

JOHN SURREY, LTD., ET AL.

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

Docket 8605. Complaint, Nov. 8, 1963—Decision, Mar. 16, 1965

Order requiring a direct mail order catalog distributor of New York City engaged in selling articles of general merchandise—such as pens, radios, typewriters, tools, and drill bits—to cease making false and deceptive pricing, savings, and quality claims in advertising its merchandise by using the word “Reg.,” or similar words, in comparative pricing claims to refer to prices which were higher than its regular selling price of such merchandise, using the words “manufacturer’s list price,” or similar words

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to refer to retail prices which were appreciably higher than prevailing retail prices of such merchandise in respondents' trade area, and falsely representing that its drill bits were precision ground and of high speed quality.

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 John Surrey, Ltd., a corporation, and Joseph Ross, individually and as an officer 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 that respect as follows:

PARAGRAPH 1. Respondent John Surrey, Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 11 West 32nd Street, in the city of New York, State of New York.

Respondent Joseph Ross is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His 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 various articles of merchandise, including such items as visual control boards, typewriters, pens, electric can openers, radios, checkwriters, electra maids, tools, drill bits, and other articles of general merchandise to the consuming 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 in the District of Columbia, and 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. 4. In the further course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their said products, the respondents have caused catalogs to be published and distributed by the United States mails to prospective purchasers of

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their said products. Said catalogs describe the numerous articles of merchandise offered for sale by respondents, and in connection therewith set forth various price amounts in connection with said articles of merchandise.

Among and typical and illustrative, but not all inclusive, of such statements appearing in respondents' catalogs and other advertisements are the following:

VISUAL CONTROL BOARD * * * for HALF the USUAL PRICE!

The cost of this revolutionary New VISUAL CONTROL BOARD is not the \$49.95-\$59.95 or even \$69.95 the other boards sell for today, but only \$29.95 * * * .

* * * * *
Consul Lightweight Portable Typewriter, Mfrs. Suggested List Price \$79.95 plus Fed. Tax. OUR CLEARANCE SALE PRICE \$39.95, plus Fed. Tax.

* * * * *
AMAZING PEN OFFER \$1.69 Value—NOW 4 for \$1.00 * * * .

* * * * *
Checkwriters like this cost as much as \$150.00—each-----\$18.75.

* * * * *
Power Packed Transistor Radio, The Tiny Radio with the Titanic Tone
* * * Complete Value \$49.95—\$24.95.

* * * * *
Electric Can Opener . . . at an amazing low price—Advertised in Life—
\$19.95 * * * . Our Sale Price \$9.95.

* * * * *
CHROME VANADIUM STEEL SPEED DRILL BITS 29 PC SET IN
METAL STAND Reg. \$42.50—NOW \$6.75 * * * . (Said price of \$42.50
also appears on the carton in which said bits are sold.)

* * * * *
NEW TROY ELECTRA-MAID Reg. \$29.95—Sale Price \$19.95.

PAR. 5. By and through the use of the above quoted statements, and others of similar import not specifically set out herein, the respondents represent that the higher stated prices set out in said advertisements in connection with the terms "Half the Usual Price" for Visual Control Boards and "Reg." for drill bits and electra maids were the prices at which the advertised merchandise had been usually and customarily sold by respondents at retail in the recent regular course of their business and that the differences between the said higher price amounts and the corresponding lower prices represented savings to purchasers from respondents' usual and customary retail price.

PAR. 6. In truth and in fact, the higher prices set out in said advertisements in connection with the terms hereinabove quoted in Paragraph Five were in excess of the prices at which the advertised merchandise had been usually and customarily sold by respondents in the recent regular course of business and the differences between said higher and lower prices did not represent savings to purchasers from respondents' usual and customary retail prices.

Therefore, the above referenced statements and representations as set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. Through the use of the above-quoted higher price amounts in connection with the following words and terms, and others not expressly set out herein, "Value" for pens and radios, "Mfrs. Suggested List Price" for typewriters, "like this cost as much as" for checkwriters and "advertised in Life" for can openers, respondents represent that said amounts were the prices at which the merchandise referred to was usually and customarily sold at retail in the trade area or areas where the representations were made, and through the use of said higher price amounts and the corresponding 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 or areas.

PAR. 8. In truth and in fact, said higher price amounts set out in connection with the words and terms "Value" for pens and radios, "Mfrs. Suggested List Price" for typewriters, "like this cost as much as" for checkwriters and "advertised in Life" for can openers were not the prices at which the merchandise referred to was usually and customarily sold at retail in the trade area or areas where the representations were made, but were in excess of the price or prices at which the merchandise was generally sold in said trade area or areas, and purchasers of respondents' merchandise would not realize a saving equal in amount to the difference between the said higher and lower price amounts.

Therefore, the above referenced statements and representations as set forth in Paragraphs Four and Seven hereof were and are false, misleading and deceptive.

PAR. 9. In the further course and conduct of their afore-stated business and for the purpose of inducing the sale of their drill bits, respondents have made certain statements and representations with respect to the quality of their drill bits in catalogs and newspaper advertisements and on the carton in which the drill bits are packaged, of which the following are illustrative and typical:

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Super Speed Drills Precision Ground—29 Tested Drills with Special Gun-Metal Finish * * * No. 1229. All 29 Drills of Alloy Chrome Vanadium Steel Sand-blasted Degreased—Precision Ground for Chip Clearance—Polished Standard Jobber lengths—Fully Guaranteed.

PAR. 10. Each set of drill bits is composed of a number of individual items which are contained in a box. The country of origin is set forth in small and inconspicuous lettering on the box, the drill bits and on the bottom of the stand and sizer. Purchasers of said drill bits who fail to see the said inconspicuous lettering on the box can determine the country of origin only by opening the box and carefully examining the minute lettering on each drill or turning the metal stand upside down. Said disclosure is, therefore, inadequate to apprise prospective purchasers of the country of origin of said drill bits.

PAR. 11. In the absence of an adequate disclosure that a product, including speed drill bits, is of foreign origin, the public believes and understands that it is of domestic origin, a fact of which the Commission takes official notice.

As to the aforesaid articles of merchandise, a substantial portion of the purchasing public has a preference for said articles which are of domestic origin, of which fact the Commission also takes official notice. Respondents' failure clearly and conspicuously to disclose the country of origin of said articles of merchandise is, therefore, to the prejudice of the purchasing public.

PAR. 12. Through the use of aforesaid statements and representations, and other similar thereto, but not specifically set out herein, the respondents represent, and have represented, that:

1. Their drill bits are super speed or high speed drill bits.
2. Said drill bits are made of an alloy of chrome vanadium steel.
3. Said drill bits are "fully guaranteed."

PAR. 13. In truth and in fact:

1. Respondents' drill bits are not super speed or high speed drill bits.
2. Said drill bits are not made of an alloy of chrome vanadium steel.
3. The advertised guarantee for said drill bits fails to set forth the nature and extent of the guarantee, the manner in which the guarantor will perform thereunder and the identity of the guarantor.

Therefore, the above referenced statements and representations as set forth in Paragraphs Four and Nine are false, misleading and deceptive.

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PAR. 14. In the further 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 and distribution of visual control boards, typewriters, radios, electric can openers, electra maids, speed drill bits and articles of general merchandise of the same general kind and nature as those sold by respondents.

PAR. 15. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 16. 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 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.

Mr. William B. James and *Mr. Anthony J. Kennedy* supporting complaint.

Mr. Leonard Belford, New York, N.Y., for respondent.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER
SEPTEMBER 2, 1964

This proceeding, brought against a direct mail order catalogue distributor and its president, by complaint issued November 8, 1963, charges respondents with unfair methods of competition and unfair and deceptive acts and practices, in violation of Section 5 of the Federal Trade Commission Act.

The Pleadings

The complaint, in addition to jurisdictional allegations, quotes certain advertisements issued by respondents and makes three different types of allegations:

1. As to some advertising, the complaint charged that the advertisements represent that respondents had previously sold the merchandise at a higher price than that contained in the advertising because of the use of "regular" or "usual" in describing the higher price.

2. As to other advertising, the complaint charged that the advertisements represent that the price in the trade area is higher than that contained in the advertising because of the use of "value" and "manufacturer's suggested list price."

3. As to still other advertising, the complaint charged that the advertising and the carton in which certain drill bits were packed, a) failed to disclose foreign origin; b) falsely represented the quality of the product; and c) "guaranteed" the product without setting forth the manner in which the guarantor would perform.

