

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

IN THE MATTER OF

THE REGINA CORPORATION ET AL.

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

Docket 8323. Complaint, Mar 14, 1961—Decision, Oct. 11, 1962

Order requiring a large manufacturer of electric floor polishing machines, vacuum cleaners, and other household appliances, with headquarters in Rahway, N.J., to cease supplying its distributors and retailers with fictitious "manufacturer's list prices" or "suggested list prices", thereby represented as the usual retail prices.

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 The Regina Corporation, a corporation, and Lannon F. Mead and Robert C. Cassatt, individually and as officers of the said corporation, 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. Respondent, The Regina Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at Regina Avenue, Rahway, N.J.

Respondents Lannon F. Mead and Robert C. Cassatt are officers of the corporate respondent and as such they formulate, direct and control the acts and practices thereof, including the acts and practices hereinafter set forth. Their business address is the same as the corporate respondent.

PAR. 2. Respondents are now and for some time last past have been engaged in the business of manufacturing, selling, and distributing electric floor polishing machines and vacuum cleaners and cause such merchandise, when sold, to be transported to distributors and retailers in states other than the State of New Jersey, and maintain and at all

Complaint

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times mentioned herein have maintained a substantial course of trade in said electric floor polishing machines and vacuum cleaners, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their business, respondents are in competition, in commerce, with corporations, firms and individuals in the sale of similar items.

PAR. 4. Respondents, for the purpose of inducing the purchase of their electric floor polishing machines and vacuum cleaners, have engaged in the practice of supplying their distributors and retailers with fictitious "manufacturer's list prices" or "suggested list prices", thereby representing, directly or by implication, that such "list" prices are the usual and customary retail prices for such merchandise. In truth and in fact, such "list" prices are fictitious and are in excess of the usual and customary retail prices for said merchandise.

PAR. 5. Respondents, by the aforesaid practice, place in the hands of retailers and others the means and instrumentalities by and through which they may mislead the public as to the usual and customary retail prices for their electric floor polishing machines and vacuum cleaners.

PAR. 6. The use by the respondents 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 respondents' 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 respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 7. 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. Ames W. Williams for the Commission.

Mr. Chester Mueller, of Toms River, N.J., for respondents.

INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER

The Regina Corporation, of Rahway, New Jersey, is a large, long-established manufacturer of various electrical household appliances, including, among other things, electric floor polishing machines and

vacuum cleaners. Lannon F. Mead is its president and Robert C. Cassatt is its vice president.

In a complaint issued March 14, 1961, the Federal Trade Commission charged Regina, Mead and Cassatt with engaging in unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act. It alleged that the corporate respondent, under the direction and control of the individual respondents, supplied manufacturer's list prices or suggested list prices to distributors and retailers which were fictitious because they exceeded the usual and customary retail prices for the floor polishing machines and vacuum cleaners involved in this proceeding. In essence, the charge is that by supplying such list prices to distributors and retailers a representation is made, either directly or by implication, that such prices are the usual and customary retail prices for the goods. It is alleged further that respondents, by engaging in this practice, placed in the hands of retailers and "others" the means and instrumentalities whereby such retailers and "others" may mislead the public as to the usual and customary retail prices for the floor polishing machines and vacuum cleaners. The conclusion sought to be drawn is that such alleged false, misleading and deceptive statements, representations and practices had and have the capacity and tendency to mislead purchasers into the erroneous belief that the list prices are in fact the usual and customary retail prices, thus inducing the purchase of substantial quantities of respondents' products.

During the hearing, after hearing and interrogating Lannon F. Mead, I granted the motion to dismiss as to him in his capacity as an individual. Decision was reserved on a similar motion made on behalf of Robert C. Cassatt. Commission counsel now takes no exception to the disposition as to Mead and states that he requests no action against Cassatt in his capacity as an individual. The motion to dismiss as to Cassatt, in his capacity as an individual, is now granted. All other motions not consistent with my conclusions hereinafter set forth are denied.

Regina admits that it furnishes suggested list prices. It denies that such prices are fictitious and that the implication to be drawn therefrom is that they are the usual and customary retail prices for the goods involved. It denies also that it provides to retailers and others the means and instrumentalities whereby the public is misled as to the usual and customary retail prices.

No element of preticketing, labeling or marking is involved in this case. (E.g., cf. *The Baltimore Luggage Company*, F.T.C. Docket No. 7683, aff'd. 296 F.2d 608 (U.S.C.A., 4th Cir.), November 7, 1961.

We are confronted first with the need for determining just what is sought to be accomplished by this complaint. At the commencement of the hearing, in response to my inquiry, the Commission attorney made it clear that there is no contention here that a manufacturer, by establishing a list price or furnishing a retailer with a list price, is engaging in a wrongful practice. He went on, however, to say that if a retailer uses the list price "for purposes other than a sale at that price, why, I think that the use goes back to the manufacturer. After all, he is the one who created this and put it into circulation." This could be interpreted to mean simply that if a retailer unlawfully or deceptively uses a suggested list price supplied to him by the manufacturer, the manufacturer is responsible for that retailer's conduct. It seems to me that, in view of the manner in which this case was tried and progressed, Commission counsel really did not seek to impose such a harsh rule. It is doubtful whether wrongful use by any recipient of anything, not inherently dangerous, supplied by another person could be imputed to that other person unless other facts existed to fasten liability on such other person.

There is little doubt that mere establishment, by a manufacturer of retail selling prices for branded commodities manufactured by him, is not unlawful. Federal Trade Commission Act, Section 5(a)(2); *U.S. v. Parke, Davis and Co.*, 362 U.S. 29; *U.S. v. Colgate & Co.*, 250 U.S. 300. However, a legal practice may not be used to accomplish an illegal objective. *Opera on Tour v. Weber*, 285 N.Y. 348, 34 N.E. 2d 349, *cert. denied*, 314 U.S. 615.

The lists provided by Regina to its distributors and customers set forth in detail the various models of floor polishers and vacuum cleaners and they contain for each a suggested list price. There is also in evidence a large number of advertisements of various department stores, appliance stores and other stores in New York, Philadelphia, Newark and Boston containing the familiar format of two prices for either the floor polisher or the vacuum cleaner. In each instance are shown a price, which is called "the manufacturer's list price" or some similar term, and a lower price, which is the offering price. It is contended, in support of the complaint, that in the areas where the advertisements appear, Regina's list prices are not the actual, normal, usual retail prices, and that this comparative type of advertising falsely represents, impliedly or directly, that a purchaser, by making a purchase at the offering price, will enjoy a saving equivalent to the difference between the two prices. The evidence shows that in almost all the areas in which these advertisements are placed, the usual, normal and customary retail selling prices are considerably

below the manufacturer's list prices and are in a narrow fluctuating area above or below the offering prices. The testimony of respondents' witnesses is that generally it is the rule that Regina carpet sweepers and floor polishers are sold at prices lower than the suggested list prices. Conversely, they can be said to agree that when an appliance is sold at the list price, it is the exception to the rule.

The evidence shows further that Regina makes cooperative advertising payments to wholesalers and retailers. Advertising by a retailer which portrays a comparison between a manufacturer's list price and a lower offering price is deceptive advertising when in fact, as here, the manufacturer's suggested list price is not the actual, usual and customary retail selling price in the retailer's trade area. To the extent that Regina participated in advertising of this nature by contributing to the cost thereof, Regina is responsible equally with the retailer for the representations made.

This does not, however, dispose of all the issues in this case. The larger issue is whether Regina, merely by establishing and conveying to distributors and retailers the suggested list prices, was engaging in a deceptive practice because retailers utilized those list prices for deceptive purposes. Upon the facts of this case, giving a strict construction to Regina's knowledge of the market, this issue could be resolved with a finding that since Regina well knew that the usual selling prices for its carpet sweepers and floor polishers were less than its suggested list prices, by making such list prices available to retailers it was consciously providing a means whereby they might use them for deceptive purposes. Such a finding might justify the entry of an order banning entirely the establishment and furnishing of suggested retail selling prices for Regina's commodities.¹ If Regina's suggested list prices were extravagantly or unreasonably high to the point that the conclusion would follow that they were fixed for the purpose of deceiving the ultimate purchaser, I would not hesitate to enter an order banning that practice. This, however, is not the situation here. The undisputed evidence is to the contrary.

Since our primary objective is to stop deceptive practices, our primary assault should be at the place where such practices occur. This approach requires a broader analysis of marketing problems involving suggested retail selling prices.

Regina has never imposed "fair trade" agreements in connection with the marketing of its products in those states where such agree-

¹ Since the practice is practically universal in many businesses and the same price conditions exist generally, a precedent would be established for similar orders throughout the economy.

ments are valid. Regina does not discriminate against retailers. It sells or permits the sale of its products to all, regardless of the prices at which they sell those products.

In the appliance field, the established practice is to list-price products.

Prior to 1958, Regina published retail prices for its products in advertising placed by it. It has not done so since. It also has changed its price terminology and uses the words "suggested selling prices" or "suggested list prices." It has maintained this practice ever since even though it is aware, as noted before, that, as a rule, the suggested list price is not followed. Generally speaking, there are only isolated areas and certain so-called "class stores" where it is followed. Its experience is that a list price cannot be maintained unless the manufacturer engages in door-to-door or other direct selling to the consumer. Its suggested list prices are now uniform for all areas of the country although, for a period of four or five years after World War II, a \$5.00 differential west of the Rockies had been maintained. Its list prices do not vary from season to season or for classes of customers or channels of trade. Regina has revised its suggested list prices from time to time in order to meet competition, but by and large the prices have been kept steady because of improved methods in manufacture and reduced profits. Regina's stated policy is to keep its suggested list prices as low as possible in order to hold the market. Once Regina has determined at what suggested list price a particular model floor polisher or vacuum cleaner should be sold, it fixes its selling charge to distributors and retailers by reference to that price and making percentage allowances from it. While it would be inconvenienced if it had to change this method of pricing to retailers and distributors, it could, if it had to, determine its charges on a cost basis. Although Regina has several models of each of the products involved in this case (floor polishers and vacuum cleaners) basically the differences among them (and the list prices suggested for them) result from added parts and functions.

So much for marketing as it is related directly to Regina. There is much evidence of marketing practices and problems in general, with all of which Regina is concerned. All this evidence was presented by the respondents and their experts. It has not been rebutted and appears to be reasonable, logical and a fair portrayal. Much of it is familiar.

It is traditional in the appliance field to compute manufacturers' selling prices to distributors and dealers by discounts originating from list or suggested retail prices. A *bona fide* retail list price is deter-

mined by consumer preferences, habits and thinking and a manufacturer normally will manufacture for a conventional price bracket, giving due consideration to the characteristics of the product, its quality and the promotion necessary to create desires for it. Actual cost of manufacture is not necessarily the prime factor for determination of a retail list price. When the *bona fide* list price finally is determined, this represents the manufacturer's opinion as to value of the commodity on the retail market, conditioned by the probability that it can be sold at that price. The *bona fide* list price is intended to take care of intervening margins or markups for both the retailer and the distributor to compensate them for the services they are expected to render and to give them a reasonable profit.

A new commodity, like color television or a well-known instant camera, may be introduced to the market at a suggested list price which has no relation at all to its then actual cost of manufacture. However, in determining the price at which it is to be offered to the consumer, the manufacturer takes into consideration the development expense which was necessary before the product became marketable, its uniqueness and the fact that it is not an article of general manufacture. Here the list price performs a dual function. It enables the manufacturer to be compensated for developing the new product and it protects the consumer from paying an exorbitant price determined only by desire and scarcity. But the suggested list price for such a new commodity, once having been established, does not remain static. As the market changes, as the manufacturer recoups his development expense, as the demand increases, as he introduces newer or improved models, he will change the list price and the usual pattern is downward. This then has an additional value to the consumer. If, at first, he was entirely out of the market for that commodity, he may be informed that its price may be coming down to the point where it is within his reach or low enough to make him want to acquire it.

A reputable brand name manufacturer cannot recklessly fix retail selling prices at figures having no relation to the true value of his commodity, assuming that he observes traditional practices of pricing to retailers and distributors. If he should do this, he soon would price his commodity out of the market or lose his good reputation.

List prices serve also to prevent overcharging in times of short supply, to provide a standard for value, as a guide for trade-in purposes and as loan justifications for finance companies.

The list price method of doing business, however it may be abused and subverted to harmful practices, has become a way of life. The consumer is habituated to it and for him it provides both identification

and comparison standards among different brands of the same commodity. It is conceded and there is no doubt that there are gullible consumers who will pay the list price. This happens when it is used for the purpose of deception. I do not mean to imply that the gullible consumer should not be protected when I say that the general populace knows that a list price is only a means of identification and a starting point for value to be fixed ultimately by the forces of competition. Our duty is to protect the gullible consumer within the framework of existing and lawful practices. The action we take should be compatible.

Today's retail market is not an orderly market. Prices are not stable. Variations result mainly from competition. This is nothing new and this is good. However, different retailers have different motives and objectives and they have varying methods of operation. There are and always will be the conventional retail outlets as we knew them before the era of discount stores.² Among the current varieties are catalogue houses, mail-order houses, "I can get it for you wholesale" operators, "mark-down" (discount) appliance and general stores, closed-door, class or group stores, and stamp plans, to name a few. A list-priced brand name article, marked down, is used as a lure to get customers into a store in the hope that when there he will buy other goods bringing higher markups. Some dealers are interested only in volume, traffic and quick turnover. Some need to raise cash in a hurry. Some want to make themselves known to the area. Some dealers give only price, do not have large selections or adequate stock, provide no information or guidance, do not install, do not instruct as to use or operation, do not give credit, do not deliver, while others provide some or all of these services. Some stores are little more than barns and others are beautifully furnished and lighted. These factors matched against the demands or preferences or needs of the customer determine the actual retail prices of goods today. They have become part of the "competition" concept.

Actual prices are not always normal, usual or customary prices. There is evidence that some stores sell some appliances below cost and that limited numbers of articles are sometimes offered at drastically reduced prices during ungodly hours—24 hair clippers at \$3.69, one to a customer, from 12 p.m. to 1 a.m.; similarly, complete transistor radios from 1 a.m. to 2 p.m.; and so on all through the night until 6 a.m., when 24 of Regina's Electricbrooms were offered, one to a customer, below cost, until 7 a.m.

² I question the use of the term "discount stores" as it is used today. Once upon a time there were "discount stores" but today they might be termed more properly "competition stores."

I do not doubt that suggested list prices have some of the attributes of value assigned to them by respondents, that their abandonment could cause confusion among consumers and promote the manufacture of potentially dangerous electrical appliances put out solely to meet price situations. All this could be to the disadvantage of the honest, legitimate manufacturer and contribute to deception of the consumer.

We do not cure a bad condition by creating another, possibly worse condition. As noted before, Commission counsel says he does not contend that the establishment of list prices and the furnishing thereof to retailers are illegal. He contends, however, that remedial action must be taken against Regina, because, as I have related above, Regina furnished these list prices to retailers when it knew that they were not the usual, customary prices for the commodities in the areas involved and thereby provided the means whereby some of those retailers deceived the public as to what such prices actually were. He proposes an order which would bar Regina from "Representing, through the use of . . . [list prices] 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."

This is an impossible and undeserved burden to place upon Regina.³

The 1958 Census of Business of the Bureau of the Census, Department of Commerce, discloses that, as of June 30, 1959, the Bureau of the Budget had established 189 Standard Metropolitan Statistical Areas in the Continental United States and Hawaii, in addition to two Standard Consolidated Areas described as the Chicago, Illinois-Northwestern Indiana Standard Consolidated Area and the New York, N.Y.-Northeastern New Jersey Standard Consolidated Area. In making the census, the Bureau of the Census studied all establishments engaged in retail trade in accordance with the principles of the 1957 edition of the *Standard Industrial Classification (SIC) Manual* issued by the Bureau of the Budget. Retail trade was allocated to eight major groups and these included establishments primarily engaged in selling merchandise to personal, household and farm users. These eight groups were: SIC Major Group 52, Lumber, Building

³ Commission counsel cites, in support of his proposed order: In the Matter of *National Silver Company, et al.*, Docket No. 3162, 1938, 27 F.T.C. 596, 610; In the Matter of *The Firestone Tire & Rubber Co., et al.*, Docket No. 3983, 1941, 33 F.T.C. 282, 297; In the Matter of *The Goodyear Tire and Rubber Company, and The Goodyear Tire and Rubber Company, Inc.*, Docket No. 3984, 1941, 33 F.T.C. 298, 311; In the Matter of *B. F. Goodrich Company*, Docket No. 3985, 1941, 33 F.T.C. 312, 332; In the Matter of *Sears, Roebuck & Company*, Docket No. 4033, 1941, 33 F.T.C. 334, 354; In the Matter of *Western Auto Supply Company*, Docket No. 4054, 1941, 33 F.T.C. 356, 365. Regina has committed no acts comparable to those found in the cited cases, except as specifically mentioned.

Materials, Hardware, Farm Equipment Dealers; SIC Major Group 53, General Merchandise Group, which included department stores, limited price variety stores, general merchandise stores, dry goods stores, sewing, needlework stores and chain stores; SIC Major Group 54 included food stores; SIC Major Group 55 covered automotive dealers; SIC Major Group 56 covered apparel and accessory stores; SIC Major Group 57 covered furniture, home furnishings and equipment stores and among these were numerous types of stores which would regard vacuum cleaners and floor polishers as major items of sale, for example, furniture stores, household appliance stores and radio and television stores; SIC Major Group 58, Eating, Drinking places; SIC Major Group 59, Other Retail Stores.

One Hundred Eighty-Nine Standard Metropolitan Statistical Areas for which so many different types of retail outlets must be studied, must necessarily present an insurmountable problem to a manufacturer who might be required to compute his suggested retail selling prices according to the usual and customary prices at which they might be sold in any given area. The problem becomes more complicated by a reference to a map prepared by the Bureau of the Census showing the Standard Metropolitan Statistical Areas in the United States from which it appears that in several of the states there is no Standard Metropolitan Statistical Area.

This difficulty cannot be ignored and it is my opinion that the order thus requested would prevent and prohibit Regina from using any suggested list price except within the limitations of Colgate, 250 U.S. 300, or by resorting to fair trade contracts, where legal.

If this happened, the wrongful practice condemned by the Commission, the practice which works the deception, would not be prevented thereby. Any retailer could still engage in the self-same practice merely by changing his tune. Instead of advertising, "Manufacturer's Suggested List Price," he would advertise, "Manufacturer's Fair Trade Price in _____" or "Manufacturer's Established Price in _____."

An order which is both impossible to obey and subject to evasion by the persons primarily responsible for deception should not be entered by an administrative agency. This does not mean that the agency is thereby rendered powerless to act. I am of the opinion that appropriate remedial action can be taken which will be effective to lay the groundwork for detecting and halting deceptive practices of retailers. This can be accomplished by making it clear, and a matter of contract or voluntarily assumed obligation, that the manufacturer's

suggested list price may not be used for deceptive comparative pricing. This is the objective which I seek by the order to be set forth below.

In summary of, but not restrictive of, the record and all the foregoing, the following are my ultimate

FINDINGS OF FACT

1. Respondent, The Regina Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at Regina Avenue, Rahway, New Jersey.

2. Respondent is now and for many years has been engaged in the business of manufacturing, selling and distributing electric floor polishing machines and vacuum cleaners and causes such merchandise, when sold, to be transported to distributors and retailers in all the states of the United States, its territories and the District of Columbia. It maintains and at all times mentioned herein has maintained a substantial course of trade in electric floor polishing machines and vacuum cleaners, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. In the course and conduct of its business, respondent is in competition, in commerce, with corporations, firms and individuals in the sale of electric floor polishers and vacuum cleaners.

4. For the purpose of promoting the sale of its electric floor polishers and vacuum cleaners, as a means or method for the identification of models thereof, and to provide a base figure from which its prices to distributors and retailers are calculated, respondent is and has been engaged in the practice of supplying distributors and retailers with lists and literature (separate from and not affixed or attached to the commodities or packaging) wherein it has set forth model numbers or illustrations to which it has assigned certain figures in dollars and cents which have been described by it as "Suggested List" prices and are interchangeably referred to as "list prices," "suggested list prices," "suggested retail selling prices" or words of similar import.

5. The prices set forth in such lists and literature with rare and isolated exceptions, are not the usual and customary retail prices for said commodities; the actual, usual and customary retail prices are generally lower; and respondent is and has been aware that these are the facts.

6. The determination of the actual retail prices at which the said commodities are sold is dependent upon the nature of the retail outlet in which any particular sale is made, the location of such outlet, the manner or means whereby it may have acquired the commodities, the

services rendered or not rendered by it in connection with such sale, the motives or promotion objectives which it may have at the time of such sale, the classes or groups of customers to whom it caters, and other factors in addition to the normal pressures of competition.

7. There are many hundred, conceivably thousands of retail trade areas in the United States. In the preparation of the 1958 Census of Business, the Bureau of the Census, United States Department of Commerce, designated 189 Standard Metropolitan Statistical Areas. This number was selected for statistical purposes. There are a number of states in which no such statistical area was designated and there are, in addition, many more retail sales areas in the United States. For the purposes of the census, Standard Industrial Classifications (abbreviated SIC) were made for the retail outlets within the areas. One of these is *SIC Major Group 57* and within this major group are not only *SIC 572, Household Appliance Stores*, but also several other SIC stores, all of which customarily sell commodities such as are involved in this proceeding. Moreover, stores in other major groups also sell such commodities.

8. Respondent cannot, at any time, furnish to any person, distributor or retailer any suggested list price or suggested retail selling price for any vacuum cleaner or floor polisher manufactured by it with the assurance, regardless of care, that when such commodity is offered for retail sale, the price so designated will be the price at which it is usually and customarily sold in any trade area or areas unless respondent successfully enforces in such area or areas dealers' retail selling prices by such legal means as may be available to it or engages in illegal practices in restraint of trade.

9. If respondent were made subject to an order restraining it from furnishing or setting suggested retail selling prices unless such prices did not exceed the prices at which its commodities were usually and customarily sold in the trade area or areas where the representation is made, retailers in such area or areas would not thereby be prevented from engaging in deceptive practices related to the usual and customary retail prices of such commodities if respondent elected to avail itself of the procedures for which provision is made in subdivision (2) of part (a) of Section 5 of the Federal Trade Commission Act.

10. Not only has respondent supplied the lists and literature containing the said suggested list prices or suggested retail selling prices with knowledge that the actual, usual and customary retail prices were and are generally lower, but it has made allowances or contributions for advertising by retailers in which advertising the said prices have been used in a comparative manner for the purpose of mislead-

ing the public and prospective purchasers as to the usual and customary retail prices for such floor polishing machines and vacuum cleaners.

11. Respondent, by this practice, places in the hands of retailers and others, the means and instrumentalities by and through which they may mislead the public and prospective purchasers as to the usual and customary retail prices for its electric floor polishing machines and vacuum cleaners.

12. The unrestricted and unqualified furnishing by respondent of suggested retail selling prices and its allowances and contributions for advertising the same in the manner aforesaid have had, and now 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 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.

And, from the foregoing, I make these

CONCLUSIONS

The aforesaid acts and practices of the respondent as herein found are all to the prejudice and injury of the public and of respondent's competitors and 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.

It is my further conclusion that it is necessary and appropriate, therefore, to enter this

ORDER

It is ordered, That the respondent, The Regina Corporation, and its officers, agents, representatives and employees, directly or indirectly, or through any corporate or other device, in connection with the offering for sale, sale and distribution of electric floor polishers and vacuum cleaners, or other household appliances, or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Furnishing or supplying to any person any literature, list, schedule or material mentioning or describing any such products which contains, sets forth or states any price or statement of value purporting to be a "manufacturer's list price," "suggested list price," "suggested retail price," or words of similar meaning

unless, in connection with the furnishing or supplying thereof and clearly stated thereon, the reservation is made that the same is furnished or supplied only for the information of any recipient thereof for the purpose of identification, that nothing therein contained shall be regarded or used as an indication that it is the usual and customary retail price of the product or products to which it refers and that it is received by the recipient and by any person who may receive it from the recipient upon the express condition and understanding that nothing therein contained shall at any time be used in any manner for the purpose of representing, or in a manner tending to represent, that any such price or statement is the usual and customary retail price of any product, when it (that is, any amount mentioned in the literature, list, schedule or material) is in excess of the price at which the same is usually and customarily sold in the trade area or areas where the representation is made.

2. Furnishing to any other person, firm or corporation any benefit, payment, allowance or thing of value contributing to or aiding such person, firm or corporation in the performance of, or doing of, any act or thing interdicted by the reservation for which provision is made in Part 1 hereof.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as respects respondents Lannon F. Mead and Robert C. Cassatt, in their individual capacities, but not to the extent that they may be subject to this order as officers or agents of the corporate respondent.

OPINION OF THE COMMISSION

By MacIntyre, *Commissioner*:

The complaint herein charges respondents with violating Section 5 of the Federal Trade Commission Act, alleging in substance that respondents, by supplying their distributors and retailers with fictitious "manufacturer's list prices" or "suggested list prices", have placed in the hands of retailers and others the means and instrumentalities by and through which they may mislead the public as to the usual and customary retail prices for respondents' products.

The hearing examiner, in his initial decision filed November 16, 1961, found the charges sustained and ordered respondent Regina, and its officers, agents, representatives and employees, to cease and desist the practices he found unlawful. He dismissed the complaint as to respondents Lannon F. Mead and Robert C. Cassatt in their individual capacities, and no appeal was taken from such dismissal. His

order would prohibit, *inter alia*, the furnishing of any price literature with suggested list prices, however designated, unless "... in connection with the furnishing or supplying thereof and clearly stated thereon, the reservation is made that the same is furnished or supplied only for the information of any recipient thereof for the purpose of identification, that nothing therein contained shall be regarded or used as an indication that it is the usual and customary retail price of the product or products to which it refers and that it is received by the recipient and by any person who may receive it from the recipient upon the express condition and understanding that nothing therein contained shall at any time be used in any manner for the purpose of representing, or in a manner tending to represent, that any such price or statement is the usual and customary retail price of any product, when it (that is, any amount mentioned in the literature, list, schedule or material) is in excess of the price at which the same is usually and customarily sold in the trade area or areas where the representation is made."

Counsel supporting the complaint has appealed from the initial decision principally on the ground that the order as qualified or limited is not proper. He requests that the examiner's order be stricken and that the proposed order in his brief be substituted therefor. Respondents have not appealed; however, in answer to the appeal of counsel supporting the complaint they contend that the complaint should be dismissed because, among other things, they claim that the suggested list prices were not fictitious and that such prices served a useful purpose as a mean of identification.

The Regina Corporation (Regina), a Delaware corporation with principal offices in Rahway, New Jersey, is, and has been, engaged in the manufacture and interstate sale of electric floor polishers and vacuum cleaners. In promoting the sale of these products, Regina supplied distributors and retailers with lists and literature setting forth its models and prices. These prices were described therein with phrases such as "Suggested List", "list price", and with other phrases of similar import. These prices hereinafter will be referred to simply as "suggested list prices". In supplying these suggested list prices, respondent Regina has represented, and has placed in the hands of others the instrument with which to represent, that these prices are the usual and customary retail prices for such merchandise.

In fact, as the record clearly shows, the suggested list prices furnished by respondent Regina to retailers and others were not the usual and customary retail prices for which the commodities involved were sold in the trading areas in which such prices were furnished.

Moreover, respondent Regina, through its officers, was clearly aware that Regina products generally sold at retail for less than its suggested list prices. Included in the evidence on this point are advertisements of Regina products by retailers showing offers at less than the suggested list prices and testimony to the effect that suggested list prices are not generally followed. The record also contains stipulations between counsel as to sales of Regina products at less than suggested retail prices. Mr. Mead, president of Regina, testified that suggested list prices are not generally adhered to. The record shows that in many instances Regina's suggested list prices were substantially higher than the prices which the goods were generally sold at retail. The examiner found in part that the usual and customary retail prices of Regina products are generally lower than its suggested list prices and that Regina was aware of these facts. Respondents agree with this as well as certain other findings in the initial decision.

Misrepresentations of the usual and customary value of a product and of savings afforded by an offered sale price of such product are unfair and deceptive practices under the Federal Trade Commission Act. *Niresk Industries, Inc., et al. v. Federal Trade Commission*, 278 F. 2d 337 [6 S. & D. 727] (7th Cir. 1960); *Harsam Distributors, Inc., et al. v. Federal Trade Commission*, 263 F. 2d 396 [6 S. & D. 528] (2d Cir. 1959). In this case, Regina disseminated its suggested list prices to resellers rather than directly to the purchasing public. Regina was fully aware that these suggested list prices were not the usual and customary retail prices at which Regina products were sold in the trading areas involved. In so furnishing fictitious retail prices to resellers, Regina placed in the hands of retailers and others the means and instrumentalities by which they could mislead and deceive the purchasing public. Such a practice is a violation of the Federal Trade Commission Act. *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 483, 494 [1 S. & D. 198] (1922); *C. Howard Hunt Pen Co. v. Federal Trade Commission*, 197 F. 2d 273 [5 S. & D. 405] (3d Cir. 1952); Cf. *Clinton Watch Company, et al. v. Federal Trade Commission*, 291 F. 2d 838 [7 S. & D. 184] (7th Cir. 1961); *The Baltimore Luggage Company v. Federal Trade Commission*, 296 F. 2d 608 [7 S. & D. 251] (4th Cir. 1961).

Respondents make the contention that manufacturer's suggested list prices are desirable as a means of identification and to aid in distinguishing products. However, even if it were shown that such prices are intended for the purpose of identification, the risk of deception is still present. A dealer supplied with fictitious list prices has a handy and easy means by which he may misrepresent as

to the value of the goods. The public interest in preventing such deception clearly outweighs any possible benefit there may be in the use of these prices for identification. This contention of the respondents is rejected.

Respondents also urge that the following benefits, among others, flow from the use of list prices: (a) they discourage overcharging, (b) they give a basis for trade-in negotiations, (c) they provide a guide to financing institutions, and (d) they offer an aid to the retailer in determining product value. Respondent Regina's practice of supplying distributors and dealers with suggested retail price lists and providing therein a means, through a system of discounts, for determining the manufacturer's selling prices to distributors and dealers may be said to be of a benefit to dealers in determining their markups. However, whatever such benefits may be they cannot justify the dissemination of such suggested retail price lists known by respondents to be fictitious and which may be used in misleading and deceiving the public. Consequently, we reject contentions that any of these alleged benefits would justify our condoning respondent Regina's continuation of the practice of supplying the suggested retail price lists, through the use of which the public may be deceived.

In a further argument, respondents assert that the law recognizes the right of a manufacturer to disseminate list prices, and they cite *United States v. Colgate & Co.*, 250 U.S. 300 (1919), and *United States v. Parke, Davis & Company*, 362 U.S. 29 (1960). These cases cover the question of the limited right of a seller to refuse to sell to customers who will not resell at prices suggested by the seller. They do not authorize the dissemination of fictitious list prices. This argument is likewise rejected.

We conclude that the charges of the complaint have been sustained as to respondent Regina and that an order to cease and desist the unlawful practices should be entered, but we do not agree with the form of the order contained in the initial decision. As we construe this order, it would broadly prohibit the use of suggested list prices unless accompanied by a certain reservation statement, and it would apparently permit the furnishing of fictitious list prices when such statement is attached. It would not be an effective order. The fact that the reservation statement would accompany suggested list prices would not prevent use of such prices as a means of misrepresentation. We believe that an appropriate order should proscribe the furnishing of all suggested list prices when the respondent knows, or has reason to know, that the figures furnished are in excess of the

price or prices at which the goods are usually sold at retail in the trade areas where they are supplied.

The appeal of counsel supporting the complaint is granted to the extent indicated herein and otherwise denied. The Commission, in conformity with the views expressed in this opinion, will make its own findings of fact, conclusions and order in lieu of those contained in the initial decision. An appropriate order will be entered.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

The Federal Trade Commission issued its complaint against the above-named respondents on March 14, 1961, charging them with violation of the Federal Trade Commission Act in connection with the furnishing of price literature to distributors and retailers containing alleged fictitious "list" prices. After the filing of an answer by respondents, hearings were held before a duly designated hearing examiner of the Federal Trade Commission and testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record. In the initial decision filed November 16, 1961, the hearing examiner ordered respondent, The Regina Corporation, and its officers, agents, representatives and employees to cease and desist from the practice which he found to be in violation of the Federal Trade Commission Act. Counsel supporting the complaint appealed therefrom, challenging mainly the form of the order.

The Commission, having considered the appeal by complaint counsel, the opposition thereto by respondents and the entire record in this proceeding, and having granted in part and denied in part the appeal, and having determined that the initial decision should be vacated and set aside, now makes this its findings as to the facts, conclusions drawn therefrom and order to cease and desist, which, together with the accompanying opinion, shall be in lieu of the findings, conclusions and order contained in the initial decision.

FINDINGS AS TO THE FACTS

1. Respondent, The Regina Corporation (Regina), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at Regina Avenue, Rahway, New Jersey.

2. Respondent Regina is now and for many years has been engaged in the business of manufacturing, selling and distributing electric floor polishing machines and vacuum cleaners and causes such merchandise, when sold, to be transported to distributors and retailers in all the

states of the United States, its territories and the District of Columbia. It maintains and at all times mentioned herein has maintained a substantial course of trade in electric floor polishing machines and vacuum cleaners, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. In the course and conduct of its business, respondent Regina is in competition, in commerce, with corporations, firms and individuals in the sale of electric floor polishers and vacuum cleaners.

4. For the purpose of promoting the sale of its electric floor polishers and vacuum cleaners, respondent Regina is and has been engaged in the practice of supplying distributors and retailers with lists and literature (separate from and not affixed or attached to the commodities or packaging) wherein it has set forth model numbers or illustrations to which it has assigned certain figures in dollars and cents which have been described by it as "Suggested List" prices and are interchangeably referred to as "list prices," "suggested list prices," "suggested retail selling prices" or words of similar import.

5. In supplying these suggested list prices, respondent Regina has represented, and has placed in the hands of others the instrumentality which may be used to represent, that such prices were the usual and customary retail prices of the products mentioned in the area or areas in which the representation was made.

6. In truth and in fact the suggested list prices set forth in the lists and literature above referred to were not the usual and customary retail prices of the products mentioned in the area or areas in which the representation was made; the usual and customary prices were generally lower, and in many instances they were substantially lower. Respondent Regina was aware that the usual and customary retail prices for its products were generally lower than its suggested list prices.

7. Respondent Regina furnished its said suggested list prices to distributors and to retailers. In the period covered by the complaint it did not make any representations as to customary and usual prices directly to the purchasing public. Regina, however, placed in the hands of retailers and others the means and instrumentalities by and through which they may mislead the purchasing public as to the usual and customary prices for Regina electric floor polishing machines and vacuum cleaners.

8. The furnishing by respondent Regina of the aforesaid suggested list prices has introduced in commerce instrumentalities which have the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the representations

were true and into the purchase of substantial quantities of its products by reason of this erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce may be unfairly diverted to respondent Regina from competitors and substantial injury thereby done to competition in commerce.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents.
2. This proceeding is in the public interest.
3. The acts and practices of respondent Regina, as found herein, were and are to the prejudice and injury of the public and 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.
4. The complaint should be dismissed as to respondents Lannon F. Mead and Robert C. Cassatt in their individual capacities, but not in their capacities as officers of corporate respondent.

ORDER*

It is ordered, That the respondent, The Regina Corporation, and its officers, agents, representatives and employees, directly or indirectly, or through any corporate or other device, in connection with the offering for sale, sale and distribution of electric floor polishers and vacuum cleaners, or other household appliances, or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Supplying to, or placing in the hands of, any distributor or retailer any tabulation of figures, sales literature, price list or other material containing "manufacturer's list prices," "manufacturer's suggested list prices," "suggested list prices," or "sug-

*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 Commission 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.

gested retail prices," when said respondent knows, or has reason to know, that such figures are in excess of the price or prices at which the items of merchandise to which they refer are usually and customarily sold at retail in the trade area or trade areas where the figures are supplied.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents Lannon F. Mead and Robert C. Cassatt in their individual capacities.

It is further ordered, That respondent, The Regina Corporation, 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.

FINAL ORDER

Respondents having filed, under Section 4.22(c) of the Commission's Rules of Practice, exceptions to the proposed order in this proceeding, reasons in support thereof and a proposed alternative form of order, and counsel supporting the complaint having filed a reply opposing said exceptions; and

The Commission having determined that respondents have not given sufficient grounds for modification of the proposed order, and that said order should be entered and adopted as the Final Order of the Commission:

It is ordered, That respondents' exceptions to the proposed order be, and they hereby are, denied.

It is further ordered, That the respondent, The Regina Corporation, and its officers, agents, representatives and employees, directly or indirectly, or through any corporate or other device, in connection with the offering for sale, sale and distribution of electric floor polishers and vacuum cleaners, or other household appliances, or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Supplying to, or placing in the hands of, any distributor or retailer any tabulation of figures, sales literature, price list or other material containing "manufacturer's list prices," "manufacturer's suggested list prices," "suggested list prices," or "suggested retail prices," when said respondent knows, or has reason to know, that such figures are in excess of the price or prices at which the items of merchandise to which they refer are usually and customarily sold at retail in the trade area or trade areas where the figures are supplied.

Complaint

61 F.T.C.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents Lannon F. Mead and Robert C. Cassatt in their individual capacities.

It is further ordered, That respondent, The Regina Corporation, shall, within sixty (60) days after service upon it of this order, file with