

IN THE MATTER OF
SPIEGEL, INC.

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

*Docket 8708. Complaint, Sept. 7, 1966—Decision, July 15, 1968**

Order requiring a large Chicago, Ill., catalog retailer to cease making fictitious pricing and savings claims in the sale of its merchandise.

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 Spiegel, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Spiegel, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 2511 West 23rd Street, in the city of Chicago, State of Illinois.

PAR. 2. Respondent is a catalog house selling merchandise by mail order and is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of bedspreads, quilts, blankets and various other articles of merchandise.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said products, when sold, to be shipped from its place of business in the State of Illinois to purchasers thereof located in various other States of the United States and the District of Columbia, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. For the purpose of inducing the purchase of said prod-

* Modified by Commission's order of Sept. 29, 1969, by deleting numbered Paragraph 3 of the order.

Complaint

74 F.T.C.

ucts respondent has made various statements in its catalogs respecting their established price and the savings afforded purchasers of said products.

Among and typical, but not all inclusive, of said statements are the following:

SPIEGEL
SAVE MORE BUYER'S OK
SALE
"WILLIAMSTOWN" HEIRLOOM BEDSPREAD
AN OUTSTANDING VALUE—YOU GET ALL
THE FEATURES OF HIGHER PRICED BEDSPREADS,
PLUS \$8.98 SAVINGS WHEN YOU BUY
TWO OF THESE HEIRLOOM SPREADS
... SUPER TWIN SIZE: ABOUT 80 X 110 in. . . . EA.9.98
2 for 10.98
GET THIS SECOND SPREAD FOR ONLY \$1 MORE
ONLY 9.98 EACH ANY 2 FOR 10.98

* * * * *

FAMOUS FRUIT OF THE LOOM QUILTS
GET THIS SECOND
QUILT FOR
ONLY
\$1
MORE
SAVE 7.98 WHEN YOU BUY TWO
OF THESE QUALITY BRAND QUILTS!
8.98 each 2 for 9.98

* * * * *

SPIEGEL
SAVE MORE
SALE
GET THIS THIRD BLANKET FOR
ONLY \$1 MORE
WHEN YOU BUY 2 FOR 11.96
SAVE NOW ON ST. MARYS BLANKETS
TAKE ADVANTAGE OF THIS AMAZING SPIEGEL VALUE!
DURING THIS SALE YOU CAN GET THREE NATIONALLY
KNOWN ST. MARYS BLANKETS FOR ONLY \$1 MORE
THAN THE LOW PRICE OF TWO!
2 for 11.96
3 for 12.96

PAR. 5. Through the use of said statements and others of similar import not specifically set out herein, respondent has represented and now represents directly or by implication:

1. That the aforestated articles of merchandise have been openly and actively offered for sale, honestly and in good faith for a reasonably substantial period of time in the recent, regular course of its business at prices of \$9.98 for a single bedspread, \$8.98 for a single quilt and \$11.96 for a pair of blankets.

2. That purchasers of said merchandise at respondent's represented regular price of \$9.98 for the bedspread, \$8.98 for the quilt and \$11.96 for the pair of blankets plus \$1.00 for an additional article of the same merchandise save \$8.98 on two bedspreads, \$7.98 on two quilts and \$4.98 on three blankets.

PAR. 6. In truth and in fact:

1. The aforestated articles of merchandise have not been openly and actively offered for sale, honestly and in good faith for a reasonably substantial period of time in the recent, regular course of its business at prices of \$9.98 for a single bedspread, \$8.98 for a single quilt and \$11.96 for a pair of blankets.

2. Purchasers of said merchandise at respondent's represented regular prices do not save \$8.98 on two bedspreads, \$7.98 on two quilts and \$4.98 on three blankets because, as stated in subparagraph 1 hereof, said represented regular prices are fictitious and savings based thereon are likewise fictitious.

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

PAR. 7. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of bedspreads, quilts, blankets and other merchandise of the same general kind and nature as that sold by respondent.

PAR. 8. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's product by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair 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.

Findings of Fact

74 F.T.C.

Mr. Charles W. O'Connell for the Commission.

Mayer, Friedlich, Spiess, Tierney, Brown & Platt, Chicago, Illinois, by *Mr. Charles L. Stewart, Jr.*, *Mr. Patrick W. O'Brien*, and *Mr. James W. Gladden* for the respondents.

INITIAL DECISION BY RAYMOND J. LYNCH, HEARING EXAMINER

MARCH 15, 1967

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its Complaint in the above-entitled proceeding on September 7, 1966, alleging that the respondent engaged in unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act, by the use of false, misleading and deceptive statements, representations and practices in the advertising and sale of certain products sold by them. The respondent was served with a copy of the complaint, counsel for the respondent filed an answer thereto, wherein he both admitted and denied certain of the allegations of the complaint, and denied in general having engaged in the illegal practices charged.

Pursuant to notice, a prehearing conference was held in Washington, D.C., on October 24, 1966. The matter came on for formal hearing in Chicago, Illinois, on November 29 and 30, 1966. The record was closed for the reception of evidence by order issued by the examiner dated December 15, 1966. Proposed findings of fact and conclusions of law were filed on January 31 and February 2, 1967, and replies thereto were filed on February 10 and February 15, 1967. Proposed findings not adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

After carefully reviewing the entire record in this proceeding, together with the proposed findings and conclusions filed by the parties, the hearing examiner finds that the proceeding is in the interest of the public and, on the basis of such review and his observation of the witnesses, makes findings of fact and conclusions and issues an appropriate order.

FINDINGS OF FACT

1. Respondent Spiegel, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business

185

Findings of Fact

located at 2511 West 23rd Street, in the city of Chicago, State of Illinois. (Admitted Answer Par. 1.)

2. Respondent is a catalog house selling merchandise by mail and is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of bedspreads, quilts, blankets and various other articles of merchandise. (Admitted Par. 2 of Answer.)

The respondent Spiegel has no retail store outlets and since 1956 has sold its merchandise only through its catalogs (Tr. 32, L. 14-15).*

3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said products, when sold, to be shipped from its place of business in the State of Illinois to purchasers thereof located in various other States of the United States and the District of Columbia, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act. (Admitted Par. 3 of Answer.) The record discloses that respondent Spiegel's gross sales during the period covered by the complaint were as follows:

1962	.....	\$275,600,000
1963	.....	295,000,000
1964	.....	304,670,233
1965	.....	338,316,883

4. Counsel supporting the complaint in Paragraph Four thereof refers to only three items of merchandise and three methods of advertising said merchandise as being typical, but not all inclusive, of statements made by the respondent and these items were expanded and for the purpose of this proceeding are referred to in the Commission Exhibit List attached to Commission Exhibit A as follows:

A. *Williamstown Heirloom Bedspreads* (#690 & 691):

1962	.....	\$ 792,000
1963	.....	1,088,000
1964	.....	777,000

*All of Spiegel's sale catalogs for sales ending between January 1, 1962, and December 31, 1964, and the two regular yearly catalogs (Spring and Summer, Fall and Winter) for years 1962 to 1965 inclusive, are in evidence, and are listed in the Commission Exhibit List attached to the Stipulation marked "Commission Exhibit A."