By answer filed December 12, 1963, respondents denied that the principal office of John Surrey, Ltd., was located where charged and that Joseph Ross was legally responsible for its acts and practices. Respondent Ross denied all of the other allegations of the complaint except paragraphs 10 and 16. Paragraph 10 states that drill bits are contained in the box (previously described), that the country of origin is in inconspicuous letters on the box, and purchasers cannot determine the country of origin except by opening the box and carefully examining the minute lettering on each drill and that said disclosure is inadequate to apprise prospective purchasers of the country of origin of said drill bits. Paragraph 16 charges that the acts and practices of respondents constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. Respondent Surrey denies that there is a substantial course of trade in the products and that the acts are being done presently. It also denies the allegation interpreting the advertising as representing the price at which goods were customarily sold in the trade area, and refers to the specific advertisements for a full statement of their contents. It denies specifically the other charging paragraphs including paragraphs 10 and 16 admitted by respondent Ross through his failure to deny them. The answers taken together thus constitute a general denial of the allegations of the complaint.

In addition to the general denial, four affirmative defenses are alleged: 1) the matters referred to in the complaint do not pertain to acts or practices of respondent Ross in commerce and are insufficient in law; 2) the activity has ceased, has no substantial effect on commerce, and the proceeding is not in the public interest; 3) the acts were "puffing" and not misleading, false or deceptive; 4) the proceeding is unfair because respondents cooperated in an investigation and readily consented and adhered to a course of business which would involve no further question of violations.

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Preliminary Matters

Counsel supporting the complaint issued its request under Rule 3.13 for admission of the genuineness of documents CX 1-29 on January 28, 1964. Respondents admitted genuineness by failure to respond.

A prehearing conference was called by order dated February 28, 1964 and issued by Hearing Examiner Tocker, to whom this matter was then assigned, for March 9, 1964. Prehearing instructions were served with such order but respondent failed to appear at such conference. The initial hearing was then set for April 20, 1964.

Under date of April 10, 1964, counsel for respondents moved to disqualify Hearing Examiner Tocker and to adjourn the hearing date. Hearing Examiner Tocker had responded previously to counsel's informal suggestion that he disqualify himself on March 23, 1964. On April 14, 1964, the hearing examiner cancelled the hearing to be reset on ten (10) days notice, and on the same date filed with the Commission an answer to respondents' motion to disqualify him. The Commission denied respondents' motion by order dated April 24, 1964. On April 30, 1964, Hearing Examiner Tocker requested relief from assignment to this proceeding due to pressure of other work and Hearing Examiner Maurice Bush was appointed to succeed him. The matter was then reassigned to the undersigned on May 18, 1964, due to other engagements of Hearing Examiner Bush.

Counsel supporting the complaint moved May 13, 1964, that the initial hearing be set to commence June 8, 1964. After reading the papers submitted in opposition to such motion, the hearing examiner, on May 20, 1964, ordered that a prehearing conference be held June 15, 1964, in New York, New York, and that the initial hearing commence the following day. A prehearing order was dictated on the record after the prehearing conference which was held June 15, 1964 (Tr. 36-37). During such conference the hearing examiner specifically drew the attention of counsel to the Commission's Guides against Deceptive Pricing effective January 8, 1964, the Guides against Deceptive Advertising Guarantees (Tr. 23), and the Administrative Bulletin concerning liaison with Customs (Tr. 29-30). The hearing commenced June 16, 1964, and was concluded June 19, 1964. Proposed findings were ordered filed July 21, 1964, and counter-proposals, conclusions and briefs August 5, 1964. By order dated July 21, 1964, the time to file proposed findings was extended to July 24, 1964.

Basis for Decision

On the entire record¹ in this proceeding, including the hearing examiner's evaluation of the credibility of the witnesses who testified and of the meaning of the documentary evidence received, the following findings of fact, reasons for decision, conclusions, and order are made. Proposed findings of fact, and conclusions not adopted in terms or in substance, are rejected as irrelevant, immaterial or erroneous.

FINDINGS OF FACT

1. Respondent John Surrey, Ltd., is a corporation organized and existing under and by virtue of the laws of the State of New York. Its principal office and place of business is 59 Hempstead Gardens Drive, West Hempstead, Long Island, New York (Tr. 43; RF 1; CF 1).

2. Respondent Joseph Ross is president, treasurer, director, and a stockholder of respondent John Surrey, Ltd., and with his wife controls more than a majority of the stock of said corporation (Tr. 43-49, 492-496). Respondent Ross determined what items should be advertised, the prices at which they should be sold and the general principles of operating its catalogues (Tr. 58, 59, 253).

3. Respondent John Surrey, Ltd., has an informal arrangement with Grand Central Pipe Company, Inc., whereby the latter company sells at retail over the counter to customers in its store located at 1152 6th Avenue, New York, New York, the articles advertised by John Surrey, Ltd., in its catalogues and newspaper advertisements, and turns over to respondent John Surrey, Ltd., orders received to be filled by mail. Respondent Joseph Ross is president and majority stockholder of Grand Central Pipe Company, Inc. (Tr. 276-278, 497, 498).

4. Respondents are now, and for some time last past have been, engaged in the advertising and offering for sale, and in the sale and distribution of various articles of general merchandise, including such items as pens, radios, visual control boards, typewriters, electra-maids, tools, and drill bits to the consuming public (respondents' answer, par. 2; CX 1, 8, 21, 22, 37; RF 2, 3; CF 3).

¹ In compliance with Rule 3.21(b), references are made to the transcript (Tr.), to Commission exhibits (CX), to respondent's exhibits (RX), and to proposed findings and the record citations referred to therein (CF and RF). The citations to particular references are intended to be illustrative only and do not in any way indicate that the entire record has not been considered because all possible references have not been made.

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5. 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 in the District of Columbia, and 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 (respondents' answer, par. 3; Tr. 47-48, 505-512; CX 50 a-j; 25).

6. In the further course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their products, the respondents have caused catalogues to be published and distributed by the United States mail to prospective purchasers of their products. Said catalogues describe the numerous articles of merchandise offered for sale by respondents, and in connection therewith, set forth various price amounts for said articles of merchandise. Typical and illustrative, but not all inclusive, of such statements appearing in respondents' catalogues and other advertisements, are the following:

Visual Control Board for Half the Usual Price!

(CX 1, p. 2; Tr. 49-55)

The cost of this revolutionary New VISUAL CONTROL BOARD is not the \$49.95-\$59.95 or even \$69.95 other boards sell for today, but only \$29.95 * * *.

(CX 1, p. 2; Tr. 49-55)

Consul Lightweight Portable Typewriter

* * * * *

Manufacturer's Suggested List Price \$79.50 plus Fed. Tax

Our Clearance Sale Price \$39.95

Plus 10% Fed. Tax

(CX 1, p. 3; Tr. 55)

AMAZING PEN OFFER \$1.69 VALUE—NOW 4 for \$1.00 * * *

(CX 5, p. 15; Tr. 57)

Checkwriters like this, cost as much as \$150.00 each -----\$18.95.

(CX 1, p. 8; Tr. 64)

POWER PACKED TRANSISTOR RADIO, THE TINY RADIO WITH THE TITANIC TONE * * * COMPLETE VALUE \$49.95—\$24.95.

(CX 5, p. 13; Tr. 59)

ELECTRIC CAN OPENER at an amazing low price.

Advertised in Life \$19.95.

Our Sale Price \$9.95.

(CX 5, p. 26; Tr. 69)

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CHROME VANADIUM STEEL SPEED DRILL BITS 29 pc SET IN METAL STAND

Reg. \$42.50

NOW \$6.75

[Price of \$42.50 also appears on the carton in which said bits are sold.]

(CX 8, p. 29; Tr. 66-67; CX 31)

NEW TROY ELECTRA-MAID

Reg. \$29.95

Sale Price \$19.95

(CX 4, p. 16; Tr. 69)

(See also respondents' answer, par. 4.)

Representations of Prior Sales at Higher Prices

7. Through the use of the statements, "Advertised in Life—\$19.95—Our Sale Price \$9.95" in connection with electric can openers, "Reg. \$42.50—Now \$6.75" in connection with drill bits, and "Reg. \$29.95—Sale Price \$19.95" in connection with electra-maids, respondents represented, directly or by implication, that the prices at which they were advertising such articles, were substantially less than the prices at which they had previously offered or sold said articles in the recent regular course of business and that the differences between the higher price amounts mentioned, and the correspondingly lower prices offered, represented savings to purchasers from respondents' usual and customary price (CX 4, p. 16; CX 5, pp. 13, 26; CX 8, p. 29; CX 31; Tr. 59, 66-67, 69). *Zenith Radio Corporation v. Federal Trade Commission*, 143 F. 2d 29 (7 Cir. 1944); *Stifel and Taylor's Value City Inc., et al.*, Docket 8440, April 30, 1964.

