

report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained herein.

IN THE MATTER OF

DIENER'S, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT AND THE TEXTILE FIBER
PRODUCTS IDENTIFICATION ACT

Docket 8804. Complaint. Nov. 25, 1969—Decision. Dec. 21, 1972

Order requiring a carpeting chain in the Washington, D.C. area, among other things to cease misrepresenting its prices and savings claims; failing to maintain adequate records; misbranding and falsely advertising its textile fiber products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Diener's, Inc., Diener's of Virginia, Inc., Diener's of Rockville, Inc., Diener's of Lanham, Inc., Diener's of Tysons Corner, Inc., and Mayfield Company, Inc., corporations, and Walter Diener, Milton Diener, and Harold Reznick, individually and as officers of each of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts, and the rules and regulations promulgated under the Textile Fiber Products Identifi-

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fication 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. Diener's 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 4511 Rhode Island Avenue, in Brentwood, State of Maryland.

Mayfield Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 4511 Rhode Island Avenue, in Brentwood, State of Maryland.

Diener's of Lanham, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 7450 Annapolis Road, in Lanham, State of Maryland.

Diener's of Rockville, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 1616 Rockville Pike, in Rockville, State of Maryland.

Diener's of Virginia, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal office and place of business located at 6437 Arlington Boulevard, in Falls Church, Commonwealth of Virginia.

Diener's of Tysons Corner, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal office and place of business located at Tysons Center, in McLean, Commonwealth of Virginia.

The coordinating office for the aforesaid corporations is located at 4511 Rhode Island Avenue, in Hyattsville, State of Maryland.

Respondents Walter Diener, Milton Diener and Harold Reznick are individuals and are officers of each of the six corporate respondents. They formulate, direct and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Their addresses are the same as the corporate respondent, Diener's Inc., located at 4511 Rhode Island Avenue, in Brentwood, State of Maryland.

The respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

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

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their places of business in the States of Virginia and Maryland to purchasers thereof located in various 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 merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their merchandise, the respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general interstate circulation, by means of radio and television broadcasts and in advertisements appearing on billboards. Typical and illustrative of the foregoing, but not all inclusive thereof, are the following:

Diener's and Monarch AT YOUR SERVICE WITH A FANTASTIC 6 STORE FACTORY INVENTORY CLEARANCE THURSDAY, FRIDAY AND SATURDAY CARPET SAVINGS OF 29%-61%.

Warehouse Carpet Sale 33% to 64% SAVINGS.

DIENER'S STOREWIDE CARPET SALES

CARPET STAIR TREAD SETS Reg. \$24.95 Set. Enough for 13 steps & risers. Choice of colors, weaves & qualities. \$10.00 Set. Limit (1) to a customer/cash & carry.

SAVE \$3.50 SQ. YD. MONARCH RUGGED NYLON PILE AREA'S COMPETITIVE PRICE \$7.95 SQ. YD. and \$4.45 SQ. YD. A Diener's Exclusive Policy—buy today—have delivered and installed today, tomorrow or at your convenience.

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning not expressly set out herein, respondents have represented and are now representing, directly or by implication, that:

1. During the period of the advertised "Diener's Storewide Carpet Sale," or "Fantastic 6 Store Factory Inventory Clearance," or words of similar import and meaning, that the advertised price of any merchandise represents a reduction from the price at which respondents have made a bona fide offer to sell and have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of their business.

2. Purchasers of merchandise advertised under the phrases: "Carpet Savings of 29%-61%," or "33% to 64% Savings," or terms of similar import and meaning, would realize a savings of the stated percentage amount from the actual price at which the merchandise was offered for sale or sold by respondents in good faith for a reasonably substantial period of time in the recent, regular course of their business.

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3. The higher prices, accompanied by the words "Regular," "Reg.," or words of similar import and meaning, were the prices that the advertised merchandise was offered for sale or sold by the respondents in good faith for a reasonably substantial period of time in the recent, regular course of their business. Purchasers of such merchandise would save an amount equal to the difference between respondents' higher selling prices and the corresponding advertised lower selling prices.

4. The higher prices, accompanied by the words, "area's competitive price," or words of similar import and meaning, were prices which do not appreciably exceed prices at which substantial sales of the same merchandise were made in respondents' trade area.

5. The represented reduced prices are offered only during the limited period of the sale and such reduced prices will be returned to respondents' pre-sale bona fide offering price or to some other substantially higher amount immediately after completion of the sale.

6. During the regular course and conduct of respondents' business, purchasers of rugs, carpets and floor coverings in all instances when so desired will receive delivery and installation of said merchandise within 48 hours after such merchandise is purchased from the respondents.

PAR. 6. In truth and in fact:

1. During the period of the advertised "Diener's Storewide Carpet Sale," or "Fantastic 6 Store Factory Inventory Clearance" or words of similar import and meaning, the advertised price of any merchandise did not represent a reduction from the price at which respondents have made a bona fide offer to sell or have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of their business.

2. Purchasers of merchandise advertised as "Carpet Savings of 29%-61%," or "33% to 64% Savings," or terms of similar import and meaning, did not realize a savings of the stated percentage amount from the actual price at which the merchandise was offered for sale or sold by respondents in good faith for a reasonably substantial period of time in the recent, regular course of their business.

3. The higher prices, accompanied by the words "Regular," "Reg.," or words of similar import and meaning, were not the prices that the advertised merchandise was offered for sale or sold by respondents in good faith for a reasonably substantial period of time in the recent, regular course of their business, and purchasers thereof, would not save amounts equal to the difference between respondents' higher selling prices and the corresponding advertised lower selling prices.

4. The higher prices, accompanied by the words, "area's competitive price," or words of similar import and meaning, were prices which do appreciably exceed prices at which substantial sales of the same merchandise were made in respondents' trade area.

5. The represented reduced prices are not offered for a limited period of time, but are the prices which respondents sell or offer to sell their merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of their business.

6. During the regular course and conduct of respondents' business, purchasers of rugs, carpets and floor coverings in all instances when so desired cannot receive delivery and installation of said merchandise within 48 hours after such merchandise is purchased from the respondents.

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

PAR. 7. In the conduct of their business at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as the aforesaid merchandise sold by the respondents.

PAR. 8. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public concerning the savings available to them on respondents' merchandise and, more generally, to mislead them into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief.

PAR. 9. The acts and practices of the respondents as set forth above 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.

PAR. 10. Respondents are now, and for some time last past have been, engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported,

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textile fiber products, which have been advertised, or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 11. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were floor coverings which were falsely and deceptively advertised in the Washington Post and the Evening Star, newspapers published in the city of Washington, District of Columbia, and having a wide circulation in said District of Columbia and various States of the United States, in that the respondents in disclosing the fiber content information as to floor coverings containing exempted backings, fillings, or paddings, failed to set forth such fiber content information in such a manner as to indicate that it applied only to the face, pile, or outer surface of the floor coverings and not to the exempted backings, fillings, or paddings.

PAR. 12. Certain of said textile fiber products were falsely and deceptively advertised in that respondents in making disclosure or implications as to the fiber content of such textile fiber products in written advertisements used to aid, promote and to assist, directly or indirectly, in the sale or offering for sale of said products, failed to set forth the required information as to fiber content as specified by Section 4(c) of the Textile Fiber Products Identification Act and in the manner and form prescribed by the rules and regulations promulgated under said Act.

Among such textile fiber products, but not limited thereto, were carpets which were falsely and deceptively advertised by means of printed matter, in newspapers, distributed by the respondents throughout the United States to customers and salesmen. The aforementioned carpets were described by such fiber-connoting terms among which, but not limited thereto, were "Acrilan," "Kodel," and "Herculon" and the true generic name of the fiber contained in such products was not set forth.

PAR. 13. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, re-

spondents have falsely and deceptively advertised textile fiber products in violation of the Textile Fiber Products Identification Act in that said textile fiber products were not advertised in accordance with the rules and regulations promulgated thereunder in the following respects:

(a) In disclosing the fiber content information as to floor coverings containing exempted backings, fillings, or paddings, such disclosure was not made in such a manner as to indicate that such fiber content information related only to the face, pile or outer surface of the floor covering and not to the backing, filling or padding, in violation of Rule II of the aforesaid rules and regulations.

(b) A fiber trademark was used in advertising textile fiber products, without a full disclosure of the fiber content information required by said Act, and the regulations thereunder in at least one instance in said advertisement, in violation of Rule 41(a) of the aforesaid rules and regulations.

(c) A fiber trademark was used in advertising textile fiber products, containing only one fiber and such fiber trademark did not appear, at least once in the said advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type, in violation of the Rule 41(c) of the aforesaid rules and regulations.

PAR. 14. The acts and practices of respondents as set forth in Paragraphs Eleven through Thirteen above were, and are, in violation of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, and constituted, and now constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, under the Federal Trade Commission Act.

Mr. Edward D. Steinman and Mr. Donald L. Bachman supporting the complaint.

Mr. Jacob A. Stein, Stein & Mitchell, Washington, D.C., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

JULY 12, 1971

PRELIMINARY STATEMENT

The complaint in this proceeding, issued on November 25, 1969, charges that Diener's, Inc., Diener's of Virginia, Inc., Diener's of Rockville, Inc., Diener's of Lanham, Inc., Diener's of Tysons Corner, Inc., Mayfield Company, Inc., corporations, and Walter Diener, Milton

Diener, and Harold Reznick, individually and as officers of each of said corporations, violated the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act in the advertising, sale and installation of rugs, carpets and floor coverings to the public at retail.

The respondents answered the complaint, admitting the existence of the corporate respondents as alleged in Paragraph One of the complaint, but denied that the individual respondents formulate, direct, control and act together in carrying out the acts and practices of corporate respondents as alleged. Respondents also denied the other allegations of the complaint.

