

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

By the Commission, Commissioner Anderson not participating.

IN THE MATTER OF
FILDERMAN CORPORATION ET AL.

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

Docket 7878. Complaint, May 3, 1960—Decision, Jan. 28, 1964*

Order requiring the operators of retail stores selling appliances and furniture under the trade name of Todd's in the District of Columbia, Maryland, and Virginia, to cease making deceptive pricing and savings claims in advertising; refusing to consummate the sale and deliver the merchandise unless an

* As amended by order of Aug. 16, 1960.

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added service charge was paid; and representing falsely that mattresses and box springs were fully guaranteed when the guarantees contained undisclosed limitations.

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 Filderman Corporation and F F & G Corporation, corporations, and Wolfe Filderman and Dorrel Goldman, individually and as officers of said corporations, and Toma Furniture Inc., a corporation, and Wolfe Filderman and Maynard E. Turow, individually and as officers of the said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Filderman Corporation is a corporation existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business at 3045 V Street, N.E., Washington, D.C.

Respondent F F & G Corporation is a corporation existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business at 3045 V Street, N.E., Washington, D.C.

Said corporate respondents operate retail stores in the District of Columbia and in the States of Maryland and Virginia.

Respondent Toma Furniture Inc., is a corporation existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business at 300 Hamilton Street, N.E., Washington, D.C.

Respondents Wolfe Filderman and Dorrel Goldman are officers of corporate respondents Filderman Corporation and F F & G Corporation. They formulate, direct and control the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondents.

Respondents Wolfe Filderman and Maynard E. Turow are officers of the corporate respondent Toma Furniture Inc. They formulate, direct and control the acts and practices of the said corporate respondent, hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Corporate respondents, under the name of "Todd's", are now, and for some time last past have been, engaged in advertising,

offering for sale, and sale, among other things, of various appliances and furniture to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their places of business in the States of Maryland and Virginia to purchasers thereof located in States other than the States in which the shipments originated and in the District of Columbia, and from the District of Columbia to adjacent States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as aforesaid, respondents have made certain statements in advertisements published in newspapers which are circulated in the District of Columbia and in the States of Virginia and Maryland. Among and typical, but not all inclusive, of such statements so made are the following:

Mfr. List—429.95 Westinghouse 14 Cu. Ft. Upright Freezer, lock, square look, shelves on door—\$288

Mfr. List—669.95 Westinghouse 16 Cu. Ft. Upside Down Refrigerator, 2 door, 190 lb. bottom freezer, cold injector automatic defrost, 2 porcelain crispers, magnetic doors—\$419

Mattresses & Box Springs \$20 * * * all new and fully guaranteed.

PAR. 5. Through the use of the aforesaid statements, and others similar thereto not included herein, respondents represented, directly or by implication:

1. That the amounts designated as "Mfr. List" were the prices at which the merchandise advertised was usually and customarily sold at retail in the trade areas where the representations were made.

2. That purchasers of the products advertised were afforded savings of the differences between the amounts designated as "Mfrs. List Price" and the advertised sales prices.

3. That the mattresses and box springs offered for sale were "fully guaranteed", that is, were guaranteed without any limitations whatsoever.

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

1. The amounts designated as "Mfr. List" were substantially in excess of the prices at which the advertised products were usually and customarily sold at retail in the trade area where the representations were made.

2. Purchasers of the advertised products were not afforded savings of the differences between the amounts designated as "Mfgs. List Price" and the advertised sales prices.

3. The mattresses and box springs were not fully guaranteed as the guarantee furnished to purchasers was limited in certain respects, which limitations were not disclosed in the advertisement.

PAR. 7. Respondents advertise and offer to sell merchandise at certain prices but, after the sale is made at the advertised price, add a service charge to said price and frequently will not consummate the sale and deliver the merchandise to the purchaser unless said additional charge is paid.

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

PAR. 9. The use by respondents of the false, misleading and deceptive statements, representations and practices, as aforesaid, 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 amounts of respondents' merchandise by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has thereby been and is being done to competition in commerce.

PAR. 10. 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. Anthony J. Kennedy, Jr., supporting the complaint.

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

INITIAL DECISION BY WILLIAM K. JACKSON, HEARING EXAMINER

MAY 10, 1963

This proceeding was commenced by the issuance of a complaint on May 3, 1960, as amended August 16, 1960, charging the above-named corporate respondents and the individual respondents, their officers,

with unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of the Federal Trade Commission Act by, (a) false and misleading representations as to the usual and customary prices of, and savings to be realized on certain merchandise advertised for sale, by use of the manufacturer's suggested retail price or list price in advertisements in juxtaposition with respondents' lower price, (b) misleading and deceptive statements in advertisements as to guarantees by using the words "fully guaranteed" when the guarantee given to purchasers was limited in certain respects not disclosed in the advertisements, and (c) false and misleading representations as to price by failing to include therein an additional charge for service without which sales frequently were not consummated.

After being served with the said complaint, respondents appeared by counsel and thereafter filed their joint answer denying, (a) that the use of a manufacturer's suggested retail price or list price is misleading, but is used solely to identify the particular product, (b) that the statements as to guarantees are false or deceptive, and (c) that sales at advertised prices would not be consummated without an additional service charge. Respondents also raised in their answer two affirmative defenses with respect to the charges relating to the use of a manufacturer's suggested retail price or list price in advertisements. The first affirmative defense seeks to bar and dismiss this complaint under the doctrine of *res judicata* or administrative estoppel predicated upon the fact that the respondents were charged with the same false, misleading and deceptive acts and practices in a prior proceeding, Docket No. 7572, and the Order in that proceeding as interpreted by respondents permitted the use of a manufacturer's suggested list price providing such figure was the correct list price supplied by the manufacturer. The second affirmative defense seeks to invoke the Congressional policy established by the Automobile Information Disclosure Act, Public Law 85-506, July 7, 1958, 72 Stat. 325, 15 U.S.C.A. 1231-1233, for the reason that the subject complaint runs counter to said policy and constitutes an unequal and discriminatory interpretation and enforcement of the law.

A prehearing conference was held in this matter on October 23, 1961, at which time, among other things, a stipulation was entered into relating to certain advertisements placed in the Washington Post and Times Herald and the Evening Star by respondents. Subsequently, on November 27, 1961, the hearing examiner entered a pretrial order setting forth certain agreements reached concerning the exchange of documents, submission of list of witnesses and other

related matters, as well as ruling on various motions made by both parties.

Hearings on the complaint were held at Washington, D.C. on January 8-10, 1962, at which testimony and other evidence were offered in support of the complaint and in opposition to the allegations set forth therein. Proposed findings of fact, conclusions of law and briefs were filed by counsel supporting the complaint and by counsel for respondents on February 26, 1962.