8. In truth and in fact, respondents never advertised in Life Magazine a price of \$19.95 for electric can openers, and never sold the electra-maids or the drill bits at the higher advertised price, nor was proof offered that the products were openly and actively offered for sale at the higher price. As a consequence, such higher prices were in excess of the prices at which such merchandise had been usually and customarily sold by respondents in the recent regular course of business, and the differences between such higher and lower prices did not represent savings to purchasers from respondents' usual and customary prices. Accordingly, respondents' representations heretofore described, were and are false, misleading and deceptive (Tr. 69, 70, 460-475).

Representations of Higher Trade Area Prices

9. Through the use of statements such as, "\$1.69 value" for pens, "Cost as much as \$150.00" for checkwriters, and "Manufacturer's

Suggested List Price \$79.95" for typewriters, respondents represented that said amounts were the prices at which identical merchandise, or merchandise of quality comparable to that referred to, was usually and customarily sold at retail in the trade area or trade areas where the representations were made, and that the difference between the higher price amounts mentioned and the correspondingly lower prices offered, represented savings to purchasers from the price at which such merchandise was usually and customarily sold in the trade area. *Giant Food, Inc. v. Federal Trade Commission*, 322 F. 2d 977 (1963); *Filderman Corporation*, Docket No. 7878, January 28, 1964 [64 F.T.C. 427].

10. With respect to the representations concerning the pens, respondent Ross testified that he compared his pen with the Paper-Mate pen which carried a price of \$1.69 and reached his decision as to the value of his pen on that basis because the quality of his pen was as good as that of the Paper-Mate pen (Tr. 58). The manufacturer claimed, "no pen at any price writes better" on its invoice (CX 14). Counsel supporting the complaint offered as CX 47 a ball point pen purporting to be identical with the pens sold to respondent. The ex-president of the manufacturer who sold pens to respondents was unable to identify CX 47 but said he made a pen similar to it. He could not recall that he had given CX 47 to the Commission's investigator (Tr. 365-369). The Commission's investigator, however, identified CX 47 as the pen received from the manufacturer (Tr. 501) and an invoice (CX 14) shows that 5 gross of retractable ball point pens were sold by that manufacturer to respondent November 3, 1960. The hearing examiner accordingly infers that CX 47 is substantially the same as the pens sold to respondents and referred to in its advertising.

11. Three experienced witnesses, respectively responsible for pricing pens in Gimbel's, Macy's, and Stern's department stores, testified that in their opinion CX 47 would sell in their respective stores for much less than \$1.69 (Tr. 370-414).

Mr. Richard A. Daniello of Stern's, testified that Stern's sold a pen of the type of CX 47 and that it would sell for approximately 29¢ in their Paramus, New Jersey, store (Tr. 372). He also said that CX 47 differed from the Paper-Mate pen which sells for \$1.69. The Paper-Mate pen had a metal band separating the cap from the barrel and also a small metal tip (Tr. 373). On cross-examination, Mr. Daniello admitted that different stores had different price levels (Tr. 377) and that he did not know how well CX 47 wrote or how long it would write, both of which are factors to be considered in

pricing (Tr. 378). Mr. Daniello also testified that a storekeeper would be justified in getting \$1.69 for an exact replica of a Paper-Mate pen if he could get it.

Mr. Sam Birnbaum of Gimbel's, testified that in his opinion the maximum retail price for CX 47 in the New York area in 1959 through 1962 would be 2 for \$1.00 (Tr. 382). On cross-examination, Mr. Birnbaum said that he did not know how CX 47 wrote and that how it wrote and for how long had a bearing on price (Tr. 385).

Miss Josephine Skrainar, an assistant buyer at Macy's, testified that in her opinion CX 47 would not have sold for more than 69 cents in 1962 in Macy's (Tr. 390). It was brought out that in the first year after ball point pens were introduced they dropped in price from \$12.50 to \$1.00 (Tr. 391), that prices vary between stores (Tr. 392), that Macy's did not sell the particular pen (CX 47) (Tr. 393), that she could not recall having written with CX 47 and did not know how well it would write (Tr. 394, 404) although that factor would bear on the sales price of a pen (Tr. 396). She could not tell how long the pen would write but did not believe that that factor bore on the sales price (Tr. 395-398, 404). Paper-Mate was the only pen selling at \$1.69 in the New York area in 1962 (Tr. 398). Macy's sells several Paper-Mate pens at different prices (Tr. 402-403). Paper-Mate was a fair traded pen until September or November 1963 (Tr. 403). CX 47 has all the parts that a Paper-Mate pen has (Tr. 404). On redirect, Miss Skrainar said that ball point pens generally sold at the same prices in Lord and Taylor (another department store) as in Macy's (Tr. 409). She also testified that Macy's sold, at one time, a ball point pen similar to that sold by a nationally known and advertised manufacturer at a lower price but could not say the lower price was due to the lack of advertising (Tr. 414).

12. From the foregoing testimony, and lacking countervailing proof offered by respondent of other prices in the trade area, the hearing examiner finds that the price at which CX 47 would be sold in leading department stores in the New York area was substantially less than the advertised value of \$1.69, and that there was a sufficient difference in quality and appearance between the nationally advertised Paper-Mate Pen and CX 47 so that respondents were not justified in taking the fair trade price of Paper-Mate as the value of CX 47 despite the manufacturer's claim that no pen writes better (CX 14). The fact that the wholesale price of CX 47 was about 81½ cents substantiates this position. Hence, the advertisement of ball point pens was false, misleading and deceptive (Finding 11).

13. With respect to the representations concerning the checkwriter, respondent Ross testified that he used the price his firm had paid for its checkwriter to set the price at which it advertised the product it sold because "in performance, the Summit which we were selling here was very much like the one which we had gone out and paid \$150 for [at] retail" (Tr. 64). CX 10, an invoice from Pearl Engraving Corporation dated November 29, 1961, showed that Summit checkwriters were purchased for \$11.84 each. No evidence was offered concerning the retail price of the Summit checkwriter in any trade area or to disprove the statement that it was very much like the one for which respondents paid \$150.00. Accordingly, it was not established that the advertisement for checkwriters was false and misleading despite the disparity in wholesale cost and the claimed retail value.

14. With respect to the representations concerning the Consul typewriters, "Manufacturer's Suggested List Price \$79.95," respondent Ross testified that this price was on the specification sheet and brochure "that was furnished to us by the manufacturers" (Tr. 55). When shown CX 28, an order form with a suggested list price of \$69.50 from General Consolidated Typewriter Company, Incorporated (undated), Ross testified, "This is not the only sheet that they gave us. We were supplied with different sheets at different times depending on what arrangements the company was making for the sale of its products" (Tr. 56). He produced no such sheets and claimed counsel supporting the complaint had them (Tr. 56). Complaint counsel offered the testimony of four witnesses each of whom fixed the highest price and the range of prices charged by his firm well below the manufacturer's suggested list price advertised by respondent (Tr. 85-95; 415-419, 419-426, 426-443).

Mr. Warren Edleman, Merchandise Manager and Advertising Director since July 1962 for fifteen jewelry stores, 8 in New Jersey, 3 in Philadelphia, 1 in New York, 2 in North Ohio and 1 in Erie, Pennsylvania (Tr. 85, 86), testified that the highest price for Consul typewriters was \$59.95 and the lowest \$29.95 in his stores. On cross-examination, he testified he could not recall whether the manufacturer ever suggested a \$79.50 price for the typewriters (Tr. 93). At certain times of the year, *e.g.* around Christmas, his firm advertises typewriters by putting them in the windows with a price of \$29.95, at other times they price them at \$59.95 and about 60% of the time get the asking price (Tr. 94).

Mr. Jack Gindi has a retail business in Brooklyn, New York. In 1962 he sold the Consul typewriter for about \$44 including Federal Tax (Tr. 416). He recalled selling it for as high as \$50 when he first

received the machines in the latter part of 1961 (Tr. 417) but he never recalled having sold such typewriters for \$79.50 plus Federal Tax during the period 1959-1962 (Tr. 417). On cross-examination, it was brought out that Mr. Gindi had a strictly retail store business, did no advertising, and knew nothing about a suggested retail price of General Consolidated Typewriter Company (Tr. 418).

Mr. Vincent Cottone has a retail business on 23rd Street in Manhattan (Tr. 419). He sold the Consul typewriter during 1959 to 1962. The lowest price was \$39.95 and the highest \$49.95. He never received promotional material from the manufacturer (Tr. 420-421). On cross-examination, Mr. Cottone testified that he did not have a fixed policy about markups. At one time he sold the Consul typewriter for \$49.95 but when his competitors were selling it for less he brought the price down to \$39.95 (Tr. 422). Mr. Cottone also testified on cross-examination that he needed a 25% overall markup and if some other concern had a lesser or greater markup they could sell for less or would sell for more (Tr. 422-423). His business was primarily cash and he did no advertising except that for which the manufacturer paid (Tr. 423-424). He never needed promotional material but he had seen figures from manufacturers some of which suggested a retail price (Tr. 424-425).

Mr. Arnold I. Silberstein, the secretary and counsel of a retail typewriter shop located on 125th Street in Manhattan, testified the firm had sold Consul typewriters in 1962. At the request of the Federal Trade Commission, he examined the firm's invoices to determine at what prices they were sold (Tr. 427). The highest price was \$47.50 (Tr. 428). CX 49 is the complete list of sale prices made up by the witness and shows the highest price \$47.50 (plus sales tax) and the lowest \$39.50 (Tr. 430-436). The firm received no promotional material from the manufacturer (Tr. 436). On cross-examination, the witness admitted that his testimony concerning promotional material was based on his examination of the records of the company (Tr. 438). He was familiar with list prices and suggested list prices (Tr. 439). The witness did not know whether his firm used order forms like CX 28 (Tr. 439-440). He never saw a specification sheet on the Consul typewriter (Tr. 442). It was stipulated that four additional witnesses, one located in Long Island, two in Newark, New Jersey, and one in the Bronx, would testify "on both direct and cross-examination, substantially to the same facts and in the same manner" as the four witnesses who testified (Tr. 476-477).

15. From the foregoing testimony and exhibits and the lack of countervailing proof offered by respondent of other prices in the

trade areas, the hearing examiner finds that the price of \$79.95 at which respondents advertised the Consul typewriter appreciably exceeded the highest price at which substantial sales were made in the New York and Newark, New Jersey, trade areas. Hence, the advertisement of Consul typewriters was false, misleading and deceptive and where respondent merely accepted the allegedly varying statements (which were not produced) by the manufacturer without making any independent estimate of the actual retail price, he cannot sustain the claim that the advertisement was an honest estimate of the retail value.

Inadequacy of Proof on Radio and Data Board Advertising

16. With respect to the representations concerning radios, no evidence was offered relating to the price at which such radios were usually and customarily offered or sold at retail in any trade area. The sole testimony, except for identification of the advertising bearing on the radios, was given by Mr. Robert S. Siegel, sales manager of Continental Merchandise Company (Continental). He identified an invoice for merchandise shipped to respondent (CX 15), stated it was identical to that advertised by respondent (CX 5) and that the price for which Continental sold the radio included the leather case, earphones, battery, instruction booklet and box (Tr. 433-435). Respondent's advertisement indicated that certain of the accessories were supplied free (CX 5). However, the complaint contains no charge that respondent improperly used the representation, "free."

17. With respect to the representations concerning control boards, no evidence was offered as to the price at which respondent had previously offered or sold the boards, nor was there competent evidence concerning the price at which such boards were usually and customarily sold at retail in any trade area (Tr. 331). The sole testimony, except for identification of exhibits by respondent Ross bearing on the control board, was that given by the sales manager, Mr. Charles T. McLaughlin, of Graphic Systems (Graphic) which manufactures a series of patented boards known by the name Boardmaster (Tr. 297-299). These sold at \$49.50 and \$67.00 depending on the size (Tr. 323). The witness compared advertising for the respondents' data board (CX 40) with that contained in Graphic's catalogue (CX 41). By this comparison, he purported to show that respondents' advertising slavishly followed the Graphic catalogue (Tr. 304-318) although the two boards differed in material and in the manner in which data cards were affixed (Tr. 320-324). Mr. McLaughlin also testified that in his opinion the value of the board

did not compare with the Boardmaster (Tr. 327). He did not know the price at which the respondents' data board was selling (Tr. 331). On cross-examination, the witness admitted that the data board could perform substantially all the functions described in the advertising (Tr. 333-364). Accordingly, since there was no charge of design piracy in the complaint and no competent proof of the price at which the respondents' data boards sold in any trade area, there was no definitive demonstration that respondents' advertising of data boards was false or misleading.

Foreign Origin, Quality and Guarantee Representations

18. With respect to the charge in the complaint concerning the failure to disclose the foreign origin of drill bits (CX 31 and 32), it is clear that the catalogue (CX 8, p. 29) does not mention foreign origin. One carton (CX 31) in which the drill bits are sold is plainly marked on top of the carton in letters approximately $\frac{1}{8}$ inch in height: "Made in West Germany." It is readable by a person of normal vision from at least four feet away. The second carton (CX 32) is stamped on the side of the carton "West Germany" in letters approximately $\frac{1}{8}$ inch in height. There is no proof as to whether or not the cartons are stacked so that the stamp is not visible to the purchaser. The color of the stamp blends with the cross-stripping on the carton and is placed so that the stamp is not prominent. There is no charge in the complaint concerning the respondents' activity with respect to other articles of foreign origin.

19. The hearing examiner has taken official notice in accordance with paragraph 11 of the complaint, that in the absence of adequate disclosure of foreign origin, the public believes that products are of domestic origin and that the purchasing public has a preference for articles which are of domestic origin. Testimony offered by respondents failed to rebut the presumption thus made. Respondent Ross testified, "Merchandise made anywhere in the world now had general acceptance in this country." (Tr. 259) He described the resistance to merchandise from Japan and Germany shortly after the war, but said this objection had disappeared (Tr. 259-260). Mr. Robert Siegel of Continental Merchandise Company which sold respondents the radios, testified that they sold principally Japanese imports (Tr. 450) and that there was a "positive" reaction (Tr. 450-451) but he later testified that he could not say what the customer reaction was "because we sell radios that are made in Japan. People that come to us know that our radios are made in Japan, so it is never a question to them whether we are selling Japanese radios" (Tr. 452).

20. No proof was offered by either party of the position of the Treasury Department as to the adequacy of the markings on respondents' drill cartons, and there is no charge in the complaint that the failure to state in respondents' catalogues that respondents' drills, radios and typewriters were of foreign origin is a failure properly to advise prospective customers of a material fact without which advice they might be misled.

21. With respect to the quality of the drills, respondents' catalogue uses the term "speed" coupled with the words "Chrome Vanadium" and "finest hardened and tempered steel available." Through the use of this combination of words, respondents represent to the ordinary purchaser that the drill bits are high speed drill bits made of an alloy of chrome vanadium steel (CX 8, p. 29; CX 31 and 32). *Zenith Radio Corporation v. Federal Trade Commission*, 143 F.2d 29 (7 Cir. 1944).

22. Mr. Kurt J. Spiegel, respondents' supplier, identified the invoice covering the importation of the drills from West Germany and the sale to respondents (CX 11, 32, 35). He testified there were three types of drills, "carbon speed [sic] drills, high speed drills—[and] in-between drills that are called chrome vanadium drills." (Tr. 103) He also testified that the drills supplied respondents were carbon steel drills (Tr. 105). He agreed on cross-examination that he watched a test of his drills to determine at what rate of speed they would disintegrate. Mr. Edward Bloom, metallurgist for Avildsen Tools and Machine Company, testified he had spark-tested certain of the drills and they were carbon steel and definitely not high speed drills (Tr. 219-222). On cross-examination, the witness testified that he could not tell whether the bits contained chrome or vanadium (Tr. 221-222). He further testified that it was not the speed alone but the friction which was created that would soften the carbon steel but not the high speed drill (Tr. 222-223). Mr. Bloom did not test the drills to find out at what speed they became useless (Tr. 225-226) and testified that it was the temperature rather than the revolutions per minute which determined when high speed drills should be used. He could not give precise answers as to the number of revolutions necessary to cause softening without consulting a table and knowing the material drilled (Tr. 226-234). Mr. Bloom stated that drill bits do not disintegrate at high speeds but lose their cutting edge which becomes soft and useless, and that disintegrate is a poor word to describe it (Tr. 223-226).

23. With respect to the quality of the grinding on the drills, respondents' catalogue uses the description, "precision ground for chip

clearance." Through the use of this phrase, respondents represent to the ordinary purchaser that the drills are ground with precision and will clear the chips created by the drilling.

24. Wilbur A. Johnson, who is in charge of production at the Avildsen Tool and Machine Company (Tr. 130), testified that the term precision ground "as made in the industry here in this country" is "a machine ground point; and from drill to drill they are very uniform" (Tr. 132). From an examination of the 27/64" drill bit in CX 31, the witness testified it was not possible that the drill had been machine ground because of the appearance of the chisel angle (Tr. 137). The witness also testified that precision ground for chip clearance meant that the drill would "take the chips and clear them out of the hole" (Tr. 142). The witness testified that some of the drill bits shown in CX 31 would not do this (Tr. 142). Avildsen Tool and Machine Company had sold carbon steel drills to the hardware trade prior to 1959-1960 when they discontinued selling them because of low cost import carbon drills (Tr. 149-151). The witness, on cross-examination, identified a particular drill in CX 31 in which he claimed the deficiencies were obvious, *e.g.* 17/64" (Tr. 160). The examiner has carefully scrutinized the exhibit and observes that the 17/64" bit is not symmetrical and ground at a different chisel angle on one side from the other. The witness made a sketch (CX 45) which diagrammatically supplies the nomenclature of the various parts of the drill (CX 48). The witness testified in effect that while the drills would make holes in wood for a time they would not satisfactorily perform over a period of time and that some of the drills would not clear chips at all (Tr. 185). Mr. Johnson did not try these drills (Tr. 167).

Respondent Ross testified that he had used a drill bit like the ones contained in CX 31 in repairing a metal chaise lounge (Tr. 255). He did not know the type of metal but he said with oil and the application of a little pressure he had had no difficulty and the bit cleared the chips (Tr. 256). He has used the bits a half dozen times and they always worked effectively (Tr. 257).

25. On the cross-examination of Mr. Johnson, reference was made to his conference with complaint counsel and to the fact that a memorandum of a previous interview with other company officials was read to him (Tr. 201-215). The hearing examiner, after reading the memorandum, determined that its use had not become necessary and should not be produced under the provisions of Rule 1.133 (Tr. 237). He, accordingly, denied respondents' motion to have it produced (Tr. 238). The memorandum was placed in a sealed envelope marked

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RX 2A for identification and the reporter was directed to place it in the rejected exhibits file (Tr. 239). It has not been considered by the hearing examiner in making his decision.

26. From the foregoing evidence concerning the quality of the drill bits (CX 31), the hearing examiner finds that the representations concerning their quality as speed drills were false, misleading and deceptive (Findings 22-24).

27. With respect to the charge in the complaint concerning the statement on the carton that the drills were "fully guaranteed" (CX 31, Complaint, par. 9), the only evidence offered was that only one return was made on drill bits and full refund was given (Tr. 255). Hence, there is no evidence that the guarantee on drill bits was not honored or that there were qualifications on the guarantee which were not set forth.

Facts Bearing on Respondents' Alleged "Affirmative" Defenses

28. With respect to the allegation that the activities of Joseph Ross are not in commerce, respondent Ross is president, treasurer, and a stockholder of respondent John Surrey, Ltd., and he and his wife control more than a majority of its stock (Tr. 43-49; 492-496). In addition, respondent Ross determined what items should be advertised, the prices at which they should be sold, and the general principles of operating its catalogues (Tr. 253, 258, 259). Respondents utilized without checking in any way the specification sheets supplied by manufacturers from whom the products in their catalogues were made and relied implicitly on the representations made by such manufacturers (Tr. 249).

29. With respect to the allegations that the alleged acts and practices have ceased, had no substantial effect on commerce and are not in the public interest, it is clear from the testimony of respondent Ross that some of the violations were continuing up until the investigation by the Federal Trade Commission. On the basis of respondents' own exhibits, RX 3A and 3B, respondents were informed as early as March 12, 1959, that the term "comparable value," as used in advertising an adjustable back aid car seat, was misleading when comparable merchandise was not generally available at the price quoted. Yet, in its catalogue mailed in March of 1962 (CX 1, p. 19), it uses the term "Value \$5.00" with respect to briar pipes and other comparable prices with respect to typewriters (p. 3) even though respondent Ross testified that the pattern of specification sheets and catalogues showing comparative prices or values, prevalent in 1959, had ceased (Tr. 248-250).

30. Respondent John Surrey, Ltd., since 1937, has been engaged in advertising, offering for sale, sale and distribution of various articles of merchandise to the consuming public. Such activities included, from 1959 to 1962, the preparation and mailing of eight different issues of catalogues. Each catalogue advertises about three to four hundred products. The total number of items of advertising in all eight catalogues was about three thousand. However, the same products were advertised in more than one catalogue so that the number of products did not equal the number of items. Said catalogues were mailed to prospective customers throughout the United States. Respondent Surrey, Ltd., had a sales volume of between \$600,000 and \$1,000,000 and sales were made geographically as follows:

The West Coast, about 30% of sales.

From the West Coast to the Eastern Region, including the Southwest, about 20% of sales.

The Eastern Region, from Maine to Florida, exclusive of the New York City Metropolitan Area, about 40% of sales.

The New York City Metropolitan Area, about 10% of sales.

(CX 1-8; Tr. 526, 527)

31. For the period 1959 through 1963, the dollar volume of sales by respondent John Surrey, Ltd., of visual control boards, typewriters, pens, electric can openers, radios, checkwriters, electra-maids and drill bits were as follows:

Items	Year	Dollar amount of sales
Visual Boards.....	1962	\$1, 587. 35
Typewriters.....	1962	599. 25
Pens.....	1959	149. 00
	1960	180. 00
Electric Can Openers.....	1961	477. 60
Radios.....	1960	1, 247. 50
Checkwriters.....	1960	1, 368. 75
	1961	11, 962. 50
	1962	1, 237. 50
	1963	562. 50
Electra Maids.....	1960	718. 20
	1963	478. 80
Drill Bits.....	1959	1, 012. 50
	1960	675. 00

(RX 4 A-B)

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32. The number of items of catalogue advertising established by the Commission to have been false and misleading, constituted a small percentage of the total number of items advertised in such catalogues (CX 1-8).

33. It is in the public interest to prevent all advertising which is false or misleading and the Commission in this instance has made a determination that it is in the public interest to prevent continuation of the type and quality of advertising described in the complaint. *Federal Trade Commission v. Algoma Lumber Company*, 291 U.S. 67, 77-78 (1934); *Fingerhut Mfg. Co., et al.*, Docket No. 8565, May 27, 1964 [65 F.T.C. 751]

34. With respect to the allegation that the acts and practices were mere puffing, the foregoing findings of fact demonstrate the contrary (Findings 1-29 incl.).

35. Respondents' claim of cooperation and following a course which they were informed would involve no further possible violations, and their charge of bad faith were not established. Despite respondent Ross' testimony that the investigator told him he felt "there was nothing for the Commission to proceed on" (Tr. 244), even after the 1959 warning by the Commission, contained in respondents' exhibit 3-A, there were a number of instances of false advertising in 1960, 1961 and 1962 (see RX 4 a-b; CX 1-8; Findings 1-26).

36. 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 articles of general merchandise of the same general kind and nature as those sold by respondents (Tr. 248, 148-151).

37. The use by the respondents of 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 respondents' products by reason of said erroneous and mistaken belief.

REASONS FOR DECISION ²

Respondents' advertising in its catalogue (CX 1-8) contained the terms "half the usual price" and "regular—sale price" or "regular—now" with two prices quoted in each instance. The hearing examiner has determined that the impression which a purchaser might get from

² Pursuant to the provisions of § 8b of the Administrative Procedure Act, and § 3.21(b) of the Rules of the Commission.

such juxtaposition of prices is that prior to the time of the sale, respondents' usual price, for a reasonable period of time, had been the higher price.³ Respondent Ross, president of John Surrey, Ltd. (Surrey), testified that he had not sold the articles at the higher price in the case of two of the articles advertised. Accordingly, as to these articles, it was clear to the hearing examiner that the advertisements contained in the catalogue were false and misleading.

As far as the visual control board advertisements were concerned, the hearing examiner did not find that the evidence showed that respondents had not sold or offered to sell previously at a higher price or what the trade area price was for a comparable board. Similarly, in connection with the advertisements for checkwriters and radios, there was no proof of the retail price in the trade area. Thus, it could not be determined that the price advertised with respect to those items was false and misleading.

The evidence in connection with the Consul Light Weight Portable Typewriter related principally to the Metropolitan New York area market and to the prices which were charged by particular firms in that area. With respect to one chain store firm, however, the evidence related to Erie and Philadelphia, Pennsylvania, New Jersey, and Northern Ohio as well. By stipulation, the Newark, New Jersey, as well as Bronx and Long Island trade areas were treated in the same fashion.

The hearing examiner, on the basis of this testimony and because no countervailing evidence of prices was offered by respondents, has inferred that the highest prices in the trade areas were substantially lower than the prices at which respondents' catalogue represented the retail price in the trade areas to be through the use of the term, manufacturer's suggested list price."⁴

Because of respondent Ross' testimony that there had been several suggested list prices dependent on what arrangements the manufacturer was making for the sale of its products and the existence of one undated sheet showing a suggested retail price of over ten dollars lower than the price which respondents claimed as the manufacturer's list, as well as the hearing examiner's observance of the witnesses who testified including those who could not recall any manufacturer's suggested price in the amount advertised, the hearing

³ *Zenith Radio Corp. v. Federal Trade Commission*, 143 F. 2d 29 (7 Cir. 1944); *J. Fiddelman & Son, Inc.*, Docket No. 8043 [58 F.T.C. 31]; *Arnold Constable Corp.*, Docket No. 7657 [58 F.T.C. 49]; *Stifel and Taylor Value City, Inc., et al.*, Docket No. 8440, April 30, 1964 [65 F.T.C. 569].

⁴ See *Gimbel Brothers, Inc.*, Docket No. 7834, Oct. 17, 1962 [61 F.T.C. 10511].

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examiner has found that the advertised manufacturer's suggested price was not an honest estimate of the actual retail price.⁵

Similarly, in connection with the ball point pen advertisements which used the terms, "value" and "now," the hearing examiner has inferred from the testimony of the representatives of the department stores, and in the absence of any contradictory testimony on behalf of respondents, that the testimony of the experienced buyers in these department stores as to the value of the pen, and the price at which they thought it would sell, indicated the highest price in the New York trade area. The hearing examiner took the position that in view of the substantial difference in construction, as well as good will, between the pen offered by respondents and that sold under the Paper-Mate name, respondents could not properly use the sales price of the Paper-Mate pen as "value" on its pen. In light of these facts, and the extremely low cost of respondents' pen, the hearing examiner finds that the price of \$1.69 was not an honest estimate of the retail value.

The advertisement concerning checkwriters, because of the absence of any showing of its falsity except the wide difference between the wholesale and retail price, was insufficient on which to base a finding of false and misleading advertising. Similarly, in connection with the advertisements for transistor radios, the evidence was insufficient to base a finding of false and misleading advertising.

The evidence concerning the electric can opener "as advertised in Life at \$19.95," was simply not true as the testimony of the witnesses from the magazine amply demonstrated. There was, accordingly, no justification for this advertisement.⁶

Charges with respect to foreign origin were inadequate to base a finding that there was an improper failure to disclose a material fact. The boxes were clearly marked with the country of origin. It was not charged that the failure to designate the country of origin in the catalogue amounted to concealment of a material fact and there was no charge that the advertisements for the radios, which were of non-domestic manufacture, were false and misleading for that reason. Accordingly, the hearing examiner has made no finding of false and misleading advertising in connection with the concealment of foreign origin charge.

⁵ See *Waltham Watch Company*, Docket No. 8396, February 28, 1964 [64 F.T.C. 1150]; *The Regina Corporation*, Docket No. 8323, April 7, 1964 [65 F.T.C. 246]; *Gruen Industries, Inc. et al.*, Docket No. 8455, February 28, 1964 [64 F.T.C. 1194].

⁶ See *Motorola, Inc.*, Docket No. 8473 [64 F.T.C. 62].

In connection with the advertisement that the drill bits were fully guaranteed, there was no evidence of any failure to make good the guarantee, and direct testimony was given that in the one case, where a return was made, a full refund was given. On the other hand, the hearing examiner has inferred from his reading of the catalogue advertisements for the drill bits that an ordinary purchaser would be misled into believing that a better grade of drill bit than a carbon steel bit would be supplied to the purchaser.⁷ Moreover, the testimony of the witnesses and the hearing examiner's own examination of the drill bits, convinced him that the drill bits were not manufactured in accordance with the representations in the advertising. Mr. Ross' testimony that he had used the bits and that they were satisfactory was no basis for advertising a drill which a reader would reasonably assume was of high quality when in fact a different product was supplied.⁸

On the basis of his analysis of the evidence offered in support of the complaint, the hearing examiner has determined that a prima facie case of false and misleading advertising was established and, accordingly, he denies respondents' motion to dismiss this complaint at the close of the Commission's case which was heretofore reserved.

By way of defense, respondents primarily stood on Ross' claim that he relied upon specification sheets supplied to him by the manufacturers of the articles which he advertised in his catalogue and having found these manufacturers reliable took the position that he need not go any further. This contention has of course no bearing on respondents' misrepresentation of the prices at which they had sold articles previously nor to representations of an affirmative fact such as that a product had been advertised in a particular magazine at a particular price.

Moreover, Ross' own testimony, in connection with the typewriters, was that there had been several specification sheets with different prices although the only specification sheet produced with suggested prices listed a price substantially lower than the manufacturer's suggested list price advertised. If, as was testified, the manufacturer had such a substantial variation in its suggested retail price, that very fact should have put Ross on inquiry. Similarly, in connection with the ball point pens, Ross' testimony was that he fixed the price of \$1.69 as the value because of the Paper-Mate pen and a representation by the manufacturer as to the fine quality of the pen. Hence, in this case, also, from Mr. Ross' own testimony, he failed to make an honest

⁷ *Zenith Radio Corporation v. Federal Trade Commission*, 143 F. 2d 29 (7 Cir. 1944).

⁸ *Federal Trade Commission v. Algoma Lumber Company*, 291 U.S. 67, 77-78 (1934).

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estimate of the retail value of the pen. He relied rather on his knowledge of the price at which a nationally advertised pen, of somewhat different physical characteristics, was selling at retail under a price stabilization agreement sometimes referred to as a fair trade contract.

Respondents pleaded defenses were either not established in fact or were insufficient in law. The first defense pertaining to Ross was simply not established. Mr. Ross was the responsible figure in the management of Surrey and he and his wife are owners, directors and officers. Moreover, Mr. Ross determined what items should be advertised in interstate commerce and the general principles of operating its catalogue.⁹

The second defense of abandonment, lack of substantial effect, and of public interest, has also not been established. To establish the defense of abandonment truly unusual circumstances must be shown.¹⁰ None were present here. The Federal Trade Commission, as early as 1959, by letter introduced by respondents (RX 3 A-B) had informed respondents that their use of comparable value advertising was misleading when compared with the actual price at which the product advertised was being sold. Yet, in the subsequent eight issues of catalogues, respondents continued to advertise comparable prices which the proof established were not comparable. It is clearly in the interest of the public to be protected against any species of deception.¹¹ We must infer from the widespread dissemination of respondents' catalogue throughout the United States that respondents' false representation have had a substantial effect on commerce.

Respondents' third defense of puffing is simply not established. The advertisements affirmatively make representations which are palpably false.

Respondents' fourth defense was likewise not established. Although respondents were informed as early as March 1959 (RX 3 A-B), it continued to utilize advertising in its catalogue which affirmatively misrepresented the quality and value of the goods advertised and there is no evidence whatsoever of any breach of faith by the Commission or of any stipulation of any character by respondents such as they inferred in the fourth defense.

⁹ *United States v. Wise*, 370 U.S. 405 (1962); *Pati Port, Inc., et al., v. Federal Trade Commission*, 313 F. 2d 103, 105 (4 Cir. 1963); *Product Testing Company, et al.*, Docket No. 8534, February 17, 1964 [64 F.T.C. 857]; *Pacific Molasses Company, et al.*, Docket No. 7462, May 21, 1964 [65 F.T.C. 675].

¹⁰ *Ward Baking Co.*, 54 F.T.C. 1919 (1958); *Product Testing Company, Inc.*, Docket No. 8534, February 17, 1964 [64 F.T.C. 857]; *Eugene Dietzen Co. v. Federal Trade Commission*, 142 F. 2d 321 (7 Cir. 1944); *Galter v. Federal Trade Commission*, 186 F. 2d 810, 813 (7 Cir. 1951).

¹¹ *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212 (1932).

The Commission's adoption, January 8, 1964, of new Guides Against Deceptive Pricing constituted a policy decision binding on the hearing examiner and applicable to cases brought prior to January 8, 1964.¹² Accordingly, the hearing examiner has evaluated the proof in the light of the policy established by the Guides and has redrafted the proposed order to conform to the Commission's decisions rendered after the adoption of such guides.¹³

CONCLUSIONS

1. Respondents are engaged in interstate commerce and the acts and practices complained of occurred in the course of such commerce. The Federal Trade Commission has jurisdiction over the persons of respondents and of the subject matter of this proceeding.

2. Respondent Joseph Ross was chargeable equally with respondent John Surrey, Ltd., for the acts and practices engaged in.

3. Respondents, through the use of words or phrases such as "regular" or "reg." with a price in juxtaposition to a word or phrase such as "now" or "sale price" followed by a lower price, represented that they had previously regularly sold or offered to sell in the usual course of business at the regular price and that the lower price constituted a saving of the difference between the two prices.

4. Respondents, through the use of words or phrases such as "manufacturer's suggested list price," "value," and "advertised in Life at" followed by a price in juxtaposition to a word or phrase such as "sale price," "clearance sales price" followed by a lower price, represented that the usual and customary price in the trade areas in which the product was sold was the higher price and that the lower price constituted a saving of the difference between the two prices.

5. The evidence established that: a) in a number of instances where the term "regular" or "reg." was used, the respondents had never sold at the higher price stated, b) in a number of instances where the terms "manufacturer's suggested list price," "value," and "ad-

¹² *Bulova Watch Company, Inc.*, Docket No. 7583, Feb. 28, 1964 [64 F.T.C. 1054]. *Continental Products, Inc.*, Docket No. 8517 [65 F.T.C. 361]. *Filderman Corporation*, Docket No. 7878, January 28, 1964 [64 F.T.C. 427]. *Waltham Watch Company*, Docket No. 8396, February 28, 1964 [64 F.T.C. 1150]. *David Mann, et al.*, Docket No. 8533, April 24, 1964 [65 F.T.C. 497]. *Clinton Watch Company*, Docket No. 7434, February 17, 1964 [64 F.T.C. 1443]. *Majestic Electric Supply Co., et al.*, Docket No. 8449, February 28, 1964 [64 F.T.C. 1166].

¹³ *Waltham Watch Co.*, Docket No. 8396, February 28, 1964 [64 F.T.C. 1150]. *The Regina Corp.*, Docket No. 8323, April 7, 1964 [65 F.T.C. 246]. *Gruen Industries, Inc.*, Docket No. 8455, Feb. 28, 1964 [64 F.T.C. 1194]. *Giant Food, Inc.*, Docket No. 7773, August 5, 1964 [66 F.T.C. 476].

vertised in Life at," were used, the higher prices advertised appreciably exceeded the highest price at which substantial sales were made in respondents' trade area and were not an honest estimate of the retail price prevalent in such areas. Hence, said advertising was false, misleading and deceptive.

6. The evidence established that respondents advertised drill bits in a manner which constituted a representation that said drill bits were precision ground for chip clearance and of high speed quality. In fact, the drill bits were not precision ground for chip clearance and were not of high speed quality. Accordingly, said advertising was false, misleading and deceptive.

7. The evidence failed to establish that respondents engaged in false, misleading and deceptive advertising in connection with foreign imports or a guarantee which was charged in the complaint.

8. Respondents failed to establish any affirmative defense which constituted a bar to relief in this proceeding.

9. The acts and practices of respondents, as found herein, constituted 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.

10. The following order should issue.

ORDER

It is ordered, That respondents John Surrey, Ltd., a corporation, and its officers, and Joseph Ross, individually and as an officer of said corporation, 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 drill bits, typewriters, pens, electric can openers, electra maids or other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "Reg.," or words of similar import, to refer to any amount which is in excess of the price at which such merchandise has been sold or offered for sale in good faith by the respondents in the recent regular course of their business, or otherwise misrepresenting the price at which such merchandise has been sold or offered for sale by respondents;

2. Advertising or disseminating any manufacturer's list or suggested price that is not established in good faith as an honest estimate of the actual retail price or that appreciably exceeds the highest price at which substantial sales are made in respondents' trade area;

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3. Using the words "manufacturer's list price," or "suggested list price," or words of similar import, unless the merchandise so described is regularly offered for sale at this or a higher price by a substantial number of the principal retail outlets in the trade area;

4. Using the words "comparable price," "advertised in Life at —," "value," or words of similar import, to refer to any amount unless they are reasonably certain that such amount does not appreciably exceed the highest price at which substantial sales of such merchandise are being made in the trade area where the representation is made, or otherwise misrepresenting the usual and customary retail selling price or prices of such merchandise in the trade area;

5. Misrepresenting, in any manner, the savings available to purchasers of respondents' merchandise;

6. Representing, directly or by implication, that their drill bits are super speed or high speed drill bits unless they are composed of the materials and have the physical properties and performance characteristics generally required for and possessed by high speed drill bits;

7. Misrepresenting, in any manner, the grade, quality, or performance of any product.

OPINION OF THE COMMISSION

By REILLY, *Commissioner*:

The complaint in this matter charges respondents with violating Section 5 of the Federal Trade Commission Act. The hearing examiner held in his initial decision that, except for two charges, the principal allegations of the complaint had been sustained and included in his decision an order to cease and desist. Respondents have appealed from this decision.

Corporate respondent, John Surrey, Ltd., is engaged in the business of selling to the public by mail order, articles of general merchandise such as pens, radios, visual control boards, typewriters, tools, and drill bits. This merchandise is advertised in catalogs and newspapers and is distributed by respondents throughout the United States.

Stated briefly, the complaint charges John Surrey, Ltd., and its president with using false and deceptive representations as to (1) the prices at which they usually sold certain articles of merchandise and (2) the generally prevailing prices of certain other articles. The complaint further charges respondents with misrepresenting the quality

of certain drill bits and the scope of the guarantee pertaining thereto, and with failing to disclose the country of origin of such bits. The hearing examiner held that there was insufficient evidence to sustain the "guarantee" and "foreign origin" charges. Complaint counsel have not appealed from this ruling.

The principal question raised by respondents' appeal concerns the adequacy of the proof offered in support of the charge that respondents had misrepresented the prices at which certain merchandise was sold in their trade area.¹ The record shows in this connection that respondents' advertising contained comparative pricing claims of which the following are typical:

Consul Lightweight Portable Typewriter

* * * * *

Manufacturer's Suggested List Price \$79.50 plus Fed. Tax

Our Clearance Sale Price \$39.95

Plus 10% Fed. Tax

AMAZING PEN OFFER \$1.69 VALUE—NOW 4 for \$1.00 . . .

ELECTRIC CAN OPENER at an amazing low price.

Advertised in Life \$19.95.

Our Sale Price \$9.95.²

The complaint alleges that through use of such representations respondents have represented that the higher amounts set forth in the advertisements "were the prices at which the merchandise referred to was usually and customarily sold at retail in the trade area or areas where the representations were made." While respondents do not dispute that consumers would so understand these claims, they argue that complaint counsel failed to establish that the higher amounts set forth in the advertising were in excess of the prevailing prices of the merchandise in the trade area in which respondents were doing business. Respondents contend in this connection that although their trade area encompasses the entire United States the only evidence offered by complaint counsel related to the prices at which the merchandise was sold in the New York City metropolitan area.

It is true that with respect to most of the products the only proof as to trade area prices presented by counsel supporting the complaint

¹ Respondents do not challenge the examiner's finding that the claims concerning their own regular prices and the representation with respect to the quality of drill bits were false and deceptive.

² The examiner erroneously construed this claim as a comparison of respondents' selling price with their own former price. (See paragraph seven of the complaint.) A seller may, of course, use this form of wording to make a comparison with another seller's (or the manufacturer's list) price, so long as the comparison is neither false nor misleading.

relates to an area in which only 10% of respondents' sales were made. There is also evidence, however, which would support the conclusion that the higher prices used by respondents were in some instances wholly fictitious. The record shows in this connection that respondents purchased ball point pens for about $8\frac{1}{3}\phi$ each, offered them at four for \$1.00, and claimed that each pen was a "\$1.69 value." Respondents attempted to justify this claim by asserting that the quality of the pen was as good as the Paper-Mate pen which has a manufacturer's list price of \$1.69. The fallacy of this position, however, is that respondents did not indicate in their advertising that they were comparing their pen with another selling for a higher price. They used instead a representation which could be construed by the reader to mean that the advertised pen sold elsewhere at the higher price.³ Moreover, even if respondents had clearly disclosed that they were comparing their pen with another selling for a higher price, their advertising would still have been deceptive since the record shows that respondents' pen was not of similar quality to the higher priced pen.

Respondents also represented that an electric can opener had been advertised in *Life* at \$19.95 and that their "Sale Price" was \$9.95. The record shows however that the can opener in question had never been advertised in *Life* at \$19.95. Respondents also represented that the "Manufacturer's Suggested List Price" of a typewriter was \$79.95. The record shows however that the manufacturer's "Suggested Retail" price was \$69.95.

In a case such as this where the seller is doing business on a nationwide scale it would be completely unrealistic to place on complaint counsel the burden of ascertaining the prevailing price of an article of merchandise in such a large trade area. To make this determination would necessitate an investigation into prices charged by literally thousands of retailers located in numerous communities in every section of the country. Nor do our Guides place this burden on a seller who wishes to advertise throughout a large geographical area that his selling price of an article of merchandise is less than the prevail-

³ The Commission's Guides Against Deceptive Pricing, effective January 8, 1964, state that advertising in which the price of one article is compared with the price of another article of like grade and quality "can serve a useful and legitimate purpose when it is made clear to the consumer that a comparison is being made with other merchandise and the other merchandise is, in fact, of essentially similar quality and obtainable in the area." Also as stated by the Court in *U.S. v. 95 Barrels of Vinegar*, 265 U.S. 438, "It is not difficult to choose statements, designs or devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to accomplishment of the purposes of the Act."

ing price of the article in that trade area. As stated in Guide III " * * * a manufacturer or other distributor who does business on a large regional or national scale cannot be required to police or investigate in detail the prevailing prices of his articles throughout so large a trade area. If he advertises or disseminates a list or preticketed price in good faith (*i.e.*, as an honest estimate of the actual retail price) which does not appreciably exceed the highest price at which substantial sales are made in his trade area, he will not be chargeable with having engaged in a deceptive practice."

Under this concept, the seller must have reason to believe that substantial sales of the merchandise are being made at a particular price before he represents in advertising or by preticketing that such price is the prevailing trade area price. He must have some information upon which to base this belief, but, as stated above, he is not required to investigate in detail all prices at which the product is being sold throughout the entire country. It is enough if he ascertains the price at which substantial (that is, not isolated or insignificant) sales of the product are being made by principal retail outlets in representative communities. This information should be readily available to any seller and should be in his possession before he makes a comparative pricing claim. If it is not available and if the seller has no reliable information as to the actual retail price of the product, he should not make an affirmative claim that the product is being sold elsewhere at a higher price.⁴ Consequently, in any proceeding challenging the propriety of trade area pricing claims the information upon which such claims are based should be within the peculiar knowledge of the seller.

In this case complaint counsel adduced evidence that respondents' advertised prices were substantially in excess of the prices charged by retailers in the New York City metropolitan area. We need not decide, however, whether this showing constituted *prima facie* proof of the allegations sufficient to shift to respondents the burden of going forward with the evidence to show that the merchandise was in fact sold at the advertised prices by various retail outlets in other communities.⁵ As stated above, there is also evidence in the record that respondents had not predicated certain of their claims on information

⁴It has been stated with respect to the practice of using false pricing claims that "morally it is not defensible and the Commission might hold it 'unfair,'" *F.T.C. v. Standard Education Society*, 86 F. 2d 692 (1936), *rev'd* on other grounds, 302 U.S. 112.

⁵Complaint counsel's case would of course be stronger if they had established that the higher amounts in respondents' advertising appreciably exceed the prices at which the products are sold by principal retail outlets in other communities located in different sections of the trade area in which respondents are doing business.

concerning the actual prices at which the merchandise was sold at retail but had, in fact, invented or fabricated the prices. In view of this showing, and in the absence of any countervailing evidence, we think the examiner was fully warranted in holding that respondents had misrepresented trade area prices.

Also rejected is respondents' contention that the complaint should be dismissed because only five out of 4,000 advertisements were found to be deceptive.⁶ In the first place, this argument is based on the erroneous premise that all but five of respondents' advertisements were truthful and non-deceptive. There is no showing, in this connection, that counsel supporting the complaint examined all of respondents' advertising and found only five deceptive claims as respondents seem to contend. Secondly, we do not believe that evidence that an advertiser has made non-deceptive, as well as deceptive, claims would tend to overcome our initial determination that a proceeding to prevent the continued use of the deceptive claims would be in the public interest. As stated by the court in *Basic Books, Inc. v. F.T.C.*, 276 F. 2d 718 (1960) "that a person or corporation * * * may have made correct statements in one instance has no bearing on the fact that they made misrepresentations in other instances."⁷ In this case, it has been shown that respondents have failed to comply with the law although given an opportunity to do so voluntarily. An order to cease and desist is therefore necessary to prevent continuation of the practices found to be deceptive.

No appeal has been taken from the order to cease and desist contained in the initial decision. We note, however, that several prohibitions in this order deal with the same practice and are somewhat redundant. Consequently, the order will be modified by incorporating the terms of the various prohibitions in one paragraph.

Most of the examiner's difficulty in framing a clear and effective order to cease and desist seems traceable to his effort to incorporate verbatim large segments of the Commission's Revised Guides Against Deceptive Pricing (effective January 8, 1964). An attempt to put the Guides to such a use reflects a misunderstanding of their nature and

⁶ Complaint counsel point out in their brief that respondents did not advertise 4,000 different items for sale. Respondents were selling approximately 300 to 400 items which were advertised repeatedly over the period 1959-1962.

⁷ See also *Gimbel Bros. v. F.T.C.*, 116 F. 2d 578 (1941) and *Western Radio Corporation v. F.T.C.*, 339 F.2d 937 (1964). In the latter case the court could "see no merit in the contention that tests of two of 20,000 transmitters produced by petitioners as of January 8, 1960, was insufficient evidence on which to base a finding of misrepresentation as to all of the transmitters."

purpose. The Guides are not designed to be an encyclopedic restatement of the law regarding deceptive pricing, as it has been developed in Commission and court decisions under Section 5 of the Federal Trade Commission Act, and are not written in the kind of "lawyer's language" that may be appropriate in a formal order.

The Guides are intended to serve a different purpose. Addressed to the businessman who desires in good faith to conduct his business in accordance with the law and who wants to know, in advance, how he may assure that his price advertising will be completely fair and non-deceptive, the Guides set forth in clear and uncomplicated layman's language the practical steps that a businessman should take to avoid becoming involved in scrapes with the law. The Guides themselves make this very clear:

These Guides are designed to highlight certain problems in the field of price advertising which experience has demonstrated to be especially troublesome to businessmen who in good faith desire to avoid deception of the consuming public. Since the Guides are not intended to serve as comprehensive or precise statements of law, but rather as practical aids to the honest businessman who seeks to conform his conduct to the requirements of fair and legitimate merchandising, they will be of no assistance to the unscrupulous few whose aim is to walk as close as possible to the line between legal and illegal conduct. They are to be considered as *guides*, and not as fixed rules of "do's" and "don'ts," or detailed statements of the Commission's enforcement policies. The fundamental spirit of the Guides will govern their application.

Therefore, when the Commission has reason to believe that a person or firm has violated the law by deceptive price advertising, and issues a complaint, one should not expect to find the answer to every question in the case within the four corners of the Guides—with respect either to whether the law has in fact been violated or to what form of order is appropriate to prevent recurrence of the unlawful conduct.

As we have frequently said, the Commission's duty in fashioning an order is to impose such prohibitions as will fairly and adequately "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *United States v. United States Gypsum Co.*, 340 U.S. 76, 88. It is apparent that the Guides, designed to assist persons who desire in good faith to avoid violations of the law, will not in every case supply the language precisely suited to drafting an order to cease and desist. We have fashioned an order in this case which, in the light of the Commission's past experience in remedying deceptive-pricing violations, will accomplish this purpose.

Respondents' appeal is denied and the initial decision as modified by this opinion will be adopted as the decision of the Commission.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT
OF COMPLIANCE

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and directing modification of the initial decision:

It is ordered, That the following order be, and it hereby is, substituted for the order contained in the initial decision:

It is ordered, That respondents John Surrey, Ltd., a corporation, and its officers, and Joseph Ross, individually and as an officer of said corporation, 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 drill bits, typewriters, pens, electric can openers, electra maids or other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "Reg.," or words of similar import, to refer to any amount which is in excess of the price at which such merchandise has been sold or offered for sale in good faith by the respondents in the recent regular course of their business, or otherwise misrepresenting the price at which such merchandise has been sold or offered for sale by respondents;

2. Using the words "manufacturer's lists price," "suggested list price," "value," or words of similar import, to refer to the price at which any product is generally sold by others, when such amount appreciably exceeds the highest price at which substantial sales of the product are being made by principal retail outlets in representative communities throughout respondents' trade area at the time such representation is made;

3. Misrepresenting, in any manner, the savings available to purchasers of respondents' merchandise;

4. Representing, directly or by implication, that their drill bits are super speed or high speed drill bits unless they are composed of the materials and have the physical properties and performance characteristics generally required for and possessed by high speed drill bits;

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