After several postponements, the hearing began on July 27, 1970, and the record for the reception of evidence was closed on August 4, 1970. Proposed findings of fact, conclusions of law, and briefs were originally scheduled to be filed on or before September 18, 1970. However, due to the loss by the reporter of more than 100 Commission exhibits, consisting of newspaper advertisements which had been placed in the Washington Post and the Evening Star by respondents during the period, April 19, 1967 through October 12, 1968, complaint counsel filed several separate requests for extensions of time within which to file proposed findings of fact, etc. These requests for extensions of time were based on the absence of these exhibits. These requests extended the filing date for proposed findings, etc., to November 19, 1970.

On November 17, 1970, complaint counsel filed a motion to reopen the record so as to receive in evidence reproductions of the lost Commission exhibits. Complaint counsel stated that the reproductions had been made from microfilm of newspapers contained in the files of the Library of Congress, and requested that these reproductions be received in evidence and substituted for the original exhibits, CX 49 through CX 150, which had been lost.

On November 19, 1970, counsel for respondents filed an opposition to complaint counsel's motion to reopen the record to receive in evidence reproductions of the lost exhibits. Also, on November 19, 1970, counsel for respondents filed proposed findings of fact, conclusions of law, and brief on behalf of respondents.

On November 23, 1970, complaint counsel filed their proposed findings of fact, conclusions of law, brief, and a proposed order.

By order dated November 24 and filed November 25, 1970, the hearing examiner granted complaint counsel's motion to reopen the record for the stated purpose of affording complaint counsel an opportunity to offer and substitute in evidence reproductions from microfilmed copies of respondents' newspaper advertisements (CX 49-150), which

had been received in evidence at hearings but subsequently lost by the reporter; a reopened hearing for this purpose was scheduled for December 15, 1970.

On November 27, 1970, complaint counsel filed a "Motion to Supplement the Purpose For Reopening the Record" in this proceeding. (The original motion to reopen the record filed on November 17, 1970 was for the stated purpose of affording complaint counsel an opportunity to offer and there be received in evidence reproductions of the lost Commission exhibits.) The Motion to Supplement the Purpose for Reopening the Record, filed on November 27, 1970, requested, among other things, that, at the reopened hearing, in addition to receiving in evidence reproductions of the lost Commission exhibits, the hearing examiner consider making certain written reports of a Commission attorney-investigator, who, at the original hearing, had testified as a Commission witness, available to counsel for respondents for examination prior to cross-examining the attorney-investigator in the event counsel for respondents should desire to cross-examine this witness at the reopened hearing.

On December 3, 1970, counsel for respondents filed an opposition to complaint counsel's Motion to Supplement the Purpose for Reopening the Record and, on December 8, 1970, complaint counsel filed a reply to respondents' opposition to complaint counsel's Motion to Supplement the Purpose for Reopening the Record.

On December 9, 1970, pursuant to the request of complaint counsel, the hearing examiner rescheduled the date for the reopening of the hearing from December 15, 1970 to December 11, 1970.

At the reopened hearing on December 11, 1970, the reproductions of the lost Commission exhibits were received in evidence and certain investigation reports made by Mr. Joseph J. Koman, Jr., an attorney-investigator in the employ of the Commission, who made the investigation of this matter and testified as a Commission witness at the original hearing, were produced by complaint counsel and made available to counsel for respondents for his examination pursuant to complaint counsel's Motion to Supplement the Purpose for Reopening the Record, filed on November 17, 1970. However, upon complaint counsel's refusal to produce a summary memorandum prepared by Mr. Koman in connection with his investigation of respondents and about which he had testified at the hearing, and the production of which had been requested by counsel for respondents, the hearing examiner struck the testimony which Mr. Koman had given at the hearing. At the request of complaint counsel, the hearing examiner held the record open while complaint counsel sought to file an interlocutory appeal to the Commission from the ruling of the hearing examiner striking the testimony.

In a majority opinion and order issued February 8, 1971, the Commission decided that the ruling of the hearing examiner was correct and denied complaint counsel's request for permission to file an interlocutory appeal from the ruling of the hearing examiner striking the testimony of Mr. Koman, the attorney-investigator. In the majority opinion,¹ after ruling that the hearing examiner was correct in striking the testimony and denying an interlocutory appeal, the Commission stated, among other things, that "* * * the examiner might find it appropriate to reopen the record to give complaint counsel an opportunity to produce the Koman summary memorandum and, if produced, to afford respondent his full 'Jencks' rights."

On February 25, 1971, complaint counsel filed a Motion to Reopen the Record "to allow the production of the summary memorandum and if such is desired cross-examination of Attorney Koman."

On March 3, 1971, counsel for respondents filed an opposition to the motion to reopen, and on March 4, 1971 complaint counsel filed their reply to respondents' opposition to complaint counsel's motion to reopen.

Pursuant to notice, a further hearing was held on April 12, 1971, at which time complaint counsel produced and delivered to respondents' counsel for his perusal the summary memorandum written by Mr. Koman, which complaint counsel had previously refused to produce. Complaint counsel also produced Mr. Koman and he was cross-examined by counsel for respondents. At the conclusion of his cross-examination that same day, April 12, 1971, the record for the reception of evidence was again closed.

Supplementary Proposed Findings of Fact and Conclusions of Law have been filed by counsel for respondents.

All proposed findings of fact and conclusions of law not found or concluded herein are denied. Upon the basis of the entire record, the hearing examiner makes the following findings of fact and conclusions of law, and issues the following order:

FINDINGS OF FACT

1. Diener's, Inc., is a corporation organized and doing business under the laws of the State of Delaware, with its office and place of business located at 4511 Rhode Island Avenue, Brentwood, Maryland.
2. Diener's of Virginia, Inc., is a corporation organized and doing business under the laws of the Commonwealth of Virginia, with its office and place of business located at 6437 Arlington Boulevard, Falls Church, Virginia.

¹ Commissioner MacIntyre dissented, and filed a dissenting statement.

3. Diener's of Rockville, Inc., is a corporation organized and doing business under the laws of the State of Maryland, with its office and place of business located at 1616 Rockville Pike, Rockville, Maryland.

4. Diener's of Lanham, Inc., is a corporation organized and doing business under the laws of the State of Maryland, with its office and place of business located at 7450 Annapolis Road, Lanham, Maryland.

5. Diener's of Tysons Corner, Inc., is a corporation organized and doing business under the laws of the Commonwealth of Virginia, with its office and place of business located at Tysons Center, McLean, Virginia.

6. Mayfield Company, Inc., is a corporation organized and doing business under the laws of the State of Maryland, with its office and place of business located at 4511 Rhode Island Avenue, Brentwood, Maryland.

7. The executive office for the aforesaid corporations is located at 4511 Rhode Island Avenue, Brentwood, Maryland (admitted in Ans., Par. 2).

8. The respondents, Walter Diener, Milton Diener, and Harold Reznick, are stockholders and officers of each of the six corporate respondents. Mr. Milton Diener is president; Mr. Walter Diener is secretary-treasury; and Mr. Reznick is executive vice president and general manager of Diener's, Inc., the parent of the subsidiary corporations named in Paragraph numbered 1 above. Messrs. Milton and Walter Diener and Harold Reznick are members of the boards of directors of the respondent corporations. However, due to illness, including a serious heart ailment, Mr. Walter Diener has not been active in the business of the corporations for several years and does not share full responsibilities in the management with his brother, Milton Diener, and Mr. Reznick. He visits and spends a few hours at his office each day he feels able to do so (Tr. 27, 148-149). As executive vice president and general manager, Mr. Reznick controls the operation of the respondent corporations (Tr. 21, 26-27, 159-160, 164). The business offices of the five subsidiaries are located at the office of the corporate respondent, Diener's, Inc., 4511 Rhode Island Avenue, Brentwood, Maryland (admitted in Ans., Par. 2).

9. Respondents Diener's are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, distribution and installation of floor covering, including rugs and carpets, to the public at retail (Tr. 21).

10. In the course and conduct of their business as aforesaid, respondents Diener's now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their places of

business in the States of Virginia and Maryland to purchasers thereof located in various 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 merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act (Tr. 26).

11. The complaint is directed toward improper use of the terms "regular" and "area's competitive price," and also toward representations in newspaper advertisements with respect to the time of delivery and installation of carpets, which are alleged to be false, misleading and deceptive. The complaint also alleges violations of the Textile Fiber Products Identification Act in some of the Diener's newspaper advertising. Specifically, the complaint alleges that, in the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their merchandise, the respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general interstate circulation. Typical and illustrative of the representations and advertisements are the following:

[A] Diener's and Monarch AT YOUR SERVICE WITH A FANTASTIC 6 STORE FACTORY INVENTORY CLEARANCE THURSDAY, FRIDAY AND SATURDAY CARPET SAVINGS OF 29%-61%

(The above representations are contained in CX 90.)

[B] Warehouse Carpet Sale 33% to 64% SAVINGS

(This representation is contained in CX 85 and 86.)

[C] DIENER'S STOREWIDE CARPET SALE

(This representation is contained in CX 61 and 88.)

[D] CARPET STAIR TREAD SETS Reg. \$24.95 Set Enough for 13 steps & risers. Choice of colors, weaves & qualities. \$10.00 Set Limit (1) to a customer/ cash & carry.

(The representation in [D] above is contained in CX 74, 77, 105, 115, 118-120, 129-131, and 149-150.)

[E] SAVE \$3.50 SQ. YD. MONARCH RUGGED NYLON PILE AREA'S COMPETITIVE PRICE \$7.95 SQ. YD. 4.45 SQ. YD.

(The representations in [E] above are contained in CX 68, 104, and 135.)

[F] A Diener's Exclusive Policy—buy today—have delivered and installed today, tomorrow or at your convenience

(The representation set out in [F] above is not contained in any of the numerous Commission exhibits received in evidence.)