Thereafter, on March 23, 1962, the hearing examiner filed his initial decision ordering respondents to discontinue their deceptive pricing, savings and guarantee claims. Respondents appealed from the initial decision, and on October 1, 1962 the Commission vacated and set aside the initial decision and remanded this proceeding to the hearing examiner "for the purpose of having presented and received in the record, without restriction regarding its consideration and use by either the hearing examiner or the Commission, available evidence relative to the charges set forth in the complaint."

Pursuant to said order of remand, the hearing examiner held a prehearing conference on December 4, 1962, for the purpose of exchanging lists of documents and witnesses; considering any requests for admissions, proposed stipulations, matters of which official notice should be taken; and various other matters set forth in the notice of the prehearing conference. Complaint counsel in accordance with the hearing examiner's prehearing conference order informed the examiner that he intended to offer in evidence CX 29, CX 30A-E and CX 31A-Z98, previously marked for identification, but not received in evidence. Complaint counsel further notified the examiner that he did not intend to call any further witnesses. Counsel for respondents indicated he would also call no witnesses and submit no additional exhibits. During the course of the prehearing conference, complaint counsel requested and was granted additional time to consider the advisability of calling witnesses and the matter was set for a further prehearing conference on January 11, 1963. On January 4, 1963, complaint counsel advised the hearing examiner he intended to call two witnesses, Brackett Lewis and Louis Hanna, who would both testify as to delivery and installation charges. Thereafter, on January 8, 1963, complaint counsel advised the hearing examiner that through oversight he had failed to list Nicholas J. Liebert as a witness for the purpose of authenticating CX 29, CX 30A-E, and CX 31A-Z98. At the prehearing conference held on January 11, 1963, counsel for respondents requested and was granted an additional four days to decide whether or not he wished to make further requests. On January 14, 1963, counsel for respon-

dents filed a motion for discovery and a request for a subpoena duces tecum. By order of the hearing examiner dated January 25, 1963, the names of all witnesses and documents exchanged by the parties were finalized and respondents' motion for discovery was denied, but their request for a subpoena duces tecum was granted.

On February 13, 1963, a hearing in accordance with the remand was held at Washington, D.C., before the undersigned at which testimony and other evidence were offered in support of the complaint. No testimony or evidence either in rebuttal or otherwise was offered by respondents. Proposed findings of fact, conclusions of law and briefs were filed by counsel supporting the complaint and by counsel for respondents on March 29, 1963.

This proceeding is now before the hearing examiner for final consideration in accordance with the remand of the Commission ordering "the hearing examiner [to] make and file a new initial decision on the basis of the entire record herein." Consideration has been given to the proposed findings of fact, conclusions of law and briefs submitted by the parties, and all proposed findings of fact not hereinafter specifically adopted are rejected. Based upon the entire record and his observation of the witnesses, the hearing examiner makes the following findings as to the facts, conclusions drawn therefrom and order.

FINDINGS OF FACT

1. Respondent, Filderman Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 11th and F Streets, N.W., Washington, D.C. It is engaged in the business of selling major appliances such as refrigerators, freezers, washers, dryers, etc.

Respondent, F F & G Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal place of business located at 11th and F Streets, N.W., Washington, D.C. It is engaged in the business of selling small appliances such as toasters, mixers, etc.

Respondent, Toma Furniture Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 300 Hamilton Street, N.E., Washington, D.C. It is engaged in the business of selling furniture.

2. Individual respondents, Wolfe Filderman and Dorrel Goldman, are officers of the corporate respondents, Filderman Corporation and

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F F & G Corporation. They formulate, direct and control the acts and practices of the aforesaid corporate respondents.

3. Individual respondents, Wolfe Filderman and Maynard E. Turow, were officers of the corporate respondent, Toma Furniture Inc., at the time of its incorporation, prior to the issuance of the complaint and the amended complaint in this matter and after the issuance of the complaint and amended complaint until April 1, 1961, at which time the Filderman Corporation sold its controlling interest in Toma Furniture Inc., to individual respondent Maynard E. Turow and one Bernard Post.

During the aforesaid period, individual respondents, Wolfe Filderman and Maynard E. Turow, formulated, directed and controlled the acts and practices of the said corporate respondent.

4. The corporate respondents were owned in their entirety by the Filderman family and Dorrel Goldman, with the exception of twenty-five shares of stock in the Toma Furniture Inc., which were held by Maynard E. Turow, prior to and at the time of the issuance of the complaint in this matter. This same ownership obtains at the present time with the exception of the sale of the Filderman Corporation interest in Toma Furniture Inc., on April 1, 1961.

5. The corporate respondents operate retail stores under the trade name of *Todd's* in the District of Columbia and in the States of Maryland and Virginia.

6. Corporate respondents under the trade name of *Todd's* are now, and for some time last past have been, engaged in advertising, offering for sale, and sale, among other things, of various appliances and furniture to the public.

7. In the course and conduct of their business, respondents now cause, and for some time last past have caused their said merchandise, when sold, to be shipped from their places of business in the States of Maryland and Virginia to purchasers thereof located in States other than the States in which the shipments originated and in the District of Columbia and from the District of Columbia to adjacent States and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

8. The respondents placed the following advertisements in The Washington Post, Times Herald and The Evening Star, newspapers of general circulation in the Washington, D.C. metropolitan area on the dates indicated under the name of *Todd's*:

(1) "Mfr. list 429.95 Westinghouse 14 Cu. Ft. Upright Freezer, lock, square look, shelves on door—\$288," was advertised in The Washington Post on July 29, 1959. (CX 1)

(2) "Mfr. list 429.95 Westinghouse 14 Cu. Ft. Upright Freezer * * * \$266," was advertised in The Washington Post on August 2, (CX 2), 8 (CX 3), 12 (CX 4), 15 (CX 5) and 16 (CX 6), 1959 and in The Evening Star on August 5 (CX 7), 7 (CX 8), 12 (CX 9), and 14 (CX 10), 1959.

(3) "Mfr. list 429.95 Westinghouse 12.6 Cu. Ft. Upright Freezer * * * \$218," was advertised in The Evening Star on September 16 (CX 11), and 18 (CX 12), 1959.