The articles of merchandise which were the subject of the hearing in this matter were advertised from time to time in the Sale Catalogs and the catalog and page in which the article appeared are tabulated in the Commission Exhibit List referred to above.

Findings of Fact

74 F.T.C.

B. *Fruit of the Loom Quilts* (#1840) :

1962	.....	\$ 65,000
1963	.....	115,000
1964	.....	90,000

C. *St. Marys Blankets* (#1324) :

1962	.....	\$ 131,000
1963	.....	177,000
1964	.....	112,000

D. *Acrilan Comforter* (#1698) :

1962	.....	\$ 312,000
1963	.....	107,000
1964	.....	45,000

E. *Pacific Percale Sheets* (#8470) :

1962	.....	None
1963	.....	\$ 473,000
1964	.....	168,000

F. *Beacon Blankets* (#1212) :

1962	.....	\$ 102,000
1963	.....	118,000
1964	.....	64,000

G. *Ladies Pumps* (various numbers) :

1962	.....	\$ 701,000
1963	.....	459,956
1964	.....	411,705

Stipulation Commission Exhibit A pp. 2-6.

5. For the purpose of inducing the purchase of its merchandise the respondent has made various statements in its catalogs respecting their established prices and the savings afforded purchasers of said products.

Among and typical, but not all inclusive, of said statements are the following :

THE "WILLIAMSTOWN" BREADSPREAD

(Catalog nos. 690 & 691)

"WILLIAMSTOWN" HEIRLOOM SPREADS

(Photograph of bedspreads)

GET THIS BEDSPREAD for only ONE DOLLAR

with purchase of this regular \$9.98 bedspread

Save to \$8.98 on special purchase!

Two of these luxurious Williamstown

spreads are yours for only \$1

more than the \$9.98 each or 2 for \$10.98 regular price of one.

(CX 1 p. 8, CX 1a.)

(Photograph of bedspreads)

GET THIS BEDSPREAD FOR ONLY \$1 MORE

with purchase of this regular \$9.98 spread

185

Findings of Fact

REVERSIBLE HEIRLOOM BEDSPREADS

Special purchase offers you this once-in-a-lifetime chance to save \$8.98 on these two beautiful spreads.

9.98 each or 2 for \$10.98

(CX 4, p. 45, CX 4a.) *

THE PATCHWORK PRINT QUILTS:

(Catalog No. 1840)

(Photograph of Quilts)

GET THIS QUILT FOR ONLY \$1 MORE

PATCHWORK PRINT QUILTS

Each \$8.98 2 for \$9.98

Buy now—take advantage of this offer, for you save to \$7.98 when you buy two of these colorful quilts during our Buyer's O.K. Sale!

(CX 4, p. 46, CX 4b, S.E., 7/15/62.)

SAVE ON FRUIT OF THE LOOM QUILTS

(Photograph of quilts)

GET THIS 100% COTTON QUILT

FOR ONLY \$1 MORE

with the purchase of one Regular \$8.98 Quilt

\$8.98 each—or 2 for \$9.98

Exceptionally low priced at \$8.98 each . . . but now you can enjoy two colorful cotton quilts for just \$1 more than the regular price for one!

. . . SAVE! 2 for \$9.98

(CX 10, back cover, CX 10b, S.E., 12/25/62.)

FINE FRUIT OF THE LOOM QUILT

GET SECOND QUILT FOR ONLY \$1 MORE

with 1 regular \$8.98 quilt

(Photograph of quilts)

only \$8.98 each—2 for \$9.98

(CX 20, p. 159, CX 20b, S.E., 10/31/63.)

COMPARE THESE WONDERFUL VALUES . . . SEE
HOW MUCH MORE YOUR DOLLAR BUYS AT SPIEGEL
(Photograph of quilts)

* Additional offerings of the Williamstown Bedspreads were made by the respondent and are set forth in the following list of exhibits: CX 10 p. 3; CX 10a; CX 12 p. 9; CX 12a; CX 14 back cover; CX 14a; CX 15 p. 57; CX 15a; CX 16 p. 70; CX 16a; CX 17 p. 244; CX 17a; CX 19 p. 11; CX 19a; CX 20 p. 81; CX 20a; CX 22 p. 2; CX 22a; CX 24 back cover; CX 24a; CX 26 p. 93; CX 26a; CX 27 p. 47; CX 27a; CX 28 p. 59; CX 28a; CX 29 p. 149; CX 29a; CX 30 p. 217; CX 30a; CX 31 p. 8; CX 31a; CX 32 p. 43; CX 32a; CX 33 p. 69; CX 33a; CX 35 p. 107; CX 35a.

Findings of Fact

74 F.T.C.

GET THIS SECOND QUILT-COVERLET FOR ONLY \$1 MORE
 when you buy one at \$8.98
 gay patchwork quilts by Fruit of the Loom
 \$8.98 each—2 for \$9.98

An amazing offer from Spiegel—your second nationally famous brand
 quilt for only \$1 more than the low price of one
 (CX 30, p. 216, CX 30b, S.E., 8/15/64.) *

THE ST. MARYS BLANKETS
 (Catalog no. 1324)

GET THIS ST. MARYS BLANKET ONLY \$1 MORE
 with these regular 2 for \$11.96 blankets
 (Photograph of blankets)
 NOW 3 for \$12.96

ONLY AT SPIEGEL—SAVINGS TO \$4.98 YES, IT'S TRUE . . .

now you can get famous St. Mary's blankets in one of the greatest
 offers we've ever made! . . . For this Sale only, you can buy 3 blankets
 for only \$1 more than the low price for 2

. . . 2 for \$11.96 . . . SAVE! . . . 3 for \$12.96
 (CX 9, back cover, CX 9a, S.E., 11/15/62.)

GET THIS ST. MARYS BLANKET ONLY \$1 MORE
 with purchase of these REGULAR 2 for \$11.96 BLANKETS
 (Photograph of blankets)

SAVE MORE!

Heavy St. Marys Blankets of Luxurious 15% Virgin Acrylic

3 for \$12.96

Only at Spiegel—famous St. Marys blankets, known for warmth,
 beauty and superior quality—now at unsurpassed savings! You can get
 three of these luxury blankets for only \$1 more than Spiegel's already
 low price for 2.

(CX 10, p. 7, CX 10C, S.E. 12/25/62.) **

The Comforter
 Catalog No. 1698

Get This Comforter For Only \$1 More
 (Photograph of comforters)
 Acrilan Filled Comforters

Only \$12.98 each . . . or 2 for \$13.98 save \$11.98

* Additional offerings of Fruit of the Loom Quilts were made by the respondent and are set forth in the following list of exhibits: CX 22 p. 2; CX 22b; CX 24 p. 32; CX 24b; CX 28 p. 57; CX 28b; CX 29 p. 148; CX 29b; CX 32 p. 42; CX 32b.