12. The complaint further alleges that, through the use of the above-quoted statements and representations, respondents have represented and are now representing, directly or by implication, that:

(1) During the period of the advertised "Diener's Storewide Carpet Sale," or "Fantastic 6 Store Factory Inventory Clearance," or words of similar import and meaning, that the advertised price of any merchandise represents a reduction from the price at which respondents have made a bona fide offer to sell and have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of their business, whereas, in truth and in fact, the advertised price of any merchandise did not represent a reduction from the price at which respondents have made a bona fide offer to sell or have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of their business.

(2) Purchasers of merchandise advertised under the phrases: "Carpet Savings of 29%-61%," or "33% to 64% Savings," or terms of similar import and meaning, would realize a savings of the stated percentage amount from the actual price at which the merchandise was offered for sale or sold by respondents in good faith for a reasonably substantial period of time in the recent, regular course of their business, whereas, in truth and in fact, purchasers of such advertised merchandise did not realize a savings of the stated percentage amount from the actual price at which the merchandise was offered for sale or sold by respondents in good faith for a reasonably substantial period of time in the recent, regular course of their business.

(3) The higher prices, accompanied by the words "Regular," "Reg.," or words of similar import and meaning, were the prices that the advertised merchandise was offered for sale or sold by the respondents in good faith for a reasonably substantial period of time in the recent, regular course of their business. Purchasers of such merchandise would save an amount equal to the difference between respondents' higher selling prices and the corresponding advertised lower selling prices, whereas, in truth and in fact, the higher prices were not the prices that the advertised merchandise was offered for sale or sold by respondents in good faith for a reasonably substantial period of time in the recent, regular course of their business, and purchasers thereof would not save amounts equal to the difference between respondents' higher selling prices and the corresponding advertised lower selling prices.

(4) The higher prices, accompanied by the words, "area's competitive price," or words of similar import and meaning, were prices which do not appreciably exceed prices at which substantial sales of the same merchandise were made in respondents' trade area, whereas, in truth and in fact, the higher prices were prices which do appreciably exceed

prices at which substantial sales of the same merchandise were made in respondents' trade area.

(5) The represented reduced prices are offered only during the limited period of the sale and such reduced prices will be returned to respondents' pre-sale bona fide offering price or to some other substantially higher amount immediately after completion of the sale, whereas, in truth and in fact, the represented reduced prices are not offered for a limited period of time, but are the prices which respondents sell or offer to sell their merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of their business.

(6) During the regular course and conduct of respondents' business, purchasers of rugs, carpets and floor coverings in all instances when so desired will receive delivery and installation of said merchandise within 48 hours after such merchandise is purchased from the respondents, whereas, in truth and in fact, during the regular course and conduct of respondents' business, purchasers of rugs, carpets and floor coverings in all instances when so desired cannot receive delivery and installation of said merchandise within 48 hours after such merchandise is purchased from the respondents.

Wherefore, the complaint alleges, the statements and representations as set forth in Paragraphs Four and Five of the complaint (Paragraph numbered 12 above) were and are false, misleading and deceptive.

13. Mr. Joseph J. Koman, Jr., an attorney-investigator for the Federal Trade Commission, who made the investigation and recommended the issuance of the complaint in this proceeding, was the principal witness offered by complaint counsel to establish the greater part of the allegations contained in the complaint. Mr. Koman's testimony is based upon information obtained by Mr. Koman from his examination of the Diener's records, invoices, more than 100 newspaper advertisements which appeared in the Washington Post and the Evening Star during the years 1967-1968, and statements allegedly made to Mr. Koman by Mr. Harold Reznick, vice president and general manager of Diener's, Inc., the principal corporate respondent herein, during Mr. Koman's first visit to the main office of Diener's on January 24, 1968 (Tr. 168; 225). The statements allegedly made by Mr. Reznick to Mr. Koman included the identification by Mr. Reznick of the quality or pattern designation of floor covering or carpeting and padding which were advertised by Diener's in a full-page newspaper advertisement in the Washington Post on Thursday, June 29, 1967 (CX 68; Tr. 168-169).

14. Ordinarily, Diener's and other retailers of floor covering and carpeting located in the District of Columbia metropolitan area do not identify the quality designation of the carpet advertised in newspapers (Tr. 431). A carpet advertisement, describing the carpet as "NYLON PILE," "ACRILAN ACRYLIC PILE," or "ALL WOOL PILE," for example, but giving the name of the manufacturer, is not sufficient information by which the carpet can be identified by quality, and thus determine the price (Tr. 260). Carpet manufacturers generally produce more than one grade or quality of carpeting, and give each grade or quality a name designation so that it can be identified. The quality designation for the carpeting advertised for sale by Diener's in CX 68 was not given in the advertisement so, in order to determine the accuracy or truthfulness of the representations in the advertisement with respect to price, it was necessary for Mr. Koman to identify the various carpets referred to in the advertisement by obtaining their respective name designations. Mr. Koman testified that, during his first interview with Mr. Reznick on January 24, 1968, pursuant to Mr. Koman's request, Mr. Reznick identified the carpeting by giving to Mr. Koman the quality name designation of each of the carpets advertised in the seven segments of the main carpet portion of the advertisement, which appears in the center portion of the advertisement (CX 68; Tr. 168-169). At the hearing, Mr. Koman then proceeded to identify by quality name designation the carpet advertised in each of the seven segments of CX 68 from the information and identification which Mr. Koman testified that Mr. Reznick had previously given to him.

15. Beginning with the carpet advertised in the first segment of the advertisement, Mr. Koman identified the "MONARCH RUGGED NYLON PILE AREA'S COMPETITIVE PRICE \$7.95 SQ. YD. 4.45 SQ. YD." as being either Garland or Benton, which Diener's call Princess or Westernaire. Mr. Reznick advised Mr. Koman that the Garland and the Benton were discontinued merchandise, and that the Westernaire was a regular pattern or quality (Tr. 167-170).

16. Mr. Koman then proceeded to the second segment of the advertisement (CX 68), counter-clockwise, referred to in the advertisement as featuring "A QUALITY ASSURED CARPET FROM DIENER'S SAVE \$4.28 SQ. YD. Luxury Quality MONARCH NYLON PILE * * * AREA'S COMPETITIVE PRICE \$10.95 SQ. YD. 6.67 SQ. YD." as being "* * * either Park West plush or Luxurious, which they purchased for \$3.80 a square yard, or Glen Contessa, which he now calls Penfield, at \$3.95 a square yard" (Tr. 170).

Initial Decision

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17. Mr. Koman then identified the carpeting listed in the third segment of the advertisement (CX 68), counter-clockwise, referred to in the advertisement as "A QUALITY ASSURED CARPET FROM DIENER'S SAVE \$3.39 TO \$4.39 SQ. YD. CUSTOM QUALITY SOLID COLOR GRACIOUS PLUSH ACRILAN ACRYLIC PILE * * * AREA'S COMPETITIVE PRICES \$13.95 TO \$14.95 SQ. YD. 10.56 SQ. YD." as being "Monarch Langston, * * * Monarch's Classic, pattern and quality, * * * and Monarch's Royalite and Colonnade" (Tr. 172).

18. Mr. Koman then identified the carpet advertised in the fourth and bottom segment of the advertisement (CX 68), "A QUALITY ASSURED CARPET FROM DIENER'S SAVE \$5.06 SQ. YD. LEES * ALDON * MOHAWK Ultra Plush 100% ALL WOOL PILE RANDOM PLUSH * SHAG * TWIST OR SOLID COLOR PLUSH PILES AREA'S COMPETITIVE PRICE \$17.95 SQ. YD. 12.89 SQ. YD.," as being "Lee's Grand Parade and Tabor Island, * * * Alden Duchess Desiree, and Camelot, * * * and Mohawk Avalon quality or pattern" (Tr. 172).

19. Mr. Koman identified the carpet advertised in the fifth segment of CX 68, "A QUALITY ASSURED CARPET FROM DIENER'S SAVE \$2.06 SQ. YD. FROM THE WORLD'S LARGEST CARPET MAKER Luxury Quality ACRILAN Acrylic Pile * * * AREA'S COMPETITIVE PRICE \$10.95 SQ. YD. 8.89 SQ. YD.," as being "Monarch Plantation, * * * Delta, * * * and Monarch's Carefree" (Tr. 172).

20. Mr. Koman identified the carpet advertised in the sixth segment of CX 68, "A QUALITY ASSURED CARPET FROM DIENER'S SAVE \$2.17 TO \$4.17 SQ. YD. MOHAWK * MONARCH ACRILAN ACRYLIC PILE * * * AREA'S COMPETITIVE PRICES \$9.95 TO \$11.95 SQ. YD. 7.78 SQ. YD.," as being "Monarch Kenesaw or Fairway quality patterns * * * Mohawk Mayflower or Glencairn" (Tr. 173).

21. Mr. Koman then identified the carpet advertised in the seventh segment of CX 68, "A QUALITY ASSURED CARPET FROM DIENER'S SAVE \$4.39 SQ. YD. FABULOUS '501' NYLON PILE * * * AREA'S COMPETITIVE PRICE \$9.95 SQ. YD. 5.56 SQ. YD.," as being "Monarch Twin Star, * * * Alden Contessa or Glen" (Tr. 173).

22. Mr. Koman further testified that Mr. Reznick also identified the "HEAVY WAFFLE RUBBERIZED PADDING Reg. \$1.49 Sq. Yd. 76¢ SQ. YD." advertised in CX 68 as being Orange Supreme, 42 ounce, manufactured by Crown, and at times it was the Diplomat

padding, 38 ounce. With respect to the "THICK LUXURY WAFFLE FOAM RUBBER PADDING Reg. \$1.95 Sq. Yd. \$1.16 SQ. YD.," advertised in CX 68, Mr. Koman testified that Mr. Reznick identified this as either the Golden Sparkle or Somerset padding manufactured by Crown, or the Washingtonian or rubber top padding from the Allen Company (Tr. 175-176).