(4) Mfr. list 429.95 Westinghouse 12.6 Cu. Ft. Upright Freezer * * * \$249," was advertised in The Evening Star on September 25, 1959. (CX 13)

(5) "Mfr. list 669.95 Westinghouse 16 Cu. Ft. Upside Down Refrigerator * * * 2 Doors, 190 lb. bottom freezer, cold injector, automatic defrost, 2 porcelain crispers, magnetic doors * * * \$419," was advertised in The Evening Star on September 2, 1959. (CX 14)

(6) "Mfr. list 669.95 Westinghouse 16.1 Cu. Ft. 2 Door Upside Down Refrigerator * * * \$397," was advertised in The Evening Star on September 25, 1959. (CX 15)

9. Frequently but not always, the aforesaid advertising included a statement, in fine print, concerning the use of the term "manufacturer's list price" or variations thereof. This statement, varying in size from approximately twenty to thirty column lines, contained the following language:

NOTICE!! All of the manufacturers' list prices shown in all of Todd's advertising are reproduced only for the purpose of identifying and clarifying the models of the nationally known branded merchandise. All merchandise at Todd's three locations is sold everyday at low discount prices * * * prices that are always lower than manufacturers' list prices. However, practically all of the sale prices shown in Todd's advertising are reduced BELOW our regular everyday discount prices. This message is printed as a public service—for the education and protection of the general public in order to clear up any misconception about manufacturers' list prices which are not normal selling prices, but are used only for purposes of quickly identifying the many models produced by the various manufacturers. List prices shown on furniture—which are not established by national manufacturers—are set by our comparison shopper and the merchandise is evaluated against comparable current merchandise now selling in this area. (CX 8)

10. The above-quoted "disclaimer" as indicated heretofore did not always appear in respondents' aforesaid advertising, and when it did appear, it was inconspicuously placed either at the bottom of a full page advertisement or buried somewhere in the lower half of the advertisement. In some instances, the so-called "disclaimer" bore in medium-size type the heading "Notice" and in other advertisements no such heading was carried, and the text of the statement was set in very fine type in contrast to larger type in most of the remaining portions of the advertisement. Although no consumer testimony was adduced at the hearing by counsel in support of the complaint demonstrating what, if any, notice persons reading respondents' advertising would take of such "disclaimer", the examiner

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finds, as a fact, that (1) many persons reading the advertisement either would not notice or if they did notice would not take the trouble to read the so-called "disclaimer" and (2) of those persons who might have taken the trouble to read said "disclaimer" many would not fully understand its purport and meaning. Looking at the advertisement in its entirety, the "disclaimer" rather than clarifying the usage of the manufacturer's suggested list price in juxtaposition to the respondents' lower sales price serves merely to create further confusion in the minds of the purchasing public.

11. The aforesaid advertised Westinghouse appliances have been identified by the respondents with the following Westinghouse models:

	Model
(1) \$429.95 Upright Freezer (either 14 cu. ft. or 12.6 cu. ft. capacity)	UM 14
(2) \$669.95 2 Door Upside Down Refrigerator (either 16 cu. ft. or 16.1 cu. ft. capacity)	DCM 16

12. The use of a price designated "Mfr. List" 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 Washington trade area and that a saving will be made of the difference between the two prices.

13. Theodore G. Proctor, trading as Proctor Appliance Service, 109 University Boulevard West, Silver Spring, Maryland; Robert Gell, general manager of Fulford's Colony Radio and Television, 6119 Georgia Avenue, N.W., Washington, D.C.; Oliver C. Dennis, inventory control officer of Dowd's, Inc., 4418 Connecticut Avenue, N.W., Washington, D.C.; Robert Leventhal, vice president of Star Radio TV Appliance, Inc., 421 Tenth Street, N.W., Washington, D.C.; Irving E. McConkey, owner of Irving's Sales, 935 H Street, N.W., Washington, D.C.; Leon Schwartz, president and owner of A & A Appliance Company, 7614 Georgia Avenue, N.W., Washington, D.C.; Ethel B. Kasten, president of Military Personnel Buying Service, 3409 Columbia Pike, Arlington, Va.; William T. Coe, a partner in Virginia Appliance Service Company, 4248 North Fairfax Drive, Arlington, Va.; John J. Slattery, executive vice president of Slattery Radio and TV, Inc., 1050 Ripley Street, Silver Spring, Maryland; Edward D. McGuire, owner of McGuire's Appliances, 5903 Lee Highway, Arlington, Va.; and Nicholas J. Liebert, operations manager of George's Radio & TV, 2850 New York Avenue, N.E., Washington, D.C. were called by complaint counsel and constitute a fair cross-section of the competition in the appliance field in

the Washington area. The testimony of these eleven competitors of respondents followed the same general pattern and may be summarized as follows: the witnesses testified that they all sold major appliances including Westinghouse appliances; that they were familiar with Westinghouse's suggested list price sheets (CX 18, CX 19); and that as a general rule they sold all their appliances, including Westinghouse products, at less than the manufacturer's suggested list price, although the method of arriving at their prices varied from dealer to dealer, that is, some used cost plus \$50, others a cost plus a given percentage mark-up, etc.¹

On cross-examination, Leon Schwartz testified that during the latter half of 1959 he had sold two or three Westinghouse freezers, Model Number UM-14 and a couple of Westinghouse refrigerators, Model Number DCM-16 at substantially less than the manufacturer's suggested list price. (Tr. pp. 142-143) In addition, an inspection of CX 29, CX 30A-E, and CX 31A-Z98, which constitute a complete record of major electric appliance sales of George's Radio and Television Company for the period April 1959 to December 1959, shows conclusively that George's selling prices of Westinghouse freezers, Model Number UM-14, and Westinghouse refrigerators, Model Number DCM-16, were substantially lower than the manufacturer's suggested list price.

Respondents, in their brief, seek to discredit the selling prices set forth in these exhibits by culling from CX 31A-Z98 figures which they say represent incredibly low selling prices of \$121 for Model Number UM-14 and \$242.50 for Model Number DCM-16, when the carload lot prices for these products were \$244.32 and \$439.08 respectively. (CX 18) At the outset, the hearing examiner wishes to point out that each page of CX 31A-Z98 is captioned salesman's "Commission Statement", and is headed in the upper left hand corner by the printed caption "Salesman", followed by a salesman's name which has been entered in handwriting. The hearing examiner also notes that on each page of CX 31A-Z98 there is a column headed "Assisting Salesman". The hearing examiner further notes that in those instances cited by respondents in their brief of incredibly low prices, the column headed "Assisting Salesman" has been filled in with the name of another salesman. Consequently, it is reasonable to infer therefrom and the hearing examiner does so infer therefrom that the salesman whose name appears at the top of the page has been credited

¹ This testimony was substantially the same as the testimony adduced in *George's Radio and Television Company, Inc.*, Docket 8134, upon which the Commission on January 19, 1962, [60 F.T.C. 179] predicated an order directed at the same practice of using "Mfr. Sugg. List Price" as alleged in this complaint.

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with a split commission; *i.e.*, on the basis of one-half the selling price, thus making the selling price in those instances cited by respondents double that shown in the column headed "Amount of sale" or \$242 and \$485 for Model Nos. UM-14 and DCM-16 respectively. This position is fully supported by the fact that where the column "Assisting Salesman" has not been filled in, the price of a Model Number UM-14 is \$288 (CX 31F, line 9); \$309 (CX 31Z-1, lines 6 and 13); \$242 (CX 31Z-22, line 2); \$242 (CX 31Z-23, line 2); and \$242 (CX 31Z-40, line 8).