** Additional offerings of St. Marys Blankets were made by the respondent and are set forth in the following list of exhibits: CX 21 back cover; CX 21A; CX 24 p. 36; CX 24C; CX 33 p. 137; CX 33b; CX 34 p. 4; CX 34A; CX 35 p. 4; CX 35B.

185

Findings of Fact

An exceptional value at \$12.98 each—but now you can enjoy the double luxury of two comforters for only \$1 more than the regular price of one.

(CX 8, back cover, CX 8A, S.E., 10/15/62; CX 10, p. 5, CX 10D, S.E., 12/25/62; CX 12, p. 8, CX 12B.)

Get This Comforter For Only \$1 more with regular \$12.98 comforter
(Photograph of comforters)

Acrilan Filled Comforters
\$12.98 each—2 for \$13.98

A terrific value at \$12.98 each . . . and now you get another comforter for only \$1 more!

(CX 20, p. 157, CX 20C, S.E., 10/31/63; CX 22, p. 3, CX 22D.)

Get Second Comforter For Only \$1 more

When you buy one at \$12.98

Acrilan filled comforters . . . each \$12.98—2 for \$13.98

(CX 25, p. 12, CX 25A, S.E., 3/15/64; CX 34, p. 4, CX 34B.)

The Sheets
(Catalog No. 8470)

Get This Sheet For Only \$1 more

Pacific Percale Sheets—Twin Size

Sale Flat or Contour \$2.99 each . . . or 2 for \$3.99

Imagine—a Pacific printed percale sheet for only \$1 when you buy 2—you save to \$2.99. Only Spiegel could make such an outstanding offer!
But hurry—Sale ends March 15

(CX 12, back cover, CX 12C, S.E., 3/15/63.)

Save now on Pacific sheets at Spiegel

Pacific Floral Print Percale Sheets at terrific savings when you buy two

\$2.99 each with 2 for \$3.99

(same as CX 12 above)

(CX 16, p. 131, CX 16B, S.E., 8/15/63.)

Get This Sheet for Only \$1 more

With one regular \$2.99 sheet

Pacific Percale Sheets

Twin size \$2.99 each—2 for \$3.99

Buy one Pacific printed percale sheet at Spiegel's low, low sale price—and get a second sheet for only \$1 more! You save up to \$2.99. Only Spiegel could make such an outstanding offer!

Findings of Fact

74 F.T.C.

(CX 20 p. 150, CX 20D, S.E., 10/31/63.)

The Beacon Blankets
(Catalog No. 1212)

Get This Blanket For Only \$1 More with these regularly
3 for \$9.96 Blankets
(Photograph of blankets)
now all 4 for \$10.96

Enjoy warmth and smartness in plaid, blankets at low, low prices!
Regularly 3 for \$9.96—now you get four for just \$1 more.
Save more! . . . 4 for \$10.96

(CX 1 p. 23, CX 1B, S.E., 3/15/62.)

* * * * *

Sale all 4 for \$10.96
Now—choose woven plaid or solid color blankets and save to \$2.32
when you buy in lots of four!

* * * * *

Save more on any four . . . 4 for \$10.96
(CX 12 p. 55, CX 12D, S.E., 3/15/63.)

3 for \$9.96—4 for \$10.96
Get Fourth Blanket For Only \$1 more
Plaid or Solid Blankets—Save \$2.32 on 4

* * * * *

Any four blankets—Save \$2.32 . . . Any 4 for \$10.96

(CX 31 p. 9, CX 31B, S.E., 9/15/64.)

6. Through the use of said statements and others of similar import not specifically set out herein, respondent has represented and now represents directly or by implication:

1. That the aforestated articles of merchandise have been openly and actively offered for sale, honestly and in good faith for a reasonably substantial period of time in the recent, regular course of its business at prices of:

- (a) \$9.98 for a single "Williamstown" bedspread.
- (b) \$8.98 for a single "Fruit of the Loom" quilt.
- (c) \$11.96 for a pair of "St. Marys" blankets.
- (d) \$12.98 for a single acrilan filled comforter.
- (e) \$2.99 for a single Pacific Percale sheet, and
- (f) \$9.96 for 3 "Beacon" blankets.

2. That purchasers of said merchandise at respondent's repre-

sented regular price of \$9.98 for the bedspread, \$8.98 for the quilt, \$11.96 for the pair of St. Marys blankets, \$12.98 for the comforter, \$2.99 for the sheet and \$9.96 for the three Beacon blankets plus \$1.00 for an additional article of the same merchandise save \$8.98 on the two bedspreads, \$7.98 on the two quilts, \$4.98 on the three "St. Marys" blankets, \$11.98 on the two comforters, \$1.99 on the two sheets, and \$2.32 on the Beacon blankets.

7. The advertisements in Spiegel's sale catalogs (CX 1 to 35 incl.) represent that the single article of merchandise, or in the case of the blankets, a group of articles of merchandise, had been offered and sold in the regular course of business at the stated unit price. While in truth and in fact the articles, during the period involved, were never offered as single items but only in the course of the sales effort.

8. Spiegel's offerings of merchandise in the regular course of its business are made in the two regular catalogs called the "Spring & Summer" catalog and the "Fall & Winter" catalog. The sale catalogs represent special events or sales not in the regular course of business (Tr. 93, 96). The prices designated as the "regular" prices in the sale catalogs would have reference to the prices in the regular catalogs.

9. The Williamstown bedspread, catalog number 690 and 691, was offered in combination at \$9.98 for one and \$10.98 for two in 21 sale catalogs from March 15, 1962, to December 25, 1964, as shown by sale catalogs in evidence (CX 1 to 35 incl.). This item had been offered in the same manner for the first time in a sale catalog in 1960 and in 1961 in three separate sale catalogs according to other evidence in the record (CX 47, RX 2, p. 2).

10. Examination of regular catalogs from 1962 to 1964 inclusive (CX 36 to 43) disclosed that bedspread number 690 had not appeared in a regular catalog until the Fall and Winter catalog of 1964 (see RX 10), after the respondent was apprised of the Commission's field investigation, initiated in January 1964 (Tr. 66 L. 12). It then later appeared in Spiegel Christmas Book, 1965, CX 44 (RX 11).

11. Evidence was offered by respondent through witness Albert Paul to show that a Williamstown bedspread was advertised in the Spiegel 1958 Spring and Summer catalog and the 1959 Fall and Winter catalog (RX 8, 9; Tr. 111-13). However, the bedspread described in RX 8 and 9 bears the catalog number 70 Z 500A, whereas the Williamstown bedspread which has ap-

peared in respondent's catalogs since 1962 is identified by catalog number 691. Mr. Paul stated he had been actively connected with the bedspread department only since about 1962 (Tr. 111).

12. It is clear that the Williamstown bedspread, catalog 691, had never been offered in the recent regular course of respondent's business at the price of \$9.98 for a single bedspread.

13. The quilt identified as catalog number 1840 was advertised in sale catalogs ten times between July 1962 and October 1964 (CX 4b, 10b, 20b, 22b, 24b, 28b, 29b, 30b, 32b, 33b). This item had never been offered in respondent's regular catalog. It had never been offered as a single item. It had been offered only in respondent's sale catalogs in the dollar sale context. Therefore, this article of merchandise had neither been offered in Spiegel's recent regular course of business nor at the single item price of \$8.98.