23. Mr. Koman further testified that Mr. Reznick identified the carpet stair tread sets advertised in the lower left-hand corner of CX 68, "Reg. \$24.95 Set 10.66 SET" as being manufactured by Montauk Rug and Carpet Co. of New York City, and were offered by Diener's at prices ranging from \$10.66-\$10.88 on an advertised basis, and at unadvertised times for not more than \$13.00 per set. In answer to a question by complaint counsel as to whether Mr. Reznick made "any explanation as to why there was a regular \$24.95 representation on the ad," Mr. Koman replied: "Outside of the fact that the stair tread sets at other locations, competitors might be selling for \$24.95 a set. But as far as Diener's regular retail price, they never sold it for more than \$13. He admitted that, that that particular segment carpet stair tread was in error, and that should be changed" (Tr. 178).

24. In reply to a question by complaint counsel as to whether Mr. Reznick offered any explanation as to how he determined the "area competitive price" for the carpeting advertised in CX 68, Mr. Koman replied as follows:

Yes, he advised me that with respect to either the representation "regular" or the representation "area's competitive price," or to obtain the other saving representations contained in such ads, they would normally take or he would take the distributor's cost on a cut or raw basis, and with this price he would times it by a 60 percent markup, which he stated was the normal markup for most carpeting concerns located in the Metropolitan D.C. Area, and that the cut order price plus the markup would equal either the regular or the area's competitive price (Tr. 179).

25. Mr. Koman testified that he then examined sales tickets from each of the Diener's stores covering the period from June through October and, for some stores, through November, 1967, to determine the actual prices at which Diener's were selling the identified carpeting and padding (Tr. 179-180); and that, after examining the sales tickets, he found no evidence of sales of the carpeting, padding, and stair treads advertised in CX 68 at the higher, regular prices set forth in the various segments of CX 68 (Tr. 180; 516). Mr. Koman further testified that he then made a selection "*" * * of certain merchandise that was featured on the sales tickets at either the advertised price, or the price higher, but not the higher regular price. A sampling of these

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sales tickets appears as Commission Exhibits 1 through 44" (Tr. 180-181). Mr. Koman further testified that, due to the fact that Diener's use various colors of sales tickets for each of their stores, such as pink, blue, etc., photostatic representations of some of these sales tickets are not legible, and it was not until he received the photostats of the sales tickets (CX 1-44), during his visit to Diener's on February 27, 1968, did he become aware that some of the sales tickets were not legible (Tr. 180-181; 190). (This hearing examiner has examined each of the copies of sales invoices which are in evidence (CX 1-44), and approximately 23 of the 44 copies are illegible.)

26. Mr. Koman also testified that he questioned Mr. Reznick concerning some of the representations of Diener's in an advertisement in the July 20, 1967 issue of the Washington Post (CX 71). In this advertisement Diener's announced that they had purchased from James Lees & Sons Company its entire roll inventory of Romantica carpeting and Diener's were offering this carpeting as follows:

AREA'S COMPETITIVE PRICE \$11.95 SQ. YD. SOLD FOR AS LOW AS \$9.95 SQ. YD. DIENER'S SPECIAL PURCHASE PRICE ONLY 6.63 SQ. YD.

Mr. Koman testified that he questioned Mr. Reznick with regard to the representation in this advertisement, "SOLD FOR AS LOW AS \$9.95 SQ. YD.," and that Mr. Reznick replied that, "* * * if Reznick made purchases during 1966 and the early part of 1967 that it would have been sold by Diener's for as low as \$9.95 a square yard" (Tr. 215). Mr. Koman further testified that Diener's did not purchase Romantica carpeting in 1965, and only offered it through special order at their Rhode Island Avenue store (Tr. 217). With respect to the representation of "AREA'S COMPETITIVE PRICE \$11.95 SQ. YD." in CX 71, Mr. Koman testified that Mr. Reznick explained that Diener's arrived at the area's competitive price "* * * if the merchandise was purchased at distributor cut order price and if the retailer took a 60 per cent markup on the cut order price, it would be the area's competitive price" (Tr. 217).

27. By and through the use of the representations "DIENER'S STOREWIDE CARPET SALE" in CX 61 and 88, for example, and "FANTASTIC 6 STORE FACTORY INVENTORY CLEARANCE" in CX 90, for example, Diener's represented that, during the period of "DIENER'S STOREWIDE CARPET SALE" and "FANTASTIC 6 STORE FACTORY INVENTORY CLEARANCE," the advertised price of any merchandise contained in the said advertisements represents a reduction from the price at which respondents have made a bona fide offer to sell, and have sold, said merchandise on a regular basis for a reasonably substantial period

of time in the recent, regular course of their business. And, in this connection, Mr. Reznick testified that, when Diener's used the words "regular price" in an advertisement, Diener's meant that Diener's "* * * had previously sold merchandise for the regular price" (Tr. 420). When such representations are used in connection with the words "regular price," Diener's thereby represent that they have, in the past, made a bona fide offer to sell, and have sold, said merchandise on a regular basis. However, the evidence shows that the advertised price of certain merchandise did not represent a reduction from the price at which Diener's have made a bona fide offer to sell, or have sold, said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of their business. For example, in CX 79, 80, 85, and 86, Diener's advertised Romantica carpeting, a self-identifying pattern or quality, as follows: "* * * REG. \$9.95 Sq. Yd. * * * ONLY 7.88 SQ. YD." Mr. Koman testified, among other things, that he obtained all sales receipts or invoices for each store operated by Diener's for the period, June through November, 1967 (CX 1-44), for the specific purpose of ascertaining whether Diener's ever sold the carpeting at the higher regular price and found no sales at the advertised regular price (Tr. 179-180; 516). An examination of the legible copies of the sales receipts (CX 1-44), which are in evidence, do not show any sales of Romantica at the advertised regular price of \$9.95 per square yard, and, at the hearing, respondents did not offer any sales receipt or otherwise go forward with evidence to rebut or contradict the evidence offered by complaint counsel to the effect that an examination of the Diener's sales invoices for the period, June through November, 1967, did not show any sales of Romantica at the advertised higher regular price of \$9.95 per square yard. Sales receipts or invoices CX 7, 10 and 36 do list sales of Romantica at \$6.63 per square yard, and CX 43 lists a sale of Romantica at \$7.00 per square yard. It is found, therefore, that the representation of Diener's that \$9.95 is their regular price for Romantica carpeting is false.

28. Other examples of deceptive use by Diener's of the word "Regular" or "Reg." are their regular price representations with respect to carpet stair tread sets, "* * * Reg. \$24.95 Set \$10 SET," as advertised in CX 74, 77, 105, 115, 118-120, 129-131, and 149-150. (See Paragraph numbered 23 of this decision as to Mr. Koman's testimony with regard to Mr. Reznick's explanation as to the use by Diener's of the representation "Reg. \$24.95 Set" for their stair tread sets.) None of the legible copies of sales receipts (CX 1-44), which are in evidence, show any sales of carpet stair tread sets for \$24.95 (Tr. 180). However, CX 13 reflects a sale of stair tread sets at \$10.88. Upon the basis of

the testimony, it is found that the representation by Diener's that \$24.95 is their regular price for stair tread sets is false and misleading.

29. The representation of Diener's with respect to the "regular" price being false, the representations of Diener's in their advertisements of carpet savings of "34% to 63%" in CX 79 and 80, and "33% to 64%" in CX 85 are also false and misleading since a purchaser of the advertised Romantica carpet would not realize a savings of the stated percentage amount from the actual price at which the carpet was offered for sale or sold by Diener's in good faith for a reasonably substantial period of time in the recent, regular course of their business.

30. In an effort to establish the allegations contained in subparagraphs 4 of Paragraphs Five and Six of the complaint with respect to "area's competitive price," complaint counsel offered the testimony of several carpet buyers for local stores, including Mr. Ralph Berlin, carpet buyer at the Kann's department store, Washington, D.C., since 1949 (Tr. 248). Mr. Berlin testified that Kann's sold Monarch's "Langston" pattern carpet in 1967 at \$9.95 and \$10.95 per square yard. The Langston is one of the patterns which Mr. Koman testified that Mr. Reznick identified as being referred to in the third segment of CX 68, wherein Diener's advertise "A QUALITY ASSURED CARPET FROM DIENER'S SAVE \$3.39 TO \$4.39 SQ. YD. CUSTOM QUALITY SOLID COLOR GRACIOUS PLUSH ACRYLAN ACRYLIC PILE * * * AREA'S COMPETITIVE PRICES \$13.95 TO \$14.95 SQ. YD. 10.56 SQ. YD." (CX 68; Tr. 172; 249-250). It is seen that the Kann's price for the Langston is considerably less than the "AREA'S COMPETITIVE PRICES \$13.95 TO \$14.95" per square yard represented by Diener's in CX 68. Mr. Berlin also testified that Kann's sold Monarch's "Park West" in 1967 at \$4.95 and \$5.95 per square yard. According to Mr. Koman, Mr. Reznick identified the Park West as being one of the carpet patterns offered in the second segment of CX 68, "* * * Luxury Quality MONARCH NYLON PILE * * * AREA'S COMPETITIVE PRICE \$10.95 SQ. YD. 6.67 SQ. YD." (CX 68; Tr. 172; 250). Thus, it appears that the Kann's price for the Park West is much less than the area competitive price represented by Diener's in the second segment of CX 68. (Mr. Reznick testified that the words "area competitive price" as used by Diener's in their advertising mean the price charged by Diener's competitors for the same or comparable merchandise [Tr. 420].)

31. Mr. Berlin further testified that Kann's also sold Monarch's quality or pattern carpet called "Kennesaw" at \$6.95 per square yard

and at an installed price of \$9.00 per square yard. The Kennesaw pattern carpet is one of the patterns which Mr. Koman testified that Mr. Reznick identified as being referred to in the sixth segment of CX 68, "* * * MOHAWK * MONARCH ACRILAN ACRYLIC PILE * * * AREA'S COMPETITIVE PRICES \$9.95 TO \$11.95 SQ. YD. 7.78 SQ. YD." (CX 68; Tr. 173; 250). It is plainly evident that the Kann's price of \$6.95 per square yard for the Kennesaw is considerably less than the "AREA'S COMPETITIVE PRICES \$9.95 TO \$11.95 SQ. YD." represented by Diener's in the sixth segment of CX 68.

32. Another witness offered by complaint counsel was Mr. Kenneth Mink, buyer of floor coverings at Woodward & Lothrop, a department store, located in Washington, D.C., with branch stores in Maryland and Virginia. Mr. Mink testified as follows: In 1967, Woodward & Lothrop sold three patterns of carpeting manufactured by Monarch, "Delta," "Royalite," and "Classic." Woodward & Lothrop sold the Delta pattern at \$7.12 per square yard in 1967, without padding or installation. Woodward & Lothrop sold the Royalite at \$8.12 per square yard, and the Classic pattern at \$10.12 per square yard in 1967 (Tr. 267). The Delta is one of the patterns which Mr. Koman testified that Mr. Reznick identified as being referred to in the fifth segment of CX 68, "* * * Luxury Quality ACRILAN Acrylic Pile * * * AREA'S COMPETITIVE PRICE \$10.95 SQ. YD. 8.89 SQ. YD." (CX 68; Tr. 172). The Classic and Royalite are two of the patterns which Mr. Koman testified that Mr. Reznick identified as being referred to in the third segment of CX 68, "* * * CUSTOM QUALITY SOLID COLOR GRACIOUS PLUSH ACRILAN ACRYLIC PILE * * * AREA'S COMPETITIVE PRICES \$13.95 TO \$14.95 SQ. YD. 10.56 SQ. YD." (CX 68; Tr. 172). It is plainly evident that Woodward & Lothrop's prices for these three patterns of carpeting are considerably less than the area competitive prices as represented by Diener's in the third segment of CX 68.

33. Mr. Quinn M. Cardwell, general manager of Cardwell's, Inc., a carpet specialty store in Arlington, Virginia, testified, among other things, as follows: In 1967, Cardwell's, Inc. carried several qualities of Monarch carpeting, including "Park West," priced at \$6.00 per square yard; "Langston" priced at \$10.00 per square yard; "Classic," at \$10.00 per square yard, and "Delta" at \$7.50 per square yard during the early part of 1967, and raised to \$8.00 per square yard during the year 1967 (Tr. 277). Cardwell's, Inc. also sold several lines of carpeting manufactured by James Lees and Sons Company, including "Romantica," which Cardwell's, Inc. retailed at \$8.50 per square yard.

34. Mr. John Taylor, carpet buyer for the Hecht Company, with stores in Washington, D.C., Maryland, and Virginia, testified as follows: In 1967, the Hecht Company sold several qualities of floor covering manufactured by Monarch, including "Delta" and "Kennesaw" at \$8.09 per square yard; "Langston" at \$10.95 or \$11.95 per square yard; "Park West" at \$5.00 per square yard; and "Royalite" at \$9.95 per square yard. The Hecht Company also sold a floor covering manufactured by Mohawk called "Avalon" at \$14.95 per square yard.

35. Mr. Stanley Rochlin, buyer of floor covering for Giant Food, was another witness offered by complaint counsel, and testified as follows: In 1967, Giant Food offered and sold a floor covering manufactured by James Lees and Sons Company by the name of "Romantica" at \$9.99 per square yard (Tr. 339). Giant Food also sold a quality of carpeting called "Contessa" at \$12.99 per square yard (Tr. 340). Under a preponderance of the evidence, it is found that the allegations in subparagraphs 4 of Paragraphs Five and Six of the complaint have been sustained.

36. Complaint counsel contend that, through the use of the quoted statement "A Diener's Exclusive Policy—buy today—have delivered and installed today, tomorrow or at your convenience," set out in Paragraph Four of the complaint, Diener's represent that purchasers of floor coverings and carpets "in all instances when so desired will receive delivery and installation of said merchandise within 48 hours after such merchandise is purchased from respondents." Complaint counsel contend that advertisements of Diener's contain statements to the effect "that purchased merchandise will be delivered and installed the same or following day of the purchase," which complaint counsel contend amounts to 48 hours. (See complaint counsel's Eighteenth Proposed Finding of Fact.) This hearing examiner has examined each of the reproductions of the newspaper advertisements of Diener's in the record and does not find an advertisement identical with the quoted statement set out in Paragraph Four of the complaint. As a matter of fact, the statements used by Diener's in most of the advertisements in the record with respect to the Diener's delivery and installation policy are as follows:

A DIENER'S EXCLUSIVE DELIVERY AND INSTALLATION POLICY—
BUY TODAY—HAVE TODAY, TOMORROW OR AT YOUR CONVENIENCE
(CX 68-89.)

37. A reasonable interpretation of the above statement does not support the contention advanced by complaint counsel that Diener's were, by the above representation, obligated to install and deliver floor covering within 48 hours after purchase—such a construction

would be strained and distorted. Complaint counsel offered the testimony of several customer purchasers of floor coverings from Diener's, but their testimony is unrelated to a claim of 48-hour delivery. The first witness testified that the carpet was not delivered within two weeks after its purchase as the salesman had promised at the time of purchase (Tr. 323-324). Another witness testified that he purchased carpet during the week in February 1968, and the salesman promised delivery on the following Saturday, but delivery was not made until five days later (Tr. 352-353). Another witness happened to be in Wheaton, Maryland, with her husband and daughter, and walked into the Diener's store to look at carpeting. They decided to purchase a carpet and the salesman promised delivery in two to three weeks (Tr. 356-357). The carpeting was not delivered as promised (Tr. 359). The final witness testified that he purchased carpeting on September 2, 1968, and the salesman agreed to deliver and install it by the time the witness and his wife took possession of a new apartment on the first of October (Tr. 368). By the time the witness moved into the apartment on October 3, the padding had been installed but not the carpeting (Tr. 369).

38. Complaint counsel also contend that the alleged 48 hour delivery representation was violated even in instances of special orders of carpeting from the factory, which normally requires several weeks and, in some instances, several months for delivery, and also where the customer made application to a bank for a loan with which to pay for a carpet purchase. In cases of special order and bank loan applications, the salesman gives the customer an estimate as to the time the special order is expected from the factory (Tr. 74-75), and agrees to notify the customer as soon as Diener's receive notification by the bank of its action on the customer's bank loan application. This hearing examiner finds no merit in complaint counsel's contentions with respect to the alleged 48 hour delivery representation.

39. With respect to the allegations that Diener's mishandled certain textile fiber products in violation of Section 4(a) of the Textile Fiber Products Identification Act and the rules and regulations thereunder, it is found that certain floor coverings advertised by Diener's in the Washington Post and the Evening Star were falsely and deceptively advertised as to the name or amount of constituent fibers contained therein in that Diener's, in disclosing the fiber content information as to floor coverings containing exempted backings, fillings, or paddings, failed to set forth such fiber content information in such a manner as to indicate that it applied only to the face, pile, or outer surface of the floor coverings and not the exempted backings, fillings, or

paddings. In many of their newspaper advertisements which are in evidence herein, Diener's failed to use the word "pile" or similar word so as to indicate that the fiber information pertained to the top or outer surface of the floor covering advertised. Some examples of the failure by Diener's to so indicate in advertisements of Oriental Rugs are CX 49, 51, 54-63, 65, 66, 68-73 and many others. Some examples with respect to Nylon Rugs are CX 49, 52, 79, 80, 85, 86 and many others. Examples with respect to Acrilan-Acrylic carpeting are CX 72, 78, 81, 87-90 and many others. Some examples with respect to Fortrel Polyester or Kodel Polyester carpeting are CX 93, 94, 101, 102, 106 and others. Examples with respect to Herculon-Olefin carpeting are CX 88, 89, 96, 97, 99-102 and others. Examples with respect to 100% Imported Wool carpeting are CX 95 and 144, in violation of Section 4(a) and Rule 11 of the Textile Fiber Products Identification Act.

40. Certain of the Diener's floor coverings were falsely and deceptively advertised in that Diener's failed to set forth the required information as to fiber content as specified in Section 4(c) of the Textile Fiber Products Identification Act and the rules and regulations thereunder in that in some newspaper advertisements the carpeting was described by such fiber-connoting terms as "Acrilan," "Kodel," and "Herculon," and the true generic name of the fiber contained in such carpeting was not set forth, in violation of Section 4(c) and Rule 41 of the Textile Fiber Products Identification Act. In many of their newspaper advertisements, when offering the fiber trade name Acrilan, Diener's failed to use the generic name Acrylic, such as in CX 49, 50, 52-57, 60, 63, 65, and others; failed to use the generic name Polyester when advertising the fiber trade names Kodel or Fortrel, in CX 76, 100-110, 123-128, and others, and the generic name Olefin when advertising the fiber trade name Herculon, as in CX 73, 74, 77, 78, and others, in violation of Section 4(c) and Rule 41 of the Textile Fiber Products Identification Act. Also, in many of the Diener's newspaper advertisements in evidence, asterisks and abbreviations are used in an apparent attempt to provide the fiber content information required by Section 4(a) and Rule 41 of the Textile Fiber Products Identification Act. The use of asterisks or abbreviations is specifically prohibited by Rule 5 of the regulations promulgated under the Act.

41. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents have falsely and deceptively advertised textile fiber products in violation of the Textile Fiber Products Identification Act in that said textile fiber products were not advertised in accordance with the rules and regulations promulgated thereunder in the following respects:

(a) In disclosing the fiber content information as to floor coverings containing exempted backings, fillings, or paddings, such disclosure was not made in such a manner as to indicate that such fiber content information related only to the face, pile or outer surface of the floor covering and not to the backings, fillings, or paddings, in violation of Rule 11 of the aforesaid rules and regulations.