To double check the correctness of his hypothesis, the hearing examiner compared CX 31D, line 23 of salesman Binder's commission statement with CX 31E, line 24 of salesman Simon's commission statement, both of these items having been cited by respondents in their brief in support of their argument to discredit these exhibits. The columns and entries on these exhibits read as follows:

	D/Date	S/Date	Account No.	Customer's name	Assisting salesman
CX 31D (Binder).	6/8	6/6	31453	Barnes.....	Simon.
CX 31E (Simon).	6/8	6/6	31453	Barnes.....	Binder.

	Make	Model	Amount of sale	Percent	Amount of commission
CX 31D (Binder).	West.....	UM 14....	\$121	2	242
CX 31E (Simon).	West.....	UM 14....	121	2	242

A comparison of these entries establishes beyond a shadow of a doubt, that these two entries refer to the same sale and each salesman was credited with commissions on one-half the amount of the sale as indicated above. Consequently, the amount of the sale as reflected in the column so headed similarly reflects only one-half the selling price of the particular item referred to therein. A spot check of the remainder of respondents' citations indicates a similar correlation.

However, if respondents still have any lingering doubts, they need merely refer to the summaries of CX 31A-Z98 prepared by the

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witness Liebert (CX 30A-E) and will find that CX 30A, line 5, reads as follows:

6/6 31453 Barnes----- UM 14 \$242 Simon Binder .

This obviously reflects witness Liebert's summary of the transactions quoted above from CX 31D and CX 31E. Accordingly, the hearing examiner flatly rejects respondents' contention "that the documents could not possibly disclose or be representative of the selling prices of Westinghouse Models Nos. UM-14 and DCM-16" and specifically finds that they are.

Finally, respondent Dorrel Goldman's testimony indicates that it is also respondents' policy to sell at prices substantially below the manufacturer's suggested list price.²

14. The "Mfr. List" prices of Westinghouse appliances, including those contained in the advertisements set out in Finding No. 8 are substantially higher than the prices at which stores in the Washington, D.C. trade area usually and customarily sold the Westinghouse appliances to which they refer. Purchasers of the advertised products were not afforded savings of the differences between the higher stated prices, designated "Mfr. List" and the advertised lower sales prices.

15. Respondents' contention that the manufacturer's suggested list or retail price is only used for identification is not supported by the record as set forth in Finding No. 16 below.

16. The Electric Institute of Washington, a non-profit organization organized to promote the sale of products and services and to keep the public informed and educated on new developments in the industry and new uses of the products of the industry, maintains a display room on the ground floor of the Potomac Electric Power Building, 10th and E Streets, N.W., Washington, D.C. On display and demonstrated to the consuming public is a representative line of practically all types of electrical products for the home. Each item is tagged to show: the item, the name of the manufacturer, the model number, a description of the size, a price figure with no qualifying words, and a list of the association members' retailers where the item may be purchased. William G. Hills, executive director of the Electric Institute, testified that when a visitor expresses an interest in an item, the hostess demonstrates it and gives the visitor a tag showing a place or places in the visitor's vicinity where the item may be

² Although it is not part of the record of this proceeding and the hearing examiner has given it no weight whatsoever, he notes that respondents include in their current local newspaper advertisements the following: "NOTICE: Manufacturer's List Price Is Not the Usual and Customary Selling Price in This Area".

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purchased and the model number of the item. In response to a question whether a price was put on the tag handed to the visitor, Hills testified he did not remember, and that the Institute was not interested in the price. Hills indicated that the price on the tag attached to the appliance might be submitted either by the manufacturer or a local distributor, depending on whose exhibit it was and that some distributors used prices other than the manufacturer's published suggested list prices. However, RX 8, RX 9 and RX 10A, which are representative of the price tags placed on the exhibits, contain no legend or qualifying words to show that the prices quoted thereon are manufacturer's list prices. Hills further testified that he had no knowledge of the actual selling price of any of the articles and that no study had been made of prices. Under these circumstances, the manufacturer's suggested list price seems to have little value for purpose of identifying an item at the Electric Institute and is not an effective or the usual manner of identifying a product which has other means of identification.

17. The respondents placed the following advertisements in The Washington Post, Times Herald and The Evening Star, newspapers of general circulation in the Washington, D.C. metropolitan area on the dates indicated under the name of Todd's:

(1) "Mattresses & Box Springs \$20 * * * all new and fully guaranteed," was advertised in The Washington Post on January 6 (CX 20) and 10 (CX 21), 1960 and in The Evening Star on January 6, 1960. (CX 22)

(2) "Hollywood Bed with inner-spring mattress, box spring and legs, Brand new. Fully guaranteed \$20," was advertised in The Evening Star on July 29, 1959. (CX 23)

(3) "Innerspring Mattresses \$18 * * * all name brands fully guaranteed," was advertised in The Washington Post on August 12, 1959 (CX 4) and in The Evening Star on August 12, 1959. (CX 9)

(4) "3 PC Sectional Sofa-Sleepers * * * all brand new and fully guaranteed * * * \$199," was advertised in The Evening Star on September 24, 1959. (CX 24)

(5) "Innerspring Mattresses and Box Springs * * * Serta. All brand new All guaranteed \$20," was advertised in The Evening Star on December 11 (CX 25) and 13 (CX 26), 1959.

(6) "Ther-A-Pedic. Posture Board Mattress and Box Spring unconditionally guaranteed * * * \$118," was advertised in The Evening Star on January 20, 1960. (CX 27)

(7) "80 in. Mattresses and Box Spring Sets \$77 fully guaranteed," was advertised in The Washington Post on February 6, 1960. (CX 28)

18. The respondents represented, directly or by implication, through the use of the aforesaid advertisements that the said mattresses, box springs and sectional pieces were "fully guaranteed", that is, were guaranteed without any limitation whatsoever.

19. The advertisements of the aforesaid mattresses, box springs and sectional pieces were false, misleading and deceptive because the guarantee, furnished to the purchaser, was limited in certain respects, which limitations were not disclosed in the advertisements.

Maynard E. Turow, who was employed by Todd's as a furniture buyer prior to the incorporation of Toma Furniture Company in 1960 and thereafter became vice president of Toma, testified that the guarantees were for various time periods; that the guarantees did not cover fabrics; that because the mattresses were assorted, the guarantees would differ; that the guarantee could be a "money back" guarantee under certain conditions; that the purchasers did not always receive a written guarantee, and that initially the guarantees were factory guarantees.

