

IN THE MATTER OF
CORO, INC., ET AL.

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

Docket 8346. Complaint, Apr. 5, 1961—Decision, Nov. 6, 1963

Order requiring New York City manufacturer and importers of costume jewelry, watches and other products, to cease representing falsely that fictitious and exaggerated price figures—set forth on catalog sheets distributed for insertion in jobbers' and retailers' catalogs and in their own catalogs—were the regular retail prices for their products in the trade areas concerned, and—by statements on the catalog insert sheets and in other advertisements—that their watches were “guaranteed in writing for one full year”, when the so-called guarantee provided for payment of a service charge.

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 Coro, Inc., a corporation, and Gerald E. Rosenberger, Royal Marcher and Jerome H. Oppenheimer, individually and as officers of 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 as follows:

PARAGRAPH 1. Respondent Coro, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and place of business located at 47 West 34th Street, New York, New York.

Individual respondents Gerald E. Rosenberger, Royal Marcher, and Jerome H. Oppenheimer are officers of said corporate respondent and of its wholly owned subsidiary corporations. They participate

in the formulation, direction and control of the acts and practices of said corporate respondent and its wholly owned subsidiaries. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now and for some time last past have been engaged in the manufacture, sale and distribution of costume jewelry, watches, and other products to retail stores and jobbers for resale to the public.

In the regular course and conduct of their said business, respondents cause, and have caused, said products, when sold to be transported to purchasers thereof located in various states of the United States other than the state in which such shipments originate.

Respondents maintain and at all times mentioned herein have maintained a substantial course of trade in said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their business respondents have engaged in the practice of using fictitious retail prices for their said costume jewelry, watches, and other products of various types sold under several trade names including but not limited to the following method:

Respondents distribute to jobbers and retailers, who sell by catalog, catalog sheets to be inserted in the catalogs of said jobbers and retailers. Said catalog sheets contain thereon pictures and descriptions of various types of costume jewelry, watches and other products with prices listed in connection therewith as the retail prices thereof. Respondents also distribute their own catalogs to jobbers and retailers, in which retail prices are set out.

Respondents by the aforesaid practices represented, and now represent, directly or by implication that the price figures so set forth and so used are the regular and usual retail prices for said costume jewelry, watches and other products in the trade area or areas where the representations are made, when in truth and in fact, the said figures are not the usual retail prices for said costume jewelry, watches and other products in the trade area or areas where the representations are made, but are fictitious and exaggerated prices.

By such acts and practices respondents place in the hands of retailers and jobbers means and instrumentalities by and through which they may deceive and mislead the purchasing public as to the usual and customary retail prices of said costume jewelry, watches and other products.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of their watches respondents have caused to be printed on the catalog insert sheets, and in various

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other advertisements, the following statements: "guaranteed in writing for one full year", and "guaranteed imported Swiss movement" thereby representing that the said watches are unconditionally guaranteed.

PAR. 5. Said representation was and is false, misleading and deceptive. In truth and in fact the said watches were not, and are not, unconditionally guaranteed in that the so-called guarantee provides for a payment of a service charge. The terms, conditions and extent to which the said guarantee applies and the manner in which the guarantor will perform thereunder are not disclosed in respondents' catalog insert sheets or other advertising matter.

PAR. 6. Respondents in the course and conduct of their business have been, and are, in substantial competition in commerce with other corporations, firms and individuals likewise engaged in the sale of costume jewelry and watches.

PAR. 7. The aforesaid acts and practices of the respondents had, and now have, the capacity and tendency to mislead and deceive members of the purchasing public with respect to the usual and customary retail prices of their costume jewelry, watches and other products, and to mislead and deceive said members of the purchasing public as to the guarantee provided by respondents on their watches, and into the purchase of their said products as a result thereof. As a consequence thereof, trade has been unfairly diverted to respondents from their competitors and substantial injury has thereby been done, and is being done, to competition in commerce.

PAR. 8. 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. Garland S. Ferguson supporting the complaint.

Weil, Gotshal and Manges, New York, N.Y., by *Mr. Ira M. Millstein* and *Mr. Marshall C. Berger*, for respondents.

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER

JUNE 1, 1962

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the respondents on April 5, 1961, charging them with having engaged in

unfair and deceptive acts and practices and unfair methods of competition in commerce, in violation of the Federal Trade Commission Act, by using fictitious retail prices for costume jewelry, watches and other products, and by misrepresenting that their watches are unconditionally guaranteed. After being served with the complaint, respondents appeared by counsel and filed answer denying generally the allegations of the complaint, but admitting certain factual allegations. In addition, respondents advanced as "Affirmative Defenses" allegations to the effect that their pricing practices were in accord with industry-wide practices as to which the Federal Trade Commission had acquiesced, and that the practices complained of had been discontinued before issuance of the complaint.

Although there is evidence that the pricing practices challenged in this proceeding are widespread, this constitutes no defense. No evidence was adduced to support the claim of Federal Trade Commission acquiescence in the practices. The so-called defense of pre-complaint discontinuance has been considered and rejected as a basis for dismissal of the complaint.

Pursuant to notice duly given, hearings were held November 20-21, 1961, December 5, 1961, and February 20, 1962, in New York, New York; Philadelphia, Pennsylvania; and Washington, D.C., before the undersigned hearing examiner, duly designated by the Commission to hear this proceeding. At these hearings, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint, which testimony and evidence were duly recorded and filed in the office of the Commission.

Both sides were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues.

At the close of the evidence in support of the complaint, counsel for respondents moved to dismiss the complaint as to the individual respondents and, pursuant to leave granted, memoranda were filed in support of and in opposition to this motion. At the final hearing in this matter, on February 20, 1962, the hearing examiner ruled that the complaint should be dismissed as to Royal Marcher, both individually and as an officer of the corporation. As to Gerald E. Rosenberger and Jerome H. Oppenheimer, the examiner ruled that the complaint should be dismissed against them in their individual capacities but reserved decision as to dismissal in their capacities as officers of the respondent corporation.

The orders of dismissal entered on the record are hereby confirmed and taken into account in this initial decision. As more fully set

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forth below, the complaint is also being dismissed as to respondents Rosenberger and Oppenheimer in their official capacities, except to the extent that, as corporate officers, they are bound by the order being entered against respondent Coro.

Proposed findings of fact and conclusions of law and a proposed form of order, together with supporting briefs, were filed at the conclusion of all of the evidence by counsel supporting the complaint and counsel for respondents, and a reply brief also was filed on behalf of the respondents.

After carefully reviewing the entire record in this proceeding, and the proposed findings, conclusions and order¹ filed by the parties, together with the supporting briefs, the hearing examiner finds that this proceeding is in the interest of the public and, based on the entire record and his observation of the witnesses, makes the following findings of fact and conclusions drawn therefrom, and issues the following order.

FINDINGS OF FACT

1. Respondent Coro, Inc.², is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and place of business located at 47 West 34th Street, New York, New York.

Coro, Inc., conducts some of its operations through wholly-owned subsidiary corporations, including Coro Fashion Watches, Ltd., which manufactures, sells and distributes watches. At the time of hearing, that subsidiary was in the process of liquidating its inventory, and there is doubt whether Coro, either directly or through any subsidiary, will continue in the watch business.

Respondent Gerald E. Rosenberger is an officer and director of respondent Coro, Inc., as well as a substantial stockholder. He has been a director for more than 30 years, president for about 20 years, and chairman of the board for approximately 5 years.

Mr. Rosenberger referred to himself as having "the overall corporate responsibility"—"the responsibility of the acts and practices of the corporation." He disclaimed, however, any personal responsibilities or connection with the sale of Coro merchandise to catalog houses. He did not supervise directly the sale of merchandise to catalog houses. The supervision and direction of this phase of the business were in the hands of a Coro salesman, Edwin Oppenheimer, but Mr. Rosenberger participated in the decision to discontinue sales to the type of catalog houses described in the complaint.

¹ Proposed findings not adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

² Sometimes hereafter referred to as Coro or Respondent.

At the time of hearing, respondent Royal Marcher was a stockholder, director and consultant, but was no longer an officer of the corporation. He had been executive vice president until 1958. He has been a director of the corporation for more than 40 years, and was an officer for about 25 years. Since his retirement, he has not been connected in any way with the selling of Coro merchandise to catalog houses.

For at least three years prior to issuance of the complaint in this matter, respondent Jerome H. Oppenheimer was vice president and secretary of the corporation. He has been a director since 1913; an officer for more than 20 years; and a stockholder for many years. The testimony was that Mr. Oppenheimer, who is more than 80 years old, is "not quite as active as he was." His duties had no relationship to the sale of merchandise to catalog houses.

Edwin Oppenheimer specifically stated that he never took any instructions, directions or orders from any of the individual respondents in connection with Coro's catalog business and did not report to them concerning that business.

Neither Mr. Marcher nor Mr. Jerome Oppenheimer controlled the acts and practices of respondent Coro, according to the uncontradicted testimony of Mr. Rosenberger.

Coro, Inc., is a publicly held corporation, with its stock listed on the American Stock Exchange since 1929.

The business address of each of the individual respondents is the same as that of the corporate respondent.

2. Respondent Coro is now, and for some time has been, engaged in the manufacture, sale and distribution of costume jewelry, watches, and other products to department and variety stores and to other resellers known as catalog houses.³

In the regular course and conduct of its business, respondent Coro, Inc., causes and had caused its products, when sold, to be transported to purchasers located in various States other than the State in which such shipments originate.

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

³ The complaint alleged sales to "retail stores and jobbers for resale to the public." Coro's answer denied that it sells to jobbers, and there was no proof in support of this allegation. In requesting a finding that respondents "have in the past, and until recently, sold costume jewelry and watches to jobbers," counsel supporting the complaint refers only to the fact that certain pricing sheets furnished to catalog houses contained a column designated "Jobber's Cost." This does not support the requested finding, except to the extent that catalog houses may be considered jobbers as to part of their business. See Tr. 18, 87. For a definition and description of a catalog house, see Para. 8 and 9, *infra*.

Some of the costume jewelry distributed by the corporation is manufactured by it; some is imported.

Coro also manufactures and distributes watches for sale to the public. The company imports the movements and either buys or manufactures the ornamentation in which the movement is placed. Distribution of Coro watches has been effected through a separate, wholly-owned corporation, Coro Fashion Watches, Ltd.

3. In the course and conduct of its business, respondent Coro has been and is in substantial competition in commerce with other corporations, firms and individuals likewise engaged in the sale of costume jewelry and watches.

4. In connection with the sale of watches in commerce, through its wholly owned subsidiary, Coro Fashion Watches, Ltd., and for the purpose of inducing the purchase of such watches, Coro has published and caused to be published, in media having interstate circulation, representations concerning the guarantee covering its watches.

In an advertisement for Coro Fashion Watches, published in Life magazine, respondent Coro used such language as "Imported Swiss movement, guaranteed for one year." An advertisement in the New York Times magazine referred to Coro watches, "each with a guaranteed imported Swiss movement." Catalog insert sheets prepared and distributed in commerce by Coro bore the legend, "all watches guaranteed in writing for one year."

No language modified the quoted phrases, and Coro has thereby represented that its watches were and are unconditionally guaranteed.

5. The guarantee furnished with the advertised watches provides as follows:

The Coro watch movement is guaranteed for one year from date of purchase against defect of material or workmanship. * * * The Coro watch movement returned for service within the one year guarantee period that does not show breakage or mishandling will be serviced and returned to you, prepaid, for \$1.00. If, upon inspection, breakage or mishandling is found, an estimate will be sent for your approval before it is repaired.

6. Thus, respondent Coro's representations regarding its guarantee were and are false, misleading and deceptive. In truth and in fact, the watches were not, and are not, unconditionally guaranteed in that the so-called guarantee provides for payment of a service charge. The other terms and conditions, and the extent to which the guarantee applies, and the manner in which the guarantor will perform thereunder were not disclosed in respondent's catalog insert sheets or in other advertising matter.

7. In connection with the sale in commerce of its merchandise, including jewelry and watches, Coro had a catalog department that

prepared and distributed catalog pages for incorporation in catalogs published and distributed by a class of resellers known as "catalog houses."

8. Catalog houses publish and distribute, in commerce, catalogs listing and depicting a variety of merchandise for resale to various classes of customers.

As shown by this record, they send catalogs and sell to the following:

Retailers, primarily in small towns, for resale.

Industrial and commercial firms buying for their own use—i.e., for service and maintenance purposes—or for awards, prizes and gifts, but not for resale.

Organizations, such as fraternal groups, for awards, prizes, etc.

Individual consumers.

Individual consumers include employees of industrial and commercial firms who are given an opportunity, through their employer or an employee organization, to buy for themselves through use of a catalog house catalog.

There has been a trend in the last few years for catalog houses to sell to individual consumers to a greater extent than in the past.

9. Catalog houses, numbering approximately 50, generally sell to the same classes of customers. Their methods of operation, including the presentation of price information in their catalogs, are substantially similar.

Characteristically, the catalogs list two price figures for the merchandise depicted in their catalogs. One price figure is represented, directly or indirectly, as a "retail" or "list" price; the other, a lower figure represents the selling price of the catalog house. The actual selling price may be "hidden" in a code number—a so-called coded price—or it may be designated by such terms as "Your Cost" or simply "Cost."

Some catalog houses have show rooms where they display their merchandise for sale to retail customers who walk in "off the street," or who present identification from the company where they are employed. Such sales are made at the lower coded price or "Cost" price, not at the so-called "retail" or "list" price.

10. One of the catalog houses to which Coro sold and for which it prepared catalog insert sheets or color positives was L & C Mayers Co. of New York.

Circulation of the Mayers' catalog was about 500,000 in 1959 and 1960. Over the years, circulation had increased from something like 125,000 to over a half-million. The biggest increase in circulation has been within the past five years.

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Those to whom the Mayers' catalog was distributed included dealers in small towns, who bought for resale, and also a number of industrial corporations that had occasion to buy merchandise for awards, prizes, gifts, etc. Although Mayers attempted to screen out individuals from its catalog mailing list, catalogs and merchandise were nevertheless shipped to "some" individuals.

Mayers maintained one or more showrooms or stores for display of catalog house merchandise, including one in New York City and another in Philadelphia. Articles were displayed for sale and sales were made in these showrooms, some to individuals—to "people who walked in off the street." However, the largest portion of its business came through as the result of mail orders originating from the catalog.

Mayers always sold to all customers—including individuals—at the coded price.

11. Another catalog house that resold Coro products, using catalog pages supplied by Coro, was Waldron and Company, Inc., of Philadelphia, Pennsylvania.

In the Waldron catalog, since 1960, pricing information is generally given by means of two figures. One figure is identified as "Retail" and the other lower figure as "Cost" or "Your Cost." In prior years, Waldron had used a coded price for its selling price.

Waldron sells at the same price to all customers, including individual consumers, except that its catalog states that "Additional discount is available on bulk lots of the same item."

There were 100,000 copies printed of the 1959-1960 catalog. The same number were printed for 1958-1959. The figure was 110,000 for 1961.

Waldron catalogs are distributed by mail to dealers in small towns, primarily under ten thousand population, and they are also distributed nationwide to industrial concerns and organizations for prizes, premiums, sales, etc. Waldron's sales to "industrial accounts" amount to about 50 percent of its total sales. The bulk of Waldron's merchandise has always been sold to small-town dealers and industrial concerns.

In the words of a Waldron official,

* * * an industrial concern may be using merchandise for any number of reasons, either as a sales incentive or, for instance, as a safety award, and when they have need for merchandise which fits into the categories which we handle, we are interested in selling them at the cost prices.

Employees of such firms can buy through the catalog or through purchase orders.

Waldron has a showroom displaying the merchandise it handles. There, individuals may make purchases if they have identification from the company where they are employed. Over-the-counter sales account for approximately 35 or 40 percent of Waldron's business.

Coro merchandise was on display in the showroom in 1958, 1959 and 1960. There were showroom sales of Coro merchandise during those years at the coded price or the "Your Cost" figure.

The last time Coro jewelry appeared in a Waldron catalog was the 1960 catalog—prepared and published in September or October 1959. Coro products also appeared in Waldron's 1958 and 1959 catalogs.

12. Although the catalog houses make some sales that may be characterized as wholesale, they also make retail sales. The catalog houses do not sell at the prices represented or indicated as "retail" or "list." They sell to all customers—wholesale and retail—at the lower prices—the coded prices or those designated by such terms as "Your Cost" or "Cost."

Coro had knowledge of these selling and pricing practices of the catalog houses.

13. Coro sold to numerous catalog houses a line of merchandise, including costume jewelry and watches. This merchandise was not Coro's "regular line" of merchandise—i.e., that sold to department and variety stores—but a "special line" sold only to catalog houses (and to firms using such merchandise for "giveaways").

In 1960, Coro had 30 catalog house customers, located throughout the United States.

Gross sales (less discounts and returns) to catalog houses,⁴ 1958–1960, were as follows:

1958.....	\$227, 925. 00
1959.....	186, 209. 00
1960.....	172, 078. 00

14. For its catalog house customers, Coro prepared and printed catalog insert sheets for binding into their catalogs. These pages depict in color various items of Coro jewelry, including necklaces, bracelets, earrings and pins, as well as Coro watches. Each item or set bears an identifying letter, and the text at the bottom of the page is keyed to those letters, as well as the name of the set. Then, following language descriptive of the jewelry or watch, there is a catalog code number, together with a price.

⁴ Total consolidated net sales of Coro, Inc., during the same period were:

1958.....	\$29, 205. 185
1959.....	30, 910, 688
1960.....	33, 191, 895

In some instances, instead of furnishing printed sheets for insertion in catalogs, respondent Coro furnished color positives—photographic transparencies—of such sheets. These were used by catalog houses that printed their own catalogs. They were substantially similar to the insert sheets and contained the same illustrations and price information.

The insert sheets and color positives were printed and distributed at Coro's expense. Where color positives were furnished, a printing allowance was made by Coro.

The volume of catalog insert sheets produced and printed for Coro during the three-year period, 1958–1960, was as follows:

1958.....	2, 305, 850
1959.....	1, 251, 636
1960.....	986, 744

During the same period, Coro furnished color positives as follows:

1958.....	2 sets
1959.....	15 sets
1960.....	12 sets

15. In soliciting orders from catalog houses, Coro submitted sample catalog pages, or mock-ups, accompanied by a coding sheet for the use of the catalog house in adapting the pages, or portions thereof, to its particular catalog.

16. Typical of the product description and price data in the catalog insert sheets used by Coro in 1958 and 1959 is the following excerpt:

[B] NANCY * * * Irresistibly lovely, royally styled for the queen in your life!

Graceful MESH design.

Necklace and Earrings * * *

7483/02C825 2-Pc. Set.....	\$16.50
7483/26C525 Necklace only.....	10.50
7483/16C525 Bracelet only.....	10.50
7483/50C300 Earrings only.....	6.00

The first part of the code number consisting of figures and one or more letters (e.g., 7483/02C) was Coro's style number identifying the merchandise. The last three or four figures represented the selling price of the catalog house.

For example, in the case of the "Nancy" jewelry set referred to above, the figures 825, 525 and 300 in the catalog code number, following the letter "C", were translatable into prices of \$8.25, \$5.25 and \$3. Usually, if not invariably, the coded price for Coro jewelry is one-half the price set forth at the extreme right-hand side of the price line (\$16.50, \$10.50 and \$6 in the "Nancy" example), which

is the so-called "retail" or "list" price, and which was so characterized in some catalogs.

17. To its catalog customers, in 1958 and 1959, respondent Coro sent a coding sheet listing its catalog merchandise by style number and setting forth price information. The price data furnished on such coding sheets was under three column headings: "Jobber Cost", "Dealer Cost" and "Suggested Line."⁵

For example, the "Nancy" set was listed on the Coro coding sheet as follows:

Key	Number	Item	Jobber cost	Dealer cost	Suggested line	Your corresponding price line as it is to print
B	7483/02 Nancy.....	2 pc. set.....	5.50	8.25	16.50	
	7483/26.....	Necklace.....	3.50	5.25	10.50	
	7483/16.....	Bracelet.....	3.50	5.25	10.50	
	7483/50.....	Earrings.....	2.00	3.00	6.00	

The figure designated "Jobber Cost" was Coro's selling price to catalog houses. The "Dealer Cost" was the price at which it was assumed or suggested that the catalog house would sell. The "Suggested Line" was the suggested "list" or "retail" price.

In the blank lines under the heading, "Your corresponding price line as it is to print," the catalog house placed its own catalog code number, the coded price and the purported price, or equivalent information.

18. While there may have been occasional variations, catalog house customers generally utilized in their catalogs the price data furnished by respondent Coro on the coding sheet.

By way of illustration, Coro's price data relating to the "Nancy" set was utilized as follows by three different catalog houses:

*L & C Mayers*⁶

20 K 0168 TG 825	2 Pc. Set.....	\$16.50
20 K 0169 TG 525	Necklace.....	10.50
20 K 0170 TG 525	Bracelet.....	10.50
20 K 1071 TG 300	Earrings.....	6.00

⁵ Whether this was a misprint for "Suggested List" or an effort to avoid using that term was not explained. However, that is what it was intended to represent, and that is how it was used.

⁶ Although the purported price of the Coro merchandise is not specifically identified as "retail" in the Mayers' catalog, most of the other merchandise depicted in the book has the word "Retail" or the abbreviation "Ret." preceding the purported price. Furthermore, an insert in the Mayer catalog explaining the price coding system states: "The only prices shown are retail. Your cost is concealed in the catalog number." In transmitting its coding sheet to Coro, Mayers specified that "The suggested retail price for each item should be stated," and its coding sheet identified the purported prices as "Retail."

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*Service Exchange Distributors*⁷

2 pc. set	17407CT825	Retail \$16. 50
Necklace	17408CT525	Retail 10. 50
Bracelet	17409CT525	Retail 10. 50
Earrings	17410CT300	Retail 6. 00

Waldron and Company, Inc.

		<i>Retail</i>	<i>Your Cost</i>
3089JT	2 Pc. Set-----	\$16. 50	\$8. 25
3090JT	Necklace-----	10. 50	5. 25
3091JT	Bracelet-----	10. 50	5. 25
3092JT	Earrings-----	6. 00	3. 00

19. The price line information in the Coro catalog inserts was furnished initially by Coro to the catalog houses to which it sold. Utilizing the figures supplied by Coro, the catalog house specified the manner in which the price line information was to appear in the catalog pages furnished by Coro.

20. The figure described by Coro as "Suggested Line" on the coding sheet it sent to catalog houses appeared in some catalogs simply as a price figure bearing no characterization, except as it was explained elsewhere in the catalog. Others applied the term "retail" to it, while still others called it "List" or "List Price."

21. The price line used by Coro in its 1958 and 1959 insert sheets—including a purported retail price and a coded price—was based on a so-called "three times" formula. Under this formula, the price Coro charged the catalog house for an item was tripled (exactly or approximately) to arrive at the "retail" or "list" price. The coded price or "Dealer Cost"—at which the catalog houses actually sold to all customers—was exactly or approximately one-half the so-called "retail" or "list" price.

This "three times" formula has been in general use in catalog house sales of jewelry for many years. Coro adopted it when it began selling to catalog houses, about 1955 or 1956.

22. A change was made in the format of the coding sheet in 1960, following conferences with Coro counsel. The coding sheet used in that year contained only one price figure under a column headed "Your Cost." This was the cost to the catalog house customer.

⁷ By respondent's own testimony, the coding sheet of this company is typical of the way catalog houses completed the coding sheet.

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A typical listing was as follows:

Key	Number	Item	Your cost	Your corresponding price line as it is to print
C	077/02 Royal Elegance.....	2 pc. set.....	16.50	
	077/26.....	Necklace only.....	12.00	
	077/50.....	Earrings only.....	4.50	

However, the sample catalog pages and the "insert application sheet" [i.e., the coding sheet] used by Coro in 1960 were accompanied by a letter stating in part as follows:

The insert application sheet shows your cost for each set or item. You must indicate on the accompanying line exactly how you wish your price line to read. In making this out, *you must include the price at which you will offer it to your dealer and list price which you will suggest to him. On the basis of past experience, we can advise you that catalogs using our insert usually take a markup of 50% on their cost. Catalogs usually suggest a retail price of double this amount for their dealer.*⁸ On watches a retail price allowing the dealers a 40% markup is usually suggested.

23. The manner in which Coro's 1960 price data was used is illustrated by the coding sheet executed by Leonard Krower & Son, Inc., of New Orleans, Louisiana.

Applying to the "Royal Elegance" set, for example, the formula suggested by Coro, Krower simply specified the price line as follows:

077/02 Royal Elegance	2 pc. set.	List \$49.50
077/26	Necklace only.	List \$36.00
077/50	Earrings only.	List \$13.50

This was reflected accordingly in the catalog insert sheet as published.

24. The catalog insert sheets, color positives, coding sheets and related material were distributed in commerce by respondent Coro. Similarly, the catalogs containing the pages furnished by Coro, directly or indirectly, were in turn distributed in commerce by the catalog houses, with resulting sales in commerce.

25. By preparing and distributing in commerce the coding sheets, catalog insert sheets, color positives and related material setting forth price figures as "retail," "list" or "suggested line," or without specific designation, respondent Coro represented directly or by implication that such price figures, however, designated, were the usual and regu-

⁸ Emphasis added. The markup and retail price formula here advised is simply another way of describing the "three times" formula.

lar retail prices for its costume jewelry, watches and other products in trade area or areas where the representations were made.

26. In truth and in fact, those price figures were not the usual and regular retail prices for Coro merchandise in the trade area or areas where the representations were made, but were fictitious and exaggerated prices, arrived at by the use of an arbitrary, inflexible formula. The usual and regular retail prices were those at which the catalog houses sold Coro merchandise—*i.e.*, prices approximately 50 percent less than the prices represented as retail.

27. By the acts and practices herein found, Coro placed in the hands of catalog houses the means and instrumentalities by and through which they might mislead and deceive the purchasing public as to the usual and regular prices of Coro merchandise.

28. Concerning the defense of discontinuance of the practices charged, the record shows that, although Coro has continued to sell watches and costume jewelry in commerce, it is liquidating the watch business and has withdrawn from the catalog house business. The latter decision was made before this complaint issued, but after the Commission instituted its investigation. Following conferences and communications with personnel of the Commission's New York branch office, the determination was made that Coro would not sell merchandise to the type of catalog houses described in the complaint. That decision was made at a conference attended by Gerald Rosenberger, Jerome Roberts, Edwin Oppenheimer and counsel.

Discontinuance was the subject of a memorandum dated December 14, 1960, from Jerome Roberts, a Coro vice president, to Edwin J. Oppenheimer and Morris Malkin, who operated the catalog department. It stated in part as follows:

We have just had a final conference with the lawyers on the catalog page. The following decisions are now company policy and they will be adhered to:

- 1—We are not going to print any catalog pages with or without prices.
- 2—No sales will be permitted of any merchandise to any concerns, with or without the Coro name, where discounting from a fictitious list price or discounting of any kind is the method of sale.
- 3—It is permissible to sell to catalog houses, provided that our goods are merchandised in the same way that Speigels presently merchandise their catalog.

Following receipt of this memorandum, Coro advised the catalog houses with which it did business, that it was no longer going to offer a line of jewelry for sale to catalogs, that it wasn't going to print any insert sheets or color positives in the future. No general statement to this effect was sent out, but Coro advised the catalog houses of this decision as it got in touch with them, beginning about December 1960 or January 1961.

Mr. Roberts was quoted as giving the following reasons for the adoption of the policy: "That the catalog department represented a very small fraction of Coro's overall business and regardless of whether we legally might be right or wrong, and regardless of the elements involved there, the fact that we may be right, the fact that it would be a subject of controversy, would be very bad for our company's reputation, and that, in itself, was a sufficient reason for abandoning it. Also, that it would become a matter of controversy, that it would mean that every step or action taken in the course of sales of the organization, would have to be subject to meeting, subject to scrutiny by counsel, and we didn't want to involve any branch of our company in any kind of business where we felt we would have to ask counsel if we could do this, that or the other thing. It was a question of business we wanted to have."

Since the decision, there has been no merchandise sold to any catalog customer, and it was stated that Coro has no intention of resuming the catalog business in the future.

Summary and Concluding Findings

1. There is little or no dispute as to the basic facts in this proceeding. As to the charge of deceptively advertising the Coro watch guarantee, the only questions raised by respondent relate to the necessity for an order, and its breadth if one is issued. These matters are considered *infra*. Thus, it is sufficient at this juncture to refer to *Parker Pen Co. v. F.T.C.*, 159 F. 2d 509 (7th Cir. 1946) as authority for an order terminating deceptive advertising of the guarantee.

2. Concerning the fictitious pricing charge, respondents' defense revolves primarily around these contentions:

(a.) That the fictitious prices alleged were established by the catalog houses, not by Coro.

(b.) That there is no proof that the public understands "list" or "retail" price to mean the regular and usual retail price.

(c.) That in any event, there is no proof that the prices so denominated were not the usual retail prices.

Each of these contentions will be considered in turn.

3. Respondents contend that Coro should be absolved here because

* * * the prices contained on these insert sheets and color positives were not inserted at Coro's command, rather they were established by Coro's catalog house customers. Coro simply printed as the price line whatever the catalog house customer desired. (Respondents' Main Brief, p. 6.)

4. Respondent's contention that it cannot properly be held liable because it simply prints the price information designated by its cus-

tomers must be rejected. Actually, the price information furnished to Coro by the customer was simply a utilization of price data furnished and suggested by Coro. And this is true even of the modified practice of 1960. Furthermore, even if the fictitious prices were originated by the customer and printed by Coro on order of the customer, this would not mean that Coro could simply shrug and say, "We're simply a printer, following directions."

The mere fact that the deceptive information was furnished on request cannot be held to absolve the respondent. In *Rayex Corporation*, Docket 7346 (April 2, 1962) [60 F.T.C. 664], the evidence was that the questioned price stickers were affixed at the request of customers, but an order was issued prohibiting the practice.

Similarly, in *Orloff Company, Inc.*, 52 F.T.C. 709, Docket 6184 (1956), it was stipulated that the determination whether price tags affixed to respondents' watches should be attached at the time of resale to the ultimate consumer was made by respondents' customers, not by respondents. An order was nevertheless issued.

5. Although respondents' counsel has emphasized that this case does not involve "pre-ticketing" of merchandise with fictitious prices, it is clear that the same principles apply. The media or vehicle used for the dissemination of the fictitious prices is not controlling.

Whether the fictitious prices are printed on price tickets attached to merchandise or contained in catalog sheets, coding sheets, price lists, brochures, circular or other advertising material, the question is whether the price information has the capacity and tendency to deceive the purchasing public.

6. There is no difference in principle between the furnishing of fictitious prices through catalog sheets and the furnishing of fictitious prices through the device of pre-ticketing. This is pointed out in the Commission's opinion in *Rayex Corporation*, Docket 7346 (April 2, 1962) [60 F.T.C. 664, 675]. The Commission's opinion stated:

There is, of course, no convention requiring manufacturers and distributors to use pre-ticketing as a means for "suggesting" resale prices to their dealers. They could as well simply enclose a list of suggested prices with each shipment. That procedure would involve no possibility of the sort of deception with which we are here concerned, assuming that the price list information was not passed on to the public. (Emphasis added.)

The opinion goes on to note that when resale prices supplied to dealers—whether through preticketing or some similar practice—are made public, and dealers in a trade area, or many of them, habitually market the product for substantially less, the tendency to deceive and hence its illegality are settled matters.

Thus, it is clear that it is the misrepresentation that is unlawful and not the particular form in which the misrepresentation is accomplished.

In *Helbros Watch Company, Inc.*, Docket 6807 (December 26, 1961) [59 F.T.C. 1377], for example, price lists furnished to dealers by a supplier and displayed by dealers to potential and actual customers were held to be deceptive instrumentalities.

Also overlooked by respondent in contending that this proceeding is novel is the fact that *The Clinton Watch Company* case, Docket 7434 (July 19, 1960) [57 F.T.C. 222], *aff'd* 291 F.2d 838 (7th Cir. 1961),* involved catalog inserts, brochures, circulars and other advertising material, as well as pre-ticketing.

7. Presentation in catalogs of a "suggested" "retail" or "list" price, whether so designated or not, in juxtaposition with the actual selling price, has the capacity and tendency to mislead and deceive purchasers into the mistaken belief that they are realizing a saving from the usual and regular price of the seller. Actually, there was no saving from the usual and regular prices of the catalog houses. Their coded or "Your Cost" prices were their usual and regular prices.

8. As in the pre-ticketing cases, respondent Coro, by supplying the catalog pages and other material setting forth fictitious retail prices, has furnished the means and instrumentalities whereby retail customers might be misled into the mistaken belief that they were obtaining bargain prices when, in fact, they were paying the regular catalog house price.

9. An order to cease and desist is warranted where, as here, a manufacturer or distributor, knowing that its catalog house customers sell to retail customers at less than the "retail" prices stated in their catalogs, supplies to such catalog houses, catalog sheets and other material aiding and abetting such misrepresentation.

10. Respondents also argue that the case must fail because there was no evidence of consumer understanding of such terms as "retail" and "list" prices.

11. It is sufficient answer to this contention—if any answer be needed—to cite the recent case of *George's Radio and Television Company, Inc.*, Docket 8134 (January 19, 1962) [60 F.T.C. 179, 192-193, 195], in which the Commission prohibited the use of the designation of prices in respondents' advertisements as "Mfr's Sug. List" and "Manufacturer's Suggested List." The Commission held:

The representation "Mfr's. Sug. List" creates the impression that there is a usual and customary retail price for the product in the trade area, and that

* *Cert. denied* 368 U.S. 952.

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that price is the specified "Mfr's. Sug. List" price. The soundness of this interpretation is settled law. * * *

The Commission also found:

The use with the designation "Mfr's. Sug. List" or "Manufacturer's Suggested List" price in advertising in juxtaposition with a lower price represents and tends to lead readers of such advertising to believe that the higher price is the price at which the merchandise is usually and customarily sold in the * * * trade area and that a saving will be made of the difference between the two prices.

12. When the word "list," qualified by the word "suggested," is held to constitute a representation of the usual and customary retail price, it follows that the unqualified terms "list" and "retail" must be likewise construed. There is no need for a consumer poll or testimony of public witnesses as to the meaning of those terms.

13. The *George's* case also stands for the proposition that:

The use, without designation as such, of the manufacturer's suggested retail price in advertising in juxtaposition with a lower price, represents and tends to lead readers of such advertising to believe that the higher price is the price at which the merchandise is usually and customarily sold by the advertiser in the recent regular course of business and that a saving will be made of the difference between the two prices.

14. The application of those principles to the instant matter is clear.

15. The argument that respondent mainly relies on is that there has been a failure to prove that the figures denominated as retail prices in the catalog sheets distributed by Coro to catalog houses were not the usual retail prices for the products. It takes the position that there is no proof as to what the customary retail prices were for the Coro merchandise described in the catalog insert sheets.

16. In focusing attention on the lack of evidence as to the prices at which retailer customers of the catalog houses may have resold the Coro catalog line, respondent overlooks or minimizes the fact that the catalog houses themselves were selling at retail.

17. The record does not permit a definitive analysis of the nature and scope of the sales transactions of Coro's catalog house customers. But, as indicated in the findings of fact, although some of their sales may be wholesale, there is no doubt that they also sell as retailers.

18. Sales to individual consumers are clearly retail sales, whether made in a showroom or through mail-order, and regardless of their possession of company credentials. And there is no doubt from the evidence that catalog houses generally—and L & C Mayers

Company and Waldron and Company, Inc., in particular—did and do make sales to individual consumers.

19. Despite respondents' intimations to the contrary, there is specific evidence that Waldron and Company made showroom sales of Coro jewelry in 1958, 1959, 1960 at the coded or "Your Cost" price.

20. In addition to individual consumers, certain other categories of catalog house sales, on the facts of record and in the light of court and Commission precedents, may be denominated as retail.

21. The so-called industrial account sales may be wholesale or retail, depending on whether sales are made in bulk. This record supports the inference that some—perhaps most—of those sales were retail.

22. In *Plaza Luggage & Supply Co., Inc.*, 44 F.T.C. 443, Docket 4857 (1948), customers and prospective customers included "business concerns for their use and the use of their employees" and "groups of associated individuals, all of whom buy for their own use or the use of their employees and not for resale * * *." The Commission held that respondents were retailers.

