

It is further ordered, That the complaint, insofar as it relates to individual respondents Irving H. Stolz, Seth Harrison and Frank Silver, be, and it hereby is, dismissed.

It is further ordered, That respondents 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.

IN THE MATTER OF
GIMBEL BROTHERS, INC.

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

Docket 7834. Complaint, Mar. 21, 1960—Decision, Oct. 17, 1962

Order requiring the corporate operator of 13 retail department stores in and around the cities of New York, N.Y., Philadelphia and Pittsburgh, Pa., and Milwaukee, Wis., to cease making in advertising deceptive pricing and savings claims for merchandise—including rugs, luggage, Hotpoint refrigerators, and cashmere coats—through use of such words as “comparable value”, “regularly”, “originally”, “list price” with a fictitious price figure; and to cease overstating the size of rugs offered for sale.

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 Gimbel Brothers, 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 Gimbel Brothers, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 33rd Street and Broadway in the city of New York, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of floorcoverings, luggage, household appliances, women's wearing apparel and other articles of general merchandise to the public.

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Respondent operates a number of retail department stores and specialty shops throughout the United States. One or more of such stores are located in and around the metropolitan areas of New York, New York; Philadelphia, Pennsylvania; Chicago, Illinois; Detroit, Michigan; San Francisco, California; St. Louis, Missouri, and other localities in the United States.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused its said products, when sold, to be shipped from its various places of business as aforesaid to purchasers thereof located in various other States of the United States and in the District of Columbia. Furthermore, respondent advertises its aforesaid products for sale in various newspapers having interstate circulation. Persons are thereby induced to travel from the various other states into the states in which the aforesaid stores and shops are operated and to purchase and transport, or cause to be transported the aforesaid products into the states from which such persons came. 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.

PAR. 4. In the aforesaid advertisements of said products, respondent has made numerous representations respecting the price of the said products, amount of savings and the size of the floorcoverings.

Typical and illustrative of such representations are the following:

Gimbel's new group of reversible braided rugs \$49.95 sale 9 x 12' oval rugs . . . comparable value \$69.95. (Obscurely printed in one corner of the advertisement is the following: "All sizes approximate")

Never before this low price . . . compares to 9 x 12' all wool braids selling at 197.95 all wool braided rugs sale \$79.00 big 9 x 12' size. (Very obscurely printed in one corner is the following: "All sizes approximate")

Wool-blend braided rugs! Room sizes! Regularly 89.95 9 x 12' and 8 x 10' 39.95. (Obscurely printed in one corner "all sizes approximate")

heavy wool blend oval braid rugs 9 x 12 special! or 8 x 10 \$49. (no statement at all that sizes are approximate)

Sale! Featherweight luggage . . . \$6.98 to \$15.98 . . . sold last week at Gimbels for \$9.98 to \$24.98 . . . a. 18" weekender, usually \$9.98 \$6.98 etc.

Sale! \$7.95 to \$15.95 comparable luggage is 10.98 to \$24.98 fiberglass reinforced featherweight luggage! Only at Gimbels . . . 14" train case . . . reg. \$13.98 . . . now \$9.95 etc.

Gimbels breaks the price on new 1959 Hotpoint Refrigerators . . . Sale . . . Hotpoint 14 cu. ft. Refrigerator . . . \$399 list price \$629.95 . . . Hotpoint 2-door 12 cubic foot refrigerator . . . sale \$329 list price 479.95.

Cashmere coat sale . . . value \$135 to 168 Einiger cashmere . . . \$88 reg. 135 Bernhard Altmann's cashmere . . . \$88 reg. 135 Mongolian cashmere . . . 109 reg. 165.

Wrap up in cashmere and save! Bernhard Altmann cashmere . . . sale \$88 originally \$135 . . . Mongolian cashmere . . . sale \$109 originally \$165.

PAR. 5. Through the use of the aforesaid statements, respondent has represented, directly or indirectly, that:

1. Rugs of like size, grade, quality, design and workmanship generally available for purchase at \$69.95 in the same trade area were being offered for sale by respondent at \$49.95; that rugs of like size, grade, quality, designs and workmanship generally available for purchase at \$197.95 in the same trade area were being offered for sale by respondent at \$79.00; and that rugs sold by respondent in the recent regular course of its business for \$89.95 were being offered for sale at \$39.95. In each of the aforesaid advertisements respondent further represented that said rugs were offered to the purchasers at substantial savings from such prices.

2. Respondent sold certain of said luggage in the recent regular course of its business at the higher amounts stated; that certain of said luggage was of a grade, quality, design and workmanship equal to that of higher priced luggage and that said luggage was offered to purchasers at a substantial savings from said higher prices.

3. The higher price amounts stated for the said refrigerators is the usual and customary retail price of the said refrigerators in the New York trade area and that a reduction in price with a consequent saving to the purchaser has been made by respondent.

4. Said women's coats were offered for sale by respondent in the recent regular course of its business at the higher price amounts and that reduction from respondent's higher prices had been made with consequent savings to the purchaser.

5. The size of said rugs was actually 9 x 12', 8 x 10' and other stated sizes with only minor variations resulting from uncontrollable factors in the manufacturing processes.

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

1. Said rugs were not of a size, grade, quality, design and workmanship equal to rugs selling at the higher prices of \$69.95 or \$197.95; respondent has not offered said rugs for sale in the recent normal course of its business at \$89.95. The prices at which respondent offered said rugs for sale were its usual and regular retail selling prices for such rugs and no savings were afforded to the purchasers thereof.

2. Said luggage has not been offered for sale by respondent in the recent normal course of its business at the higher stated amounts; said luggage was not of a grade, quality, design and workmanship equal to luggage selling at the higher price amounts. The prices at which respondent offered said luggage for sale constituted the respondent's

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usual and customary retail selling price for said luggage and afforded no savings to the purchasers.

3. The higher stated "list price" of said refrigerators is not the usual and customary retail price in the New York trade area. The usual and customary price in the New York trade area of said refrigerators is an amount substantially less than the so-called "list price". Savings or reductions in the amounts indicated are therefore not afforded to the purchaser.

4. Respondent has not sold said women's coats at the higher price amounts in the recent normal course of its business. Savings are, therefore, not afforded to the purchaser of said women's coats in the amounts represented.

5. Said rugs are not of the stated sizes of 9 x 12', 8 x 10' or the other sizes stated by respondents with due allowances for uncontrollable factors in the manufacturing processes. Said rugs are purchased by respondent, invoiced and labelled as being of cut sizes. For example, certain of the aforesaid rugs are invoiced and labelled as 103'' x 139'' for the so-called 9 x 12' size; and 92'' x 116'' for the so-called 8 x 10 foot size. Other kinds and sizes of rugs are purchased, invoiced and labelled as substandard or "cut sizes".

PAR. 7. In the conduct of its business and at all times mentioned herein, respondent has been in substantial competition to commerce, with corporations, firms and individuals in the sale of floorcoverings, luggage, household appliances, women's wearing apparel and other articles of general merchandise of the same general kind and nature as that 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 to commerce.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's 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. Terral A. Jordan for the Commission.