20. Respondents do not contend that the use of the term "fully guaranteed" under the circumstances set forth above was not misleading or deceptive, but urge that an officer of F F & G and Filderman gave orders to its advertising agency on or about April or May 1960 never to utilize the word "guarantee" in any fashion in any advertising under the trade name "Todd's" and respondents have no present intention to renew the use of the term "guaranteed" in any form or except in conformity with the Guides Against Deceptive Advertising of Guarantees issued by the Federal Trade Commission on April 26, 1960. In short, respondents urge that since the practices set forth in Findings 17, 18 and 19 hereinabove were discontinued immediately prior to the issuance of the complaint on May 3, 1960, and the issuance of the Guides Against Deceptive Advertising of Guarantees on April 26, 1960, and that they do not intend to resume them, no order is necessary.

The record indicates that an investigator of the Commission visited Mr. Turow in February 1960 concerning respondents' practices of advertising their mattresses as "fully guaranteed". Shortly thereafter, respondents discontinued these practices and they do not intend to resume them. This action on the part of respondents is commendable.

It is well settled that a discontinuance of the practices which the Commission may find to constitute a violation of the law does not render the controversy moot. *F.T.C. v. Goodyear Tire and Rubber Company*, 304 U.S. 257 (1938). It is also well established that even though a respondent has discontinued an unlawful practice, even prior to the issuance of a complaint, that this, in and of itself, does not prevent the Commission from issuing a cease and desist order. *Marlene's, Inc. v. F.T.C.*, 216 F.2d 556 (C.A. 7 1954); see also Initial

Decision, *Swanee Paper Corporation*, Docket No. 6927,³ (1959), where the abandonment defense was rejected, although it took place ten months prior to the issuance of the complaint. The Commission may, however, in its broad discretion dismiss a complaint because of discontinuance if unusual circumstances arise warranting dismissal. *Ward Baking Co.*, 54 F.T.C. 1919 (1958); *Argus Cameras, Inc.*, 51 F.T.C. 405 (1954).

In *Art National Manufacturers Distributing Co., Inc., et al*, Docket No. 7286, the Chairman speaking for the Commission recently stated,

* * * One such plea is respondents' claim that they have discontinued or abandoned several of the practices indicted by the complaint and have no intention to again engage in them. To resolve such questions we generally look to the timing and circumstances surrounding the alleged discontinuance. In this case it is admitted that the practices were not discontinued until the Commission attorney investigating this matter informed respondents of their questionable nature. Such discontinuance after the commencement of proceedings will not support a conclusion or give assurance that the practices will not be resumed and under such circumstances we have consistently refused to dismiss complaints, e.g., *Ward Baking Company*, 54 F.T.C. 1919 (1958); *Arnold Constable Corporation*, Docket No. 7657 (January 12, 1961) [58 F.T.C. 49]. Respondents here have presented no grounds which would justify our departure from past holdings and we accordingly reject their plea of abandonment.

The facts and circumstances which exist in this case do not justify dismissal of the charges contained in Paragraphs 5(3) and 6(3) of the complaint on the ground that respondents have discontinued these practices. The respondents did not discontinue these acts and practices until after the Commission began its investigation and after the Commission's "hand was on respondents' shoulder".¹¹ *Snap-On Tools Corporation*, Docket No. 7116 (November 1, 1961) [59 F.T.C. 1035]. No unusual circumstances are shown to exist in this proceeding which would justify dismissal of this portion of the complaint on the grounds of abandonment.

21. Paragraph 7 of the complaint charges that respondents advertise and offer to sell merchandise at certain prices, but after the sale is made at the advertised price add a service charge to said price and frequently will not consummate the sale and deliver the merchandise to the purchaser unless said additional charge is paid. In support of this paragraph of the complaint, Stanley W. Jameson testified that in September 1959 he purchased an Admiral Imperial Dual Temp Refrigerator at Todd's store in Silver Spring and that the salesman in writing up the sales slip automatically added a service charge of \$7 to the sales price. Mr. Jameson further testified that

³ Adopted by Commission March 1960 [56 F.T.C. 1077] *aff'd.* on this point *sub silentio* 291 F. 2d 833 (C.A. 2 June 1961)

when he indicated he did not want to pay the service charge, the salesman stated, "Well, I'm sorry, but we can't sell you the refrigerator without the service charge." Under these circumstances and after checking to see if respondents serviced as far as Waldorf, Maryland, Jameson paid the service charge.

Another witness, Louis Hanna, a vending machine operator and maintenance man, testified that he went to Todd's Alexandria store in the spring of 1959 in response to an ad in The Evening Star to purchase a Westinghouse washing machine priced at \$144. Hanna further testified that after he agreed to purchase the machine and had the \$144 in cash in his hand ready to pay, he noticed that the sales slip made out by the clerk had an additional \$15 for a service charge. When he informed the clerk he didn't want the service, Hanna stated, the clerk informed him that they couldn't sell the machine unless he bought the service. Although he didn't want the service, Hanna finally agreed to pay it, but when they insisted on an additional \$5 delivery charge, he refused and no sale was made.

Still another witness, Brackett Lewis, a senior research analyst in the Reference Department of the Library of Congress, testified that in response to a newspaper advertisement featuring a Westinghouse refrigerator at \$169, he and his wife went to respondents' sale at Uline's Arena. Lewis also stated he was unaware of the service charge until after the sale was consummated, when he noticed an item for \$12.50 on the sales slip called a service and delivery charge. After he protested, Lewis testified, the salesman, C. R. Jones, stated that that was "the only way we sell them". When Lewis further protested, the salesman got the manager who repeated that that was the only way respondents sold them. Lewis finally paid the service charge under protest.

Respondent Goldman sat in the hearing room throughout the testimony of these witnesses and actively assisted his counsel in cross-examination of the witnesses. However, Goldman was not called as a rebuttal witness nor was the salesman, C. R. Jones. The unimpeached testimony of these three witnesses is clear, convincing and reliable and the hearing examiner finds therefrom that respondents advertise and offer to sell merchandise at certain prices, but, after the sale is made at the advertised price, they add a service charge to said price and frequently will not consummate the sale and deliver the merchandise to the purchaser unless said additional charge is paid.

Further corroborating evidence would be merely cumulative. As Judge Schnackenberg, in his concurring opinion in *Niresk Indus-*

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tries, Inc. v. F.T.C., 278 F. 2d 337, 343 (C.A. 7 March 1960), *cert. denied* 364 U.S. 883, said:

If it [the Commission] adduces enough evidence to sustain its action and decision I see no reason why it should spend public funds by enlarging its investigation for the purpose of gathering additional evidence.