23. Very much in point here is *L. & C. Mayers Co., Inc.*, 21 F.T.C. 434, Docket 2038 (1935), *aff'd*, 97 F. 2d 365 (2d Cir. 1938). Mayers' catalogs were sent chiefly to industrial concerns, cooperative buying bureaus, state governments, municipal governments and purchasing clubs. The Commission held that Mayers was not a wholesaler but a mail order house engaged chiefly in selling to the purchasing public. The Commission further held that sales to the following were "retail business":

(1) industrial concerns, public utilities, banks and other similar organizations to which merchandise was sold and shipped by the respondent, not for resale, but for use by such organizations. The sales to this group include various articles, but do not include purchases in quantity lots.

(2) industrial concerns, public utilities, banks and other similar organizations, which buy merchandise from the respondent, not for resale but for the benefit of their employees * * *.

(3) mutual buying clubs maintained by fraternities, colleges and universities and the employees of some large industrial, public utility or similar organizations * * *. Merchandise * * * not resold by the vendees, but is applied to their own use or the use of the members of such organizations.

The hearing examiner does not understand this decision to conflict with *Roland Electric Co. v. Walling*, 326 U.S. 657 (1946), cited in respondents' brief.

24. Reference also should be made to *Helbros Watch Company, Inc.*, Docket 6807 (December 26, 1961) [59 F.T.C. 1377, 1405]. There the Commission found catalog houses "were selling respond-

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ents' watches to the ultimate consumer and were, therefore, selling at retail."

25. It is not necessary, however, for purposes of this proceeding, to examine any nice distinctions between sales at wholesale and sales at retail. It is sufficient that Coro's catalog customers made retail sales at prices below what they, aided and abetted by Coro, represented to be the retail price.

26. The absence of any evidence in this record of the prices charged for Coro catalog merchandise by retailers who bought from catalog houses for resale does not result in a failure of proof that the prices represented by Coro as "retail" were not the usual retail prices. There is ample evidence that the purported "retail" prices were not the prices at which the catalog houses sold at retail. That is sufficient to support the allegations of the complaint.

27. The validity of this conclusion finds support in *Art National Manufacturers Distributing Co., Inc.*, Docket 7286 (May 10, 1961) [58 F.T.C. 719], *aff'd.*, 298 F. 2d 476 (2d Cir. 1962). In that case, there was evidence of sales *below* the suggested resale or pre-ticketed prices by some retailers, including a large catalog house, but also evidence of sales *at* the suggested resale or pre-ticketed prices by other retailers. In these circumstances, the hearing examiner held the fictitious pricing charge was not sustained.

Reversing on appeal, the Commission based its finding of fictitious pricing on the sales of the catalog house at prices below what it represented to be "retail prices" (corresponding to the suggested resale and pre-ticketed prices of its supplier).

The Commission's decision turned on the fact that the supplier had knowledge of substantial sales by the catalog house at prices below the pre-ticketed prices. The fact that the supplier and the catalog house were affiliated corporations does not detract from the principle that fictitious pricing may exist even in the presence of some sales at the suggested or pre-ticketed prices if there is a representation that regular retail prices are substantially higher than they actually are.

28. Similarly in *The Baltimore Luggage Company*, Docket 7683 (March 15, 1961) [58 F.T.C. 451], *aff'd.* 296 F. 2d 608 (4th Cir. 1961),* there was a finding of fictitious pricing through pre-ticketing although 70 percent of respondents' customers, representing 62.5 percent of respondents' dollar volume of sales, sold at the pre-ticketed prices. The order to cease and desist was upheld on a

* *Cert. denied* April 23, 1962, 30 L.W. 3333.

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showing of sales in three trade areas at prices below pre-ticketed prices.

29. The charge that the purported retail prices were "fictitious and exaggerated" also finds support in the fact that respondent Coro fixed the so-called retail price pursuant to a rigid formula resulting in an arbitrary amount bearing no discernible relationship to the realities of the market where the representations were being made.

30. In fixing the so-called "retail" prices of their products pursuant to the "three times" formula, respondent obviously did not base them on any actual prices in any particular trade area.

The catalog "retail" price for a particular Coro product was identical, regardless of the location of the catalog house or its sales area.

31. The hearing examiner has considered respondents' contentions that the complaint should be dismissed on the ground that the challenged practices have been discontinued, with no intent to resume.

The facts and circumstances here are more persuasive than in many cases where such a plea has been made. Nevertheless, discontinuance took place only after the Commission began looking into the matter, and the Commission has held that dismissal is rarely warranted under those circumstances. Other factors impelling denial of the dismissal plea include the nature of the practices and their duration.

Although respondent has withdrawn from the catalog house field and apparently is liquidating its watch business, it remains substantially engaged in the sale of the same products. In the absence of a legally binding order, there exists some cognizable danger of recurrent violation. The rationale of the *Bell & Howell* dismissal, 54 F.T.C. 108, Docket 6729 (1957) is not controlling here, and the other cases cited by respondents are likewise distinguishable.

After consideration of the facts in the light of Commission and court precedent⁹, the examiner concludes that dismissal on the ground of discontinuance is not warranted. There are "no unusual circumstances which in the interest of justice require" dismissal. *Argus Cameras, Inc.*, 51 F.T.C. 405, Docket 6199 (1954). The public interest calls for an order.

⁹ E.g., *Art National Manufacturers Distributing Co., Inc.*, Docket 7286 (May 10, 1961) [58 F.T.C. 719], 298 F. 2d 476 (2d Cir. 1962); *Cannon Mills, Inc.*, 55 F.T.C. 1448, 1457-58, Docket 7115 (1959); *Ward Baking Co.*, 54 F.T.C. 1919, Docket 6833 (1958); and cases there cited.

32. Although the individual respondents, as officers and directors, doubtless participated generally in the formulation, direction and control of the acts and practices of respondent Coro, the evidence does not show such involvement in the acts and practices challenged by the complaint as to necessitate or warrant their being personally named in the order to cease and desist. Nor are there other circumstances to require or justify their being named in the order, individually or as officers.

33. The inclusion of named individuals in an order to cease and desist is a question of discretion on the part of the hearing examiner and the Commission.

The basic question is whether an order against the corporation (and its officers and agents generally) will be adequate to prevent continuation or resumption of the challenged practices. In the circumstances here, the hearing examiner concludes that it will. Accordingly, the order provides for qualified dismissal as to all the individual respondents—that is, except as they are bound as corporate officers or agents.

34. It is true that respondent Gerald E. Rosenberger, as president and chairman of the board, has the over-all responsibility for the acts and practices of the corporation. This is not enough, however, to show individual responsibility warranting the stigmatization attendant upon an order naming him personally. There is no showing of “active personal participation” in the acts and practices here found unlawful; of domination of the corporation by him; or of any special circumstances suggesting the likelihood that omission of his name from the order would result in any evasion by the corporation of the prohibitions here imposed.

Although recognizing that such precedents as *Standard Distributors, Inc., v. F.T.C.*, 211 F. 2d 7 (2d Cir. 1954) and *Seborne Company v. F.T.C.*, 135 F. 2d 676 (7th Cir. 1943), support the levying of an order against Mr. Rosenberger, and perhaps the other two individuals as well, nevertheless, the examiner relies on *Maryland Baking Company*, 52 F.T.C. 1679, 1691, Docket 6327 (1956), 243 F. 2d 716 (4th Cir. 1957), as authority for dismissal here. And see *The Clinton Watch Company v. F.T.C.*, 291 F. 2d 838 (7th Cir. 1961); dissenting opinion in *Standard Distributors, supra*, 211 F. 2d at 13-14; cf. *Kay Jewelry Stores, Inc.*, 54 F.T.C. 548, Docket 6445 (1957); *Wilson Tobacco Board of Trade, Inc.*, 53 F.T.C. 141, Docket 6262 (1956); *Neuville, Inc.*, 53 F.T.C. 436, Docket 6405 (1956); *Jewel Radio & Television Corp. of America*, 49 F.T.C. 781, Docket 5683 (1953).

The fact that Mr. Rosenberger participated in the decision to discontinue the catalog house operation of respondent Coro was cited by counsel supporting the complaint in urging his inclusion in the order. On the record here, it would be anomalous indeed to rely on that fact as ground for assessing personal liability.

35. As for respondent Royal Marcher, he is no longer an officer, and even as to the time when he was, there is no showing of any participation in the practices challenged by the complaint. *Browning King & Company, Inc.*, Docket 7060 (August 2, 1961) [59 F.T.C. 155], supports dismissal in these circumstances.

36. Respondent Jerome H. Oppenheimer is an officer and director, but beyond the inferences to be drawn from his holding of those positions, there is no evidence that he was responsible for or participated in the formulation, direction or control of the acts and practices of the corporation; nor did he have any connection with the practices challenged by the complaint.

37. The roles of respondents Marcher and Oppenheimer are analogous to those of the individuals dismissed as respondents in *Standard Distributors, Inc.*, 48 F.T.C. 1435, 1441-2, Docket 5580 (1952), 211 F. 2d 7 (2d. Cir. 1954).

38. Respondent Coro is a large, responsible, publicly-held corporation, and the fictitious pricing charge is applicable only to a small segment of its business. These circumstances distinguish this case from those in which corporate officers were held personally because of their domination of closely-held or family corporations; their active, direct and personal participation in unlawful practices; or the existence of circumstances suggesting a likelihood of the order's evasion.

39. Here we do not have, as in *Reliance Wool & Quilting Products, Inc.*, Docket 7165 (November 20, 1959), facts and circumstances supporting "inferences of roles of prime responsibility and active personal participation in the acts and practices found unlawful."

We do not have as to any of the respondents, corporate or individual, the circumstances that led the Supreme Court to uphold the Commission's attachment of individual liability in *F.T.C. v. Standard Education Society*, 302 U.S. 112 (1937).

40. The order proposed by respondents would limit the coverage of the fictitious pricing prohibitions to costume jewelry and watches, and that of the guarantee claim prohibition to watches. Counsel supporting the complaint, however, has proposed that the order specifically apply to those products and, in addition, cover "any other merchandise."

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41. The complaint alleged, and the answer admitted, that Coro is "engaged in the manufacture, sale and distribution of costume jewelry, watches, and other products."

42. It is true that the evidence in this proceeding has been limited to jewelry and watches. However, the practices found unlawful do not have any peculiar connection with the products specifically named and are susceptible of being extended to such "other products" as respondent may sell now or in the future.

If, as contended, respondent has discontinued the practices without intent to resume, it suffers no burden by virtue of the broad product coverage.

On the other hand, if there should be continuance or resumption of the unlawful practices, but with respect to products other than those named in a narrow order, the public interest would be prejudiced by the necessity of relitigating as to those.

43. Where a deceptive practice has been found in the sale of specific products, it is proper for an order to prohibit a respondent from selling different merchandise using the same practice. *Consumer Sales Corp. v. F.T.C.*, 198 F. 2d 404 (2d Cir. 1952).

44. There appear to be no special circumstances requiring or warranting any narrowing of the product coverage to the merchandise specifically involved in this proceeding.

45. As to the other objections to the breadth and alleged vagueness of the order, similar prohibitions were approved in *The Baltimore Luggage Company v. F.T.C.*, 296 F. 2d 608 (4th Cir. 1961).^{*} The Court found "no substance" in the contention that the order was "ambiguous and indefinite." The decisions in *Grand Union Co. v. F.T.C.*, 300 F. 2d 92 (2d Cir. 1962) and *Swanee Paper Corp. v. F.T.C.*, 291 F. 2d 833 (2d Cir. 1961), rely on circumstances not present here and, in the examiner's opinion, do not require narrowing of this order.

CONCLUSIONS OF LAW

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

2. The complaint herein states a cause of action, and this proceeding is in the public interest.

3. The acts and practices of respondent Coro, as found herein, have had, and may have, the capacity and tendency to mislead and deceive members of the purchasing public with respect to the usual and customary retail prices of its costume jewelry, watches and

^{*}*Cert. denied* April 23, 1962, 30 L.W. 3333.

other products, and to mislead and deceive members of the purchasing public as to the guarantee provided by respondent on its watches, and into the purchase of such products as a result. As a consequence, trade has been unfairly diverted to respondent from its competitors and substantial injury has thereby been done to competition in commerce.

4. By its acts and practices respondent placed in the hands of catalog houses means and instrumentalities by and through which they might deceive and mislead the purchasing public as to the usual and customary retail prices of respondent's merchandise.

5. The acts and practices of respondent Coro, as found herein, 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.

ORDER

It is ordered, That respondent Coro, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of costume jewelry, watches or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication, on catalog insert sheets, on color positives for the printing of such catalog sheets, or on price lists, or in any other manner, that any amount is the usual and regular retail price of merchandise when such amount is in excess of the price at which such merchandise is usually and customarily sold at retail in the trade area or areas where the representations are made.

2. Putting into operation any plan whereby retailers or others may misrepresent the usual and regular prices of such merchandise.

3. Representing directly or by implication that any product is guaranteed unless the terms and conditions of such guarantee and the manner and form in which the guarantor will perform are clearly and conspicuously set forth.

4. Representing that any product is guaranteed when a service or other charge is imposed, unless the amount thereof is clearly and conspicuously set forth.

It is further ordered, That the complaint be, and it hereby is, dismissed as to Gerald E. Rosenberger, Royal Marcher and Jerome

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H. Oppenheimer, individually, except to the extent that they are bound by the order against respondent Coro, Inc., as officers, agents or representatives.

OPINION OF THE COMMISSION

JULY 9, 1963

By DIXON, *Commissioner*:

Respondent Coro, Inc., appeals from a hearing examiner's initial decision holding that respondent, in the sale of its costume jewelry and watches, has engaged in the unfair practice of "fictitious pricing" in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.¹ Respondent does not except, however, to the examiner's further finding that respondent has also violated that statute by representing that its watches were unconditionally guaranteed when, in fact, a charge was imposed on persons seeking to avail themselves of the "guarantee."

The examiner dismissed the complaint as to the three individual respondents. Counsel supporting the complaint does not appeal that dismissal but the Commission, *sua sponte*, has placed that aspect of the matter on its docket for review.²

Coro, Inc., the corporate respondent, is a New York corporation with its principal office and place of business in New York City. It is engaged in manufacturing and importing watches, costume jewelry, and other products, with factories in Providence, Rhode Island; Toronto, Canada; and Crawley, England. Its annual sales are approximately \$30 million. These are made primarily to such retailers as department and variety stores, through Coro's own sales staff. Apparently no sales are made to wholesalers or jobbers.

The three individual respondents named in the complaint are officers, directors, and stockholders of the corporate respondent. Gerald E. Rosenberger is its Chairman of the Board, President, one of its Directors, and its largest single stockholder. Royal Marcher is a Director and Consultant. Jerome H. Oppenheimer is its Vice President and Secretary. The complaint charges, in substance, that they control the acts and practices of the corporate respondent, and are thus responsible for the unlawful acts involved herein.

Respondent presents seven exceptions to the examiner's findings and order on the "fictitious pricing" issue. Three of these go to the

¹ This section provides in pertinent part that: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

² Order Placing Case on Commission's Docket for Review as to Certain Respondents (June 29, 1962).

"substantive" question of whether the evidence establishes that respondent has in fact engaged in the unfair practice of fictitious pricing. The other four exceptions, including its challenge to the scope of the order, are all related, in one way or another, to respondent's alleged "abandonment" of the practice.

I

In 1955 or 1956,³ Coro began selling watches and costume jewelry to a class of customers called "catalog houses." It sold them, however, not its "regular" line (that is, the line that it sold to department and variety stores) but a "special" line manufactured solely for sale to, and resale by, the "catalog houses." This special line of merchandise made exclusively for the catalog houses was never sold by Coro to any other class of customers, or through any other channels of trade.

Respondent's method of soliciting and selling to the catalog houses can be summarized as follows: First, by means of photography and art work, Coro prepared mock-ups of catalog pages, in color, each page picturing several items of Coro merchandise.⁴ At the bottom of each page, the items pictured thereon are described in words, identified by "order number," and priced. For example, one such mock-up page prepared by respondent pictured, among other Coro items, its "Nancy" necklace and earring set. The text at the bottom of the page described and priced that set in part as follows:

NANCY * * * Irresistibly lovely, royally styled for the queen in your life!
Graceful mesh design.
Necklace and Earrings * * *
7483/02C825 2-Pc. Set..... \$16.50⁵

Respondent prepared this particular page for the catalog houses that use what is called the "coded" method of pricing. Here, the actual selling price of the item—that is, the price the catalog houses actually charge their mail-order and other customers—is "hidden" or "coded" into the order number.⁶ In the order number ("7483/

³ Respondent's officials were unable to fix the date with any greater precision. Tr. 68, 85.

⁴ See CX 8-A through 10-D.

⁵ CX 9C.

⁶ The catalogs carry an instruction sheet that tells their readers how to find the actual selling price, that is, the amount of money they are to forward with their order. See e.g. p. 4 of the "insert" just inside the front cover of the catalog included in the record as CX 59. A portion of this page is entitled "How To Read Your Low Confidential Cost! CONFIDENTIAL The only prices shown are retail. Your cost is concealed in the catalog number. EXAMPLE: Catalog Number 65 M 1201 G 1450 Order Number of Article 65 M 1201G Your Cost \$14.50." In other words, the reader is to pay the "coded" price, and ignore the higher price appearing beside it. This latter price is almost always exactly double the actual selling (or "coded") price. See Coro's jewelry on pp. 28-31 of CX 59.

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02C825"), the last three numbers ("825") constitute the "coded" price at which the catalogs actually sell, namely, \$8.25. The other "price" figure set out above (\$16.50) purports to be the "retail" price of the item.⁷ In fact, however, that price was derived by respondent Coro not from its understanding of the price at which its goods were actually being sold at retail, but by a simple mathematical computation that employs what is known as the "three-times formula."