(b) A fiber trademark was used in advertising textile fiber products, without a full disclosure of the fiber content information required by said Act, and the regulations thereunder in at least one instance in said advertisement, in violation of Rule 4(a) of the aforesaid rules and regulations.

(c) A fiber trademark was used in advertising textile fiber products, containing only one fiber and such fiber trademark did not appear, at least once in the said advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type, in violation of the Rule 41(c) of the aforesaid rules and regulations.

42. The use by Diener's of the aforesaid false, misleading and deceptive statements, representations, acts and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public as to the savings available to them on floor covering and carpeting from Diener's, and misleads them into the mistaken and erroneous belief that said statements and representations are true and into the purchase of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief.

43. In the conduct of their business, Diener's have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of floor covering and carpeting of the same general kind and nature as that sold by Diener's. The aforesaid acts and practices of Diener's as found herein 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.

44. The acts and practices of respondents as herein found in Findings 39-41 herein were, and are, in violation of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, and constitute unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce, under the Federal Trade Commission Act.

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CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondents, and this proceeding is in the public interest.

2. Complaint counsel request that any order to be issued herein be directed to the individual respondents, Milton Diener, Walter Diener, and Harold Reznick, in their capacities as individuals, as well as officers and directors of the corporate respondents. The evidence shows, and it has been found, that Mr. Walter Diener has not been active in recent years in management responsibilities of the corporate respondents due to ill health. Although he visits his office on days when he feels physically able to do so, he does not participate in full management responsibilities. For this reason, the order herein will not be directed toward Mr. Walter Diener as an individual.

ORDER

It is ordered, That respondents Diener's, Inc., Diener's of Virginia, Inc., Diener's of Rockville, Inc., Diener's of Lanham, Inc., Diener's of Tysons Corner, Inc., and Mayfield Company, Inc., corporations, and their officers, and Milton Diener and Harold Reznick, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of rugs, carpets, floor coverings, or any other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "Diener's Storewide Carpet Sale," "Fantastic 6 Store Factory Inventory Clearance" or any other word or words of similar import or meaning unless the price of such merchandise being offered for sale constitutes a reduction, in an amount not so insignificant as to be meaningless, from the actual bona fide price at which such merchandise was sold or offered for sale to the public on a regular basis by respondents for a reasonably substantial period of time in the recent, regular course of their business.

2. Using the words "Save" or "Savings" or any other word or words of similar import or meaning in conjunction with a stated dollar or percentage amount of savings, unless the stated dollar or percentage amount of savings actually represents the difference between the offering price and the actual bona fide price at which such merchandise had been sold or offered for sale on a regular

basis to the public by the respondents for a reasonably substantial period of time in the recent, regular course of their business.

3. Using the words "Regular," "Reg.," or any other words of similar import and meaning, to refer to any price amount which is in excess of the price at which such merchandise has been sold or offered for sale in good faith by respondents for a reasonably substantial period of time in the recent, regular course of their business and unless respondents' business records establish that said amount is the price at which such merchandise has been sold or offered for sale in good faith by respondents for a reasonably substantial period of time in the recent, regular course of their business.

4. Using the words "area's competitive price," or words of similar import and meaning, to refer to any price amount which is appreciably in excess of the prices at which substantial sales of the same merchandise have been made in respondents' trade area and unless respondents have in good faith conducted a market survey which establishes the validity of the trade area prices; or misrepresenting, in any manner, the price at which merchandise has been sold in respondents' trade area.

5. (a) Representing, in any manner, that by purchasing any of said merchandise, customers are afforded savings amounting to the difference between respondents' stated price and respondents' former price unless such merchandise has been sold or offered for sale in good faith at the former price by respondents for a reasonably substantial period of time in the recent, regular course of their business.

(b) Representing, in any manner, that by purchasing any of said merchandise, customers are afforded savings amounting to the difference between respondents' stated price and a compared price for said merchandise in respondents' trade area unless a substantial number of the principal retail outlets in the trade area regularly sell said merchandise at the compared price or some higher price.

(c) Representing, in any manner, that by purchasing any of said merchandise, customers are afforded savings amounting to the difference between respondents' stated price and a compared value price for comparable merchandise, unless substantial sales of merchandise of like grade and quality are being made in the trade area at the compared price or a higher price and unless respondents have in good faith conducted a market survey or obtained a similar representative sample

of prices in their trade area which establishes the validity of said compared price and it is clearly and conspicuously disclosed that the comparison is with merchandise of like grade and quality.

6. Misrepresenting, in any manner, the amount of savings available to purchasers or prospective purchasers of respondents' merchandise at retail.

7. Failing to maintain adequate records (a) which disclose the facts upon which any savings claims, including former pricing claims and comparative value claims, and similar representations of the type described in Paragraphs 2-6 of this order are based, and (b) from which the validity of any savings claims, including former pricing claims and comparative value claims, and similar representations of the type described in Paragraphs 2-6 of this order can be determined.

8. Representing, directly or by implication, that any offer is limited in point of time or restricted in any manner, unless the represented limitation or restriction is actually imposed and in good faith adhered to by respondents.

9. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products or services, and failing to secure from each such salesman or other person a signed statement acknowledging receipt of said order.

It is further ordered, That respondents Diener's, Inc., Diener's of Virginia, Inc., Diener's of Rockville, Inc., Diener's of Lanham, Inc., Diener's of Tysons Corner, Inc., and Mayfield Company, Inc., corporations, and their officers, and Milton Diener and Harold Reznick, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product which has been advertised or offered for sale, in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the

Textile Fiber Products Identification Act, do forthwith cease and desist from:

A. Misbranding textile fiber products by falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of constituent fibers contained therein.

B. Falsely and deceptively advertising textile fiber products by:

1. Making any representations by disclosure or by implication, as to fiber content of any textile fiber product in any written advertisement which is used to aid, promote or assist, directly or indirectly, in the sale, or offering for sale of such textile fiber product unless the same information required to be shown on the stamp, tag, label or other means of identification under Sections 4(b) (1) and (2) of the Textile Fiber Products Identification Act is contained in the said advertisement, except that the percentages of the fibers present in the textile fiber product need not be stated.

2. Failing to set forth in disclosing fiber content, information as to coverings containing exempted backings, fillings or paddings, that such disclosure relates only to the face, pile or outer surface of such textile fiber products and not to the exempted backings, fillings, or paddings.

3. Using a fiber trademark in advertising textile fiber products without a full disclosure of the required fiber content information in at least one instance in said advertisement.

4. Using a fiber trademark in advertising textile fiber products containing only one fiber without such fiber trademark appearing at least once in the advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type.

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

It is further ordered, That respondents notify the Commission at least thirty days prior to any proposed change in any of the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations, or any of them, which may affect compliance obligations arising out of this order.

It is further ordered, That the respondents shall forthwith distribute a copy of this order to each of their respective operating divisions.

DISSENTING STATEMENT OF COMMISSIONER MARY GARDINER JONES

I agree with the Commission's decision to sustain the hearing examiner's findings and conclusions on liability.

I dissent from the order which the Commission is entering in this case. Its provisions do no more than direct the respondent "to sin no more" in language which is to me incomprehensible. It promises virtually no relief at all for the deceptions in this case which have bilked consumers of hundreds of dollars and unfairly injured honest advertisers. Moreover, entry of this type of essentially meaningless order renders useless the sizable Commission resources expended in bringing this case.

While I recognize that the meaning of these order provisions can be clarified in compliance, it is this type of order which the Commission has been historically entering and which has accounted in such large part for the essential ineffectiveness of so many Commission enforcement activities in the past. Its entry at this time seems a strange and unaccountable throwback to an earlier phase of the Commission's life which some of us had hoped would not again be repeated.

OPINION OF THE COMMISSION

BY KIRKPATRICK, *Commissioner*:

This matter is before the Commission on respondents' appeal from the initial decision of the administrative law judge. The Commission's complaint of November 25, 1969, alleged that the respondents¹ had violated Section 5 of the Federal Trade Commission Act by deceptively advertising their rugs, carpets, and floor coverings. The complaint also alleged violations of Sections 4 (a) and (c) of the Textile Fiber Products Identification Act. Respondents filed an answer denying the allegations. And on July 12, 1971, the administrative law judge issued an initial decision upholding the charges of the complaint and entered an order to cease and desist. Respondents are now appealing from this decision.

As this Commission observed quite some time ago, "people love a bargain."² And one of the most effective ways of selling them some-

¹ Respondent, Diener's, Inc., is the parent of the five other subsidiary corporations named in the complaint: Diener's of Virginia, Inc., Diener's of Rockville, Inc., Diener's of Lanham, Inc., Diener's of Tysons Corner, Inc. and Mayfield Company, Inc. The respondents, Walter Diener, Milton Diener, and Harold Reznick, are stockholders and officers of each of the six corporate respondents. Mr. Milton Diener is president; Mr. Walter Diener is secretary-treasurer; and Mr. Reznick is executive vice-president and general manager of Diener's, Inc. Messrs. Milton and Walter Diener and Harold Reznick are members of the boards of directors of the respondent corporations. The complaint was dismissed as to Walter Diener and no appeal was taken from that decision.

² *Revco D. S., Inc., et al.*, 67 F.T.C. 1239 (1965).

thing is to tell them that they are getting a bargain price. A misrepresentation of the existence or extent of the bargain either by comparison with "regular" prices or with the prices of competitors has long been held a violation of Section 5. Both such types of comparative price claims were challenged by the complaint in this proceeding. And, as corollary to the "regular" price charges, the complaint also alleged that certain "savings" claims were also deceptive.³

Respondents are appealing from the initial decision of the administrative law judge on essentially two grounds. First, they contend that the administrative law judge improperly relied upon the testimony of the Commission attorney, Joseph J. Koman, who investigated the case. And second, they contend that complaint counsel failed to make a *prima facie* case both as to the "regular" price allegations and the "area competitive price" allegations. They contend that complaint counsel failed to prove that they did not make substantial sales at the advertised regular prices. Nor, they contend, did he prove that the advertised "area competitive prices" were above those prices actually charged by their competitors.

I. THE EVIDENCE

Most of the essential elements of complaint counsel's case were contained in the testimony of Mr. Joseph J. Koman, Jr., the Commission attorney who investigated the matter. Koman testified that on February 23 and 27, 1968, he interviewed Mr. Harold Reznick, vice president and general manager of Diener's Inc. At these interviews, Koman had with him a set of the newspaper advertisements run by Diener's from March through December 1967. According to Koman, Reznick went through these advertisements, and in a number of instances, identified the specific types of carpet and floor covering material that were advertised.

Reznick's assistance in identifying the specific items featured in the advertisements was essential to Koman because of the curious practice of retailers (at least in the Washington area) of advertising carpet without disclosing its grade or quality.⁴ All that is usually given is color, the material from which the carpet is made, the price and, on occasion, the manufacturer's name. Since each carpet manufacturer produces several grades or qualities of carpet that could fit

³ Respondents were also charged with misrepresenting the time in which their merchandise would be delivered and installed. This charge was dismissed by the administrative law judge and no appeal has been taken from that ruling.

⁴ Tr. 260, 269. This aspect of the respondents' advertising was not challenged in this proceeding.

such a limited description, Koman, not to say the poor customers, had no way of knowing which type of carpet had been advertised. Obviously, if he did not know what carpet was being advertised, he could not determine whether it had ever been sold at the advertised "regular" price. Manufacturers, however, designate each of the various grades or qualities with a name so that it can easily be identified. It was this essential information which Reznick gave to Koman, and, with one exception, Koman's testimony, as to what Reznick told him, is the only record evidence connecting the advertisements with specific types of carpeting and floor covering material.

Koman specifically testified, at considerable length, concerning Commission Exhibit 68, which was a full page advertisement run in the Washington Post on June 29, 1967.

He testified that Reznick went over the various floor covering items advertised on this page and identified each one by the manufacturer's name. Koman also testified that Reznick had explained that the items advertised on this page were the same items that Diener's advertised throughout 1967. Being able to identify the carpets advertised on this page, one could identify the carpets featured in any of the 1967 advertisements. Once Koman knew which specific grades of carpet were featured in the advertisements, he was then able to examine the respondents' sales records in order to determine whether any sales were actually made at the higher "regular" prices.

A. Regular Price Claims

Koman took the Washington Post advertisement of June 29, 1967, and compared the advertised "regular" prices with prices on the sales tickets from each of the respondents' stores during the period from June through October, and for some stores, June through November. Koman testified that he could find no evidence that any of the essential carpet or floor covering material had sold at the advertised "regular" prices.

Koman made copies of a sampling of the tickets that reflected the prices at which the advertised items had actually sold during this period. The tickets, however, were printed on colored papers and 23 out of 44 of the sample copies Koman made turned out to be illegible.

With regard to one type of carpet in Diener's advertisements, Koman did not have to rely on Reznick's identification. This carpet manufactured by James Lee & Sons Company was actually advertised under its quality designation "Romantica." In a number of advertisements (CX 79, 80, 85 and 86), the respondents advertised "Romantica" carpeting as:

* * * Reg. \$9.95 Sq. Yd. * * * ONLY 7.88 Sq. Yd.

And in two of the advertisements they represented that savings of "34% to 63%" could be realized by purchasing "Romantica." In the other two advertisements the savings were represented as being "33% to 64%." Koman testified that he could find no evidence in the respondents' sales records covering June through November 1967, that it had sold for \$9.95.

Among the legible copies of the sales tickets that were placed in evidence, there were three (CX 7, 10, and 36) which indicated sales of "Romantica" at \$6.63 per square yard. One other sales receipt (CX 43), indicated a sale at \$7.00 per square yard. Koman testified that he questioned Reznick specifically about "Romantica" and that Reznick told him that Diener's had not sold "Romantica" for a year prior to featuring it in their 1967 advertisements. Between 1965 and 1967, Reznick admitted to Koman that Diener's offered "Romantica" only in the sense that a sampling was kept at a headquarter's store and it could have been ordered special for any customer who wanted it. Reznick explained that if Diener's had purchased "Romantica" in 1966, it would have been sold at \$9.95 per square yard.

Koman testified that in the course of these interviews, Reznick made another admission concerning some carpet stair tread which had been advertised as regularly selling at \$24.95. According to Koman, Reznick admitted that the stair tread was never sold by Diener's for more than \$13.00.

Koman was questioned by the complaint counsel as to whether Reznick offered any explanation as to how he determined the area competitive price for the carpets advertised in CX 68 and Mr. Koman replied as follows:

Yes, he advised me that with respect to either the representation "regular" or the representation "area's competitive price," or to obtain the other saving representations contained in such ads, they would normally take or he would take the distributor's cost on a cut or raw basis, and with this price he would times it by a 60 percent markup, which he stated was the normal markup [sic] for most carpeting concerns located in the Metropolitan D.C. Area, and that the cut order price plus the markup would equal either the regular or the area's competitive price. (Tr. 179).

Respondent's evidence on the "regular" price issue consisted of the testimony of Reznick, who said that "regular" price in an advertisement meant that Diener's had previously sold that item for the advertised "regular" price. He stated that as a general rule carpets featured in advertisements are not advertised more than one time, and claimed that all records of which products are featured in a particular advertisement are destroyed as soon as the advertisements

are forwarded to the advertising agency. However, Mr. Reznick was unable to recall any of the details of his conversation with Mr. Koman.

B. Area Competitive Price Claims.

To establish their case regarding the misrepresentations of area prices, complaint counsel again had to rely on the identification of the grade or qualities of the advertised carpets which were given to Koman by Reznick. Complaint counsel called, as witnesses, five carpet buyers from other stores in the Washington area. Each of these was questioned about the prices that their respective firms charged in 1967, for particular lines of carpet that were identified as having been advertised by Diener's. In each case, a comparison showed that these prices were considerably less than the "area competitive price" advertised by Diener's. Each buyer also testified on the measures that he or his firm took to insure that their prices were competitive.

Respondents' evidence on the "area competitive price" issue consisted of testimony by Reznick who said that he shopped "at least eight to ten" competitors every Saturday. On cross-examination, however, Reznick was unable to recall what stores he visited. And, at another place in the record, Reznick described a procedure somewhat more consistent with that attributed to him by Koman:

Q. Who determines the comparative prices that are offered for sale in those ads?

A. Sometimes the manufacture [sic], sometimes I do. (TR. 89).

II TESTIMONY OF THE COMMISSION INVESTIGATOR

Presumably, respondents are not challenging Koman's competence to testify. The issue of his competence does not appear to have been raised at trial and their brief appears to concede the point.⁵ Apparently, the issue they are attempting to raise is that of the weight which should be given his testimony in view of his status as a Commission employee. But since they cite no record evidence of bias, they are apparently asking us to assume the existence of bias in Koman's testimony from the mere fact of his employment. The testimony of a Commission employee, like any other witness, may contain bias. And that bias may even be a product of his employment, but this is a matter for the administrative law judge to determine. As one court bluntly put it, "The credibility of witnesses must be left in large part to the

⁵ At one point in their brief, respondents appear to concede Koman's competence to testify, but further on, they claim that the trial judge erred in even admitting Koman's testimony at all. And in their Reply Brief, respondents contend that "the central issue in this case [is] the weight to be given the testimony of the attorney-investigator, Mr. Koman."

hearer of the testimony, a proposition too elementary to require citation of authority." [*Communist Party of U.S. v. SACB*, 254, F. 2d 314 at 331 (D.C. Cir. 1958)].⁶ A party seeking to overturn an initial decision on the grounds that the administrative law judge improperly evaluated the credibility of a witness ought to be able to cite a solid record basis for its contention. But the respondents cite no error on the part of the administrative law judge except a simple failure to find that Koman's status as an employee alone rendered his testimony unbelievable. Nor do they now present any persuasive reason as to why the Commission should find, as a matter of law, that its employees are less credible than the general run of mankind.

Respondents also attack Koman's testimony as conclusionary:

The testimony of the attorney-investigator shows that he made an on sight inspection of certain documents and concluded that the respondents were guilty of various charges. The function of examining the documents and drawing inferences therefrom is conferred on the Hearing Examiner and not the staff investigator. If the course of conduct adopted by staff counsel is approved by the Commission we can look for more Star Chamber proceedings justified in the name of Consumerism. If the end justifies the means there is really no need for any testimony other than the attorney-investigator. He can decide what he wants to prove and then by his on sight inspection merely report that he concludes there has been a violation. The staff's theory is that once the attorney-investigator concludes that there is a violation the burden shifts to the respondent to disprove what an employee of the Commission has decided in an ex parte investigation. (Respondents' Reply Brief, p. 2.)

If Koman's testimony was conclusionary, as the respondents contend, then it was indeed improper for the administrative law judge to rely on it. Conclusionary testimony is as improper coming from a Commission investigator as it is coming from any other witness. If Koman had expressed any opinions as to whether or not the respondents violated the law, they would have been simply irrelevant and should not have been relied upon by the administrative law judge in any way. We find, however, after a careful review of the record, that Koman's testimony was in no way conclusionary. He testified, as any other witness, about those things he physically heard and saw. Nor do we find any indication that the administrative law judge improperly relied on Koman's testimony.

There is a more serious question here, however, and it deserves some examination even though it was not expressly raised by the respondents. It is whether it is fair to permit complaint counsel to base his *prima facie* case on testimony by a Commission employee. Without

⁶ This ruling was affirmed by the Supreme Court, *Communist Party of U.S. v. SACB*, 367 U.S. 1, 28-29, after remand to Board, 277 F. 2d 78 (1959).

deciding whether or not such procedure could, under some circumstances, be unfair, we find that there was no unfairness here. Koman's testimony hardly involved matters about which respondents would have had difficulty producing evidence. On the contrary, his testimony concerns matters which, but for his investigation, were exclusively within the respondents' knowledge and control. Sheer facetiousness must have inspired respondents' counsel to suggest that complaint counsel should have proved his case wholly by documents after his own client testified that the documents necessary to connect the advertisements with the advertised items were routinely destroyed.

III. REGULAR PRICE CLAIMS

Respondents contend that complaint counsel's *prima facie* case is defective in other respects in addition to its reliance on Koman's testimony. With regard to the allegations dealing with "regular" price, respondents claim that complaint counsel failed to show a violation of the Commission's "Guides Against Deceptive Pricing." Guide 1 provides, *inter alia* that: "If the former price is the actual *bona fide* price at which the article was offered to the public on a regular basis for a reasonably substantial period of time, it provides a legitimate basis for the advertising of a price comparison." Respondents cite Reznick's testimony that "regular price" meant "that we had previously sold merchandise for the regular price." They contend that the only evidence introduced by complaint counsel to show that no sales were made at the "regular" price were the 23 legible invoices or tickets which covered a period of only three or four months. Respondents also claim that the invoices do not reflect the date of purchase, nor do they identify the carpet purchased and, therefore, they cannot be related to the advertisements. Respondents also make much of the fact that 20 some receipts copied by Koman turned out to be illegible.

It is a little difficult to find much substance in the quibble over these invoices. The only way for complaint counsel to have proved that there were *no* sales of the items in question at the "regular" prices was to produce evidence as to all of the respondents' sales records. Hence, the crucial part of complaint counsel's evidence on this point was Koman's testimony that he examined *all* respondents' sales tickets and found *none* that reflected sales at the higher "regular" prices. It is hard to see how twenty-three or even forty-four tickets could add much to this. Koman did, of course, represent that the tickets reflected the prices at which the advertised items had actually been sold. But the tickets themselves do not establish this, independent of his testimony.

We find no error in the administrative law judge's decision to give

greater weight to Koman's testimony over Reznick's cryptic and self-serving statement.

Respondents protest that Koman examined only four months worth of invoices. From this, they claim, one cannot conclude that the regular price claims were deceptive.⁷ Koman, however, testified that while his examination of sales tickets went back only four months for some stores, it went back six months for many others, depending only upon what was available in the respondents' files. Since it is most unlikely the "regular" prices would have prevailed at some stores and not others, the question then becomes whether it is fair to make a regular price claim when that "regular" price has not prevailed for six months. Even the respondents seem unwilling to endorse such a proposition.

IV AREA COMPETITIVE PRICE CLAIMS

Respondents also contend that complaint counsel failed to present a *prima facie* case concerning the "area competitive price" claims. They say that complaint counsel's proof falls short of the standard established in Guide II of the "Guides Against Deceptive Pricing." This Guide, they insist, requires complaint counsel to prove their "area competitive prices" exceeded the prices at which "substantial sales" of the article were being made in the area. The only evidence as to area prices was the testimony of the six buyers who testified only as to their own prices and not the prices prevailing in the area. This evidence was insufficient under the Commission's decision in *Revco*, where it was held that evidence of the prices of three chains with some seventy-five drugstores was insufficient evidence as to the prevailing prices in a market with over 600 drugstores.

This argument is unpersuasive for a number of reasons.⁸ All of the

⁷ Respondent's counsel rather disingeniously claims that Koman testified that he found sales tickets showing advertised items being sold at the higher "regular" prices. This claim is clearly contradicted by the record of Koman's testimony:

"By Mr. Stein:

"Q. I believe you testified, sir, that you saw some sales tickets in the Diener's files which supported their claim that they were offering a bona fide sale but you also added to that they were few in number, you said few. Is that a fair paraphrase of your testimony?

"A. If I could go back again, the investigation, the sales tickets examination dealt with regular pricing. I went through four months supply of sales tickets that was furnished to try to find out whether Diener's ever sold the merchandise at the higher regular price. I found no such sales.

"The next thing is what prices was Diener's selling this merchandise for during this time period. It was either at the advertised price or slightly higher than the advertised price.

"HEARING EXAMINER POINDEXTER: The advertised sale price or reduced price?

"THE WITNESS: Right."

(Tr. 515-516).

⁸ The Guides are not intended to establish a standard of proof for litigated proceedings. They are what they say they are: "practical aids to the honest businessman who seeks manufacturer's list prices obtained by respondent."

six buyers testified that they took serious measures to know the prices of their competitors and to insure that their own prices were competitive. In comment on similar testimony in *Giant Food, Inc.* [61 F.T.C. 326], the Commission said: "If the prices * * * were thus deemed 'competitive' by these experts in the field, it is highly unlikely that a preponderant or even substantial segment of the Washington retailing community was charging the inflated manufacturer's list prices advertised by respondent." (p. 352). This reasoning is particularly applicable here where, as the respondents themselves have pointed out, two of the buyers that testified represented firms that made no special effort to undersell their competitors. One of these, Mr. Vern Miller of Carpets, Inc., testified (on respondents' cross-examination) that his firm preferred to compete on the basis of service rather than price. He testified that his firm never ran an advertisement in a newspaper nor displayed a sale sign in 16 years.

Similarly, Mr. Quinn M. Cardwell of Cardwell's Inc., testified that his firm was a specialty store and while he attempted to keep his prices competitive, he did not deal with a particular price conscious trade and therefore simply used a mechanical markup procedure.⁹ Yet, even the prices of these firms were below the "area competitive prices" advertised by the respondents.

The evidence of other buyers is significant for the same reason. And again, it was the testimony elicited by respondents' counsel which established that the department stores use a conventional markup procedure that reflects a higher overhead. Yet again, the prices charged by the department stores were lower than the prices represented by the respondents as the "area competitive prices."

In the face of such evidence, we are compelled to agree with the administrative law judge that complaint counsel clearly established a *prima facie* case.

On the basis of advertisements placed in evidence, the administrative law judge found that the respondents violated certain provisions

⁹ "Basically speaking, I use a fairly mechanical procedure in markup that my retail price is a function of my delivered cost price on the merchandise, and the material either is successfully sold at the retail price or if we have a situation occurring where one manufacturer's line we have repeated difficulty in selling or some particular fabrics we have repeated difficulty in selling because of price and where the problem where interested consumers literally don't buy the carpet because they say it is available at a better price elsewhere exists, we may review to make sure we don't have some error in our pricing structure and if we find we have no error and this continues, my general procedure [sic] is to discontinue the fabric where we are high in price." (Tr. 273).

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Final Order

of the Textile Fiber Products Identification Act.¹⁰ Respondents are appealing from this ruling on the grounds that "there is no finding indicating that these technical offenses occurred after the first part of 1968, of that there is any likelihood that these offenses will be repeated in the future."

The Commission has dealt with this argument many times. Quite recently we said:

It is well established that the mere fact that the offending practices have been discontinued prior to the issuance of a complaint does not provide, by itself, the requisite assurance that an order is unnecessary and not in the public interest. As the courts have noted, it is the timing and circumstances of the claimed abandonment which is of importance to the issue of the necessity for an order. Where, as here, the abandonment took place only after the Commission's hand was on the respondent's shoulder, the courts are clear that abandonment of the practices under such circumstances will not support a conclusion that the practices will not be resumed.¹¹

We see no reason to abandon this rule in the present case.

The Initial Decision and Order of the administrative law judge is affirmed.

FINAL ORDER

This matter is before the Commission on the appeal of respondents from the initial decision and order of the administrative law judge issued July 12, 1971. Upon examination of the record, the brief, and after full consideration of the issues of fact and law presented, the Commission has concluded that the initial decision of the administrative law judge should be adopted and issued as the decision of the Commission. Accordingly,

It is ordered, That respondents' appeal from the initial decision of the administrative law judge be, and it hereby is, denied.

It is further ordered, That the initial decision of the administrative law judge be, and it hereby is, adopted as the decision of the Commission.

By the Commission, without the concurrence of Commissioner MacIntyre. He did not concur because he said it is apparent to him that much of the decision of the majority rests upon the testimony of

¹⁰ He found that respondents (1) failed to disclose the fiber content information in such a manner as to indicate that it applied to the face, pile or outer surface of the floor covering and not to the backings, fillings, or paddings; (2) failed to set forth the required information as to fiber content as specified in Section 4(c) of the Textile Fiber Products Identification Act and the rules and regulations thereunder in that in some advertisements carpeting was described by such fiber-connoting terms as "Acrilan," "Kodel," and "Herculon," and the true generic name of the fiber was not disclosed; (3) falsely and deceptively advertised textile fiber products in violation of the Textile Fiber Products Identification Act.

¹¹ *Zale Corp.*, Docket No. 8810 (1970).

Complaint

81 F.T.C.

witness Koman. It is the view of Commissioner MacIntyre that the testimony of witness Koman should have been stricken for the reason stated in a dissenting opinion by him in January 1971 [78 F.T.C. 1564], during the course of an interlocutory appeal proceeding herein. Commissioner Jones agreed to the opinion on liability, but dissented to the order, and submitted a dissenting statement.

IN THE MATTER OF

GEORGIA-PACIFIC CORPORATION

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE

FEDERAL TRADE COMMISSION ACT AND CLAYTON ACT, SEC. 7

Docket 8843. Complaint, May 26, 1971—Decision, Dec. 26, 1972.

Consent order requiring, among other things, the divestiture by the nation's leading producer and distributor of softwood plywood, headquartered in Portland, Ore., of certain acquisitions alleged to be anticompetitive and monopolistic in nature. The principal provisions of the order are that the respondent shall create an independent corporation and transfer approximately 20 percent of its assets to said corporation. The order further restricts and prohibits future acquisitions in the timber industry in the South for five years and places a ten-year ban on the acquisition of the stocks and assets of softwood plywood concerns without prior Federal Trade Commission approval.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named above, as hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 7 of the Clayton Act, as amended, (U.S.C. Title 15, Section