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

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

24. On August 24, 1959, the Federal Trade Commission, in Docket No. 7572, filed a complaint against Filderman Corporation, F F & G Corporation, Wolfe Filderman, Dorrel Goldman and others, charging them with false, deceptive and misleading advertising. The gravamen of the complaint in Docket No. 7572 was against the use: (1) of a higher stated price, either unaccompanied by any descriptive language or accompanied by the language "Reg." or "Orig.", when in fact such higher prices were fictitious and in excess of the usual and customary retail prices charged by respondents in the normal course of business and (2) of the descriptive language "Mfr. List" together with a price figure when in fact such amount represented as manufacturer's list was substantially higher than the manufacturer's current list prices.

25. On October 22, 1959, respondents in Docket No. 7572 entered into an agreement containing a consent order to cease and desist which was accepted by the examiner and set forth in an initial decision dated October 27, 1959, and adopted by the Commission on December 30, 1959 [56 F.T.C. 685]. The Order in Docket No. 7572 provided in pertinent part as follows:

IT IS ORDERED THAT respondents * * * FILDERMAN CORPORATION, a corporation, F F & G CORPORATION, a corporation, and their officers, and WOLFE FILDERMAN and DORREL GOLDMAN, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offer-

ing for sale or sale of any merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication:

(a) That a certain price is respondents' usual and customary price for merchandise when it is in excess of the price at which said merchandise is usually and customarily sold by respondents in the normal course of business in the area or areas where the representations are made.

(b) That any saving is afforded in the purchase of merchandise unless the selling price constitutes a reduction from the price at which said merchandise is usually and customarily sold by respondents in the normal course of their business in the area or areas where the representations are made.

(c) That a stated price is the "Manufacturer's List Price" for any merchandise unless it is the current list price of the manufacturer for the identical merchandise to which such price is applied.

26. The substantive issues in the present proceeding are not the same as in Docket No. 7572. There is nothing in Docket No. 7572 which relates to the use of false and deceptive guarantees or hidden service charges. The only violation in Docket No. 7572 remotely similar to those charged herein involved the use of a false "Mfr. List" price. However, the complaint in this proceeding does not challenge the bona fides of the "Mfr. List" prices used in the advertisements relied upon in this proceeding, but raises an entirely new question of the propriety under the Federal Trade Commission Act of using accurate manufacturer's suggested list prices in juxtaposition with respondents' lower prices. It should also be pointed out that the proceedings in this matter deal with a different period of time at least in part, since many of the advertisements relied upon in support of the violations alleged in the complaint were published subsequent to August 27, 1959, the date when the complaint in Docket No. 7572 was issued.

CONCLUSIONS

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

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

3. The use of a manufacturer's suggested retail price, so designated, in advertising in commerce when such price is placed in juxtaposition with a lower price, constitutes an unfair or deceptive act or practice where such suggested retail price is not in fact the price at which the merchandise is usually and customarily sold in the trade area. A written advertisement requires no consumer testimony as to its meaning and the examiner in the first instance, and the Commission, should it disagree, are capable of interpreting the meaning

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or effect of the advertisement.⁴ This proposition was aptly expressed in *Zenith Radio Corp. v. F.T.C.*, 143 F. 2d 29, 31 (C.A. 7, 1944).⁵

The Commission had a right to look at the advertisement in question, consider the relevant evidence in the record that would aid it in interpreting the advertisements, and then decide for itself whether the practices engaged in by the petitioner were unfair or deceptive, as charged in the complaint.

Recently in *Grand Union v. F.T.C.*, 300 F. 2d 92 (C.A. 2, 1962) the court stated:

Congress established the Federal Trade Commission as an expert body to apply the imprecise standards of Section 5 and "[i]ts expert opinion is entitled to great weight in the reviewing courts" *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608, 614; *F.T.C. v. Cement Institute, Inc.*, 333 U.S. 683, 720.

Particularly relevant to this case is what the court stated some years ago in *Brown Fence & Wire Co. v. F.T.C.*, 64 F. 2d 934, 936 (C.A. 6, 1933):

In the instant case the Commission produced no direct testimony tending to show that any of the petitioner's customers were imposed upon or deceived by the presentations made in its catalogue, and it is claimed that such omission is fatal to the case against it. We know of no reason why reasonable factual inference may not be the basis for the fact findings of the Commission as well as direct evidence. Price is so fundamental a factor in merchandising and so persuasive in drawing customers to one competitor and from others, that it seems superfluous to demand direct proof of the efficacy of methods, frankly relied upon, to accomplish the results now denied.

4. The Commission has repeatedly held that using the term "List Price" or any other term of similar import or meaning to refer to prices not bona fide regular established selling prices constitutes an unfair or deceptive act or practice. *The Firestone Tire & Rubber Co., et al.*, 33 F.T.C. 282 (1941); *The Goodyear Tire & Rubber Co., et al.*, 33 F.T.C. 298 (1941); *The B. F. Goodrich Company*, 33 F.T.C. 312 (1941); *Sears, Roebuck & Co.*, 33 F.T.C. 334 (1941); *Maxwell Distributing Co., Inc., et al.*, 54 F.T.C. 260 (1957); *Hutchinson Chemical Corp., et al.*, 55 F.T.C. 1942 (1959); *Bond Stores, Inc.*, Docket No. 6789 (January 7, 1960) [56 F.T.C. 716]; *Arnold Constable Corporation*, Docket No. 7657 (January 12, 1961) [58 F.T.C. 49]; *Art National Manufacturers Distributing Co., Inc., et al.*, Docket No. 7286 (May 10, 1961) [58 F.T.C. 719], and *George's Radio and Television Company, Inc., a corporation, et al.*, Docket No. 8134 (January 19, 1962) [60 F.T.C. 179].

⁴ This not only applies to the use of the term "Mfr. List" in respondents' advertisements, but to the use of the "disclaimer".

⁵ See also *Charles of the Ritz Dist. Corp. v. F.T.C.*, 143 F. 2d 676 (C.A. 2, 1944); *Exposition Press, Inc., et al. v. F.T.C.*, 295 F. 2d 869 (C.A. 2, 1961); *Bankers Securities Corp., v. F.T.C.*, 297 F. 2d 869 (C.A. 3, 1961).

The courts have upheld Commission Orders banning fictitious pricing practices and the making of false saving claims. *L. & C. Mayers Co., Inc. v. F.T.C.*, 97 F. 2d 365 (C.A. 2, 1938); *Consumers Home Equipment Co., et al v. F.T.C.*, 164 F. 2d 972 (C.A. 6, 1947); *Niresk Industries, Inc., et al v. F.T.C.*, 278 F. 2d 337 (C.A. 7, 1960), *cert. denied* 364 U.S. 883 (1960); *Kalwajtyz, et al v. F.T.C.*, 237 F. 2d 654 (C.A. 7, 1956), *cert. denied* 352 U.S. 1025 (1957); *Progress Tailoring Co. v. F.T.C.*, 153 F. 2d 103 (C.A. 7, 1946); *Clinton Watch Company v. F.T.C.*, 291 F. 2d 838 (C.A. 7, 1961), and *Baltimore Luggage Co. v. F.T.C.*, 296 F. 2d 608 (C.A. 4, 1961). The use by the respondents in this case of manufacturer's suggested list prices in juxtaposition with lower advertised sales prices was a misrepresentation as to usual and customary prices and as to savings afforded purchasers and was an unfair act or practice and unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. *Clinton Watch Company, et al. v. F.T.C. supra*.