The working of this "three-times formula" is illustrated by another document employed by respondent in soliciting and selling to its catalog house customers. This one, which is called the "coding sheet," is sent along with the catalog page mock-ups and thus forms a part of respondent's presentation to the catalog house customer (or potential customer). On this "coding sheet," respondent lists by names and order numbers the items in the "line" it is offering. In addition, it lists three separate price figures. Thus, the "Nancy" necklace and earring set noted above, in addition to the appropriate order numbers, was further described on the "coding sheet" sent by Coro to the catalog houses as follows:⁸

Jobber cost	Dealer cost	Suggested line	Your corresponding price line as it is to print
5.50	8.25	16.50	

The "jobber cost" (\$5.50) was the price at which Coro was offering to sell to the catalog houses themselves. The "dealer cost" (\$8.25) was the price Coro suggested the catalog houses should *actually* resell the item. And the "suggested line" (\$16.50) was the price figure respondent suggested the catalog houses should "direct" or "instruct" respondent to print in the finished catalog pages as the "suggested retail" price. The \$5.50 price—the one respondent charged the catalog houses themselves—was the base figure from which the other two "suggested" figures were derived. Applying the "three-times formula" to \$5.50, that is, multiplying it by three, gives the "suggested retail" price of \$16.50. No catalog house has ever sold this item or any other item at these "three-times" prices, *i.e.*, at this 200% markup. The catalog houses *always* sell at exactly

⁷ Some of the catalog houses preface these purported retail price figures with such words as "retail," "list," "list price," etc. Whether so described or not, it is plain that the higher of the two price figures is designed to, and does, convey to the reader the idea that it is the usual and regular "retail" price of the item.

⁸ CX 55-B, at "Page 3."

(or approximately) one-half that amount (in the example given here, at the \$8.25 price suggested by respondent).⁹

The "blank" line appearing on the "coding sheets" sent by respondent to the catalog houses, *i.e.*, the line appearing beneath the heading "Your corresponding price line as it is to print," set out above, forms the basis for one of respondent's arguments herein. In addition to its other functions (*e.g.*, price list), the "coding sheet" serves as something of an "order blank," in that the catalog houses who accept respondent's offer to sell (and thus to have respondent's merchandise pictured in their catalogs), indicate their acceptance by returning to respondent its "coding sheet," with appropriate notations. Thus, Service Exchange Distributors, a catalog house located in San Francisco, accepted respondent's offer by returning Coro's "coding sheet" with the notation that, among other things, Service Exchange Distributors wanted Coro to print, for insertion in Service's catalog, 36,000 copies of respondent's "mock-up" catalog pages. In addition, Service indicated, in the blank spaces beneath the heading "Your corresponding price line as it is to print," its acceptance of respondent's suggestions as to both the *actual* price at which it would resell and the purported "retail" price. For example, Service returned respondent's "coding sheet" with the following notation inserted in the blank space noted above in connection with Coro's "Nancy" necklace and earring set:¹⁰

17407CT825----- Retail \$16.50

As previously noted, "825" is the "code" for a price of \$8.25, the price respondent suggested as the *actual* resale price of the catalog houses, and the "Retail \$16.50" is the purported retail price computed by Coro under the "three-times formula."

Apparently aware of the illegality of supplying its customers with these blatantly fictitious prices, respondent, in 1960, made a rather transparent attempt to transfer "responsibility" for the publication of those prices to its catalog house customers. It eliminated from its "coding sheets" both the actual and the fictitious "suggested" retail prices, leaving only one price figure on those sheets—the price charged to the catalog houses themselves. For example, Coro's new 1960 coding sheet contained the following "price entries" for its "Riviera" jewelry set:¹¹

Your cost
7.00

Your corresponding price line as it is to print

⁹ Representatives of two of respondent's catalog house customers testified herein. Tr. 128 and 177. Both testified that they had only one price to all customers—the "coded" or otherwise designated *actual* retail price, and that this was invariably one-half the "retail" price "suggested" to them by their manufacturers including Coro. Tr. 144-146; and 180, 191, 206, 214.

¹⁰ RX 2, p. 2.

¹¹ RX 3.

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When this coding sheet came back from the catalog house customer, the blank space contained the notation, by that customer, "List \$21.00."¹²

Respondent contends, therefore, that in printing 16,000 "insert sheets" containing the fictitious "list" or retail price of \$21, it, Coro, was merely following the instructions or directions of the catalog house, and was thus no more responsible for the publication and dissemination of that fictitious price than "the printer who actually set the type for the price line. Both were merely following the directions of the Catalog Houses."¹³

The first answer to this argument is that it lacks factual support. True, respondent's 1960 "coding sheet" itself contained no "suggestions" as to the catalog houses' resale prices, but a letter that accompanied that "coding sheet" served the same purpose.¹⁴

Secondly, respondent's claim here is insufficient as a matter of law. Even if we assumed that respondent had no part in the *formulation* of the fictitious "retail" price figure—that Coro simply followed the "instructions" of its catalog house customers and printed what they told it to—respondent would still be responsible. It is settled law that "one who places in the hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of the Act," notwithstanding the fact that, in doing so, he is merely "acting on instructions from [his] customer." *C. Howard Hunt Pen Co. v. Federal Trade Commission*, 197 F. 2d 273, 281 (3d Cir. 1952). See also, *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922); *Clinton Watch Co. v. Federal Trade Commission*, 291 F. 2d 838, 840 (7th Cir. 1961), *cert. denied*, 368 U.S. 952 (1962); *Baltimore Luggage Co. v. Federal Trade Commission*, 296 F. 2d 608, 610 (4th Cir. 1961), *cert. denied*, 369 U.S. 860 (1962).

¹² *Ibid.*

¹³ Respondent's brief, p. 26.

¹⁴ Respondent's revised coding sheets were accompanied by a letter (CX 58-A, 58-B) that stated in part as follows:

Inserts will be available on a *formula basis* as previously * * *

The insert application sheet shows your cost for each set or item. You must indicate on the accompanying line exactly how you wish your price line to read. In making this out, you must include the price at which you will offer it to your dealer and list price which you will suggest to him. *On the basis of past experience, we can advise you that catalogs using our insert usually take a markup of 50% on their cost. Catalogs usually suggest a retail price of double this amount for their dealer.* (Emphasis added.)

As the hearing examiner observed, Initial Decision, p. 1177, n. 8, the "markup and retail price formula here advised is simply another way of describing the 'three times' formula."

Nor is there any merit in respondent's contentions that the record fails to support the examiner's findings (1) that the prices represented by respondent to be the usual and regular retail prices of its merchandise in the areas where the catalogs were distributed and used by the public were, in fact, fictitious, and (2) that the public understands the terms "retail," "list price," etc., to mean "usual and regular retail price."

This latter contention is based on the argument that only "consumer testimony" can establish the meaning ascribed to these terms by the public. This is not the law. "That the Commission may itself, without the benefit of consumer testimony, find an ad to be misleading is not open to serious question." *Gimbel Brothers, Inc.*, Dkt. 7834 (July 26, 1962) [61 F.T.C. 1051, 1071], and cases cited there. We find here, as we have found many times before,¹⁵ that the terms "list price," "retail price," and words of similar import¹⁶ convey to the consumer the impression that the price figures quoted in conjunction with those terms are the "normal," the "going," the "generally prevailing," or the "usual and customary" price at which the product is being sold in the area where the representation is made.¹⁷ If respondent's representations in this regard are false, they constitute fictitious pricing, an unfair practice within the meaning of Section 5 of the Federal Trade Commission Act. *Clinton Watch Co. v. Federal Trade Commission*, 291 F. 2d 838, 840 (7th Cir. 1961), cert. denied, 368 U.S. 952 (1962); *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F. 2d 337, 340 (7th Cir. 1960), cert. denied, 364 U.S. 883; *Baltimore Luggage Co. v. Federal Trade Commission*, 296 F. 2d 608, 610 (4th Cir. 1961), cert. denied, 369 U.S. 860 (1962).

We think this respondent has grossly misrepresented the "retail" prices of its merchandise. First, it is undisputed that this merchandise was a "special line" marketed by respondent solely through its catalog house customers, and that, therefore, the prices charged in this line of distribution are the *only* prices we can look to in determining the truth or falsity of respondent's "retail" price representa-

¹⁵ See, e.g., *Giant Food, Inc.*, Dkt. 7773 (July 31, 1962) [61 F.T.C. 326]; *George's Radio and Television Co., Inc.*, Dkt. 8134 (January 19, 1962) [60 F.T.C. 179], civil penalties imposed, *United States v. George's Radio and Television Co., Inc.*, 1962 Trade Cases Par. 70,281 (D.C. Cir. 1962); *The Regina Corp.*, Dkt. 8323 (June 13, 1962).

¹⁶ Some of the catalogs omit all adjectives before the purported retail price, that is, instead of setting out side by side a "coded" or "your cost" price of \$8.25 and a "Retail \$16.50" they omit from the latter the word "Retail," leaving it to the reader to draw his own inferences as to what the unexplained figure "\$16.50" purports to be. The consumer-reader could only infer that, when two prices are set forth together, and the lower of the two is the price he is required to pay, the higher price purports to be the "regular, retail price," and that he is being given a "discount" therefrom.

¹⁷ See, e.g., *Guides Against Deceptive Pricing*, Section I(b) (Adopted October 2, 1958), 2 CCH Trade Reg. Rep. Par. 7897 at p. 12,907.

tions.¹⁸ Secondly, it is also undisputed that the catalog houses *themselves* resell to all of their customers, regardless of classification, at a single price—namely, at *one-half* the amount printed by respondent in the catalogs as the purported “retail” price.¹⁹ The catalogs have never sold at those exaggerated prices, and respondent has known it all along.²⁰

The record indicates that these catalog houses have resold to three general classes of customers: to “organizations” (industrial, commercial, fraternal, etc.) that *use* the merchandise—and hence do not resell it—as gifts, prizes, or awards (to its employees, customers, etc.); in some instances, at least in the past, to small-town retailers who *do* resell the goods; and to “individual” consumers who buy for their own use and consumption, purchasing either by the mail-order method, or by “over-the-counter” buying in the various “show-room” stores operated by the catalog houses.

Representatives of two of respondent’s catalog house customers, as noted, testified herein. One of them stated that “better than fifty per cent” of his company’s total sales were made to “industrial accounts,”²¹ and that sales to individual consumers who bought over-the-counter in his Philadelphia show-room store accounted for another 35% to 40%.²²

We agree with the examiner that, at least for the purposes of this case, all of these sales are “retail” in character.

We conclude that respondent has misrepresented the retail price of its goods in every city and town—in every “market area”—in which non-retailers, whether “organizations” or “individual” employees of such organizations, purchased from the catalog houses.²³ The number of such areas is undoubtedly very large. Respondent had as many as 30 different catalog house customers in a single year,²⁴

¹⁸ Respondent’s counsel conceded this in oral argument before us. “I have no other retail price to look to. My client testified at the hearing that this was a special line restricted only to the catalogue houses. Accordingly, such retail prices that exist with respect to this merchandise exist because of the practice of the catalogue houses alone.” Transcript of oral argument, p. 5.

¹⁹ See tr. 144–151, 179–180, 191, 214.

²⁰ Respondent’s officials were told about “the price structure in which the catalog industry operates” before they entered the field in 1955 or 1956, tr. 89, and, of course, respondent had to know the “coding” technique (see “instructions” quoted in note 6, *supra*) in order to print their own “pages” for insertion in the catalogs (see CX 59, pp. 28–31).

²¹ Tr. 219. It is not clear whether the term “industrial accounts,” as used by this witness, includes purchases by “individual” consumers who are *employed* by industrial firms or whether it refers solely to purchases by these “organizations” for their own use as gifts, prizes, etc.

²² Tr. 188–189.

²³ See, e.g., *George’s Radio and Television Co., Inc.*, Dkt. 8134 (January 19, 1962) [80 F.T.C. 179], civil penalties imposed, *United States v. George’s Radio and Television Co., Inc.*, 1962 Trade Cases Par. 70,281 (D.C. Cir. 1962).

²⁴ CX 11-A, 11-B

some of which distributed as many as 100,000 and 500,000 copies of their catalogs to cities and towns throughout the 50 States.²⁵ And the volume of sales generated by those misrepresentations were substantial. (As noted, the catalog houses bought—and, of course, resold—approximately \$200,000 worth of Coro's merchandise per year, for a period of five or six years.)

Respondent points, however, to the third class of catalog house customer mentioned above—the “retailers” who buy from the catalog houses and then resell.

Because there are, apparently, a few such customers, and because there is some indication in the record that these customers have, at least occasionally, resold catalog house merchandise at the full “suggested retail” price, respondent contends that the latter prices, although derived from the mathematical “three-times formula” rather than market experience, might actually be true.

While it appears that the proliferation of the catalogs in recent years and the growing sophistication of consumers as to the pricing “codes”²⁶ has all but eliminated the possibility that any but the most rustic of buyers could be induced to purchase at this 200% markup over the manufacturer's selling price, the affirmative burden in a fictitious pricing case is not to prove that no one, at any place, has ever succeeded in “retailing” the merchandise at the allegedly “fictitious” price. Counsel supporting the complaint need only prove that “the product involved [has been] sold at retail in a *substantial segment* of a market area at less than the [fictitious] price * * *.” *Rayex Corp. v. Federal Trade Commission*, CCH 1963 Trade Cases Par. 70,774, at p. 78, 124 (2d Cir., May 7, 1963) (emphasis added). Thus, if a substantial part of the total volume of a particular manufacturer's merchandise flowing into each of these thousands of cities and towns across the country was sold in each such local area by the catalog houses to non-retailers (*i.e.*, to those who do not resell) at one-half the purported “retail” price, the latter would still be

²⁵ The two catalog house representatives who testified herein estimated their respective “circulations” at 100,000 and 500,000. See tr. 139-140, 186.

²⁶ The retailers used the catalogs as “countersalesmen,” that is, they displayed the catalogs on their counters and invited customers to look through them and make purchases on the basis of the pictures and representations appearing in the catalogs. The retailer could conceal the fact that he was paying the “coded” price (one-half the “suggested retail” price) by simply tearing out of the catalog the “confidential” or “code” instructions that appear there as an insert. See CX 59, insert inside front cover, p. 4. Now, however, according to one of the catalog house representatives, the public's familiarity with the “coding” systems, tr. 200, has lessened its effectiveness and caused the catalog house to abandon it and simply designate the lower of the two prices as “Your Cost.” Tr. 204. This precludes the use of the catalog as a “countersalesman,” because “the customer [of the retailer] could see what the dealer was paying” for the goods. Tr. 204. This change occurred in 1960, the last year respondent's merchandise appeared in the catalogs.

false even if it should appear that there was *also* a local retailer in that area who had, in fact, bought the same item from the catalog houses and resold it at the full "suggested retail" price. Thus, if an item has been retailed in a particular town at both \$16.50 *and* \$8.25, the manufacturer may not ignore the latter figure and claim that \$16.50 is "the" retail price of the item in that area. It is true, of course, that manufacturers and distributors have no control over the prices charged by retailers, and that the retailers in a particular area, by reselling at different prices, might make it difficult or even impossible for the manufacturer to determine "the" local retail price. But this ignores the fact that, by the act of printing a specific price figure as "the" retail price, the manufacturer has affirmatively represented to the reading public that there *is* a "usual and regular" or "going" retail price in each and every market area where the representation is made (*e.g.*, in each town where the catalogs are received by the public); that the manufacturer *knows* what that single price is; and that the quoted "retail" price is, in fact, that "going" retail price.²⁷ If one cannot give the buying public an honest and accurate retail price figure, then he should give it no figure at all.

II

Respondent's other four exceptions relate principally to its "abandonment" argument. Boldly asserting that it had effected an "irrevocable" ²⁸ abandonment of its fictitious pricing some five months prior to the filing of the complaint in this matter,²⁹ respondent contends, in effect, that this fact alone established its "right" (1) to have the entire matter disposed of by an informal "stipulation," rather than by the formal procedure of complaint, adjudication, and order to cease and desist (and thus that the Commission was acting contrary to "the public interest" when it issued this complaint in the first place), (2) to have a dismissal of the charge now, or (3) at the very least, to have a very "narrow" cease-and-desist order. It also argues that the examiner erred in restricting its "proof" on these points. He refused to let respondent "prove" its alleged abandonment by means of a letter he regarded as fatally self-serving, and refused to subpoena the Commission's records and personnel (including our Secretary and "project attorneys") in aid of respondent's effort to prove that the Commission, in not offering respondent a "stipulation," had failed to adhere to its own "policies."

²⁷ *George's Radio and Television Co., Inc.*, n. 23, *supra*.

²⁸ Respondent's brief, p. 1e.

²⁹ The abandonment allegedly occurred in December of 1960, and the complaint was filed in April of 1961.

All of these contentions are patently without merit. Our "policy" records are, by their very nature, confidential in character, and will only be released, as plainly stated in our Rules of Practice, upon application to the Commission itself, *Postal Life and Casualty Insurance Co.*, Dkt. 6276, 52 F.T.C. 651, 652-653 (1956), *L. G. Balfour Co.*, Dkt. 8435 (May 10, 1963, p. 6), and a showing of "good cause" for their release.³⁰ At the time this complaint was issued (April, 1961), our Rules did provide for a "stipulation" procedure.³¹ But that stipulation policy gave no one any "rights." Indeed, the pertinent provision of that former Rule expressly provided that: "The Commission reserves the right *in all cases* to withhold the privilege of disposition by voluntary agreement."³² Hence, respondent's desire to search through the Commission's papers and interrogate its staff in regard to our stipulation "policies" was an attempt to go beyond the issues before the examiner, and launch a probe into the mental processes of the Commission itself.

Respondent's argument misconceives the nature of the "public interest" requirement in our statute. This issue ultimately turns upon, and is bound up in, the "merits" of the case, *i.e.*, whether, in fact, there "has been," *C. Howard Hunt Pen Co. v. Federal Trade Commission*, 197 F. 2d 273, 281 (3d Cir. 1952), a violation of law. *Hill Bros. v. Federal Trade Commission*, 9 F. 2d 481, 484 (9th Cir. 1926), *cert. denied*, 270 U.S. 662; *Parke, Austin & Lipscomb, Inc., v. Federal Trade Commission*, 142 F. 2d 437, 441 (2d Cir. 1944). Thus, if the evidence received at the hearing fails to disclose a practice that is "prohibited by this Act," then there is obviously no "public interest" in the proceeding. *Federal Trade Commission v. Gratz*, 253 U.S. 421, 427, 428 (1920). But "[i]f the practice is unfair within the meaning of the Act, it is equally clear that [a] proceeding, aimed at suppressing it, is brought, as § 5 of the Act requires, 'to the interest of the public.'" *Federal Trade Commission v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 308 (1934). And it has long been settled that it is "in the interest of the public to prevent the sale of commodities by the use of false and misleading statements and representations." *L. & C. Mayers Co., Inc. v. Federal Trade Commission*, 97 F. 2d 365, 367 (2d Cir. 1938).

It is true, of course, that there have been cases where, because of the total and permanent character of the abandonment, it was concluded that resumption, because it would be economically unprofit-

³⁰ Rules of Practice, Procedures and Organization (1961), Sections 1.61-1.64. Our 1955 Rules contained similar provisions. See Rules of Practice (1955), Sections 1.131-1.134.

³¹ 1955 Rules, *supra*, Section 1.51.

³² *Ibid.* (Emphasis added.)

able, was highly improbable. The leading case, and one this respondent relies heavily upon, is *National Lead Co. v. Federal Trade Commission*, 227 F. 2d 825 (7th Cir. 1955), *rev'd in part*, 352 U.S. 419 (1957). There, however, the court's dismissal of the complaint as to one of the respondents was based upon the facts that it had ceased all production of the product in question, had sold its plant and facilities, and had discharged its technicians and sales personnel. 227 F. 2d at 839.

Here, respondent concedes that its "abandonment" was prompted *solely* by the commencement of the investigation by this Commission, and makes no attempt to show that it was forced upon it by business and economic conditions in its field. From respondent's silence on this point, we must conclude (1) that its \$200,000 worth of annual sales to the catalog houses was still yielding profits when our investigation caused it to stop those sales in December, 1960, and (2) that re-entry into the business of selling to those catalog houses would today be just as easy, if not more so, as its initial entry in 1955 or 1956. While the testimony of its officials intimated that the manufacture of this "special line" of goods for exclusive sale to the catalog houses had required special "parts, tools, or dies,"³³ we were not told whether respondent's "irrevocable abandonment" of the entire catalog house "industry" included a *disposal* of that equipment.

In any event, however, abandonment of sales to catalog houses does not, as respondent contends, render it "impossible" for it to continue the practice in issue. That practice, as discussed hereafter in connection with the scope of the order, is not fictitious pricing "by means of mail-order catalogs," but simply fictitious pricing. Respondent does not claim that it has stopped manufacturing and selling *costume jewelry*. It says only that it has stopped selling costume jewelry *to catalog houses*. The practice of fictitiously pricing costume jewelry could be continued by this respondent through a host of other media.

It has long been settled that an "abandonment," as such, is not enough to warrant dismissal of a proceeding. As we said in *Giant Food, Inc.*, Dkt. 7773, (July 31, 1962), [61 F.T.C. 326, 356]:

That discontinuance of an unlawful practice, of itself, does not necessarily preclude the issuance of a cease and desist order is so well settled as to preclude further argument. *Marlene's, Inc. v. Federal Trade Commission*, 216 F.2d 556, 559 (C.A. 7). This being so, it was incumbent upon respondent to show something more.

These respondents have completely failed to show us this "something more." Their testimony indicates that they stopped fictitiously pricing their merchandise in December, 1960, only because they had

³³ Tr. 84-86.

been visited in the preceding month—November, 1960—by our attorneys, and thus advised that the Commission was investigating the matter. In their testimony, they explained that the Commission's proceedings "would be very bad for our company's reputation" and that, after the "controversy" with the Commission ends—

* * * every step or action taken in the course of sales of the organization, would have to be subject to meeting, subject to scrutiny by counsel, and we didn't want to involve any branch of our company in any kind of business where we felt that we would have to ask counsel if we could do this, that, or the other thing.³⁴

In other words, respondent stopped violating the law when it learned that the law's hand was already on its shoulder, and it stopped then because it wished to avoid the embarrassment of having its violations exposed to the public view, and the inconvenience of having to comply with the law's requirements in the future.

III

Respondent finds no fault with that part of the examiner's order which prohibits misrepresentation of its watch "guarantees," thus conceding that it has violated the law in this respect and that the order is appropriate in scope. Respondent objects strenuously, however, to the scope of the fictitious pricing prohibitions. The examiner's order would require respondent to cease and desist from:

1. Representing directly or by implication, on catalog insert sheets, on color positives for the printing of such catalog sheets, or on price lists, or in any other manner, that any amount is the usual and regular retail price of merchandise when such amount is in excess of the price at which such merchandise is usually and customarily sold at retail in the trade area or areas where the representations are made.

2. Putting into operation any plan whereby retailers or others may misrepresent the usual and regular prices of such merchandise. (Emphasis added.)

The only defect we see in this order is that it fails to include two provisions that we included in the order entered in *Leeds Travelwear, Inc.*, Dkt. 8140 (July 20, 1962) [61 F.T.C. 152], a case that, like this one, involved the use of catalog sheets to place in the hands of resellers fictitious prices that can be used to deceive the public. Those provisions, paragraphs (2) and (3) of the *Leeds* order, will be added here. As to paragraph (2) of the examiner's order here, the meaning of the phrase "putting into operation any plan" (emphasis added) is sufficiently clear that respondent need have no fear of being blamed for any fictitious prices that its customers might create on their own. A similar provision was included in the *Leeds* order,

³⁴ Tr. 111-112.

and was expressly approved by the Court in *Baltimore Luggage Co. v. Federal Trade Commission*, 296 F. 2d 608 (4th Cir. 1961), *cert. denied*, 369 U.S. 860 (1962).

Respondent contends that it is entitled to a narrow order because of its "abandonment" of the practice; because only a small percentage of its over-all volume of business was involved in the fictitious pricing violation; and because here, "as in the *Grand Union* case,³⁵ there was only a single violation and that in a highly uncertain area of the law."³⁶

We have already noted that respondent's abandonment, having been prompted solely by the commencement of this proceeding, and thus undertaken "in the apparent hope that it [would] thereby avoid the issuance of an order to cease and desist," *Ward Baking Co.*, Dkt. 6833, 54 F.T.C. 1919, 1921 (1958), entitles it to no special consideration.

The contention that fictitious pricing involves a "highly uncertain area of the law" is similarly without merit. This practice—"falsely representing that the regular price" of a product is greater than it is in fact—was condemned by the Supreme Court as "contrary to decent business standards" as early as 1937. *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112, 116 (1937). Communicating fictitious prices to the public by the particular *medium* employed here—mail-order "catalogs"—was held unlawful as long ago as 1938, *L. & C. Mayers Co., Inc. v. Federal Trade Commission*, 97 F. 2d 365 (2d Cir. 1938), and as recently as July 1962, *Leeds Travelwear, Inc.*, Dkt. 8140. (See also *The Clinton Watch Co.*, Dkt. 7434, 57 F.T.C. 222, 223, 226 (decided by the Commission in July, 1960, several months *before* the investigation in this case began), *affirmed*, 291 F. 2d 838 (7th Cir. 1961), *cert. denied*, 368 U.S. 952 (1962).)

Nor do we understand that the printing, year after year, of many thousands of catalog pages, each of which contained several separate and distinct misrepresentations as to prices, can be translated into "only a single violation." As we have already noted, respondent had as many as 30 different catalog house customers in a single year; two of these catalog houses "circulated" as many as 100,000 to 500,000 separate catalogs containing the fictitious prices printed up by respondent (thus placing respondent's false representations in the hands of consumers located in thousands of cities and towns throughout the 50 States); and the fruits of these thousands of violations

³⁵ *Grand Union Co. v. Federal Trade Commission*, 300 F. 2d 92 (2d Cir. 1962).

³⁶ Respondent's brief, p. 20.

were reflected in respondent's sales of some \$200,000 of its merchandise each year.

Respondent's other argument—that these amounts, while not *de minimis*,³⁷ call for a narrow order because they amount to only a fraction of its over-all business—is principally a challenge to the “product coverage” of the order. In effect, respondent contends that we have no right to prohibit it from fictitiously pricing any and *all* of its goods in the future, when its past offenses have all occurred in connection with its sales of a “special line” of watches and costume jewelry sold to only one—and a relatively minor one—of its several *classes* of customers. We must, respondent argues, leave it free to fictitiously price its “regular” line of watches and costume jewelry, a line it sells to department and variety stores.

It has long been settled that, since the Federal Trade Commission Act prohibits not only unfair “acts” but unfair “methods of competition” and unfair “practices,” a violation that involves the sale of only a single product is sufficient basis for an order covering repetitions of the “practice” in future sales of *all* of the offender's products. *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F. 2d 337, 343 (7th Cir. 1960), *cert. denied*, 364 U.S. 883. As we said in *Colgate-Palmolive Co.*, Dkt. 7736 (December 27, 1961) [59 F.T.C. 1452, 1473] *remanded*, 310 F. 2d 89 (1st Cir. 1962), (new order issued by the Commission May 7, 1963): “The language of the cases, like the statute, has always employed the *generic term* ‘practices,’ and it has frequently been made clear that the Commission's authority—indeed, its obligation—in framing an order extends to the prevention of unfair *types* or *forms* of conduct rather than merely isolated acts.” (Emphasis added.)

That fictitious pricing, in all of its myriad forms, is but a single “practice” is well illustrated by the case of *Baltimore Luggage Co. v. Federal Trade Commission*, *supra*, 296 F. 2d 608 (4th Cir. 1961), *cert. denied*, 369 U.S. 860 (1962). There, the order approved by the Court prohibited that respondent from “[r]epresenting, directly or by implication, by means of *preticketing* or *in any other manner*, that any amount is the usual and regular retail price of merchandise when such amount is in excess of the price at which said merchandise is usually and regularly sold at retail in the trade area or areas where the representations are made.” 296 F. 2d at 610. The *Baltimore Luggage* order's prohibition of fictitious pricing accomplished “by means of preticketing or in any other manner” has precisely the same

³⁷ Respondent concedes that \$200,000 is not *de minimis*. Transcript of oral argument, p. 32.

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coverage as the instant order's prohibition of fictitious pricing accomplished by "catalog insert sheets * * * or in any other manner." Both of these orders prohibit fictitious pricing, regardless of the means by which it might be accomplished. For us to enter an order that prohibits only one of several means of engaging in a particular unlawful practice is to invite ingenious attempts to circumvent it. If this respondent is honestly resolved to eschew fictitious pricing of all kinds in the future, then it should be wholly unconcerned with whether our order prohibits all or only one of the *methods* of doing it.³⁸

IV

While we agree with the examiner that the record fails to disclose enough about the activities of two of the individual respondents to hold them personally liable for obedience to our order,³⁹ we believe he erred in dismissing the complaint as to one of them, Gerald E. Rosenberger. The examiner noted the testimony that Rosenberger, as President and Chairman of the Board, "has the over-all responsibility for the acts and practices of the corporation." But the examiner felt that: "This is not enough, however, to show individual responsibility warranting the stigmatization attendant upon an order naming him personally. There is no showing of 'active personal participation' in the acts and practices here found unlawful * * *."

In *United States v. Wise*, 370 U.S. 405 (1962), the Supreme Court held that "a corporate officer is subject to prosecution under § 1 of the Sherman Act whenever he knowingly participates in effecting the illegal contract, combination, or conspiracy—be he one who *authorizes, orders or helps perpetrate* the crime—regardless of whether he is acting in a representative capacity." 370 U.S. at 416 (emphasis added). We think the Federal Trade Commission Act,⁴⁰ like the Sherman Act, should also be construed "in its common-sense meaning to apply to *all officers* who have a *responsible share* in the proscribed transaction." *Id.*, at 409 (emphasis added).

³⁸ See p. 1188 of the examiner's initial decision.

³⁹ There is very little information in the record as to the exact area of responsibility occupied by Royal Marcher (Director and Consultant) and Jerome H. Oppenheimer (Vice President and Secretary). Therefore, although we are satisfied that the executive approval of these unlawful acts ran from the President down through one or more of the subordinate officers, we cannot say that either of these were the one or ones that formed the "link" in the "chain" of events constituting those violations. *United States v. Wise*, 370 U.S. 405, 414 (1962).

In addition, however, it is appropriate to note that Marcher's participation in the affairs of the corporation has apparently been very limited since 1958, and that Jerome Oppenheimer is over 80 years old.

⁴⁰ "Persons" are liable under both statutes. See Section 5(a)(6) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(6), and Sections 1, 2, and 8 of the Sherman Act, 15 U.S.C. §§ 1, 2, and 7.

Rosenberger was not merely a "link" in the "chain" of events that effected the violations—he was the apex of the responsibility pyramid. Subordinate officers, in the absence of proof to the contrary, can claim that their particular responsibilities lie in an entirely different segment of the company's operations, and that they were therefore by-passed by the "chain" that ran downward from the top to the employees at the bottom who physically performed the unlawful acts. But all of these separate "lines" of responsibility converge on the man at the top. Rosenberger, President of Coro for 20 years, and Chairman of the Board for the past four or five years, is that man here, and he admits—as indeed he must—that he bears the "over-all responsibility for the acts and practices of the corporation."

He is also the company's largest single stockholder. Of the firm's 476,520 outstanding shares of common voting stock, he owns 53,916 (11.31%); he holds, as Co-Trustee under various trusts for the benefit of his grandchildren, another 11,957 shares; he is one of three Executors of, and has a beneficial interest in, the Estate of Carl Rosenberger, which owns another 51,776 shares (10.87%);⁴¹ and Mrs. Rosenberger owns still another 5,982 shares.

While he insisted that he did not "directly" supervise "the sale of this merchandise to catalog houses," claiming that this "supervision and direction" was in "someone else's hands," his testimony shows plainly that he personally participated in the decision to *enter* the business of selling to catalog houses. And while he testified that his "catalog department" or division was headed by a gentleman who identified himself as a "salesman,"⁴² and that the "advertising goes through" still another official,⁴³ it strains our credulity to suppose that the President of the corporation permitted it to begin production of a "special line" of merchandise,⁴⁴ set up a division to sell it to an entirely new class of customers, and pay for the printing of millions of catalog sheets per year over a period of some five or six years without ever discovering that the "retail" prices being quoted for his merchandise by his own employees were twice their actual retail price. In short, we do not think that this operation, which brought the company additional sales of \$200,000 per year, was so insignificant that the President of the company did not bother to notice it, or that the false and deceptive nature of the claims being made in the name of

⁴¹ RX 1, pp. 3, 4.

⁴² Tr. 24.

⁴³ Mr. Adolph Katz, Executive Vice President, tr. 13.

⁴⁴ Tr. 84-86.

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his company could have been concealed from him by subordinates. We have no doubt that Rosenberger, at the very least, "authorized" his juniors to make these false claims, and thus had "a responsible share in the proscribed transaction."

As we said in *Fred Meyer, Inc.*, Dkt. 7492 (March 29, 1963) [p. 72 herein]: "This is not a question of something that could have been concealed by subordinates; if [the general public has been] apprised of the details of these programs, we think it a fair inference that the Chairman of the Board also knew about them. High corporate officials who pass upon and approve illegal practices are no less liable than the subordinates who actually do the work. Since these [individual respondents] are the ones with the actual power to see that our order is obeyed, we think they should be given every incentive to exercise it."

Respondent's exceptions are denied. The initial decision and order as supplemented and modified to conform to the views expressed in this opinion will be adopted as the decision of the Commission.

Commissioner Elman dissented.

FINAL ORDER

NOVEMBER 6, 1963

Pursuant to the Commission's order of July 9, 1963, respondents having filed objections to the proposed order to cease and desist in this proceeding, including an objection based on the Commission's alleged failure to specifically rule upon respondents' exception to the hearing examiner's refusal to admit into evidence respondents' exhibit 4 for identification, a proposed alternative order, and reasons in support thereof; and counsel in support of the complaint having filed a reply in opposition thereto; and

It appearing that the Commission, in its opinion of July 9, 1963, made specific reference at page 1199 thereof to, *inter alia*, respondents' exception to the hearing examiner's rejection of respondents' exhibit 4 for identification, and concluded that all of the noted exceptions were without merit; and

The Commission having determined that respondents' objections to the proposed final order of July 9, 1963, are without merit and that said order should be entered as the final order of the Commission:

It is ordered, That respondent Coro, Inc., a corporation, and its officers, and respondent Gerald E. Rosenberger, individually and as an officer of the corporate respondent, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution

of costume jewelry, watches or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication, on catalog insert sheets, on color positives for the printing of such catalog sheets, or on price lists, or in any other manner, that any amount is the usual and regular retail price of merchandise when such amount is in excess of the price at which such merchandise is usually and customarily sold at retail in the trade area or areas where the representations are made.

2. Supplying to, or placing in the hands of, any distributor, dealer or other purchaser, catalog sheets or other materials which are displayed to the purchasing public and which contain an indicated retail price for respondents' merchandise when the indicated retail price is in excess of the generally prevailing retail price for such merchandise in the trade area or when there is no generally prevailing retail price for such merchandise in the trade area.

3. Furnishing to others any means or instrumentality by or through which the public may be misled as to the generally prevailing retail prices of respondents' merchandise.

4. Putting into operation any plan whereby retailers or others may misrepresent the usual and regular prices of such merchandise.

5. Representing directly or by implication that any product is guaranteed unless the terms and conditions of such guarantee and the manner and form in which the guarantor will perform are clearly and conspicuously set forth.

6. Representing that any product is guaranteed when a service or other charge is imposed, unless the amount thereof is clearly and conspicuously set forth.

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

It is further ordered, That the hearing examiner's initial decision, as supplemented and modified by the Commission's opinion of July 9, 1963, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent Coro, Inc., a corporation, and its officers, and respondent Gerald E. Rosenberger, individually and as an officer of the corporate respondent, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

By the Commission, Commissioner Elman dissenting.

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IN THE MATTER OF

GRAYSON-ROBINSON STORES, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT*Docket 8482. Complaint, May 1, 1962—Decision, Nov. 6, 1963*

Order dismissing, for insufficiency of the record to prove the allegations, complaint charging a New York City retailer of cameras and its former parent corporation with making deceptive pricing and savings claims, misrepresenting the quality of certain camera lenses, and failing to disclose clearly the country of origin of cameras made in U.S.S.R., Occupied Germany.

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 Grayson-Robinson Stores, Inc., a corporation, and Maxwell H. Gluck, Stanley Roth, C. Louis Wood and Eugene F. Roth, individually and as officers of said corporation; and Peerless Camera Stores Corp., a corporation, and Maxwell H. Gluck, Stanley Roth, Herbert Ochshorn, Sidney Rosen, C. Louis Wood and Stanley Dorman, individually and as officers of 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 respect thereof as follows:

PARAGRAPH 1. Respondent Grayson-Robinson Stores, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal place of business located at 550 West 59th Street, New York, New York.

Respondents Maxwell H. Gluck, Stanley Roth, C. Louis Wood and Eugene F. Roth are individuals and officers of said corporate respondent Grayson-Robinson Stores, Inc. They formulate, direct and control the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

Respondent Peerless Camera Stores Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal place of business located at 415 Lexington Avenue, New York, New York.

Respondents Maxwell H. Gluck, Stanley Roth, Herbert Ochshorn, Sidney Rosen, C. Louis Wood and Stanley Dorman are individuals

and officers of said corporate respondent Peerless Camera Stores Corp. They formulate, direct and control the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of cameras at retail to the public.

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

PAR. 4. In the course and conduct of their business and for the purpose of inducing the sale of their cameras, respondents have made certain statements and representations, of which the following are typical but not all inclusive:

Save \$22.50 off List Price
 Bolex 8 mm Movie Outfit
 List \$172 (when bought separately) \$149.50
 Revere Automatic 8 mm Movie Camera
 * * * * *
 Comparable List \$89.50 Special \$49.95
 Bonus Tag Item
 Imported 35 mm
 Canon L-I
 Original List \$379.50—\$119.95

PAR. 5. Through the use of the amounts in connection with the word and terms "List", "Comparable List" and "Original List" respondents represented that said amounts were the prices at which the merchandise referred to was usually and customarily sold at retail in their trade area, and through the use of said amounts and the lesser amounts that the difference between said amounts represented a saving to the purchaser from the price at which said merchandise was usually and customarily sold in said trade area.

Through the use of the term "Canon L-I" respondents represented that the camera so designated contained a "Canon lens" or the lens with which Canon cameras were regularly and usually equipped.

PAR. 6. In truth and in fact, the amounts set out in connection with the words and terms "List", "Comparable List" and "Original List" were not the prices at which the merchandise referred to was usually

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and customarily sold at retail in respondents' trade area, but were in excess of the price or prices at which the merchandise was generally sold in said trade area, and purchasers of respondents' merchandise would not realize a saving of the difference between the said higher and lower price amounts.

In truth and in fact, the "Canon L-I" camera was not equipped with a Canon lens but was equipped with a lens that was inferior to the Canon lens. The aforesaid representations were therefore false, misleading and deceptive.

PAR. 7. Among the cameras offered for sale and sold by respondents are cameras made in that part of Germany occupied by the U.S.S.R. and imported into the United States. While these cameras are marked to show the country of origin, said marking is so small and indistinct and so placed that it does not give or constitute adequate notice of the country of origin.

The containers in which the cameras are enclosed are not marked to show the country of origin, nor is the fact that the cameras are manufactured in that part of Germany occupied by the U.S.S.R. disclosed in respondents' advertisements offering said cameras for sale.

PAR. 8. When merchandise, including cameras, is offered for sale to the purchasing public and such merchandise is not marked or is not adequately marked showing that it is of foreign origin, such purchasing public understands and believes that such merchandise is of domestic origin, a fact of which the Commission takes official notice.

PAR. 9. A substantial portion of the purchasing public prefers merchandise, including cameras, that is manufactured in the United States over such merchandise that is manufactured in territory occupied by the U.S.S.R., of which fact the Commission also takes official notice.

PAR. 10. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of cameras of the same general kind and nature as those sold by respondents.

PAR. 11. The use by 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 are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

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PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

Mr. Frederick J. McManus and *Mr. Charles J. Connolly* of Washington, D.C., for the Commission.

Dammann, Blank, Hirsch & Heming, of New York, N.Y., by *Mr. Allen Blank*, of counsel, for respondents *Grayson-Robinson Stores, Inc.*, *Gluck, Stanley* and *Mr. Eugene Roth, Wood and Dorman*.

Parker, Chapin & Flattau, of New York, N.Y., by *Mr. Alvin Stein*, of counsel, for respondents *Peerless Camera Stores Corp.*, *Mr. Herbert Ochshorn* and *Mr. Sidney Rosen*.

INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER

This proceeding is concerned with alleged violations of the Federal Trade Commission Act. It is charged that the respondents engaged in unfair methods of competition and unfair or deceptive acts or practices in commerce. These were deceptive advertising of prices at which cameras were offered for sale, deceptive claims as to savings to be had, deception as to the brand and composition of a camera offered for sale, and a failure to show adequately the East German origin of cameras imported from and manufactured there and offered for sale in commerce.

Preliminary Note as to the Respondents

Two corporate entities and a number of individuals have been charged in this proceeding. One of the entities is Grayson-Robinson Stores, Inc. (hereafter Grayson), which, for the purpose of this proceeding, may be regarded as having been a holding company. The other entity is Peerless Camera Stores Corp. (hereafter Peerless), all the stock of which had been owned by Grayson. The practices with which we are concerned were those of Peerless in the advertising of cameras which it had for sale in its retail store in New York City. Grayson was not engaged in the retail sale and distribution of cameras. Its only connection with the facts involved in this proceeding arose from its stock ownership of Peerless. The individuals, Maxwell H. Gluck, Stanley Roth, C. Louis Wood and Eugene F.

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Roth are or were officers of Grayson. As a corollary to their holding such offices, they became officers or directors of Peerless. The two remaining individual respondents, Herbert Ochshorn and Sidney Rosen, were connected directly with Peerless and engaged directly in the operations of its business. This involved a large volume of distribution, at retail, of cameras, camera supplies, film, motion picture projectors, lenses, exposure meters, a myriad of camera accessories of all types, dark-room accessories and paper and chemicals (Tr. pp. 140, 141). Although its store was located in New York City, at 415 Lexington Avenue, it solicited its customers nationally by advertising in various photo magazines, such business being handled mainly by mail (Tr. pp. 8, 123-124; CX 12, CX 13, CX 14). Over-the-counter business was solicited by advertising in the New York City daily newspapers. These circulated not only in New York, but also in New Jersey and Connecticut. Some customers came from these adjoining states (Tr. pp. 7, 19-22).

Dismissal of Complaint as to Certain Respondents

At pretrial, a motion was made to dismiss the complaint as to all the respondents except Peerless and Herbert Ochshorn. That motion was "denied on the ground that if, in fact, the complaint should be dismissed as to any one or all of such respondents, that cannot be determined until after a hearing of the evidence to be offered herein." (Pretrial Order of July 27, 1962).

Thereafter, on August 14, 1962, Grayson filed a petition in the United States District Court for the Southern District of New York proposing an arrangement under Chapter XI of the Bankruptcy Act. To this day it has operated its business as a debtor in possession. Because of events which transpired in that proceeding, by motion dated January 21, 1963, counsel representing Grayson, Gluck, Stanley and Eugene Roth, Wood, Dorman (and also Sidney Rosen, with whom this division of the decision is not concerned) moved that the complaint against them be dismissed. One of the grounds was that none of those respondents (with the exception of Sidney Rosen) at any time participated in the acts set forth in the complaint. Other grounds were that the individuals had become connected with Peerless only because of their connection with Grayson, and that all the shares of Peerless stock and all other Grayson camera properties had been sold by Grayson to Berkey Photo, Inc. pursuant to order of the United States District Court, duly entered in the arrangement proceeding. It appeared from affidavits then and subsequently filed in

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support of the motion that the individuals (except Rosen) had had no actual operating connection with Peerless, but held their offices in that company by reason of their positions in the parent corporation, Grayson. It was also made to appear that neither the parent corporation, Grayson, nor any of those individuals since has been engaged in the camera business. Counsel supporting the complaint, in a document dated and filed January 28, 1963, formally consented to the granting of the motion to dismiss the complaint as to the respondents named in this division of this decision, except Sidney Rosen, saying, "The grounds cited by the motion as the basis for dismissal of the complaint insofar as it relates to these respondents appear to be sufficient for the granting thereof." In ruling on the motion, the Hearing Examiner, in a paper dated and filed February 20, 1963, said:

In view of the Commission's final order in The Borden Company and its opinion issued therewith, Docket No. 7129, January 30, 1963, the broad form products order procedure must be given consideration, even though Peerless was a wholly owned but separate corporation. It is the Hearing Examiner's opinion that whatever bearing this procedure might have on orders to be issued in cases involving wholly owned subsidiaries or divisions, it is not applicable to this particular case because of the Chapter XI arrangement proceeding, the sale of Peerless, the apparent complete separation of functions, the manner in which the various individuals became involved with Peerless, the completely autonomous nature of Peerless and the present divorcement of all the named individuals and of Grayson-Robinson from any activities in the camera business. In reciting these various factors, the Hearing Examiner does not mean to imply that any one of them, standing alone, might justify a departure from the rule in Borden but that all considered together, under the peculiar circumstances of this case, justify a disregard of the rule in this case. Moreover, the express consent by counsel supporting the complaint that the motion be granted also is an important factor which cannot be overlooked.

Because of Section 4.6(e), Rules of Practice, the Hearing Examiner deferred entering an order of dismissal, but this decision will provide for the dismissal of the complaint, without prejudice, as to the respondents Grayson, Gluck, Dorman, Wood, Stanley Roth and Eugene F. Roth.

The Complaint

The case is concerned with alleged deceptive price and commodity advertising, and with alleged deception as to country of origin because of insufficient, indistinct or obscure marking of cameras offered for sale and failure to disclose origin in the advertising of such cameras.

Three illustrative advertisements are quoted in the complaint for the purpose of supporting the deceptive pricing charge. One is cited

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also for the purpose of supporting the charge of commodity deception.

First, we find the following:

Save \$22.50 off List Price
Bolex 8 mm Movie Outfit
List \$172 (when bought separately)
\$149.50

It is alleged that the \$172 claimed "list price" was not, in fact, the price at which the Bolex outfit usually and customarily was sold at retail in respondents' trade areas and that, consequently, the representation that there would be a saving of \$22.50 off the "list price" was deceptive. This conclusion is based on the allegation that, by using the word "list", Peerless represented that the price so designated was the usual and customary price of the article at retail in its trade area.

The next advertisement cited was:

Revere Automatic 8 mm Movie Camera
* * * * *
Comparable List \$89.50 Special \$49.95

Upon the same reasoning, and referring to the figure of "\$89.50", which had been designated by Peerless as "Comparable List", the complaint charged that it had deceived prospective customers because, in fact, the Revere Automatic 8 mm Movie Camera was not comparable to cameras sold in its trade area at \$89.50.

The third advertisement cited in the complaint was:

Bonus Tag Item
Imported 35 mm
Canon L-1
Original List \$379.50—\$119.95

As before, it was claimed, for the same reasons, that the represented "Original List \$379.50" was a deceptive representation as to the usual and customary price at which the Canon L-1 was sold in respondents' trade area. It was alleged, in addition, as to this Canon L-1 advertisement, that it constituted a false representation that the camera being sold for \$119.95 was equipped with a Canon lens when, in fact, it was not so equipped, but was equipped with an inferior lens.

These three advertisements were the only ones cited in the complaint. Commission counsel offered in evidence and there were received a number of advertisements which had been placed in the New York Times and in the New York Post, both well known to have large circulation in New York and elsewhere (CX 3-10, incl.)

Finally, it was charged that cameras which had been manufactured in East Germany, U.S.S.R. occupied, though "marked to show the country of origin, (had marking which was) so small and indistinct and so placed that it does not give or constitute adequate notice of the country or origin." It was alleged also that the containers in which the cameras were packed and the advertisements did not disclose that the cameras had been manufactured in East Germany, occupied by the U.S.S.R. This was claimed to be deceptive in that "A substantial portion of the purchasing public prefers merchandise, including cameras, that is manufactured in countries other than those countries or territory occupied by U.S.S.R. over such merchandise that is manufactured in the territory occupied by the U.S.S.R., of which fact the Commission * * * takes official notice" (Tr. pp. 132, 133).

The respondents answered in due course, admitted some allegations of the complaint but put in issue the essential allegations of deceptive or unfair practices as well as the allegations with respect to interstate commerce. Following the second ruling on the motion to dismiss, Peerless, Ochshorn and Rosen retained as counsel, and were represented by, the attorneys noted as appearing for them among the appearances at the beginning of this decision.

In writing this decision, I shall concern myself initially with the alleged unlawful practices. Following that, I shall take up separately the special contentions on behalf of Ochshorn and Rosen with respect to their alleged individual or personal responsibility for the practices which are the subject matter of this proceeding. For this reason, I shall not refer to the respondents collectively as "respondents", but shall use only the name "Peerless".

Jurisdiction

At the threshold, we are confronted with the contention that the Federal Trade Commission has no jurisdiction because (a) of an alleged lack of evidence that Peerless ever made shipments from New York to purchasers in other states, and (b) a failure to show a substantial course of trade in commerce as "commerce" is defined in the Federal Trade Commission Act. In addition, it is contended that even if Peerless is engaged in interstate commerce, there is no evidence of relationship between the practices which are the subject matter of this complaint and any interstate activity in which it may have engaged.

It is conceded that Peerless does a credit business and that about 12 to 15 percent of \$7,000,000 total sales are time-payment sales. It

is conceded, also, that the mails are used to handle this credit business and that a mail-order business had been conducted. (In fact, one of the magazine advertisements (CX 12, p. 111) says, "get the BIG PLUS in MAIL ORDER from the BIG STORE * * * PEERLESS!") It is conceded, also, that Peerless advertised in photographic magazines and in New York City newspapers, all of which circulate in interstate commerce. The concession as to mail-order business is qualified by the claim that it "has since been discontinued". (I do not find any satisfactory evidence as to discontinuance of mail-order business or as to the time when such discontinuance may have become effective.)

Essentially, the case involves advertising because a large proportion of Peerless business is over-the-counter in a retail store in New York City. In support of its contention that the conceded advertising is not sufficient to subject it to the jurisdictional requirements of the Federal Trade Commission Act, reliance is mainly on *General Motors Corp. v. Federal Trade Commission*, 114 F. 2d 33; *Federal Trade Commission v. Bunte Brothers, Inc.*, 312 U. S. 349; *Progress Tailoring Co. v. Federal Trade Commission*, 153 F. 2d 103; *American Hospital and Life Insurance Co. v. Federal Trade Commission*, 243 F. 2d 719 and also 357 U.S. 560; a 1936 order of the Federal Trade Commission dismissing the complaint in *Crisafulli*, Docket 2290, 22 F.T.C. 906; and the Commission's recent decision dismissing the complaint in *S. Klein Department Stores, Inc.*, Docket No. 7891, CCH Part 29,222 [60 F.T.C. 388].

I find nothing in these authorities to support the claim of lack of jurisdiction. They are, in fact, authorities *contra*.

In *General Motors*, the court said that although the finance company "was primarily acting as a local finance company, it * * * acted as an agent of *General Motors* in a unified plan of selling and financing cars shipped in interstate commerce." (Page 287.) Peerless concedes that it advertised and made sales of cameras in interstate commerce.

In *Bunte*, the unfair practice involved a method of sale dependent upon chance. After a buyer purchased a package, he might get more than he had paid for because *Bunte* packaged its goods in similar appearing packages containing varying amounts of merchandise. The element of chance arose from the fact that when the purchaser bought the package, he did not know whether he would get a quantity of merchandise equivalent to that which he would get normally for the price paid or a greater quantity. This was known in the trade as "break and take" packages and the Fed-

eral Trade Commission had barred "break and take" packages as an unfair method of competition. *Bunte*, however, made *all its sales within the State of Illinois*. Jurisdiction had been asserted because it was claimed that by indulging in the "break and take" package scheme, *Bunte* was competing unfairly with manufacturers outside of Illinois who shipped their goods into Illinois but who could not indulge in the scheme because of the Federal Trade Commission's rulings. This was claimed to have an effect on interstate commerce and therefore was cited as justification for the Federal Trade Commission taking jurisdiction. The court in *Bunte* held merely that although the wholly intrastate sale of candy had an indirect effect on the sales of candy imported from other states and thus might have "affected" interstate commerce, the statute could not be extended to practices merely *affecting* interstate commerce, since it is concerned only with unfair methods of competition *in* interstate commerce. I do not read the complaint in this proceeding nor do I consider the facts here as being comparable to those in *Bunte* because the acts or practices involved in this case actually were in interstate commerce. The advertising was circulated out of New York to other states of the United States. It invited purchases and transactions from persons in those other states. Assuming that the advertising in the New York Times and the New York Post was beamed primarily at the retail business in New York City, it cannot have failed to have attracted customers from the other states in which the Times and Post circulated. That is the premise upon which widely circulated newspapers justify advertising rates higher than those charged by local media. The evidence also shows (Exhibits CX 12, CX 13 and CX 14) that Peerless aggressively solicited mail-order business nationally. The advertisements were full-page ads (which do not come cheap in national magazines), each contained specific reference to dozens of cameras and accessories offered for sale, each contained a cut-out coupon in the lower right-hand corner to facilitate the purchase by mail, and each said, "Rush your mail order in today! 10-day free trial! Year of service! Add estimated shipping costs. We'll refund every cent not used! If you prefer c.o.d., send 10 percent deposit." The trier of the facts has the right to assume or infer that the large expenditures for these non-institutional advertisements did result in substantial interstate sales. A business does not spend on advertising such as this if it is not productive.

Progress Tailoring pointed out that the respondents there placed "advertisements in magazines, newspapers, and periodicals which have an interstate circulation." After referring to the point that the

Act "authorizes the Commission to proceed only against business practices employed in interstate commerce", the court distinguished *Bunte* and said, "We are of the opinion that under the circumstances here appearing, the advertisements are a part of the preliminary negotiations leading up to a sale in interstate commerce. They cannot be separated from the final sale, and are themselves a part of interstate commerce." Then it said, "Every negotiation and dealing between citizens of different States which contemplates and causes such importation, whether it be goods or information, is a transaction of interstate commerce".

American Hospital and Life Insurance Co. has no bearing upon the issues involved in this case. It was concerned only with the fact that the McCarran-Ferguson Act, 15 U.S.C., Sections 1011-1015 prohibits the Federal Trade Commission from regulating advertising practices of insurance companies within states which have their own statutes prohibiting unfair and deceptive insurance practices.

Crisafulli, as Peerless says, was dismissed (but without prejudice) "for the reason that the record fails to disclose interstate sales of respondent's products alleged to be falsely labeled, advertised or misbranded". It does not appear from the report of that case that the Commission there was concerned with or ever decided the issue of deceptive advertising practices in interstate commerce. To the contrary, the Commission expressly has ruled, more recently, in *S. Klein Department Stores, Inc.*, interlocutory order of November 18, 1960, Docket No. 7891, that "interstate disseminations of advertisements for inducing purchases of merchandise constitute 'methods of competition in commerce' and 'acts or practices in commerce' within the purview or coverage of Section 5(a)(1) of the Federal Trade Commission Act". It added, "The jurisdiction alleged thus rests solely on the interstate disseminations alleged. Conclusions that the statute's coverage so extends have sound basis in law and public policy. The Act's specified targets are unfair or deceptive activities which are in commerce * * * The respondent's contentions that the charges of the complaint are not adequately related to interstate commerce are accordingly rejected". It is true, as stated by Peerless, that Klein had its main offices in New York and only operated four department stores there for the sale of merchandise to the public in competition with others. It is true, also, that Klein was a retail store. But, there is no basis for the argument that the ultimate dismissal by the Commission of the complaint in *Klein*, Docket No. 7891, CCH, Part 29,222, was because of a lack of jurisdiction over advertising in interstate commerce. That decision was without

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opinion. There is no reason to assume that the Commission intended to overrule (by silence) its prior interlocutory order in the same case.

To the extent, therefore, that Peerless contends that the complaint ought to be dismissed for lack of jurisdiction, that contention is overruled and any motions based thereon are denied.

The Bolex Advertisement

As quoted in the complaint, this advertisement read:

Save \$22.50 off List Price
Bolex 8 mm Movie Outfit
List \$172 (when bought separately) \$149.50

This is not a complete quotation of the advertisement. The *entire* advertisement must be considered for the purpose of determining whether it is, in fact, deceptive. It is in the record as Commission Exhibit 3, Commission Exhibit 9, and Commission Exhibit 10. In addition to the material quoted in the complaint, each of the actual advertisements has specific references to component elements of or contained in the camera offered for sale. It is only after listing these component elements separately that the advertisement refers to the list at \$172. It is important, also, to read the qualification, "*when bought separately*", which is clearly and with equal conspicuousness set out in connection with the reference to the list price. CX 10 says, "Brand new! List price \$172 (when purchased separately)". CX 9 says, "List \$172 (when bought separately)". Only one of the ads (CX 3) fails to have the qualifying remark after the reference to "List \$172". The Commission has not held in any case that a reference to a list price in and of itself is unlawful or deceptive. Consistently, it has justified a proscription of the practice only where evidence appeared in the record that the advertised goods "usually and customarily" were sold at prices lower than the claimed "List" in trade areas in which the advertising was circulated. Indeed, the complaint here is predicated on that principle and so alleges. In an attempt to supply this proof, Commission counsel offered the testimony of the operator of a retail camera store in New York City who, in addition, is editor of a publication, "X Camera", which circulates throughout the country. This witness testified that he was in constant touch with dealers not only in New York City but "of the whole country". His sole testimony as to selling prices of this Bolex outfit was to the effect that he had priced it at The Bronx Camera Exchange in the latter half of 1960 and that he had telephoned Willoughby's Camera Store between June and September of 1960. He priced the

cameras in no other camera store in New York City. He testified, "I think it was \$124.50, or *something like that*" at Willoughby's and that "I believe it was being offered there (The Bronx Camera Exchange) for about \$120" (Tr. pp. 108-110, emphasis added). However, he testified also that Bolex products, in general, were supplied only to franchised dealers and that they were subject to fair trade law price restrictions. He identified the manufacturer's advertisement in a national magazine offering the Bolex Special as "a \$172 combination for only \$149.50!" [Tr. pp. 110-115, RX 6 (a)]. While the Commission's witness, very generally and indefinitely testified as to the lower prices and fixed the dates of his inquiries in parts of the latter half of 1960 and, with generosity, such a fixing of dates could be regarded as reasonably close to the time that the advertisements were placed (July 1959 and December 1960), the sum total of the pricing cited by him is connected with only two stores in New York City, one in the Bronx and one in Manhattan. These two isolated pricings, even without regard to the indefinite manner in which he testified about them, are not sufficient (or "substantial evidence") to establish that the Bolex Special was "usually and customarily" sold for less than \$149.50 in New York City. On the other hand, his testimony and the Bolex Company's advertisement do show that the offer was made up of a combination of elements which were fair traded to sell at the \$172 figure. Consequently, there is nothing deceptive about the statement in the advertisement to the effect that if the elements were bought separately, the list would be \$172.

This does not, however, dispose completely of the representations in this advertisement. The advertisement still represents that, if the reader bought this combination from Peerless, he would save \$22.50 off list price. This presents a question as to what is list price. Is list price the \$172 which is the aggregate of the list prices of all the individual elements (as to which I have ruled already is not a deception), or is list price the price at which the manufacturer had made up the combination as a special? (Tr. pp. 106-107, 118-119). By the respondents' own evidence (the manufacturer's advertising above mentioned), it was the manufacturer who made up this package deal to sell at the \$149.50 price. Bolex advertised it at \$149.50. Since Bolex advertised it at \$149.50, *qua* combination, the list price was \$149.50 and not \$172. It may appear at first that this is an extremely narrow view to take of the advertisement and of the circumstances. However, when one analyzes the entire situation, it is not so at all. After all, Peerless advertised that there would be a saving of \$22.50 if the purchaser came to Peerless and bought this combination for

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\$149.50. In truth and in fact, however, the purchaser did not and would not save \$22.50 by buying it at Peerless because (regardless of the Commission witness's testimony of the lower price sales at Willoughby's and The Bronx Camera Exchange) the purchaser could get the combination anywhere in New York and probably anywhere in the United States for the \$149.50, the price placed upon it by the manufacturer in making up the special. To this extent the advertisement was deceptive.

The Revere Advertisement

The complete Revere advertisement (CX 6) was:

PEERLESS
FACTORY PURCHASE
REVERE
8mm MOVIE CAMERA

(picture of camera)

BRAND
NEW!
WITH FULLY
AUTOMATIC
Electric-Eye!

COMPARABLE
LIST \$89.50!

49⁹⁵

CHECK THESE LUXURY FEATURES . . .

- Self-Adjusting f1.8 Coated Lens
- Automatic Back-Light Compensation
- Parallax-Corrected Tri-Field Finder
- Insufficient-Light Signal in Finder
- Low-cost Spool Loading Model 186.

In somewhat different form, but substantially the same, it is found also in CX 7. The issue with respect to this advertisement is whether, in fact, this Revere camera was comparable to another camera listed or sold at \$89.50. There is no evidence whatsoever in the entire record that a camera comparable to the camera advertised sold anywhere at less than \$89.50. On the contrary, there is affirmative evidence that the comparable, in fact, the identical, camera did sell at \$89.50 (Tr. p. 80). It appears from the testimony that the Revere camera was a specialty put out by the Revere Company for sale to the armed forces under the name "Revere." The camera itself was identical to a camera manufactured by the Revere Company and marketed by it under the name "Wollensak," to be sold at \$89.50. Peerless bought the entire surplus stock of the Revere camera and sold it at its own advertised price. All it did in the advertisement was

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to say that the camera was comparable to another camera (disclosed at the hearing to be the Wollensak) listed at the higher price (Tr. pp. 79-81; 87-95). All testimony to this effect was given by respondent Ochshorn. Its reasonableness and consistency with "common" business practice was affirmed by the Commission's expert witness (Tr. pp. 121-122). It stands uncontradicted.

This advertisement was not deceptive. *Nash, Inc.*, FTC Docket No. 8201, September 18, 1962 [61 F.T.C. 596] FTC Guides Against Deceptive Pricing, October 2, 1958, Part III.

The Canon L-1 Advertisement

The following is a complete copy of the Canon L-1 ad as it appears in the record (CX 8):

(picture of camera)	BONUS TAG ITEM IMPORTED 35mm CANON L-1
Fast f2 THC Lens. Cpld Rangefinder. Speeds to 1/1000. New! Discontinued Orig. List \$379.50!	119⁹⁵

The charge with respect to this advertisement is twofold—first, that it was deceptive in representing that the list price, that is to say, the price at which the Canon L-1, *as advertised*, customarily and usually was sold in the Peerless trade area, was \$379.50 and was being sold by it at \$119.95, resulting in a saving of \$259.55 to the purchaser; and second, that the camera offered for sale was not actually a Canon camera because the lens which came with it was not a Canon lens. Thus we have a charge of price or savings deception and a charge of commodity deception.

In justice to Commission counsel, it should be noted that a witness from the Canon Camera Company, whom he had hoped to call and to whom he had directed a subpoena, did not appear at the hearing because of his absence abroad. It is unlikely, however, that this witness could have established more than was actually admitted at the hearing or that he could have established that the price claim was de-

ceptive. Certainly, as to the claimed deceptive nature of the price claim, in a city like New York, if, in fact, the representation was false the falsity could have been established by any number of expert witnesses readily there available.

In the consideration of this advertisement, it is important to note that although it advertised a Canon L-1 camera, it stated clearly and conspicuously that the commodity being sold was equipped with a "Fast f2 THC Lens". The testimony is that a THC lens is not a Canon lens, is a lens manufactured in England, and was not a part of the original Canon camera in that Canon did not manufacture it, it having been manufactured by a company known as "Tailor, Hops and Cook" (Tr. pp. 128-129). But the uncontradicted testimony also is that "Canon L-1" is a designation placed by the Canon Company on the box without the lens and that a feature of that camera, as it is a feature also of other advanced or sophisticated cameras, is its ability to accept and receive lenses interchangeably, its compatibility for lenses manufactured not only by the manufacturer of the camera box, but by other manufacturers as well.¹ While the testimony is not particularly clear as to what the aggregate would be of the list prices of the camera box, plus the lens, plus the coupled range finder, there is no testimony in the record that the camera with the THC lens and the range finder, as advertised, was usually and customarily sold anywhere else in the City of New York for less than \$379.50, the price advertised as the list (Tr. pp. 51-59; 127-133).

There being no evidence that a Canon L-1 camera equipped with the f2 THC lens and the coupled range finder was sold anywhere else in New York for less than \$379.50, and there being no substantial evidence that the individual components, if added up, would not list at \$379.50, the charge as to deceptive pricing with respect to this advertisement must be dismissed.

Next we have the question whether there was deception in advertising as a Canon camera a camera which was not sold with a Canon lens. The uncontradicted testimony is to the effect that the Canon L-1 is a designation given by the company to the box which will accommodate various types of lenses. The advertisement clearly disclosed that the Canon L-1 was being offered with a THC lens. That

¹ In another connection (the stated reason for supporting his requested Eighth Proposed Finding), Commission counsel cites CX 12, p. 23, which is a two-thirds page advertisement in the magazine Modern Photography, of an EXAKTA camera equipped with a Carl Zeiss lens. A Zeiss lens is not an EXAKTA product and an EXAKTA camera is not a Zeiss camera. See also discussion, *infra*, of the PRAKTICA camera, which comes equipped with an Isco-Gottingen Westanar lens, page 19 of this decision.

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this is normal and usual is discussed elsewhere and in Footnote 1, p. 15. An advertisement exploiting the Canon name, but *not referring* to the fact that the camera was equipped with a THC lens, could be regarded as deceptive under the rule of *Charles of the Ritz v. FTC*, 143 F. 2d 676. However, in view of the affirmative disclosure that the camera contained a THC lens, the feature of lens interchangeability, the uncontradicted testimony of Ochshorn and the lack of evidence that anyone was deceived, it is my ruling that this advertisement was not deceptive.

Failure to Disclose Foreign Origin

It is now well known that we take official notice of the fact that consumers and purchasers have prejudices against or preferences for products or commodities manufactured or produced in particular countries or areas of the world. While we take official notice of the fact that if a commodity or product is not marked to show foreign origin, there will be a presumption that it is of domestic origin, the fact that an article is of foreign origin, in and of itself, is not a mark of undesirability. It has been observed frequently that perfumes from France, cameras from Germany (East or West), cameras from Japan, cultured pearls from Japan, ladies' attire from Paris, china and dinnerware from England, Germany or Italy, steel from Sheffield or Germany, tableware from Denmark, and a myriad of other products from many foreign countries, all can be wanted and sought after items. The fact that they are wanted and sought after or the fact that a purchaser may have a pet hate or peeve against any particular country of origin are elements of the concept that a failure to disclose the country of origin is a deceptive practice. When there is a failure to disclose, the purchaser may be deceived and he or she has the right not to be deceived. He or she has the right to know whether the article being purchased is from the country from which he or she hopes it is or whether the article being offered is from a country the economy of which he or she does not want to aid. This is the reason and background, in capsule form, for requiring disclosure and for the evolution and development of official notice with respect thereto.² The mere fact that it may

² The Commission has given specific public notice of its concept of official notice. *Manco Watch Strap Co., Inc.*, Docket No. 7785, March 13, 1962 [60 F.T.C. 495]. With the greatest respect and not intending to be perverse, this Examiner would go further and hold (but may not because the Commission has ruled it is a matter for official notice) that personal preferences and prejudices as to country of origin are an everyday fact of life and do not require notice of intention to take official notice. Where the contrary is claimed, a respondent should be required to allege and prove it as an affirmative defense without prior warning of intention to take "official notice". Davis, *Administrative Law Treatise*, 1958, Sections 15.03 and 15.04.

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not be customary or usual in the advertising of cameras and camera accessories to advertise country of origin, or the mere fact that it is customary and usual not so to advertise the camera and camera accessories does not justify disregarding the Federal Trade Commission's view, universally supported by the courts, that a failure to disclose country of origin is a deceptive practice (subject, of course, only to the slight qualification that if the imported element within an article is of such a minor or inconsequential nature as not to materially constitute or contribute to the constituency or main function of the article, there need be no disclosure).³

Nor is it a defense that a camera, particularly an advanced camera such as the Praktica, which is the article involved in this charge, is purchased only by sophisticated users who are well informed of the place of origin. This argument does not meet the issue. A camera does not come within the rule of *Industrial Engineering Associates*, 50 F.T.C. 300 at 315, or *Waltham Precision Instrument Co.*, FTC Docket No. 6914, July 20, 1962, (Slip opinion, p. 9). An effort was made to present evidence to the effect that only advanced amateurs and professionals would purchase a Praktica camera, but this was not developed completely because of a frustrated attempt to introduce testimony about the knowledge possessed by possible purchasers (Tr. p. 86). In any event, we know as a common fact of life⁴ that even expensive cameras are bought not only by sophisticated camera fans, but are bought as well by the general populace. Only the availability of spending money stands in the way of their universal sale. Moreover, they are particularly of a gift nature and are bought by doting spouses, parents, friends and sweethearts who, even if the objects of their affections may be sophisticated, are not themselves informed as to place of origin. The Hearing Examiner shudders to contemplate what might happen to the economy of this country if, to cite only two striking examples, advanced cameras were sold only to the experts and sophisticates or yachts were sold only to trained mariners.

The Praktica camera involved in this proceeding, when viewed from the front, which is the first view which anybody picking it up will have, has a $1\frac{7}{8}$ inches by $\frac{1}{4}$ inch area of grayish metal both to the left and to the right of a quadrangular center plate set into a symmetric larger quadrangular section, $1\frac{3}{4}$ inches by $\frac{3}{4}$ of an inch.

³ As to customs and their relation to the law, see Cardozo, *The Nature of the Judicial Process*, Tenth Printing, Yale University Press, 1939, pp. 63-65. "Finally, when the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in pursuit of other and larger ends." (*Ibid.* p. 65).

⁴ *McCarthy v. Industrial Commission*, 104 Wisc. 198. 215 N.W. 824.

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On the metal plate, there is emblazoned, black on gray, so that it is the first thing which strikes the eye, the legend "Praktica F. X 3". Although there is ample room on the metal portions, one to each side of this plate, to show that the Praktica camera came from U.S.S.R. Occupied Germany, this is not shown at either of these places nor anywhere on the large areas all over the camera's face and back. On the contrary, it is shown only in small, etched printing, without color distinction, on the upper rim of one of the knurled metal knobs set into the top of the camera. The knob on which this etching appears is at the left side and there are two additional knobs at the right side of the reflex viewing device. I have noted already that the first thing at which one looks when picking up the camera is the face of the camera, where there is no indication of country of origin. This being a reflex camera, the next thing at which one looks is the window of the reflex device. To look at this, one does grasp the camera and look down at its top, but one's attention is now directed exclusively to the reflex device and not to the barely discernible etching of country of origin on the rim of one of the knobs.

As has been noted elsewhere in this decision, some cameras accommodate interchangeable lenses. This Praktica camera seems to be of that type. It is equipped with an Isco-Gottingen Westanar lens, clearly so marked on its face and also marked, fairly legibly, in white on a black strip or band running around the lens at its side, "Germany". (This is quite interesting because, although we have an admittedly "U.S.S.R. Occupied Germany" camera before us, we find that the lens comes from Gottingen, which is in West Germany.) The unqualified use of the word "Germany" could lead the reasonable person to believe that the place of origin of the entire camera is West Germany. (That marking may not be deceptive as to the lens alone, but no ruling is made thereon because that is not an issue in this case.) The clear showing of the Gottingen lens, together with the probably acceptable showing of "Germany", tend to obscure further the "U.S.S.R. Occupied Germany" origin of the Praktica camera.

In view of the foregoing, I find, as did Hearing Examiner Joseph Kaufman in *Standard Camera Corporation*, FTC Docket No. 8469, January 29, 1963 p. 1240 herein, that the marking on the Praktica camera is an inadequate marking of country of origin and thus deceptive. The same may be said of the box or package in which the camera is sold. Nowhere on that box is it disclosed that the

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camera therein offered for sale comes from U.S.S.R. occupied Germany. This likewise is deceptive.

The main thrust of this charge, as it has been developed in the evidence of record, is the advertising practices of Peerless. The charge is that, in its advertising, Peerless does not disclose country of origin of articles offered for sale and that this failure to disclose is a deceptive practice. (Paragraph 7, part 2 of the Complaint, alleges, "The containers in which the cameras are enclosed are not marked to show the country of origin, nor is the fact that the cameras are manufactured in that part of Germany occupied by the U.S.S.R. disclosed in respondents' advertisements offering said cameras for sale.")

The mere fact that an order has been entered or may be entered against *Standard Camera Corporation*, the importer of the Praktica camera, is not dispositive of the deceptive advertising by Peerless which is related to country of origin. It must not be overlooked that, apart from its over-the-counter business in New York City, Peerless aggressively seeks and maintains a large mail-order business and its advertising to procure this business goes to all parts of the United States (CX 12, CX 13, CX 14). The Examiner is unable to distinguish which of the many cameras and lenses advertised in the cited exhibits come from Germany (East or West) or from Japan, or which are of domestic manufacture.⁵

It does not appear to be the practice of the camera retailers to designate country of origin in their advertisements of cameras offered for mail-order sale. This does not make it right. (See Footnote 3, page 6, above.) The purchaser of a camera by mail order, if he or she is not sufficiently informed or not sufficiently sophisticated to know the country of origin of a particular camera, may not know that the Praktica or the Exakta comes from East Germany. Such a purchaser, despite deep-rooted prejudices and preferences, could very well be led to purchase this camera which, had he or she known came from Soviet-occupied Germany, or even Germany for that matter, would not have made the purchase. Such a person thus would be deceived. A glance at the advertisements in evidence (CX 12, 13 and 14) shows that Peerless finds no difficulty in classifying the cameras offered as 35mm, reflex, miniature, movie,

⁵ How many of us could? In the ads we find names like Miranda, Exakta, Kodak, Bell & Howell, Leica, Canon, Tower, Nieca, Ultrablitz, Konica, Soligor, Aires V, Exa, Astronar Monocular, Minolta, Praktica, Edixa, Olympus, Kalimar, Keystone, Elite, Pentacon, Yashica, Rikohflex, Minox, Tandberg, Ansromatic, Retina, Mamiya, Robin, Agfa Optima, Polaroid, B & H-TDC, Olympus, Beau Lightomatic, Auto Tera, Konaflex, Zeiss, Nikon, Argus Asahi, Rolleicord, Rolleiflex, Dejur, Revere and Heiland (CX 12, 13, 14)

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etc. There would be no difficulty whatsoever in further classifying or subclassifying these groups into U.S.S.R. Germany, West Germany, Japan, America, etc. Its failure to make these disclosures constitutes a deceptive advertising practice. As a matter of fact, because so many camera faddists have distinct preferences (not prejudices) for Japanese or German cameras, disclosure could be profitable.⁶

The Responsibility of Peerless Ochshorn and Rosen

Such practices as have been found deceptive herein were the practices of Peerless, and so Peerless properly may be subjected to a Federal Trade Commission cease and desist order. Rosen appears to have been fully responsible for the preparation, composition and placing of all the advertisements, and, therefore, he properly is subject to a Federal Trade Commission restraining order (Tr. pp. 27-48). He is no longer employed by Peerless but is in the sales organization of an importer of photographic merchandise (Tr. p. 27). There is no evidence that he does not now participate in the preparation of advertisements nor that he will not do so in the future. Consequently, the fact that he is no longer a Peerless employee is not reason for not entering an order against him.

Ochshorn was concerned mainly, if not entirely, with purchasing for Peerless. He continues in the employ of Peerless in that same capacity. While there is some conclusory testimony that he "assisted in the formulation, direction and control of" the practices involved in this proceeding, the bulk of the testimony in that connection is equivocal and inconclusive (Tr. pp. 31-32, 35-50) and is not sufficiently definite or substantial to justify making him personally subject to a Federal Trade Commission cease and desist order. He will be subject to such an order in his capacity as an officer or employee of Peerless.

Should an Order Be Entered Against Rosen and Peerless?

It is argued that even if unfair and deceptive practices are established (and, as already noted, some have been), an order should not issue because it would not result in specific and substantial benefit to the public (a lack of public interest) and that the practices in-

⁶ E.g. we recall that a long time ago advertisers capitalized on what some might have regarded as detrimental features of a commodity. Examples are, "The candy mint with the hole," and the vacuum carpet cleaner that "beats as it sweeps as it cleans."

volved in this proceeding transpired prior to the time that Peerless was acquired by Berkey Photo, Inc. The nature of the advertising, which appears to be a common practice in the camera and photographic supply business (Tr. p. 23 and see also CX 12, 13 and 14), does, in the opinion of the Examiner, require the entry of a cease and desist order. This advertising is not at all what might be characterized as the "soft sell". Camera and photographic supply houses engage in a particularly aggressive type of advertising, which is about as subtle as a sledge hammer. While some of the practices with which Peerless has been charged in this proceeding have not been sustained by the evidence, the practices which have been found deceptive should be stopped. An FTC restraining order is the remedy provided by statute and the objectives of the legislation will be effectuated by the utilization of that remedy. As far as the transfer of Peerless assets and stock from Grayson to Berkey Photo, Inc., may be concerned, the Examiner does not regard it as a determining factor in this particular case requiring the withholding of the entry of an order. (As a matter of fact, the decision as to whether an order ought to be entered may more properly be the subject of the Commission's discretion. *Mason, Au & Magenheimer*, Docket No. 7733, Feb. 26, 1963 [62 F.T.C. 1515].) Nor is the Examiner of the opinion that in this particular case, a sufficient case in defense on the part of Berkey has been made. He is further of the opinion that, if the argument of transferral of ownership were accepted as justification for withholding the order, such an acceptance would result in a decision in advance that if, in a future proceeding, any one of Berkey's numerous subsidiaries and affiliates were found to have violated, an all-products, all-stores order against Berkey ought to be entered. The Examiner doubts that Berkey would care to have such an important issue decided prematurely and upon the record of this case.

In making my findings of fact and conclusions of law, I do not repeat any findings or conclusions already made with respect to those charges which I have stated are not supported by substantial evidence (Rule 52 F.R.C.P.; *Capital Transit Co. v. United States*, 97 F. Supp. 614 at 821). I have given careful consideration to all the proposed findings and conclusions submitted by counsel supporting the complaint and by counsel for the respondents. They have been well prepared and show careful study of the record. Many of them are substantially the same as findings stated in the narrative text above or ultimately to be made herein. To the extent that any

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proposed finding or conclusion is not adopted, either directly or in substance, the same has been rejected because of irrelevancy, immateriality, repetitiousness, lack of support in the evidence or as contrary to law or as unnecessary. All motions, the granting of which would be inconsistent with anything herein contained, are hereby denied, and all motions consistent with this decision and any rulings herein made, are hereby granted.

Without in any manner restricting anything heretofore narrated, after careful consideration of the entire record, and to the extent that unlawful practices are concerned, I make the following ultimate

FINDINGS OF FACT

1. Respondent Peerless Camera Stores Corp. (hereafter "Peerless") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. At all times involved in this proceeding, Sidney Rosen was one of its vice presidents and he formulated, directed and controlled the advertising acts and practices involved herein.

2. The Peerless store is and was located at 415 Lexington Avenue, New York, New York, and Rosen is now employed in the sales organization of a camera importer not involved herein.

3. Peerless is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of cameras to the public at retail.

4. Such advertising is waged in newspapers and photographic magazines having wide circulation in many, if not all, the states of the United States.

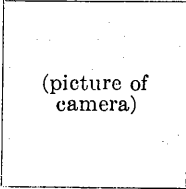
5. In the course and conduct of its business, Peerless now causes, and for some time last past has caused, its products, when sold, to be shipped from its place of business in the State of New York to purchasers thereof located in various other states of the United States. Its annual business is about \$7,000,000 and a substantial portion thereof results from advertising such as is involved in this proceeding. It maintains, and at all times mentioned herein has maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

6. It has conducted a mail-order business in cameras, and is and has been engaged in commercial intercourse with persons who purchase cameras for cash or on time and transmit payments (for goods purchased) from their residences outside the State of New York to the respondent's place of business in the State of New York.

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7. Peerless, in the course and conduct of its business and for the purpose of inducing the sale of its cameras, has advertised in New York newspapers, as follows:

 (picture of camera)	SAVE \$22.50 OFF LIST PRICE!
	BOLEX B.8SL 8mm OUTFIT
	With New Bolex "Compumatic" Turret Camera!
	YOU GET ALL THIS:
	• Lytar f1.9 Normal Lens • Yvar f2.8 Telephoto • Auto Exposure Control • Brand New! List Price \$172.00
	(When Purchased Separately)
	149⁵⁰

8. The Bolex 8 mm Movie Outfit had been assembled as a "Manufacturer's Special" and as such never sold for \$172, as stated in the advertisements. It carried a manufacturer's suggested list price of \$149.50 which was the price at which it actually was sold by Peerless. Thus the purchaser of this item at a price of \$149.50 did not save \$22.50 off the list price, as Peerless stated in its advertisements.

9. Through the use of amounts in connection with the word and terms "List" and "Off List", Peerless represented that said "List" amounts were the prices at which the merchandise referred to usually and customarily was sold at retail in its trade areas, or that the amount "Off List" represented a saving to the purchaser from the price at which said merchandise usually and customarily was sold in said trade areas.

10. The amounts set out in connection with the word and term "List", were not the prices at which the merchandise referred to usually and customarily was sold at retail in the Peerless trade areas but were in excess of the price or prices at which it generally was sold in said trade areas.

11. Purchasers of this commodity would not realize a saving of the amount characterized as "Off List" because the commodity advertised was not generally sold in the Peerless trade areas for a price higher than the price at which Peerless advertised it for sale.

12. Peerless regularly has solicited interstate mail-order purchases and has advertised for sale in newspapers and magazines circulated in many, if not all, the states of the United States cameras such as the Praktica and the Exakta manufactured in East Germany, occupied by the U.S.S.R., and imported into the United States. It does not disclose in such soliciting and advertising that such cameras are, in fact, made in and imported from U.S.S.R. occupied Germany.

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13. The marking on these cameras showing the country of origin is small and indistinct and is so placed that it does not give or constitute adequate notice of the country of origin. The containers in which they are enclosed are not marked to show the country of origin. However, these markings and failures to mark have not been shown in this proceeding as affecting any sales in interstate commerce.

14. A substantial segment of the purchasing public prefers merchandise, including cameras, that is manufactured in countries other than those countries or territories occupied by the U.S.S.R. over similar merchandise manufactured in territory occupied by the U.S.S.R.

15. The failure to disclose in its soliciting and advertising that cameras therein offered for sale by mail order in interstate commerce are imported from and are manufactured in U.S.S.R. Occupied Germany is deceptive and misleading because persons may be induced by such advertising to make purchases of such cameras when they would not have purchased them had they been informed of the country of origin.

16. In the course and conduct of its business, Peerless is and has been in substantial competition in commerce with other corporations, firms and individuals engaged in the sale and distribution of cameras.

From all of which and upon the whole record, I have made the following

CONCLUSIONS

A. The use by Peerless of the aforesaid false, misleading and deceptive statements and representations as to "list price" and "savings" and its failure to disclose in its advertising for mail orders the country of origin from which U.S.S.R. Occupied Germany cameras offered by it for sale are imported have had and now have the capacity and tendency to induce members of the purchasing public into the erroneous and mistaken beliefs that the representations are true or that the cameras which were manufactured in and imported from U.S.S.R. Occupied Germany and offered for sale are imported from countries of exportation or are manufactured in countries against which the purchasers have no prejudice. They, therefore, have the capacity and tendency to induce members of the purchasing public to make purchases by mail of substantial numbers of cameras offered for sale by Peerless in consequence of such erroneous and mistaken beliefs. Substantial trade in commerce has been and may

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be diverted unfairly thereby from competitors and substantial injury has been and may be done to competition in commerce.

B. Peerless Camera Stores Corp. and Sidney Rosen are responsible for the acts and practices set forth in the "Findings of Fact" and in these "Conclusions".

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

D. This proceeding is in the interest of the public.

E. The activities of the respondents, as more particularly set forth in the Findings of Fact, constitute unfair and deceptive acts or practices in commerce in violation of the Federal Trade Commission Act.

F. The order hereinafter set forth is necessary and reasonable to effectuate the purposes and policy of that Act.

In the drafting of the order to be entered herein, I have given careful consideration to both the order submitted by counsel supporting the complaint and the draft of order submitted by counsel for the respondents. The latter was submitted only in compliance with my request and with the express understanding that by so doing they did not concede in any manner that anything but a dismissal was an appropriate disposition of this case. Because of my disposition of various of the charges set forth in the complaint, obviously, much of what counsel supporting the complaint proposes cannot be accepted. Similarly, since the order submitted by counsel for the respondents was submitted only as an indication of what they believed to be *maximal* relief, appropriate only in the event that the entire decision went against them, I have not adopted the form submitted by them. Nevertheless, I have given careful consideration to the ideas sought to be conveyed thereby. I have given consideration as well to respondents' objections to Commission counsel's proposed order, as set forth in the reply brief.

I have been concerned also with whether the foreign origin proscription should be limited to U.S.S.R. because the evidence (other than that to be inferred from the miscellany of cameras offered in the magazine advertisements) justifying the proscription involved only U.S.S.R. cameras. After giving this much thought, I have concluded that the vice we seek to eradicate is the practice of not disclosing country of origin in advertising as opposed to the mere failure to disclose that a particular camera came from U.S.S.R. For this reason, the remedial objectives of the legislation will best be served by not limiting the order to U.S.S.R. cameras. *Taylor v. United States*, 3 How. 197 at 210. *F.T.C. v. Mandel Brothers, Inc.*, 359 U.S. 385 at 392; *Hunter Mills Corp'n v. F.T.C.*, 284 F. 2d 70, *Cert. den'd*,

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366 U.S. 903. *Niresk Industries, Inc. v. F.T.C.*, 278 F. 2d 337, *Cert. den'd*, 364 U.S. 883. Also, I considered at first the desirability of including in Part 2 of the order an exception for over-the-counter sales in New York because of the insufficiency of proof, but I have concluded that this is covered adequately by the "commerce" limitations contained in the introductory portion of the order.

It is my belief that, for the purpose of effectuating the objectives and intention of the legislation with which we are here concerned, it is proper and necessary otherwise to tailor the order to the limited facts of this case and to enter the following

ORDER

It is ordered, That respondents Peerless Camera Stores Corp., a corporation, and its officers, and Sidney Rosen as an individual, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that:

(a) Any amount is the usual and customary price of merchandise in respondents' trade area when it is in excess of the generally prevailing price or prices at which said merchandise is sold in said trade area.

(b) Any saving is afforded in the purchase of merchandise unless the price at which it is offered is lower than the generally prevailing price or prices at which said merchandise is sold in the trade area in which the representation is made.

2. Advertising for sale or selling by mail or other means of communication cameras which are in whole, or in substantial part, manufactured in foreign countries without clearly and conspicuously disclosing in such advertising that the products are manufactured in whole or in substantial part in the country or countries of actual manufacture.

And it is further ordered, That the complaint in this proceeding be, and the same hereby is, dismissed, without prejudice, as to the respondents Grayson-Robinson Stores, Inc., Maxwell H. Gluck, Stanley Roth, C. Louis Wood, Eugene F. Roth, Herbert Ochshorn, and Stanley Dorman.

ORDER VACATING INITIAL DECISION AND DISMISSING COMPLAINT

This case has been heard by the Commission upon the appeal of respondents from the initial decision of the hearing examiner. The Commission, while satisfied that it has jurisdiction of the practices alleged in the complaint to be in violation of law, has determined that the evidence of record is insufficient to prove the allegations of the complaint. Accordingly,

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

It is further ordered, That the complaint be, and it hereby is, dismissed for failure of proof.

IN THE MATTER OF

MCCRORY CORPORATION

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

Docket C-618. Complaint, Nov. 6, 1963—Decision, Nov. 6, 1963

Consent order requiring a New York City operator of numerous stores under the name "Gulf Mills Discount Department Stores" in various States, to cease using the word "Mills" in the stores' name since it owned no mill or factory but bought from manufacturers and others the clothing and other merchandise it offered for resale.

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 McCrory Corporation, 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 McCrory Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 711 5th Avenue, New York 22, New York.

PAR. 2. Respondent is now, and for several years last past has been, engaged in the operation, in various States of the United States, of

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numerous department stores using "Gulf Mills" as part of their name.

Said stores are operated under the name of "Gulf Mills Discount Department Stores" as a division of the McCrory Corporation. Through the said stores respondent sells clothing and other merchandise to the purchasing public.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said merchandise to be shipped from its headquarters in New York and warehouses in other states to its several stores in various other states of the United States, for sale to the purchasing public. In such instances shipments are made to respondent's stores in States other than that in which such shipments have originated, and respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Respondent also causes advertisements and other promotional material to be shipped from its place of business in the State of New York to its stores in various other states and maintains a substantial commercial intercourse between its headquarters in New York and its stores in other states, consisting of the transmission and receipt of numerous commercial documents, reports and information.

PAR. 4. In the course and conduct of its business, as aforesaid, and for the purpose of inducing the purchase of its merchandise which has been shipped and received in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondent has used the name "Gulf Mills" in advertisements of its merchandise in newspapers having general circulation in various States of the United States.

PAR. 5. Through the use of the word "Mills" as part of the respondent's trade name, respondent represents that it owns or operates a mill or factory in which the clothing and other merchandise sold by it are manufactured.

PAR. 6. Said representation is false, misleading and deceptive. In truth and in fact, respondent does not own or operate the mill or factory in which the clothing or other merchandise sold by it is manufactured but buys from manufacturers and others for resale to the purchasing public.

PAR. 7. There is a preference on the part of many members of the purchasing public to buy merchandise, including clothing, direct from factories or mills, believing that by so doing lower prices and other advantages thereby accrue to them, a fact of which the Commission takes official notice.

PAR. 8. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of clothing and other merchandise of the same general kind and nature as that sold by respondent.

PAR. 9. 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.

PAR. 10. 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 methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent, McCrory Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 711 5th Avenue, in the City of New York, State of New York.

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2. The Federal Trade Commission has jurisdiction of the subject