14. The St. Marys blankets, catalog number 1324, were featured in seven Spiegel sale catalogs in the period July 15, 1962, to December 25, 1964 (CX 9a, 10c, 21a, 22c, 24c, 34a, 35b). This merchandise could not be found in respondent's regular catalogs covering this period. Therefore, it had not been offered in the regular course of business at the price of \$11.96 for a pair of blankets as alleged in the complaint. Respondent attempted to show by RX 14 and 15 that the blanket advertised in 1961 and 1962 as catalog #1350 was the same as #1324. Respondent's witness Paul testified they were similar. He was not able to say they were the same (Tr. 119-122).

15. The acrilan comforter was offered in sale catalogs seven times in the period October 15, 1962, to November 30, 1964 (CX 8a, 10d, 12b, 20c, 22d, 25a, 34b). It was never offered in Spiegel's regular catalog as a single item. Therefore, it had not been offered in the regular course of respondent's business at the price of \$12.98 for a single comforter. Respondent in an attempt to show a previous offering of this article of merchandise, produced a page from Spiegel's 1961 Fall and Winter catalog (RX 17) advertising a comforter identified as catalog number 1453M. The witness was asked to compare it with the comforter offered in CX 20c which appeared in the sale catalog in October 1963. The witness said they were comparable (Tr. 132). They were not the same.

16. The Pacific percale sheets catalog number 8470 were offered in three sale catalogs between March 15, 1963, and October 31, 1963 (CX 12c, 16b, 20d). This product had not been offered in Spiegel's regular Spring and Summer, Fall and Winter catalogs

before or during the period stated and had not been offered as a single item as the complaint alleges. Respondent offered in evidence an advertisement from the 1963 Spiegel Christmas book which lists sheets identified by catalog number 8470. The offering in the Christmas book was made after the last offering in the sale catalogs hence it would have no bearing on those previous offerings.

17. The Beacon blankets, catalog number 1212, appeared in four sale catalogs between March 15, 1962, and September 15, 1964 (CX 1b, 12d, 13a, 31b). The three Beacon blankets had not been offered in Spiegel's regular catalog and had never been offered previously at a price of \$9.96 for a single unit of three substantiating the allegation of the complaint.

18. Respondent has not confined the \$1 sales to the items discussed herein. This sales technique was also used in the sale of some 35 items during the period involved in this case (Tr. 92).

19. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of bedspreads, quilts, blankets and other merchandise of the same general kind and nature as that sold by respondent (Admitted Answer Par. 7).

20. The use by respondent of the false, misleading and deceptive statements, representations and practices as herein found has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

21. The aforesaid acts and practices of respondent, as herein found, were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

CONCLUSIONS

The complaint in this matter charges respondent with using fictitious regular prices for various articles of merchandise and with making false savings claims based on those prices. The truth is that the articles of merchandise discussed in this decision were offered only in respondent's sale catalogs in combination, that is, at a stated price for one article, or, as in the case of the blankets, for a group of articles, with an additional article for

\$1 more. These items of merchandise had never been offered singly either in Spiegel's sale catalogs or in its regular catalogs at the represented price for each unit. Hence, the represented regular single price of each of these items, as well as the represented savings based on that price, was a fiction. In effect, respondent has represented through these "dollar sale" advertisements that two of the bedspreads would have regularly sold for \$19.96. Indeed, the repeated offering of these products only in combination would establish the combination price as the regular price and no savings could be available to purchasers since this price is always the same.

The use of the word "regular" in reference to Spiegel's unit prices in the advertisements quoted, conveys the impression that these were respondent's customary and usual prices for single items of such merchandise in the regular course of its business. *Gimbels Brothers, Inc.*, Docket 7834, 61 F.T.C. 1051 (1962); *Arnold Constable Corporation*, Docket 7657, 58 F.T.C. 49 (1961); *Main Street Furniture, Inc.*, Docket 7786, 57 F.T.C. 1119, 1123 (1960); *Lasky Enterprises, Inc.*, Docket 7408, 56 F.T.C. 1303 (1960). It is common understanding that the business of mail order houses in regular course is done through their regular catalogs. A purchaser might well believe, therefore, when "regular" is used in connection with a price in a Spiegel sale catalog that the item had been offered singly at that price in Spiegel's recent or current regular catalog.

The question presented in this case is not novel. The theory of the violation here is the same as that in *Mary Carter Paint Company, Inc.*, Docket No. 8290. Here Spiegel offers the second item for \$1 while Mary Carter Paint Co. offered a second can of paint free. The deception in both cases is the same. The two articles of merchandise are always offered in combination and the buyer is misled as to the usual price at which one item is usually sold.

Respondent contends that the sales of these items singly establish a regular price which would justify the representation in subsequent advertisements that each item had sold regularly at a stated price.

In the first place these sales took place after the advertisement appeared in the sale catalog and therefore could not serve as precedent for the representations in that catalog. Secondly, the mere fact that some purchasers bought a single item and failed to take advantage of the "2 for" offer does not perforce make the price they paid the regular single price of the item. This

185

Order

could not cure the deception inherent in the Dollar Sale offering. Despite these single purchases respondent still had not offered or sold the item in the regular course of business singly at the represented regular price.

Moreover, it is apparent that persons who bought only one of the items must have believed that the represented regular price was actually the true single price of the merchandise in the regular course of business. They were more sorely misled than the persons who bought the combination in reliance on the purported regular price plus one dollar.

CONCLUSIONS OF LAW

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

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

3. The use by the respondent of the false, misleading, and deceptive statements, representations, and practices, as found herein, has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true and into the purchase of substantial quantities of respondent's merchandise by reason of such erroneous and mistaken belief.

4. The acts and practices of the respondent, as herein found, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

5. Having found the facts to be as alleged in the complaint, the examiner has entered an order the same as that appended to the complaint. This represents the form of order that the Commission had reason to believe should issue if the allegations of the complaint were proved.

ORDER

It is ordered, That respondent Spiegel, Inc., a corporation, and its officers, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of bedspreads, quilts, blankets or any other product in commerce, as

"commerce" is defined in the Federal Trade Commission Act do forthwith cease and desist from:

1. Representing, directly or by implication, that any price is respondent's former or usual price for said products when such amount is in excess of the actual, bona fide price at which respondent offered or sold the said products to the public for a reasonably substantial period of time in the recent, regular course of business.

2. Representing, directly or by implication, through the device of a one dollar sale, or in any other manner, that a stated number of units of respondent's merchandise may be purchased for the price of one or more units, plus one dollar, or any other amount, when the price of the unit or units required to be purchased is in excess of the actual, bona fide price at which respondent offered or sold the said merchandise to the public for a reasonably substantial period of time in the recent, regular course of its business.

3. Misrepresenting, in any manner, the savings available to purchasers of respondent's merchandise.

OPINION OF THE COMMISSION

JULY 15, 1968

BY DIXON, *Commissioner*:

I

This matter is before the Commission upon the appeal of respondent from an initial decision of the hearing examiner, holding that respondent engaged in unfair methods of competition and unfair and deceptive acts and practices in commerce which violated Section 5 of the Federal Trade Commission Act¹ and ordering respondent to cease and desist from the practices found to be unlawful.

Respondent frequently promoted its merchandise through the use of "dollar sale" advertisements in various sale catalogs. The following advertisement is an example of this technique:

[Photograph of bedspreads]
GET THIS BEDSPREAD FOR ONLY \$1 MORE
with purchase of this regular \$9.98 spread
REVERSIBLE HEIRLOOM BEDSPREADS
\$9.98 each or 2 for \$10.98

Special purchase offers you this once-in-a-lifetime chance to save
\$8.98 on these two beautiful bedspreads.²

¹ 66 Stat. 631 (1952); 15 U.S.C. 45 (1964).

² CX 4, p. 45 (sale ending July 15, 1962). Over the next two years, this same "special purchase," "once-in-a-lifetime" occurred 19 more times. Initial decisions, pp. 191, 195.

All of the advertisements challenged in this proceeding use the same technique and make similar representations as to the regular price and the savings resulting from purchasing an additional article for "ONLY \$1 MORE." Many of the advertisements also make similar representations as to the very limited time available in which to take advantage of the offer.³

The central question in this appeal is simply whether Spiegel misrepresented the regular price at which the featured items were previously and customarily sold in the recent regular course of business. If, as the complaint alleges and the examiner found, respondent had neither offered nor sold the advertised items in the recent past at the alleged "regular" price, then the "regular" prices used in dollar sales were fictitious and any represented savings based upon these "regular" prices would also be fictitious. Additionally, if respondent repeated the dollar sale offers of the same items with great frequency, the continued savings claims made would be false and misleading since the "regular" price for the advertised items would, by lapse of time, become the price of both items in combination. The second item would therefore no longer be "only \$1 more."

II

The facts are adequately set out in the initial decision and need not be repeated at length here. To the extent they are not inconsistent with findings made in this opinion, the examiner's findings are hereby adopted as those of the Commission.

Respondent Spiegel, Inc., is a large catalog retailer. Its 1965 gross sales were \$338,316,883.⁴ Since 1956, it has sold its merchandise only through its catalogs.

In the normal course of its business, Spiegel annually issues its "regular" or "Big" (13 x 9 inches, 500 to 700 pages) Fall-Winter and Spring-Summer catalogs.⁵ These catalogs present the full range of merchandise offered for sale by respondent. The 11 to 13 supplementary sales and seasonal catalogs⁶ issued each year are much smaller (under 200 pages) and necessarily present a more limited range of merchandise. These catalogs are all issued in the regular and ordinary course of respond-

³ *E.g.*, CX 9, back cover; CX 12, back cover.

⁴ Initial decision, p. 189.

⁵ CX 36-43. Respondent repeatedly refers to these catalogs in its sale catalogs either specifically (*e.g.*, "at \$1 less than Fall Catalog price," CX 12, p. 42) or as its "Big" catalog (*e.g.*, "SAVE TO \$7 FROM OUR BIG CATALOG," CX 12, p. 37).

⁶ CX 1-35; Tr. 95.

ent's business.⁷ Since 1960, respondent has used the "dollar sale" merchandising technique in its sale catalogs.⁸ Approximately 35 items of merchandise are used in "dollar sales" during a given year. Some of these items may be used as often as ten separate times during the same year.⁹

The evidence in this proceeding, for the most part, consists of all or respondent's Fall-Winter, Spring-Summer, sale, and supplementary catalogs for the years 1962 through 1965. Complaint counsel compared various dollar sale advertisements and the relevant representations made therein with the prior regular, sale, and supplementary catalogs, in order to determine whether alleged "regular" prices, in fact, had been established previously by recent offers of the particular items at the alleged "regular" price. Complaint counsel focused his efforts on seven items selected to illustrate respondent's practices. The examiner found that as to six of the illustrative items, complaint counsel satisfactorily proved the charges contained in the complaint.¹⁰

Respondent's appeal contends that the initial decision is incorrect in three major respects:

1. The examiner should have found that all but one of the seven illustrative items offered in "dollar sales" were first offered as single items, thus previously establishing the regular prices and savings represented in the challenged advertisements.

2. The examiner should have found that all items offered in "dollar sales" were contemporaneously offered, and accepted by the public, as single items, with the result that each of the challenged advertisements individually established the regular prices and savings represented.

3. Even assuming, *arguendo*, that an order should have issued, the examiner should have promulgated a much narrower order.

III

In advancing their various contentions to the Commission, opposing counsel have argued that one or more sections of the 1964 *Guides Against Deceptive Pricing*¹¹ are controlling, and that the decision in *Mary Carter Paint Co.*,¹² either is, or is not, control-

⁷ The examiner apparently accepted complaint counsel's theory that since the various sale catalogs announce on their face that they are special events for a limited time only, they could not be in the regular course of respondent's business. The importance and necessity for this conclusion escapes us. This finding is irrelevant to the question of whether respondent misrepresented its regular prices and the savings based upon those prices.

⁸ Tr. 36.

⁹ Tr. 88.

¹⁰ Initial decision, pp. 195-197.

¹¹ 16 CFR. § 14.10 (1967).

¹² 382 U.S. 46 (1965).

ling. We cannot entirely agree with either counsel. As we have stated before,¹³ the Guides are not intended to serve as comprehensive or precise statements of law. They are designed to highlight some of the important problems in the field of price advertising. In short, they are to be considered *guides*, and not as fixed rules of "do's" and "don'ts." The *Guides* are relevant to this proceeding—they are not controlling. Similarly, *Mary Carter Paint* offers *guidance* to our disposition of this case because there are some similarities between this matter and *Mary Carter Paint*. However, it should be clear that we decide this case solely upon the record before us. *Mary Carter Paint* is relevant—it is not controlling.

The Commission has given careful consideration to respondent's objections to the hearing examiner's initial decision. After a thorough examination of the record, we find that, with the exceptions noted in this opinion, the record substantiates the examiner's findings as to the facts and conclusions and the order issued.

IV

A regular price is the price at which an article or service is openly and actively sold by the advertiser to the public on a regular basis for a reasonably substantial period of time in the recent and regular course of business. A price which (1) is not the advertiser's actual selling price, (2) is a price which was not used as a selling price in the recent past but at some remote period in the past, or (3) is a price which has been used only for a short period of time, is not a regular price. Consequently, use in advertising of any price or amount, other than the advertiser's own *bona fide* regular price, as a representation of savings in connection with a combination sale, is deceptive.

Use of the word "*regular*" in reference to Spiegel's unit prices in the challenged advertisements clearly conveys the impression that these were respondent's customary and usual prices for single items of the merchandise referred to. Not only did the examiner find that this is the consumer's common understanding,¹⁴ but also, judged within the context of each sale catalog, it appears to be the only logical conclusion one could reach.

Mail order purchasers cannot physically view the merchandise in adjudging the representations made in catalog offers and hence are extremely vulnerable to the printed word. Consequently, the

¹³ See *John Surrey, Ltd.*, Docket 8605, order issued March 16, 1965 (67 F.T.C. 299); *Mary Carter Paint*, *supra*, at 48.

¹⁴ See initial decision, p. 198.

prospective purchaser's decision to buy must be based largely on the logical inferences drawn from the wording of the advertisement.¹⁵ When a catalog advertisement states that a bedspread, "regularly \$9.98 is now reduced \$2," or that "another of these regular \$9.98 bedspreads can be purchased for only \$1 more," it is reasonable for a consumer to conclude that the individual bedspreads must have been sold recently at \$9.98. Quite obviously, if the bedspread was never individually offered in the recent regular course of business at its alleged "regular" price, the advertiser is making a false representation which, in most mail order buying instances, is a material influence on the consumer's decision to purchase. Hence, in this particular case, opposing counsel have devoted considerable effort to demonstrating whether or not respondent had previously offered the individual items at the "regular" price later used in dollar sale advertisements.

Respondent does not dispute that one of the seven illustrative items, the Fruit of the Loom quilt, was *never* previously offered as a single item.¹⁶ It had been offered only in dollar sales, ten times between July 1962 and October 1964.¹⁷ The examiner found that during this same period five other items also were never previously offered as single items.¹⁸ We have read the record and find that the evidence amply supports the examiner's findings in this regard.

The St. Marys blankets, catalog number 1324, were featured in dollar sales in seven Spiegel sales catalogs during the period July 15, 1962, to November 30, 1964.¹⁹

Typical of these advertisements was the following:

GET THIS
St. Marys Blanket
Only \$1 More
With these *regular* 2 for \$11.96 blankets
(photograph of blankets)
NOW 3 for \$12.96
ONLY AT SPIEGEL—*savings to \$4.98 . . .*

Yes, IT'S TRUE . . . now you can get famous St. Marys blankets in one of the greatest offers we've ever made! . . . *For this Sale only,*²⁰ you

¹⁵ For instance, one of the continued inferences of respondent's dollar sale practice is to falsely imply that each offer was for that sale only and thus for a very limited time, thereby inducing consumers to purchase quickly. *E.g.*, p. 200, n. 2 *supra*, p. 204, n. 20, *infra*. *Cf. S. W. Pike, Seedsman, Inc.*, 18 F.T.C. 82 (1933); *Perfolastic, Incorporated*, 16 F.T.C. 157 (1932).

¹⁶ Respondent's Appeal Brief, p. 8.

¹⁷ Initial decision, p. 196.

¹⁸ Initial decision, pp. 195-197.

¹⁹ CX 9a, 10c, 21a, 22c, 34a, 35b.

²⁰ Only one month later, in its "Save More Sale" ending December 25, 1962, respondent again made a substantially similar dollar sale offering of this item. CX 10, p. 7; CX 10c. See n. 15, *supra*.

can buy 3 blankets for only \$1 more than the low price for 2.

... 2 for \$11.96 ... SAVE! ... 3 for \$12.96²¹

This advertisement constituted an obvious representation that these blankets were formerly offered and sold at 2 for \$11.96 (\$5.98 each) and that for the limited time of this sale, an additional blanket could be purchased for one dollar more. Thus, the consumer who buys all three would save \$4.98. These representations were not true. The offer was not limited to the one sale, but repeated frequently. The blankets were not regularly 2 for \$11.96, nor \$5.98 each. They had never been offered or sold at these represented prices in any of the Spiegel regular catalogs in evidence. A purchaser of all three blankets did not save \$4.98. He was buying blankets which, during the relevant time period, had been offered and sold only in combination offers at the regular price, established through frequent offers and sales, of 3 for \$12.96 (\$4.32 each). Whether or not the blankets were offered and/or sold at 2 for \$11.96 before July 15, 1962, was not established.²² However, even if the blankets ever were offered and/or sold at this price, and if this ever was the "regular" price for them, this price was lost with the repeated advertisements covering a period of twenty-eight months, offering 3 for \$12.96, which as a result of such advertisements became the regular price.

Respondent asserts that two of its exhibits demonstrate that the same blanket was previously offered as a single item in 1961, hence the regular price and other representations challenged were previously and legitimately established. Respondent attempted to show that the blanket advertised in 1961 as catalog number 1350 was the same as number 1324.²³

An examination of the exhibits in evidence makes it clear that the earlier advertised blanket is substantially different from the blanket described in the challenged advertisement. Catalog number 1350 is of Thermal-Weave construction with a six-inch nylon binding. It is made by Beacon Mills.²⁴ Number 1324 is not of Thermal-Weave construction, and it has a five-inch nylon binding.²⁵ Each blanket is available in six colors. The two blankets

²¹ CX 9, back cover; CX 9a (emphasis added).

²² The examiner overstated the extent of the proof in this case when he concluded that the relevant items of merchandise "had never been offered singly either in Spiegel's sale catalogs or in its regular catalogs at the represented price for each unit." (Initial decision, p. 198.) Complaint counsel's proof was limited to the years 1962 through 1965.

²³ RX 14, 15.

²⁴ *Id.*

²⁵ CX 9a, 10c, 21a, 33c, 24c, 34a, 35b.

only have two colors in common. Furthermore, number 1324 may have been made by a different manufacturer.²⁶

Absent any explicit qualification that a comparison was being made between the advertised blankets and previous "comparable" blankets, the plain meaning of these challenged advertisements is that two of the *identical* blankets usually and customarily sell for 2 for \$11.96. The record demonstrates that neither the same nor similar blankets were previously offered in the recent, regular course of business at 2 for \$11.96, or at 2 for any price.

Similarly, the acrilan comforter, catalog number 1698M, was offered in dollar sales in seven Spiegel sale catalogs during the period October 15, 1962, to November 30, 1964.²⁷

Typical of these advertisements is the following:

GET THIS COMFORTER FOR ONLY \$1 MORE
(photograph of comforters)

ACRILAN FILLED FOR EXTRA WARMTH
\$12.98 each—or 2 for \$13.98

An outstanding value at \$12.98 each—but now you can enjoy two luxurious comforters for only \$1 more than the regular price of one! . . .²⁸

Spiegel was here representing that the same comforter formerly sold for \$12.98 (the "regular" price). The alleged savings offered by this advertisement are implicit. Respondent attempted to prove that the same or a comparable comforter previously had been offered as a single item,²⁹ by producing a page from the 1961 Fall-Winter catalog illustrating a comforter identified as catalog number 1453M.³⁰ The examiner found that catalog number 1698M (the challenged item) was not previously offered in any of the catalogs in evidence.³¹ Further, a comparison of the exhibits in evidence shows that the number 1698M comforter was not the same as the number 1453M comforter. It is doubtful that number 1453M was comparable in any meaningful sense with number 1698M. Number 1698M was a 74 x 86 inch, floral print on acetate crepe, available in four colors at \$12.98 each or two for \$13.98.³² Number 1453 was a 68 x 86 inch multi-color stripe on acetate taffeta, available only in two entirely different color combinations at \$8.97 each.³³ Even more importantly, an

²⁶ Tr. 123.

²⁷ CX 8a, 10d, 12b, 22d, 25a, 34b.

²⁸ CX 10, p. 5; CX 10d.

²⁹ Tr. 132; RX 17.

³⁰ RX 17.

³¹ Initial decision, p. 196.

³² CX 8a, 10d, 12b, 20c, 22d, 25a, 34b.

³³ RX 17.

examination of CX 10, the Spiegel *Save More Sale* catalog (sale ending December 25, 1962) reveals a challenged dollar sale advertisement of the catalog number 1698M comforter on page 5, and an advertisement of respondent's alleged "same" catalog number 1453M comforter on page 9.

The most charitable inference we can draw from the appearance of these two comforters within the limited space of this sale catalog is simply that, at the time the catalog was assembled and published, not even respondent believed they were the same.

We find, as did the examiner, that of the six illustrative items discussed at length in the initial decision, not one ever appeared in any one of the previous regular, sale, or supplementary catalogs in evidence. Thus, during the relevant period, the advertised items were never individually sold at the quoted "regular" price, or at any price, prior to their appearance in the dollar sale advertisements. The frequent combination offers of this merchandise at "only \$1 more" were false and misleading since Spiegel's advertised "regular" price, however well-established it may have been originally, had been replaced through repetition of the so-called "sale" price and lapse of time. Consequently, the claimed "regular" price was a fiction and any alleged "savings" based upon such price were also fictions.

V

Spiegel suggests an alternative argument to prove that it had, in fact, established the existence of the represented "regular" price. In a dollar sale advertisement, a bedspread, for example, would be represented as regularly \$9.98 each or 2 for \$10.98. Since some consumers purchased only one bedspread at \$9.98, respondent contends that each dollar sale advertisement was an offer of the single item for the stated price and also a second offer of the items in combination for one more dollar. Counsel stipulated to a tabulation which indicates that in 1963, from six to eighteen percent of Spiegel's sales in response to the challenged advertisements were sales of single items only.³⁴ Thus, respondent argues that the dollar sales were *bona fide* offers of the single items and were accepted as such by the consuming public. Further, respondent asserts that these purchases of single items show that the regular and usual price is not the combination price but, rather, the single item price as set out in the individual dollar sale advertisement.

This is but another example of the classic "bootstrap" argu-

³⁴ RX 1a-c.

ment. Respondent is asking us to conclude that since a number of consumers accepted its representations of "regular" price, that proves the truth of the representation. If a sale is to result in specified savings made by offering a second item for an additional dollar, or penny, etc., the claims must relate to the prices applicable prior to the sale.³⁵ The fact is, as we have stated, that from 1962 through 1964, respondent never sold these items singly before at any price. Thus, it did not establish any foundation on which to base the quoted "regular" price. Respondent's evidence does not establish that the stated single price was at the time of the representation the regular price. The fact that the consumer is misled into believing the existence of a price which is in fact fictitious can never be justification for deception. The real value of respondent's evidence of single sales is that it demonstrates the deceptive effect on the consumer created by the dollar sale advertisements. We cannot accept an assumption that respondent's customers would knowingly purchase a single item for the purported regular price if they had known that during the years in question the item was *always* offered in combination and never *previously* offered alone at the advertised single price. The only reasonable assumption is that the purchasers *believed* they were paying the true regular single price. This belief was induced by Spiegel's misrepresentations.

VI

Normally the representation which is relevant in determining the legality of an advertisement is the general impression given by the advertisement read as a whole.³⁶

In this matter, we cannot simply consider each challenged advertisement standing alone and without reference to its surrounding context. Each of the challenged advertisements appeared in a Spiegel Sale Book. Many of these sale books consisted of one hundred or more pages. On almost every page, the consumer was confronted with specific claims of price reductions and bargains.

³⁵ This would most certainly be the consumer's understanding upon viewing page after page of each sale catalog, comparing the sale price to a price purportedly appearing in the prior Spring-Summer or Fall-Winter catalog. (See pp. 209, 210, *infra*.) Respondent repeatedly uses references to its large Spring or Fall catalogs, such as:

"GREAT VALUES! BUY ONE ITEM AT OUR REGULAR CATALOG PRICE . . . GET SECOND ITEM FOR ONLY HALF ITS REGULAR PRICE—SAVE 25% (CX 9, pp. 22-23).

"Big Fall Catalog prices slashed for our pre-Christmas sale (CX 10, p. 97).

" . . . save \$5.05 from last spring Catalog! (CX 12, p. 25."

See G. Alexander, *Honesty and Competition* 147 (1967).

³⁶ See, e.g., *Charles of the Ritz Dist. Corp. v. Federal Trade Commission*, 143 F.2d 676, 679 (2d Cir. 1944); *Developments in the Law—Deceptive Advertising*, 80 *Harv. L. Rev.* 1006, 1043-1051 (1967).

For instance, the Save More Sale catalog³⁷ (for the period ending December 25, 1962) consisted of one hundred pages, five of which contained challenged dollar sale advertisements. Almost every page repeated the theme that the consumer was being offered price reductions, "bargains," and "big savings." In making specific price comparisons, four techniques were repeatedly used by Spiegel to let the consumer evaluate the extent of the reductions offered: (1) an assertion of a specific percentage reduction from former prices, (2) an assertion of a specific monetary reduction from former prices, (3) a former price with a line drawn through it and the sale price next to it, and (4) specific references to the source of the former price used in the comparison. For example, the front cover of the Save More Sale catalog for the period ending December 25, 1962, contained an advertisement using three of these techniques.

(picture of men's slippers)

Was ~~3.88~~ 3.44 pair

MEN'S ROMEO LOUNGERS at 11% savings for Fall Catalog

Twenty pages asserted specific percentage reductions,³⁸ twenty-four pages contained comparisons to former prices with lines drawn through the old prices,³⁹ five pages asserted specific amounts reduced,⁴⁰ and eleven pages made reference to the specific source of the stated former price.⁴¹

Similarly, the Spiegel Sale of Sales catalog⁴² (sale ending March 15, 1963) consisted of one hundred sixty-eight pages (seven of which were devoted entirely to index and order information). Four challenged advertisements were contained in this catalog.⁴³ Sixty-three pages asserted specific percentage reductions,⁴⁴ ninety pages contained comparisons to former prices with lines drawn through the old prices,⁴⁵ twenty-two pages asserted specific

³⁷ CX 10.

³⁸ E.g., "BIG SALE BARGAINS—SAVE TO 40%." CX 10, p. 4.

³⁹ E.g., "Were ~~9.97~~ to ~~24.97~~ Your Choice 7.88." CX 10, p. 14.

⁴⁰ E.g., "REDUCED! SAVE TO \$15 . . ." CX 10, p. 97.

⁴¹ E.g., "Save \$2.07 . . . Was \$14.95 in Big Fall Catalog." CX 10, p. 38.

⁴² CX 12.

⁴³ CX 12a-d.

⁴⁴ E.g., "Blanket Sale—SAVINGS TO 25%." CX 12, p. 10.

⁴⁵ E.g., "Was ~~10.97~~ Sale 8.97." CX 12, p. 6.

amounts reduced,⁴⁶ and thirty-eight pages made reference to the specific source of the former price.⁴⁷ We have examined thirty-three of respondent's sale catalogs for the years 1962 through 1964.⁴⁸ A similar showing could be made for each of them.

VII

We are not here concerned with the general truthfulness of the constant repetitions of savings comparisons and price reductions contained in each sale catalog. For purposes of this proceeding, we assume that, with the exception of the dollar sale advertisements, respondent's claims are based upon established facts. The importance of these constant savings and price reduction claims to this proceeding is that they provide the only logical context within which the challenged advertisements must be interpreted.

Spiegel constantly made savings claims based upon specific references to the immediately preceding regular catalog⁴⁹ (or, where seasonal merchandise was involved, to the immediately preceding regular catalog normally carrying such merchandise). It is conceivable that a consumer might save the catalogs from the preceding season or year and thus, if so inclined, tediously leaf through these catalogs to check the representations made in the dollar sale advertisements. It is ridiculous, however, to expect a consumer to engage in such efforts in the context of this proceeding. With all of the references made by Spiegel to the preceding regular catalog, the consumer is entitled to rely upon an assumption that the regular prices and savings claims made in dollar sales have reference to the prices at which the individual items were sold in the previous regular catalog.⁵⁰

VIII

The examiner issued an order to cease and desist, prohibiting respondent from engaging in further misrepresentations similar

⁴⁶ E.g., "ALL PRICES CUT! Save to \$20." CX 12, p. 28.

⁴⁷ E.g., "FALL CATALOG PRICES REDUCED—BUY NOW AND SAVE TO 22%." CX 12, pp. 90-91 (across center).

⁴⁸ CX 1-10, 12-22, 24-25.

⁴⁹ See n. 5, *supra*.

⁵⁰ This is reinforced by Spiegel's frequent practice of also stating the specific catalog when a comparison is made to a catalog other than the immediately preceding appropriate catalog. E.g., the *Sale of Sales Book* (sale ending March 15, 1963):

"Sold for \$107.50 in Summer Savings Sale Book . . . buy it now during this sale and save \$7.55!" CX 12, p. 56.

" . . . reduced from Christmas book." CX 12, pp. 136-137.

"Were \$4.75 each in lots of 2 in last year's spring catalog. New low price makes them only \$3.45 each when you buy two." CX 12, p. 137.

"Save to 25% from Spring '62 Catalog!" CX 12, p. 163.

185

Opinion

to those found in the dollar sale advertisements. Additionally, in paragraph 3 of the order, respondent would be prohibited from "misrepresenting, in any manner, the savings available to purchasers of respondent's merchandise."

It is well settled that the Commission has wide discretion in its choice of a remedy which it deems necessary to prevent the future use of practices which it has found to be unlawful. Commission orders "may prohibit not only the future use of the precise practice found to have existed in the past, but also the future use of related and similar practices."⁵¹ It is our opinion that the prohibition objected to by respondents is fully warranted by the facts of this case. Accordingly, respondent's appeal on this issue is denied.

We have considered the other objections raised by respondent and find them to be without merit. The findings and conclusions of the hearing examiner, except to the extent they are inconsistent with this opinion, are adopted as the findings and conclusions of the Commission. The examiner's order is adopted and an appropriate order will be entered in accordance with this opinion.

Commissioner Nicholson did not participate for the reason that oral argument was heard prior to his appointment to the Commission.

Commissioner Elman dissented and has filed a dissenting statement.

DISSENTING STATEMENT

BY ELMAN, *Commissioner*:

I find the majority opinion unclear and unconvincing, especially in rejecting respondent's alternative argument (point V). While I agree that the "dollar sale" advertisements were ambiguous and might conceivably have misled some consumers, I do not think a cease and desist order is required. Apart from the absence of any substantial showing of deception, respondent completely discontinued this form of advertising more than a year before the complaint issued. In any event, there is no justification for the imprecisely drawn, excessively broad order entered by the Commission. This is the kind of case which the Commission routinely closes upon the filing of adequate assurances of voluntary compliance under Section 2.21 of the Rules of Practice. This case

⁵¹ *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F.2d 337 (7th Cir.), cert. denied, 364 U.S. 883 (1960). See also *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470 (1952); *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419 (1957); *Federal Trade Commission v. Colgate Palmolive Co.*, 380 U.S. 374 (1965).

Order

74 F.T.C.

involves only advertisements issued by respondent between January 1962 and December 1964, all prior to the Supreme Court's decision in the *Mary Carter* case in November 1965. Since there is not the slightest likelihood that they will ever be resumed, the issuance of a cease and desist order now serves no public purpose.*

FINAL ORDER

This matter has been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision. The Commission has considered the entire record, including the briefs and oral arguments of counsel for respondent and counsel supporting the complaint, and has rendered its decision denying respondent's appeal, and adopting the findings of the hearing examiner to the extent they are consistent with the opinion accompanying this order. Other findings of fact and conclusions of law made by the Commission are contained in that opinion. For the reasons therein stated, the Commission has determined that the order entered by the hearing examiner should be adopted and issued by the Commission as its final order. Accordingly,

It is ordered, That the hearing examiner's initial decision, as modified in the accompanying opinion, be, and it hereby is, adopted as the decision of the Commission.

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

By the Commission, with Commissioner Nicholson not participating for the reason that oral argument was heard prior to his appointment to the Commission.

Commissioner Elman dissented and has filed a dissenting statement.

* I feel constrained, also, to note an objection to the process of "deliberation" by which the decision in this case was adopted by the Commission. I shall not, however, spread the details on the public record since it is my hope that voicing this protest will suffice to prevent any future repetition.

Complaint

74 F.T.C.

IN THE MATTER OF

U.S. ELECTRONICS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT*Docket 8747. Complaint, Nov. 8, 1967—Decision, Nov. 4, 1968*

Consent order requiring a Pine Lawn, Mo., distributor of radio and TV tube testing devices and supplies to cease misrepresenting the earnings of purchasers of its machines, the services furnished therewith, and the assistance in resale of the machines.

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 U.S. Electronics, Inc., a corporation, and Jerry Librach, 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 U.S. Electronics, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri. Respondent Jerry Librach is an individual and an officer of said corporation. He formulates, directs and controls the acts, practices and policies of the said corporate respondent including the acts and practices hereinafter set forth. The principal office and place of business of the respondents is located at 6267 Natural Bridge Road, Pine Lawn, Missouri.

PAR. 2. Respondents are now, and for more than one year last past have been, engaged in the business of advertising, offering for sale, sale and distribution of radio and television tube testing devices, tubes and the supplies and equipment used in connection therewith to purchasers. Said devices are located by the respondents in various places such as service stations, hardware stores and the like where the public will be induced to test the tubes from their radio and television sets and purchase replacements for defective tubes.

PAR. 3. In the course and conduct of their business, as aforesaid, respondents now cause, and for some time last past have caused, said products, when sold, to be shipped and transported from their aforesaid place of business in the State of Missouri,