5. The aforesaid acts and practices of the respondents, as herein found, 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.

6. Respondents seek to justify their use of the manufacturer's suggested list price by reference to the Automobile Information Disclosure Act, Public Law 85-506, July 7, 1958, 72 Stat. 325, 15 U.S.C.A. 1231-33, which requires manufacturers of automobiles to place a label upon each new car delivered to a retailer showing "the retail price of such automobile suggested by the manufacturer", together with the suggested retail price of accessories and other items of optional equipment attached to the automobile. The courts have held that this Act is "not a statute of general application, but applies solely and specifically to the sale of new automobiles" and has no application to cases outside that industry. See *The Baltimore Luggage Company, Inc., et al, v. F.T.C. supra*.

7. Respondents also seek to bar and dismiss this complaint under the doctrine of *res judicata* setting forth that the issues herein have previously been adjudicated in their favor in Docket No. 7572 and the Commission is now foreclosed from bringing any further action against respondents on the same issues. As set forth above in Findings 24, 25 and 26 of the issues in the present proceedings are not the same as those in the earlier proceeding and consequently the plea of *res judicata* is not available. *F.T.C. v. Motion Picture Advertis-*

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ing Service Co., Inc., 344 U.S. 392, 398 (1953). As the court said in *Exposition Press, Inc. v. F.T.C.*, 295 F. 2d 869 (C.A. 2, 1961), "In any event, new violations will support new proceedings dealing with different periods of time, at least where there is no indication of harassment by the Commission. See *F.T.C. v. Raladam Co.*, 316 U.S. 149 (1942); 2 Davis Administrative Law Treatise 570-71 (1958); cf. *Grandview Dairy, Inc. v. Jones*, 157 F. 2d 5 (2 Cir.) cert. denied, 329 U.S. 787 (1946)."

Even assuming that the instant proceeding constitutes a relitigation of the same issues, it is clear that, when we consider the respective functions of courts and of administrative agencies, the doctrine of *res judicata* should not be applicable to decisions of administrative bodies, particularly those administrative agencies charged with the protection of the public interest. *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940); *N.L.R.B. v. Thompson Products*, 130 F. 2d 363, 366 (C.A. 6, 1942); *N.L.R.B. v. T. W. Phillips Gas & Oil Co.*, 141 F. 2d 304 (C.A. 3, 1944); *N.L.R.B. v. Baltimore Transit Co.*, 140 F. 2d 51, 55 (C.A. 4, 1944); *Panhandle Eastern Pipeline Co. v. F.P.C.*, 236 F. 2d 289, 292 (C.A. 3, 1956). See also Initial Decision in *Matter of Manco Watch Strap Co., Inc.*, Docket No. 7785, and Opinion of the Commission, March 13, 1962 [60 F.T.C. 495]. The doctrine of *res judicata* is particularly inappropriate in Federal Trade Commission proceedings since that body's responsibility under the Federal Trade Commission Act is at all times to measure various acts and practices by the standard of "public interest". This is also in accord with the underlying philosophy of the Act as expressed in Section 5(b) which requires the Commission to reopen, alter, modify or set aside its orders whenever in its opinion conditions of fact or of law have so changed or the public interest so requires.

Finally, respondents argue that the previous order "sanctioned the use of manufacturer's list price where the manufacturer's list price used was the correct list price supplied by the manufacturer." It is pertinent to point out that there is a distinction between the prohibition of unlawful conduct and the affirmative regulation of lawful conduct. *F.T.C. v. Sinclair Refining Co.*, 261 U.S. 463, 475-6 (1923). The legislative history of the Federal Trade Commission Act supports the view that its purpose is primarily to prohibit unlawful conduct. Senator Cummins, a leading advocate of the Federal Trade Commission Act, said: "* * * if I thought that the commission which we hope to create would sit down and attempt to write out an instruction to the business men of this country as to the things they could lawfully do and the things which it would be unlawful

for them to do, there is no power that could induce me to favor it." 51 Cong. Rec. 12917 (1914). Senator Walsh, another leading proponent of the Act said: "We are not going to give to the trade commission the general power to regulate and prescribe rules under which the business of this country shall in the future be conducted; we propose simply to give it the power to denounce as unlawful a particular practice that is pursued by that business." 51 Cong. Rec. 13317 (1914).

In this connection, the examiner in his Initial Decision in the *Matter of Carnation Company, et al*, Docket 6172 etc. [60 F.T.C. 1274, 1410] at page 123, stated: "It [the Commission] does not 'presume to run the economic railroad.' Its function is to prohibit practices demonstrated to be 'unfair', not to prescribe 'fair' ones." It is clear, therefore, that the previous order did not presume to sanction the acts and practices sought to be prohibited in this proceeding.

8. In his initial decision of March 22, 1962, the hearing examiner dismissed the complaint as to respondent F F & G Corporation. Upon reconsideration of the record, he changes that determination for the following reasons:

(a) All of the respondent corporations, including F F & G Corporation, operate under a single trade name, *Todd's*, and Filderman Corporation and F F & G Corporation operate through the same physical retail outlets.

(b) All of the advertising of the respondent corporations, including F F & G Corporation, is handled by a single advertising agency. (Tr. 61)

(c) Respondent corporations' advertisements commingled products sold by F F & G Corporation with products sold by the other corporations. (CX 1-15)

(d) Products of F F & G Corporation appearing in such advertisements also carried comparative prices, *i.e.*, the higher price designated as "Mfr. sugg. list," or words of similar import and a lower selling price.

(e) The same two men, Wolfe Filderman and Dorrel Goldman, formulate, control and direct the advertising and selling policies of Filderman Corporation, F F & G Corporation and Toma Furniture, Inc., (in the case of Toma Furniture up to April 1, 1961) and these corporations are closely held family corporations.

9. In view of the common ownership, control and management, consolidated business addresses, joint advertising practices and single trade name under which the respondent corporations do business, the hearing examiner is of the opinion that the legal technicalities of the corporate devices must be disregarded in order to fully protect

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the public interest in this matter. *Matter of Alscap, Inc.*, Docket No. 8292, Initial Decision of the Hearing Examiner adopted by the Commission February 14, 1962 [60 F.T.C. 275].

Accordingly, the hearing examiner hereinafter issues one consolidated order against the corporate and individual respondents.

