inc., to Walcott of Worcester, Inc.

J. M. Fields of Holyoke, Inc., to Walcott of Holyoke, Inc.

J. M. Fields of Rochester, Inc., to Walcott of Rochester, Inc.

J. M. Fields of Hartford, Inc., to Walcott of Hartford, Inc.

Satisfactory evidence has been filed herein showing (a) that Walcott of Orlando, Inc., and Walcott of Tampa, Inc., have been dissolved and (b) that dissolution proceedings are pending and may be completed for all other corporate respondents except Enterprise-J. M. Fields, Inc., by the time this decision is filed. If such dissolutions are not completed by then, they should be completed within a short time thereafter.

As part of the transfer, Food Fair Stores, Inc., or subsidiaries thereof, have become entitled to use the trade name "J. M. Fields" in connection with the operation of some of their stores.

A motion was filed on behalf of the corporate respondents for an order dismissing the complaint herein. Although counsel supporting the complaint originally opposed the motion, he withdrew his opposition. In view of the fact that all the corporate respondents except Enterprise-J. M. Fields, Inc., have been or are being dissolved, and Enterprise-J. M. Fields, Inc., is not engaged, and will not in the future be engaged, in the business involved in this proceeding, the motion on behalf of the corporate respondents will be granted.

The individual respondents have now withdrawn the answer filed on their behalf. This proceeding may therefore be decided on the

basis of the complaint herein insofar as such individual respondents are concerned.

The following are my

FINDINGS OF FACT

1. Respondents Frank G. Feldman, Frank M. Beckerman and Hyman S. Glass formulated, directed and controlled the acts and practices hereinafter set forth. Their principal place of business was 1050 Commonwealth Avenue, Boston, Massachusetts.

2. For some time last past they were engaged in operating chains of department stores and in advertising, offering for sale, sale and distribution of electrical appliances and other merchandise to the public.

3. In the course and conduct of their business, they caused their merchandise when sold to be shipped from their places of business in the states wherein their stores were located to purchasers thereof located in various other states of the United States and maintained, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. For the purpose of inducing the purchase of their products, they have engaged in the practice of using certain amounts designated as "list," "manufacturer's list" and "original list" together with lesser amounts in their advertising in connection with certain of their merchandise.

5. Through the use in their advertising, as aforesaid, of the amounts in connection with the words "mfr's list," "orig. list," "list price" and "list," they represented that said amounts were the prices at which the merchandise referred to was usually and customarily sold in their trade areas. Through the use of said amounts and lesser amounts they represented that the difference between the said amounts represented a savings to a purchaser from the price at which said merchandise was usually and customarily sold in said trade areas.

6. Through the use in their advertising, as aforesaid, of various amounts in connection with the words "reg.' price they represented that said amounts were the prices at which they usually and customarily sold the merchandise referred to in their recent regular course of business, and, through the use of said amounts and the lesser amounts, that the differences between said amounts and the lesser amounts represented savings from the prices at which the merchandise referred to had been sold by them in the recent regular course of their business.

7. The aforesaid statements and representations were false, misleading and deceptive. In truth and in fact, the amounts set out in con-

nection with the words "mfr's list," "orig. list," "list price" and "list" were in excess of the prices at which the articles of merchandise referred to were usually and customarily sold in their trade areas and the differences between such amounts and the lesser amounts did not represent savings from prices at which the merchandise had been usually and customarily sold in their trade areas.

8. The amounts set out in connection with the words "reg." price were in excess of prices at which the articles of merchandise referred to had been sold by them in the recent regular course of their business and the differences between the said amounts and the lesser amounts did not represent savings from the prices at which the merchandise had been sold by them in the recent regular course of their business.

9. In the conduct of their business at all times mentioned herein, they have been in substantial competition in commerce with corporations, firms and individuals in the sale of merchandise of the same general kind and nature as that sold by them.

10. The use by them of the aforesaid false, misleading and deceptive statements and representations has had, and would have, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and would be true and into the purchase of substantial quantities of their merchandise by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and would be, unfairly diverted from their competitors, and substantial injury has thereby been, and would be, done to competition in commerce.

11. The aforesaid acts and practices were and would be all to the prejudice and injury of the public and of competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

From the foregoing, the following are my

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter and of the persons of respondents.

2. This proceeding is in the public interest.

3. The use of a manufacturer's suggested retail price, so or similarly designated, in advertising in commerce when such price is placed in juxtaposition with a lower price, constitutes an unfair or deceptive act or practice when such suggested retail price is not in fact the price at which the merchandise is usually and customarily sold in the trade area. The use of such a price, or of any price, without designation,

constitutes an unfair or deceptive act or practice when such price is not the usual and customary price at which the advertiser sold in the recent regular course of business.

4. Respondents have engaged in unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act through use of such prices placed in juxtaposition in advertising with respondents' lower current prices.

5. The use of such acts and practices has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous belief that the lower prices quoted result in a saving in the purchase of the advertised articles. As a consequence, substantial commerce may be diverted from competitors and thus cause them and the public substantial injury.

It is, therefore, appropriate to enter the following

ORDER

It is ordered, That respondents, Frank G. Feldman, Frank M. Beckerman, and Hyman S. Glass, in connection with the offering for sale, sale, and distribution of any merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) Through the use of the term "Manufacturer's List" or any other term of the same import, or in any other manner, that any amount is the price of merchandise in respondents' trade areas when it is in excess of the price at which merchandise is usually and customarily sold at retail in said trade areas.

(b) That any price, when accompanied or unaccompanied by any descriptive language, was the price at which the merchandise advertised was usually and customarily sold at retail by the respondents unless such advertised merchandise was in fact usually and customarily sold at retail at such price by the respondents in the recent past.

(c) That any saving is offered in the purchase of merchandise from the respondents unless the price at which the merchandise is offered constitutes a reduction from the price at which said merchandise was usually and customarily sold by the respondents at retail or at which said merchandise was usually and customarily sold at retail in the trade area involved.

2. Misrepresenting, in any manner, the amount of savings avail-

able to purchasers of respondents' merchandise or the amount by which the prices of said merchandise have been reduced from the prices at which it is usually and customarily sold by the respondents at retail or in the trade area or areas where the representations are made.

It is further ordered, That the complaint herein against the corporate respondents, Enterprise Stores, Inc., a Massachusetts corporation, J. M. Fields of Orlando, Inc., a Delaware corporation, J. M. Fields of Worcester, Inc., a Massachusetts corporation, J. M. Fields of Holyoke, Inc., a Massachusetts corporation, J. M. Fields of Tampa, Inc., a Delaware corporation, J. M. Fields of Hartford, Inc., a Massachusetts corporation, and J. M. Fields of Rochester, Inc., a Massachusetts corporation, be, and the same hereby is, dismissed without prejudice to the right of the Commission to take such further action as may be warranted in the future.

FINAL ORDER

The Commission by its order of July 24, 1962, having placed this case on its docket for review; and

The Commission now having concluded that the initial decision of the hearing examiner is appropriate in all respects to dispose of this proceeding:

It is ordered, That the initial decision of the hearing examiner filed June 11, 1962, be, and it hereby is, adopted as the decision of the Commission.

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

By the Commission, Commissioner Kern not participating.

IN THE MATTER OF

BEECHAM PRODUCTS INC.

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

Docket C-249. Complaint, Oct. 5, 1962—Decision, Oct. 5, 1962

Consent order requiring a Clifton, N.J., distributor of its "Silvikrin" scalp