Solinger & Gordon, of New York, N.Y., by *Mr. Eugene H. Gordon* and *Mr. Peter L. Szanton*, for respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges the respondent with use of certain misleading advertising in violation of the Federal Trade Commission Act. After the filing of respondent's answer, extended hearings were held at which evidence both in support of and in opposition to the complaint was received. Proposed findings and conclusions have been submitted, oral argument not having been requested, and the case is now before the hearing examiner for final consideration. Any proposed findings or conclusions not included herein have been rejected.

2. The respondent, Gimbel Brothers, Inc., a corporation, is the owner and operator of a large retail department store in New York City and also of department stores located in Milwaukee, Philadelphia and Pittsburgh. There is no issue over the elements of interstate commerce and the existence of competition, respondent in its answer having admitted in substance the statements in the complaint in those respects.

3. The first issue raised in the complaint has to do with certain "comparative value" advertising done by respondent in connection with braided rugs. In an advertisement published in one of the New York City daily newspapers on March 8, 1959, respondent advertised certain braided rugs which it was offering for \$49.95 as having a "comparative value" of \$69.95 (Com. Ex. 11). Commission Exhibits 12 and 13 represent similar advertisements in other New York City papers. In another advertisement (Com. Ex. 16), respondent offered certain other braided rugs at \$79.00, stating that the rug "compares to 9 x 12' all wool braids selling at 197.95".

4. Briefly stated, the issue here is whether the rugs advertised by respondent at \$49.95 and \$79.00 were comparable, respectively, to rugs being offered by competing stores in the New York Metropolitan area for \$69.95 and \$197.95. It was to this issue that most of the testimony in the record was directed.

5. Both of respondent's rugs were manufactured in Japan, being designed by and manufactured to the order of a rug company in New York, Couristan, Inc. The \$49.95 rug was marketed under the name "Stoney Creek", while the \$79.00 rug was sold under the name "Bunker

Hill". Both rugs were designed by Couristan to compete with certain American-made rugs which were then being sold by retail stores in the New York City area. The rugs advertised by respondent were purchased by it from Couristan. As to fiber content, the Stoney Creek rug and the rug with which it was compared by respondent in its advertising both contained approximately 35 percent wool, 35 percent rayon, and 30 percent other fibers. The Bunker Hill rug and the rug with which it was compared by respondent were both 100 percent wool, or practically so.

6. The essential difference between respondent's rugs and the rugs with which they were compared lies in the method of construction or manufacture. The American-made rugs in question are of the "flat braid" construction, while the Stoney Creek and Bunker Hill rugs are of the "tubular wrap-around braid" construction. Both the flat braid and the tubular braid are woven around a core or filler which usually is made of wool "shoddy" or some other relatively inexpensive material.

It appears that the flat braid method provides more of an interlacing or interlocking effect and that this may afford a somewhat tighter or more closely woven fabric.

7. The two types of construction are exemplified by two rugs received in evidence (Resp. Exs. 21 and 22). Respondent Exhibit 21 is the flat braid "Wool 0" rug with which respondent compared the Bunker Hill rug in its advertising, and Respondent Exhibit 22 is the Bunker Hill rug. In design, texture, color, appearance, attractiveness, feel, etc., the two rugs are very similar. So far as the record indicates, there is no difference in the quality of the wool used in the two rugs.

8. The only real issue is over the question of wearability. On this issue, wearability, there is testimony from four experts. One is an official of Couristan, Inc., the designer and importer of the Stoney Creek and Bunker Hill rugs. Two are officials of American companies manufacturing and selling braided rugs made in the United States. The fourth is an official of an importing company which imports rugs from Japan and a number of other countries for sale in the United States. All four of the witnesses have had long experience in the manufacture and sale of braided rugs.

9. The Couristan official was of the opinion that the wearability of the Stoney Creek and Bunker Hill rugs is equal to that of the flat-braided rugs with which they were compared. The two American manufacturers were of a contrary view, basing their opinion largely on the fact that there is more interlacing or interlocking of the yarns in a flat-braided rug, thus affording a tighter construction. The other importer was of essentially the same opinion as the Couristan

official, that there is little or no difference in the wearability of the two types of rugs, or at least between flat-braided rugs and the particular tubular-braided rugs here involved.

10. None of the experts is without some self-interest in the proceeding. As already stated, the rugs here involved were designed and imported by Couristan from Japan, and respondent is one of Couristan's customers. The two American rug manufacturers are president and vice president, respectively, of a trade association which has as one of its principal purposes combatting, through tariffs and otherwise, the importation of foreign-made braided rugs into the United States, particularly from Japan. The fourth witness is an importer of rugs, including braided rugs made in Japan. His company has on occasions sold rugs to respondent.

11. It must be remembered that the issue here is not whether the rugs are identical or the same, but only whether they are comparable. Comparable means fit to be compared with or worthy of comparison. What we are here confronted with is a relative, not an absolute, term.

12. As already indicated, and particularly as demonstrated by the rugs received in evidence, the two types of rugs are very similar in appearance, design, texture, color, attractiveness, feel, etc. There is no evidence of any substantial difference in the kind or quality of the materials used.

13. On the sole remaining issue, wearability, the hearing examiner is unconvinced that the record establishes a sound basis for a definite finding or conclusion that either type of rug is materially superior to the other. There is substantial, reliable evidence on both sides, neither side having established its contention by the greater weight of the evidence. The legal principle decisive of the issue is that of burden of proof. In such a situation it necessarily follows that the complaint has not been sustained.

14. Another charge in the complaint is that respondent has misrepresented the size of its rugs. In giving the size of the various rugs referred to in its advertisements (Com. Exs. 11, 12, 13, 16, 34, 35), some of the sizes were stated in inches, which were correct. In the case, however, of some of the larger rugs, the sizes were stated in feet, and the rugs actually were not as large as indicated. For example, the rug listed as having a size of 9' x 12' was, in fact, only 103" x 139". That is, the rug was short by five inches in both width and length.

15. Each of the advertisements carried, in connection with the listing of sizes, the statement "All Sizes Approximate", and all of the

rugs themselves had tags or labels attached to them giving the actual and correct size.

16. At the time the advertisements were used it appears to have been the custom in the trade, in advertising large rugs, to give the approximate size in feet rather than the exact size in inches. The reason for this was that most members of the public find it difficult to translate inches into feet and to envision the real size of a rug described as, for example, 103" x 139". They prefer a designation of "Approximately 9' x 12".

17. More recently, however, the trade in advertising rugs has adopted the practice of giving the exact size of all rugs in inches or in a combination of feet and inches. Respondent is now following this practice.

18. As a practical matter, it would seem that reasonably adequate protection was afforded the public by the statement in respondent's advertisements that all sizes given were approximate, and the fact that all of the rugs themselves had tags or labels attached giving the exact size. In any event, the issue raised by the complaint would appear to be largely moot, in view of the change in practice in the trade and respondent's adherence to such change.

19. The complaint also charged respondent with fictitious pricing of certain luggage. In one of its advertisements (Com. Ex. 18) certain luggage was offered by respondent at "6.98 to 15.98", and the statement was made that the luggage "sold last week at Gimbel's for 9.98 to 24.98". This statement admittedly was untrue; the luggage had not been previously sold by respondent at the higher prices indicated. The record shows that the employee responsible for the misrepresentation (a buyer in the luggage department) was severely reprimanded and that termination of his employment was considered. Because of the fact that the employee had been in respondent's employ for a long period of time (some 40 years) he was not dismissed. Later, however, he was retired, the retirement taking place some two or three years before he reached the customary retirement age.

20. It appears that the false statement in the advertisement represented a single and isolated instance, and that it was wholly unauthorized by respondent. In the examiner's opinion the instance is insufficient to warrant the issuance of a cease and desist order.

21. Other charges in the complaint regarding alleged fictitious pricing of luggage arise out of the use by respondent of the terms "usually" and "regularly". In two advertisements (Com. Exs. 18 and 21), luggage was offered at designated prices and other, higher prices were listed as the usual or regular prices of the luggage. The

complaint charged that the use of these terms constituted representations that respondent itself had sold such luggage at the higher prices during its recent regular course of business.

22. It was stipulated that respondent had not itself sold the luggage at the higher prices. The controversy is over the meaning of the terms "usually" and "regularly". There is no evidence as to the meaning attached to the terms by the public. The position of Commission counsel is that no evidence is required; that the words necessarily have the meaning attributed to them by the complaint, particularly in view of the Commission's "Guides Against Deceptive Pricing". Respondent's position is that the terms do not necessarily refer to respondent's own prices; that they could just as well refer to prices at which other retailers in the New York City area are or have been selling the same merchandise.

23. In the absence of evidence as to public understanding of the terms in the trade area here involved, no sound basis appears for a finding or conclusion that the terms have the meaning ascribed to them by the complaint. No case has come to the hearing examiner's attention in which the Commission has held, as a matter of law and in the entire absence of evidence, that the words do have such meaning. Insofar as the Guides Against Deceptive Pricing are concerned, the Commission has expressly held that they do not constitute law (Arnold Constable Corporation, Docket No. 7657, January 12, 1961). Nor are the Guides a substitute for evidence.

24. One of the two luggage advertisements (Com. Ex 21), after offering certain luggage at "7.95 to 15.95", says "comparable luggage is 10.98 to 24.98". There is no evidence indicating that this statement is untrue.

25. It thus appears that, with the exception of the isolated instance referred to in paragraphs 19 and 20 above, there is a failure of proof insofar as the charges of fictitious pricing of luggage are concerned.

26. The next charge relates to the use by respondent of the term "list price". In one advertisement (Com. Ex. 24) respondent advertised Hotpoint Electric Refrigerators at designated sale prices, and in connection with each price showed a "list price" which usually was much higher. It was stipulated that respondent itself had not sold the refrigerators at the designated list prices. The charge in the complaint is that use of the list prices in the advertisement constituted representations by respondent that the refrigerators were usually and customarily sold in the New York City trade area at such higher prices.

27. The list prices were, in fact, the retail prices recommended by the manufacturer of the refrigerators, the Hotpoint Division of General Electric Company. While the refrigerators are seldom, if ever, sold at list prices by respondent and other large department stores, there are certain types of stores in the New York City area which usually, or at least frequently, do obtain the list prices. These are for the most part residential neighborhood stores, downtown "carriage trade" stores, stores which accept high-credit risks, and department stores in outlying areas.

28. The difficulty here, as in the issues of "usual" or "regular" prices, is that there is no evidence supporting the interpretation placed upon the term "list price" by the complaint. That is, there is no evidence that the public in that trade area interprets "list price" as meaning the usual and customary price at which the article is being sold in that area. Unless the deficiency can be supplied by resort to the Guides Against Deceptive Pricing, which, as indicated above, cannot in the examiner's opinion properly be done, the charge in the complaint must fall.

29. The last charge in the complaint is that respondent has engaged in fictitious pricing of women's coats. In two advertisements (Com. Exs. 25 and 26) respondent offered coats at designated prices, stating in substance that the "reg." (regular) prices on some of the coats were specified higher prices, and that others of the coats had "originally" sold at specified higher prices. It was stipulated that the coats offered in the advertisements had not been offered for sale by respondent during the three months immediately preceding the date of the earlier advertisement (October 27, 1957) at prices in excess of those at which the coats were offered in the advertisements.

30. It further appears, however, that previous to this three-month period coats similar to some of those offered in the advertisements (same fabric and workmanship) had been sold by respondent at prices higher than the advertised "regular" prices. And, further, that at or just prior to the time of the advertisements other department stores and certain specialty stores in the New York City area were selling the other coats offered in the advertisements for prices at least as high as the "regular" and "original" prices mentioned in the advertisements.

31. The complaint alleges that use by respondent in the advertisements of the "regular" and "original" prices constituted representations that the coats "were offered for sale by respondent in the recent regular course of its business at the higher price amounts and that reduction from respondent's higher prices had been made with consequent savings to the purchaser". Again we are confronted with a

question of failure of proof. There is no evidence that the terms in issue are understood by the public in the New York City trade area as carrying the meaning ascribed to them by the complaint.

32. In summary, this case, insofar as the charges of fictitious pricing are concerned, appears to present squarely the question of the legal effect of the Commission's Guides Against Deceptive Pricing. If the Guides can properly be considered as law or as a substitute for evidence the charges have been sustained. If, on the other hand, the Guides cannot properly be so considered, these charges in the complaint must fall for lack of supporting evidence. In the examiner's opinion the latter view is the correct one.

CONCLUSION

The examiner having concluded that the complaint has not been sustained,

ORDER

It is ordered, That the complaint be, and it hereby is, dismissed.

OPINION OF THE COMMISSION

By MacIntyre, *Commissioner*:

This is a Federal Trade Commission Act proceeding instituted by a complaint issued March 21, 1960, charging that respondent made certain false, misleading and deceptive representations in newspaper advertisements. After trial the hearing examiner concluded the allegations were not sustained and dismissed the complaint. Counsel supporting the complaint has appealed.

Respondent corporation owns and operates under its corporate name thirteen department stores, and owns all of the stock of Saks & Company, a corporation, which operates a chain of nineteen retail "specialty stores". Complaint counsel's appeal assigns as error the hearing examiner's failure to find that respondent operates the nineteen Saks "specialty stores", but in our view the evidence in this record is insufficient to support such a finding, and we find no error in this respect. At the other extreme, respondent contends that any order which may issue should not be made applicable to the respondent as a whole but should apply to only the particular Gimbel store responsible for the violation in question. Respondent presents no convincing precedent to support this novel view and has not otherwise persuaded us of its merit. Respondent is the only legal entity responsible for the acts of its stores and it must exercise sufficient control to assure that they all operate within the law. A corporation cannot

evade responsibility for the actions of its divisions or units by granting them limited autonomy. An order to cease and desist directed against Gimbel Brothers, Inc., must be complied with by Gimbel Brothers and not by merely a fragment thereof.

The Rug Advertisements

In several New York newspaper advertisements published in 1959, respondent represented that the imported rugs it was offering for \$49.95 and \$79.00 were "of comparable value" or "compare [d] to" rugs selling at \$69.95 and \$197.95, respectively. The complaint charges these representations are false in that the advertised rugs "were not of a size, grade, quality, design and workmanship equal to rugs selling at the higher prices of \$69.95 or \$197.95."

The hearing examiner dismissed this charge, holding that the compared rugs were sufficiently similar to be "worthy" or "fit to be compared" and were therefore "comparable". Complaint counsel's appeal charges the hearing examiner's conception of the terms "comparable value" and "compare to" is erroneous and that proceeding from this "false base", he found the facts insufficient to prove the violation charged.

We are not persuaded that the hearing examiner's statement of the issue presented is erroneous. It may well be that items "worthy" or "fit to be compared" would be substantially "equal" in the qualities enumerated in the complaint. In other words, we are not at all sure that the hearing examiner's test differs materially from that utilized by the Commission in past decisions and in its published *Guides Against Deceptive Pricing*.¹ We are in agreement with the hearing examiner's view that the compared rugs need not be identical and that the word "comparable" is a "relative" and not an "absolute" term. However, we are unable to agree that he correctly applied the interpretative rule to the facts adduced. In our opinion, the rugs are so materially different as to be not worthy or fit for comparison.

The respondent's rugs were purchased from an importer, Couristan, Inc., at the company's regular list prices for retailers, and respondent's advertised selling prices produced a normal gross profit. Therefore, this was not a special purchase at unusually low prices nor a special reduced price sale. As a matter of fact, Couristan distributed a price list which "suggests" a "special promotion retail price" of \$39.95 for the rugs which respondent advertised at \$49.95. It would appear, therefore, that both the importer and Gimbel's took their normal and usual markup for merchandise of this type.

¹ 23 F.R. 7965 (October 15, 1958); 2 Trade Reg. Rep. par. 7897 (1961).

The rugs in question were made in Japan to the importer's (Couristan's) specifications. They were designed to resemble as closely as possible rugs manufactured by domestic manufacturers. The respondent's "Stoney Creek" rug advertised at \$49.95 was not designed to simulate any particular domestic rug but was, in the opinion of respondent's rug buyer, substantially similar and equal in value to an American-made rug marketed under the name "Troycraft". At about the time when respondent's advertisements appeared, the Troycraft rug in 9' x 12' size was being sold by another New York store for \$69.95.

The other rug principally involved, respondent's "Bunker Hill" model, was specifically designed to copy a domestically produced rug marketed under the trade name "Wool-O". One of respondent's New York competitors was selling this rug to consumers for \$197.95 for the 9' x 12' size.

The initial decision makes it appear that the "Troycraft" and "Wool-O" rugs differ from respondent's rugs in only minor and immaterial construction details. This is not correct. There are many important differences which in total render the rugs not "comparable" or of "comparable value".

The rugs are of entirely different construction and the product of different methods of manufacture. The domestic rugs are of "flat braid" construction. They are produced by braiding or weaving the surface yarn in a figure eight pattern around two parallel cords of a cheap base yarn sometimes called "shoddy". This system produces a flat braid in which the various colors of the surface yarn form the typical chevron-braid pattern. The surface material interlocks and firmly binds the cords to each other. The braids are then arranged in a tight coil, either round or oval, and sewed together to produce a finished rug.

The respondent's rugs are produced by wrapping yarn in a spiral around a single core of base yarn. This single "rope" is then sewed to another similar "rope" on which the spiral of the surface yarn angles in the reverse direction. Thus, a facsimile of the "flat braid" is produced which has the characteristic chevron pattern. These joined "ropes" or tubes are then coiled and sewed to form round or oval rugs which closely resemble flat braided rugs. The hearing examiner erroneously found that in this process the surface yarn is "woven" around the core when, in fact, no weaving or braiding takes place. The correct description of the process is "tubular wrap-around".

Although the complaint charges that the compared rugs were unlike in "size, grade, quality, design and workmanship", the hearing examiner concluded that "The only real issue is over the question of wear-

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ability." He does not discuss or specifically rule upon the complaint allegation, and we feel that this omission was also error. To fill this hiatus, we will at this point consider these issues.

It would seem obvious that in order to be "comparable" the rug should be of the same size, yet such was not the case. The respondent's rugs were a "cut" size and measured only 103" x 139", while the domestic rugs to which they were compared measured a full 9' x 12' (108" x 144"). This shortage of 5 inches in all dimensions is a material difference, making the domestic rugs approximately 8.6% larger than respondent's. In our opinion, this difference alone is sufficient to render false the representation that the rugs are a comparable value.

As to grade, quality and workmanship, the uncontroverted evidence of record shows that the surface yarns which actually receive and absorb the wear of use are four or five times more costly than the core yarns and that in "flat braided" rugs the surface yarns make up the greater part of the rugs' weight, while in rugs produced by the "tubular wrap-around" process the core outweighs the surface yarn. It was also shown that a "critical" factor in wearability is the thread which sews the braids or tubes together. In rugs produced by the tubular wrap-around process, each single tube must be sewed to its neighbor, while in the flat braid process only every other tube need be sewed, and thus there are twice as many of the "critical" seams in respondent's rugs as in the domestically produced "flat braided" rugs. It also appears that the threads which hold respondent's "Bunker Hill" rugs together are cotton, while the "Wool-O" rug is sewed with Nylon thread. The "Wool-O" rug is stitched with smaller and hence a greater number of stitches and each braid is tapered at its end and securely sewed, while the "Bunker Hill's" tubes are merely butted together and glued. From the foregoing facts, we conclude that the respondent's rugs are not comparable in grade, quality and workmanship to the domestic rugs described.

With respect to design, there is no evidence in this record that would support a finding that the rugs differ substantially in this respect. Interpreting the word "design" as meaning the surface pattern or appearance of the rugs and not in reference to the construction details, we are of the view that a difference in this factor, even though substantial, would not make rugs not comparable. In other words, rugs of different pattern or design can be alike in all other material respects and, hence, of comparable value.²

² It should be unnecessary to point out that design may be in other matters a highly significant factor, depending upon the type of product compared. We are here holding only that these rugs are not rendered not comparable by reason of the different surface patterns or designs.

Respondent contends that consumer witnesses should have been called to testify as to the impression created by respondent's advertisement. There is no merit at all to this contention. This Commission is empowered to determine the meaning of an advertisement from a perusal of the advertisement itself. It is certainly evident from this advertisement, and we hold, that respondent intended, and did convey thereby the impression that the imported rugs it was offering were substantially alike in all material respects to the higher priced domestic rugs whose prices appeared in the advertisement. This is the only sensible and logical interpretation which can be placed on the advertisement, and there was, therefore, no need for consumer testimony.³

The Rug Size Issue

The complaint alleges that the rugs advertised by the respondent as being 9' x 12' and 8' x 10' sizes were, in fact, considerably smaller. It was stipulated that the rug advertised by respondent as a 9' x 12' was actually 5 inches short in each of these dimensions and the rug advertised as being 8' x 10' was 4 inches short in each dimension. The rugs were so advertised and sold in both Philadelphia and New York City.

The hearing examiner dismissed this charge on the basis of his findings that (1) all of the advertisements carry the statement "All sizes approximate"; (2) the rugs themselves had tags or labels attached which gave the correct size in inches; and (3) the respondent had discontinued the practice. These findings do not, in our opinion, warrant dismissal of the charge.

It is true that each of the advertisements carries the caveat "All sizes approximate", but on most of the ads it appears in such very small print compared to the huge print representing the rugs to be 9' x 12' as to seriously detract from the efficacy of the disclosure. In advertisements used by the Philadelphia stores, the disclaimer is obscurely mingled in a paragraph with unrelated information.

More important, it is our view that a rug 8 feet 7 inches by 11 feet seven inches in size is not approximately the same size as a 9' x 12' rug. The word "approximate" will perhaps cover an inch or two departure from the norm, but it cannot in this instance stretch to cover five inches. As stated above, a 9' x 12' rug is 8.6% larger than one measuring 103 inches by 139 inches, and this material departure from the truth cannot be bridged by the word "approximate". The word

³ *Zenith Radio Corp. v. Federal Trade Commission*, 143 F.2d 29, 31 (7th Cir. 1944); *Charles of the Ritz Distributing Corp. v. Federal Trade Commission*, 143 F.2d 676, 680 (2nd Cir. 1944).

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"approximate" will only serve where the difference between the actual and stated size is sufficiently small to warrant application of the doctrine *de minimis non curat lex*. The difference here is far greater than the permissible minimum.

The hearing examiner's reliance upon the fact that the rug labels or tags gave the exact size as one of the grounds for dismissal is particularly inappropriate. As the court said in *Carter Products, Inc. v. Federal Trade Commission*:⁴

The law is violated if the first contact . . . is secured by deception . . . even though the true facts are made known to the buyer before he enters into the contract of purchase.

This rule is based upon the logical and even compelling assumption that business is attracted by the misleading initial approach which would not have been attracted had the advertisement been completely frank and truthful. Moreover, it is not even certain that all consumers would see the labels before purchase since the advertisements invite mail and telephone orders.

On the basis of rather questionable evidence,⁵ the hearing examiner found that at the time the advertisements appeared it was the custom in the trade in advertising large rugs to give the approximate size in feet rather than the exact size in inches. He further found that the trade has abandoned this practice and now all advertisements give the exact size of rugs, either in inches or in a combination of feet and inches. One of the respondent's officials testified that "since the commencement of the complaint in this action," the respondent has abandoned or discontinued utilizing approximate sizes in advertisements and now places therein only the exact sizes. From the foregoing evidence, the hearing examiner concluded the rug size issue "would appear to be largely moot."

That the Supreme Court and the various circuit courts of appeals have clearly, definitively and in concrete terms again and again stated that discontinuance of a practice does not render a controversy moot⁶

⁴ 186 F. 2d 821 [5 S.&D. 244] 7th Cir. 1951).

⁵ This finding is based on the testimony of the importer of the rugs in question and whose company is the subject of a Commission order requiring it to cease misrepresenting the size of its rugs. On cross-examination, this witness testified that at the time in question he didn't keep up too closely with the New York retail market on wrap-around rugs; didn't know that situation; didn't have a customer of "any size" in the New York area; and that he did not know the "actual sizes" of rugs sold at retail in the New York area.

⁶ *Federal Trade Commission v. Goodyear Tire & Rubber Co.*, 304 U.S. 257, 260 (1938); *Standard Distributors v. Federal Trade Commission*, 211 F.2d 7, 13 (2d Cir. 1954); *Educators Ass'n v. Federal Trade Commission*, 108 F. 2d 470, 473 (2d Cir. 1939); *Armand Co. v. Federal Trade Commission*, 78 F.2d 707, 708 (2d Cir. 1935); *C. Howard Hunt Pen Co. v. Federal Trade Commission*, 197 F.2d 273, 281 (3d Cir. 1952); *Hershey Chocolate Corp. v. Federal Trade Commission*, 121 F.2d 968, 971 (3d Cir. 1941); *Federal Trade Commis-*

is apparently not persuasive to this hearing examiner. The test to be applied in proceedings where the defense of discontinuance or abandonment of the challenged practice is raised is the same today as it was in 1919, when the first court decision reviewing a Commission order was passed down.⁷ The rule can be stated in many different ways, but, in essence, it requires a showing of facts which guarantee or assure against resumption of the practice. A respondent's *post litem* discontinuance and promise to abstain do not constitute a sufficient showing. Other evidence to support a finding of permanent discontinuance is not present in this record, and, in fact, the respondent argues strongly that the advertisement is truthful and not misleading to any extent. On this record, the hearing examiner's dismissal of this charge for mootness is clearly error.

The complaint also charges that respondent's "comparable value" advertisement falsely represented that the rugs advertised were offered at "substantial savings from" the price of the higher priced domestic rug to which they were compared. Complaint counsel's brief pleads:

Since the Bunker Hill and the Stoney-Creek rugs do not have the value represented by respondent's advertising, it inescapably follows that the consumer does not realize savings in the amount indicated.

It is apparent that a finding that consumers buying respondent's rugs would not realize savings from the higher comparative prices stated in the advertisements follows as a necessary corollary to our holding that respondent's rugs were not in fact comparable to rugs selling at the higher comparative prices. Complaint counsel's exception is well taken and is allowed.

The Luggage Advertisements

In an advertisement which appeared in the January 25, 1959, edition of the New York Times, the respondent represented that the luggage offered in the advertisement at prices ranging from \$6.98 to \$15.98 was "usually" priced at and had been "sold last week at Gimbel's for 9.98 to 24.98." The respondent admitted that it had not

sion v. Good Grape Co., 45 F.2d 70, 72 (6th Cir. 1930); *Clinton Watch Co. v. Federal Trade Commission*, 291 F.2d 838, 841 (7th Cir. 1961); *Marlene's, Inc. v. Federal Trade Commission*, 216 F.2d 556, 559-60 (7th Cir. 1954); *Federal Trade Commission v. Wallace*, 75 F.2d 733, 738 (8th Cir. 1935); *Arkansas Wholesale Grocers' Ass'n v. Federal Trade Commission*, 18 F.2d 866, 871 (8th Cir. 1927); *Philip R. Park, Inc. v. Federal Trade Commission*, 136 F.2d 428, 430 (9th Cir. 1943); *Juvenile Shoe Co. v. Federal Trade Commission*, 289 Fed. 57, 59-60 (9th Cir. 1923); *Dolcin Corp. v. Federal Trade Commission*, 219 F.2d 742, 745 (D.C. Cir. 1954).

⁷ *Sears, Roebuck & Co. v. Federal Trade Commission*, 258 F.2d 307 (7th Cir. 1919).

previously sold the luggage at prices higher than the advertised selling prices and the record indicates that, in fact, the luggage had not been sold during the preceding week at any price.

The complaint charges that by means of this advertisement respondent falsely represented that it had in the recent regular course of its business sold the luggage at the higher prices stated and that the purchaser would effect as a savings the difference between the said higher prices and the advertised "sale" price. The hearing examiner dismissed these charges, holding that the admitted false advertisement was "a single and isolated instance . . . wholly unauthorized by respondent" and, therefore, "insufficient to warrant the issuance of a cease and desist order." The dismissal is buttressed by the hearing examiner's conclusion that "no sound basis appears for a finding or conclusion" that the term "usually" is interpreted by the buying public as meaning that the advertiser had previously sold the luggage at the higher stated prices.

These conclusions are so fundamentally and patently erroneous that reversal might properly be ordered without opinion comment. In the first place, it is ridiculous to characterize respondent's advertisement as a "single isolated instance." This respondent has been using misleading advertising and labeling for a long time and this Commission has been required to proceed against it again and again.⁸ But even if respondent's proclivity for misleading advertising was unknown to the hearing examiner, it would be error to label an advertisement appearing in the Sunday edition of the New York Times as an isolated instance. As a matter of fact, this very point was laid to rest by the United States Court of Appeals for the Seventh Circuit in a decision involving this same respondent, the court holding:⁹

The petitioner contends that a single instance of unintentional misrepresentation does not constitute an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act of 1914, 15 U.S.C.A. § 45. We think it plain that soliciting the purchase of goods by advertisement is a method of competition; if the advertisement contains false representations, it is an unfair method of competition.

The hearing examiner's inability to determine the public understanding of the word "usually" as employed in this advertisement is incomprehensible. Even assuming, as the hearing examiner mistakenly thought, that this is a case of first impression and that the courts had not affirmed Commission findings based solely on a reading

⁸ Docket 3273, December 8, 1938; Docket 3364, December 29, 1939; and Docket 7888, February 23, 1962. Also, Stipulations #1691 (1936), #1938 (1937), #2831 (1940), #7535 (1946), #8990 (1958), #9245 (1959).

⁹ *Gimbel Bros., Inc. v. Federal Trade Commission*, 116 F. 2d 578, 579 (7th Cir. 1941).

of an advertisement that the word "usually" is understood by the purchasing public to refer to the seller's recent regular price,¹⁰ it is still inconceivable that anyone could be confused or uncertain as to the meaning of the word when employed in conjunction with the phrase "sold last week at Gimbel's for 9.98 to 24.98." When so used, the word's meaning is crystal-clear for the advertisement itself provides the definition.

But even when employed alone, the word "usually" and its synonymic companion "regularly" convey to the public the impression that the advertiser's recent usual or regular price is being referred to. This has been our consistent holding for a long period of time and is the only reasonable and logical interpretation possible. We cannot even find in good conscience that these words are ambiguous, but even if we could, it would avail respondent nothing since enjoined deception would still exist.¹¹ After all, the respondent had the whole English lexicon at its disposal and must be held to account for the choice it made for it is axiomatic that writers "... whose intentions require no concealment, generally employ the words which most directly and aptly describe the ideas they intend to convey ..."¹²

The Refrigerator Advertisement

The July 13, 1959, edition of the New York Times carried a full page advertisement in which respondent represented "Gimbel's breaks the price on new 1959 Hotpoint refrigerators." Five refrigerators were depicted and in connection with each a so-called "list price" was indicated which was considerably higher than the advertised selling price. For example: "list price 629.95" and a "sale" price of \$399. The complaint charges this advertisement to be misleading in that the higher "list" prices are not the usual prices charged in the New York City area and that respondent did not "break" prices from "list" with a resultant savings to the purchaser of the difference between "list" and the advertised selling price. The hearing examiner dismissed this count of the complaint for failure of proof.

There is no evidence in this record as to the exact price at which the model refrigerators in question were being sold to the public in the New York City area in 1959. The record does show that they were "generally" not sold at list prices; that in metropolitan New York "there might be an instance here or there where our [Hotpoint]

¹⁰ E.g., *The Fair v. Federal Trade Commission*, 272 F. 2d 609, 612-613 (7th Cir. 1959); rehearing denied January 7, 1960.

¹¹ E.g., *Murray Space Shoe Corp. v. Federal Trade Commission*, 304 F. 2d 270 (2nd Cir. 1962).

¹² *Gibbons v. Ogden*, 9 Wheat. 1, 188 (1824).

retail dealers sell at the suggested list prices"; that "Even in the rural area [around New York City] there would be very few people who would actually sell at the indicated, suggested list price"; and that the Gimbel appliance buyer would be "naive" if he were to "proceed on the assumption that a reasonable number of persons" actually sold Hotpoint products at list prices. The foregoing facts were testified by the district manager of Hotpoint's New York District; a man with twenty-three years' experience who supervises four sales managers and eighteen wholesale salesmen; who personally, periodically contacts a cross-section of Hotpoint retail dealers; and who makes it his business to know the general level at which his customers sell Hotpoint products. Such a witness is, in our view, worthy of belief and his testimony should be afforded weight. Using this testimony as a basis, we find that the list prices suggested by Hotpoint and used by Gimbel's in the advertisement are not the "usual and customary" prices for Hotpoint refrigerators in the New York trade area.

The hearing examiner's finding that certain types of stores in the New York City area do "usually, or at least frequently," obtain list prices for Hotpoint refrigerators is apparently based upon the testimony of the Gimbel official responsible for the advertisement in question. This witness could not identify a single store which sold "major appliances of this character at list price in the Gimbel Brothers' area back in 1959 when that advertisement was placed." He also testified that Gimbel's never sold its refrigerators at list prices because it was forced "To sell at exactly what our competition is selling", and that his "direct competition" were selling Hotpoint appliances "at less than list." Nothing in his testimony indicates that he had any personal knowledge that any store was selling Hotpoint refrigerators in 1959 at list prices and, in fact, he stated that he did not go out to "check" since his main concern was to see who was selling as low or lower than Gimbel's. The apparent basis for the witness' statement that some stores were selling at list prices is "common knowledge" since he used that phrase at least four times when asked the key question as to the prices charged by others. In our view a finding cannot be based upon "common knowledge" unless there is some showing that it is indeed common. Here the evidence clearly shows that list prices are generally not charged for Hotpoint refrigerators and that respondent and its competitors sell them at less than list. Thus sales at list prices must be infrequent and hardly the subject of "common knowledge."

The hearing examiner's principal difficulty with the charge is similar to the problem he posited with respect to the words "usually"

and "regularly". He holds the record to be deficient in that it contains "no evidence that the public in that area [New York City] interprets 'list price' as meaning the usual and customary price at which the article is being sold in that area."

Of course, the best evidence of consumer understanding is obtained from consumers themselves. In certain proceedings such testimony is valuable, as for example, in cases of first impression where the advertising representations have not been met before. But in this proceeding such testimony was neither necessary nor desirable. We have met the representation "list price" many times,¹³ have reviewed consumer testimony as to its import, and see no reason for expending further funds and time in pursuit of knowledge already acquired. There can be no doubt that among the many millions in the New York City area, ten, twenty or even fifty witnesses could be produced to testify that they understand the term "list price" means the price generally charged by retailers in their area. And, doubtless, respondent could produce an equal number to testify to a different understanding of the term. A record containing such conflicting testimony would, at substantial expense, prove only what is already obvious from a reading of the advertisement itself, that is, that some people are likely to be misled thereby.

Drawing upon the experience obtained over a long period of years, we can with certainty find that a substantial percentage of the consuming public in New York would interpret the term "list price" as descriptive of the usual and customary retail price being charged in that market. In this particular case our conviction on this point is strengthened by the other words used in the advertisement in question, particularly "Gimbel's breaks the price on new 1959 Hotpoint refrigerators". This sentence can have no meaning other than that Gimbel's is reducing the generally prevailing price. That the Commission may itself, without the benefit of consumer testimony, find an ad to be misleading is not open to serious question.¹⁴

It is our conclusion that a substantial portion of the consuming public would be misled and deceived by respondent's advertisement into the belief that Gimbel's was offering Hotpoint refrigerators at prices greatly reduced from the usual and customary prices charged

¹³ See *Giant Food, Inc.*, Docket 7773, July 31, 1962 p. 326 herein and cases cited therein.

¹⁴ See *Giant Food, Inc.*, Docket 7773, July 31, 1962 [p. 326 herein] and cases cited 1962); *Exposition Press, Inc. v. Federal Trade Commission*, 295 F. 2d 869 (2nd Cir. 1961); *Royal Oil Corporation v. Federal Trade Commission*, 262 F. 2d 741 (4th Cir. 1958); *E. F. Drew & Co., Inc. v. Federal Trade Commission*, 235 F. 2d 735 (2nd Cir. 1956), cert denied, 352 U.S. 969 (1957); *Zenith Radio Corp. v. Federal Trade Commission*, 143 F. 2d 29 (7th Cir. 1944).

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by others in the New York trade area. This is a material and actionable misrepresentation violative of the Federal Trade Commission Act. The hearing examiner's dismissal of this charge was erroneous and is reversed.

The Women's Coats Advertisements

In advertisements appearing in the New York Herald Tribune on October 27, 1957, and in the New York Times on December 8, 1957, respondent advertised certain women's cashmere coats as having been "originally" or "reg." (meaning "regularly") sold for stated higher prices than the advertised selling prices. The complaint charges this advertisement to be false in that respondent had not, in the recent regular course of its business, sold the coats at the higher stated prices; had not, therefore, reduced its prices; and purchasers of the coats would not effect the indicated savings. The hearing examiner's dismissal is based upon the failure of the record to show consumer understanding of the words "originally" and "reg."

The respondent stipulated that it had not offered the coats at any prices higher than the selling prices listed in the advertisements in question during a three-month period preceding the date of the first advertisement. The record shows that, in fact, the coats depicted were a "special purchase"; had not previously been sold at any price by Gimbel's; and were the first of their type and fabric purchased from their manufacturer. Gimbel officials testified that when advertising they do not intend to convey anything different by the word "regularly" as compared to the word "originally" and that when used in a Gimbel advertisement ". . . originally means that we sold the goods prior to the sale at a price higher than we are now offering it for sale."

On this record, the hearing examiner's dismissal of this complaint charge for failure of proof is so patently erroneous as to require no discussion.

The Guides

On October 2, 1958, we published, under the title "*Guides Against Deceptive Pricing*", a codification of the interpretative rules which the Commission and the courts have applied in past pricing representation cases. The "*Guides*" list many of the common terms used by advertisers in making price savings and value claims, including most of the terms at issue in this proceeding and point out the meaning these terms convey to the public as determined in past proceedings. The "*Guides*" were promulgated after lengthy and detailed study of all pertinent decided cases and are the end product of continuous

official observation of advertising practices and consumer reaction from the founding of the Commission to the date of publication. As we stated in *Arnold Constable Corporation* (Docket 7657, January 12, 1961) [58 F.T.C. 49], they are not substantive law in and of themselves, but this does not mean that they may be completely ignored and rejected in the fashion herein accomplished.

What, then, is the proper status of the "*Guides*" with respect to a Commission proceeding? When viewed as a compilation and summary of the expertise acquired by the Commission from having repeatedly decided cases dealing with identical false claims, the role of the "*Guides*" becomes apparent. They serve to inform the public and the bar of the interpretation which the Commission, unaided by further consumer testimony or other evidence, will place upon advertisements using the words and phrases therein set out. It is our view that words and phrases of the type set out in the "*Guides*" must be consistently dealt with by the Commission or its decisions will have no meaning or value. Only by consistent interpretation can some order be brought to the semantic jungle of advertising. By way of example, the court's words in *Bankers Securities Corporation v. Federal Trade Commission*,¹⁵ are particularly apt:

If different merchants may use the words "regular" and "usual" at different times to indicate either their own normal prices or the normal prices of their competitors, confusion, detrimental to buyers and sellers alike, may well be created as to the meaning of much advertising.

The Tardy Filing of Notice of Intention to Appeal

Respondent contends that the appeal of complaint counsel should be dismissed because of his failure to file a notice of intention to appeal within ten days after service of the initial decision as required by the applicable rules. It appears that complaint counsel mistakenly thought that the Commission's new Rules of Practice published in the Federal Register July 6, 1961, applied to this proceeding and made timely filing thereunder of a petition for review. Upon motion, we granted complaint counsel permission to withdraw the petition for review and accepted a notice of intention to appeal then approximately nine days overdue as timely filed.

Respondent does not allege that it has been prejudiced by the tardy filing and indeed, under the circumstances, prejudice does not appear likely or even possible. But, under these circumstances, a dismissal of the appeal as untimely filed would certainly prejudice the public,

¹⁵ 297 F.2d 403, 405 (3rd Cir. 1961).

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a result not to be countenanced for: "It must not be forgotten that the Commission is not a private party, but a body charged with the protection of the public interest; and it is unthinkable that the public interest should be allowed to suffer as a result of inadvertence or mistake on the part of the Commission or its counsel where this can be avoided."¹⁶

In view of the many errors found in the initial decision and its failure to make necessary and appropriate findings of fact, the Commission is unable to adopt any part of the initial decision and, in lieu thereof, makes its own findings of fact and an appropriate order to cease and desist based thereupon will issue.

Commissioner Elman concurred in the result of this decision.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

This matter having been heard by the Commission upon the appeal of complaint counsel from the hearing examiner's initial decision filed January 2, 1962, and the Commission, for the reasons stated in the accompanying opinion, having determined that the initial decision should not be adopted as the decision of the Commission but should be vacated and set aside, now makes in lieu thereof these, its findings as to the facts, conclusions and order.

FINDINGS AS TO THE FACTS

1. Respondent Gimbel Brothers, Inc., is a corporation incorporated under the laws of the State of New York, with its principal office located at 33rd Street and Broadway in the city of New York, State of New York.

2. Respondent owns and operates thirteen retail department stores located in and around the cities of New York, New York, Philadelphia, Pennsylvania, Milwaukee, Wisconsin, and Pittsburgh, Pennsylvania. Respondent offers and sells to the public a wide variety of goods, including rugs, luggage, household refrigerators, and women's coats. In selling, shipping, offering and advertising its goods, the respondent maintains a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. In several New York City newspaper advertisements disseminated in 1959, respondent represented that the imported rugs it was offering for \$49.95 and \$79.00 were "of comparable value" or "compare [d] to" rugs selling at \$69.95 and \$197.95, respectively.

4. Said imported rug advertisements were false and misleading for, in truth and in fact, the rugs offered by respondent were not of like

¹⁶ *P. Lorillard Co. v. Federal Trade Commission*, 186 F.2d 52, 55 (4th Cir. 1950).

size, grade, quality, and workmanship to rugs having a retail selling price of \$69.95 and \$197.95 in the area where the advertisements were disseminated. Respondent's rugs were smaller in size and inferior in the qualities enumerated and, thus, did not represent a "comparable value" or "compare to" rugs selling at the higher stated prices.

5. In a newspaper advertisement disseminated in the Philadelphia trade area in 1958, respondent represented that the rugs offered therein for \$39.95 were "regularly" \$89.95. There is no evidence that respondent had not in the recent regular course of its business in that trade area sold the rugs at \$89.95, and thus the complaint charge dealing with this representation is not sustained.

6. In certain newspaper advertisements disseminated in the New York City and Philadelphia trade areas, respondent represented that the rugs offered therein were 9 x 12 feet and 8 x 10 feet in size. Said advertisements were false and misleading for, in fact, the rug advertised as being 9 x 12 feet was actually 8 feet 7 inches by 11 feet 7 inches, and the rug advertised as being 8 x 10 feet was actually 7 feet 8 inches by 9 feet 8 inches in size. While said advertisements each carried the disclaimer "All sizes approximate," it appeared in such very small print as to be not readily apparent and noticeable. Moreover, the disparity between the stated and actual sizes of the rugs was too great to be bridged by the word "approximate".

7. In New York City newspaper advertisements, respondent represented that the luggage offered therein at prices ranging from \$6.98 to \$15.98 were "usually", "reg." and "sold last week at Gimbel's for 9.98 to 24.98". In truth and in fact, the respondent had not previously sold the advertised luggage at the higher prices set out in these advertisements.

8. The above-described luggage advertisements were false and deceptive in that they conveyed to a substantial segment of the consuming public the impression that respondent had reduced its usual and customary retail selling price for said luggage from the higher stated prices to the lower advertised selling price when such was not the fact.

9. Respondent also advertised certain luggage which it was offering for \$7.95 to \$15.95 as being "comparable" to luggage sold by others for \$10.98 to \$24.98. There is no evidence to establish that this representation is untrue, and the complaint charge with respect thereto has not been sustained.

10. In a New York City newspaper advertisement offering Hotpoint refrigerators, respondent made the following representation: "Gimbel's breaks the price on new 1959 Hotpoint refrigerators." Said advertisement contains pictorial representations of five refrigerators

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and in connection with each, sets out a "list price" considerably higher than the advertised selling price. Said "list prices" were not the usual and customary retail prices for said refrigerators in the New York trade area, but were, in fact, suggested prices supplied by the refrigerator manufacturer and were higher than the prices generally charged by retailers selling in the New York trade area.

11. Said refrigerator advertisement was false and misleading in that it conveyed to a substantial segment of the purchasing public the impression that respondent had substantially reduced its prices below the usual and customary prices found in the New York trade area for said refrigerators when such was not the fact.

12. In certain New York City newspaper advertisements, respondent represented that the cashmere coats offered therein had been "originally" or "reg.[ularly]" sold for stated higher prices than the advertised selling prices. In truth and in fact, respondent had not sold or offered the advertised coats previously at any price.

13. The above-described cashmere coat advertisements were false and misleading in that they convey to a substantial segment of the purchasing public the impression that respondent itself had sold the coats during the recent regular course of its business at the higher stated prices when such was not the fact.

14. Through the use of terms "comparable value", "compares to", "regularly", "reg.", "usually", "originally", "sold last week" and words of similar import, respondent has falsely represented that purchasers of its merchandise would be afforded savings coextensive with the difference between respondent's actual selling price and the higher comparative prices set out in the advertisements.

15. Respondent is, and has been, in substantial competition with other retail sellers of rugs, luggage, household appliances, refrigerators, women's cashmere coats, and other articles of general merchandise, of the same general kind and nature as that sold by respondent.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent.

2. The aforesaid acts and practices of respondent were and are to the prejudice and injury of the public and of respondent's competitors.

3. The false and misleading advertising aforescribed constitutes unfair and deceptive acts and practices and unfair methods of competition in commerce and violates the Federal Trade Commission Act.

Final Order

FINAL ORDER

Pursuant to § 4.22(c) of the Commission's Rules of Practice respondent, on August 10, 1962, was served with the Commission's decision on appeal and afforded the opportunity to file exceptions to the form of order which the Commission contemplates entering; and

Respondent having made timely filing of its exceptions to the order proposed which were opposed by a reply filed by counsel supporting the complaint and the Commission upon review of these pleadings having determined that respondent's exceptions should be disallowed and that the order as proposed should be entered as the final order of the Commission:

It is ordered, That respondent Gimbel Brothers, Inc., a corporation, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of rugs, luggage, refrigerators, women's coats, or any other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Comparing respondent's selling price for any article with any other price, by use of the words "comparable value", "compares to" or any other words of similar import, when the article offered by respondent is not substantially equal in all material respects, to an article or articles generally selling at the compared price in the trade area where the representation is made.

2. Referring to or describing any stated monetary amount with the words "regularly", "reg.", "usually", "originally", "sold last week", or any other words of similar import when the respondent itself has not previously sold the article advertised or when the amount so referred to or described is greater than the usual and customary price charged by respondent for the same article in the recent regular course of its business in the trade area where the representation is made.

3. Referring to or describing any stated monetary amount with the words "list price" or any other words of similar import when the amount so referred to or described is greater than the price or prices at which the advertised article is usually and customarily sold in the trade area where the representation is made.

4. 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 higher price used for comparison with that selling price, unless

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the higher price used represents the price at which the same merchandise or merchandise substantially equal in all material respects 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 in the trade area involved.

5. Representing that the dimensions or sizes of rugs offered for sale are greater than they actually are.

It is further ordered, That respondent Gimbel Brothers, 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 facts in which it has complied with the order set forth herein.