ORDER

It is ordered, That respondents Filderman Corporation, a corporation, and its officers, F F & G Corporation, a corporation, and its officers, and Wolfe Filderman and Dorrel Goldman, individually and as officers of the said corporations, Toma Furniture Inc., a corporation, and Wolfe Filderman and Maynard E. Turow, individually and as officers of the said corporation, and respondents' agents, representatives and employees, directly or through any corporate device, in connection with the advertising, offering for sale, or sale of electrical appliances, furniture 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,

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

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

(c) That merchandise is guaranteed unless the extent and nature of the guarantee and the manner in which the guarantor will perform are clearly set forth.

(d) That any amount is the price of merchandise when an additional amount is required to be paid before the merchandise will be sold.

2. Misrepresenting in any manner, the amount of savings available to purchasers of respondents' merchandise or the amount by which the price of said merchandise has been reduced from the price at which it is usually and customarily sold in the trade area or areas where the representation is made.

OPINION OF THE COMMISSION

The complaint charged respondents with violating Section 5 of the Federal Trade Commission Act by the fictitious use of the term "manufacturers' list price," misrepresenting the extent of guarantees, and unfairly adding hidden charges to their advertised sales prices. Respondents, who do business under the trade name of Todd's, one of the more prominent discount houses in the Washington, D.C., metropolitan area, sell a variety of products, including large and small appliances and furniture, to the consumer at a number of locations in the District of Columbia, Maryland, and Virginia.

This matter is now before us on respondents' appeal from the second initial decision of the hearing examiner. On respondents' appeal from the first initial decision, that decision was vacated and remanded to the examiner by our order of October 1, 1962, for further evidence on the issues, since the record as then constituted was not sufficient to permit the Commission to make an informed disposition of this case in its entirety.¹ The examiner, in accordance with the remand order, held further hearings and issued the second initial decision, filed May 10, 1963, on the basis of the entire record and the proceeding is now before us for a review of his determination that all the charges made in the complaint have been sustained.

Respondents' use of the term "manufacturers' list price" must be viewed in the light of the Guides Against Deceptive Pricing issued January 8, 1964. The evidence adduced in support of the fictitious pricing charge does not meet the new standard promulgated by the Commission and this allegation will, therefore, be dismissed.

In the case of the deceptive guarantee charge, the admissions of the individual respondent Turow fully substantiate the allegations of the complaint on that point, and respondents do not seriously dispute the examiner's finding on this score. The real issue with which we are confronted is whether the complaint should be dismissed on the basis of evidence indicating the practice had been discontinued. We have reviewed the record and initial decision on this issue and agree with the examiner that mere discontinuance of the challenged guarantee advertising subsequent to the time the Commission's investigation was initiated will not justify dismissal of the charge in this instance. We will adopt the findings and conclusions of the examiner on this point.

Complaint counsel adduced additional testimony from two Todd customers subsequent to the remand to supplement that of the wit-

¹ While the evidence on the guarantee issue was clear prior to the remand, the record at that time did not permit disposition of the other charges.

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ness testifying in support of the hidden charges allegation in the first round of hearings. The testimony of the witnesses establishes that respondents have advertised their appliances at certain prices but refused to consummate sales unless the customer agrees to pay an additional amount in the form of a service charge. The examiner who observed these witnesses expressly found their testimony was clear, convincing, and reliable. Respondents object, in effect, that the testimony is insufficient evidence on which to base the finding. We see no merit in this contention; the examiner who saw and heard the witnesses is in the best position to determine whether additional corroborative testimony would be merely cumulative or is necessary to help him come to a conclusion.² In this instance he specifically found that additional evidence along the same lines would be merely cumulative. A review of the record convinces us that he has not abused his discretion in making that determination.

The remaining issue is the scope of the order to be directed against the several corporate and individual respondents. The examiner issued a consolidated order applicable in its entirety to all respondents, even though the record did not show that certain respondents had participated in or were responsible for all the practices challenged in the complaint. Under the circumstances of this case a more selective order will provide the necessary relief. Accordingly, the provision in the order applicable to the hidden charges practice will be directed to the Filderman Corporation and to Wolfe Filderman and Dorrell Goldman in their individual and official capacities, while the guarantee provision will be directed against Toma Furniture Inc., and to Wolfe Filderman and Maynard Turow in their official as well as their individual capacities. The complaint will be dismissed as to the F F & G Corporation.

The initial decision and order of the hearing examiner, as modified to conform to the views expressed in this opinion, will be adopted as the decision of the Commission.

Commissioner Anderson did not participate.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of respondents from the initial decision of the hearing examiner, filed May 10, 1963, and the answer of counsel in support of the complaint in opposition thereto. The Commission has now determined that the appeal should be denied in part and granted in part. Accordingly,

² See *Brown Shoe Company*, Docket No. 7606, February 20, 1963 [62 F.T.C. 679].

It is ordered, That the initial decision be modified by striking therefrom that section beginning on page 436 with the phrase "Theodore G. Proctor, trading as" and ending on page 440 with the phrase "which has other means of identification" and substituting therefor the following:

The evidence on respondents' use of the term "manufacturers' list price" does not meet the standards set forth under the Guides Against Deceptive Pricing issued January 8, 1964.

It is further ordered, That the initial decision be modified by striking therefrom that section beginning on page 444 with the phrase "On August 24th, 1959, the Federal Trade Commission" and ending on page 445 with the phrase "when the complaint in Docket No. 7572 was issued" and that section beginning on page 445 with the phrase "The use of a manufacturer's suggested retail price," and ending on page 450 with the phrase "one consolidated order against the corporate and individual respondents."

It is further ordered, That the order to cease and desist in the initial decision is modified to read as follows:

It is ordered, That respondents Filderman Corporation, a corporation, and its officers, and Wolfe Filderman and Dorrel Goldman, individually and as officers of the said corporation, and respondents' agents, representatives and employees, directly or through any corporate device, in connection with the advertising, offering for sale, or sale of electrical appliances, or any other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, directly or by implication:

That any amount is the price of merchandise when an additional amount is required to be paid before the merchandise will be sold.

It is further ordered, That respondents Toma Furniture Inc., a corporation, and its officers, and Maynard E. Turow and Wolfe Filderman, individually and as officers of the said corporation, and respondents' agents, representatives and employees, directly or through any corporate device, in connection with the advertising, offering for sale, or sale of furniture, or any other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, directly or by implication:

That merchandise is guaranteed unless the extent and nature of the guarantee and the manner in which the guarantor will perform are clearly set forth.

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It is further ordered, That the complaint be, and it hereby is, dismissed as to the F F & G Corporation, a corporation.

It is further ordered, That the initial decision, as modified to conform to the views expressed in the accompanying opinion, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents named in the order to cease and desist shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing,