IN THE MATTER OF

SYLVIA ABRAMS TRADING AS BARCLAY DISTRIBUTORS

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

Docket C-198. Complaint, July 26, 1962—Decision, July 26, 1962

Consent order requiring a New York City distributor of men's wallets, calendar banks, self-illuminating power magnifiers, travel irons, immersion heaters and other merchandise, to cease making false price and savings claims and misleading guarantees such as those she made in newspaper advertising and catalogs.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Sylvia Abrams, hereinafter referred to as the respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sylvia Abrams is an individual trading as Barclay Distributors, with her principal office and place of business located at 170-30 Jamaica Avenue, Jamaica 32, Borough of Queens, in the city of New York, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of men's wallets, calendar banks, self illuminating magnifiers, travel irons, travel immersion heater kits, wrist watches, cigarette lighters, and other items of general merchandise to the public.

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

PAR. 4. In the course and conduct of her business the respondent has placed or caused to be placed advertisements in newspapers of general circulation and in nationally distributed magazines, and has distributed catalogues through the United States mail to prospective

purchasers located in various States other than the State of New York. The following statements from the catalogues are typical but not all inclusive:

#LM 40 Men's genuine leather wallet at $4.00 (this price being lightly crossed out) $2.19 each.

#B 551 Calendar Bank reg. $3.50 our price $1.98.

#M 401 Self-illuminating 10 power magnifier $9.95 (this price being lightly crossed out) special sale price only $2.24.

#401 Self-illuminating 7 power magnifier special sale price only $2.24 reg. $9.95 value.

Self-illuminating 10 power magnifier special sale price only $2.24 reg. 9.95 value.

#79–T Featherweight deluxe travel iron reg. $5.95 special low price $3.59.

#915 Travel immersion heater kit $2.19 reg. $5.95 value.

SL Famous Sovereign Jeweled SM watches * * *. Now at the lowest price in history $7.95 * * *. Reg. 14.95 value.

In each instance the statement is set forth in close conjunction with an illustration of the article.

Terrific Discounts
Save up to 70%
Save up to 71%

PAR. 5. Through the use of the aforesaid statements the respondent has represented, directly or indirectly, that the higher stated prices quoted in paragraph 4 in juxtaposition with the lower stated prices were the prices at which the men's wallets, the calendar bank, the self-illuminating power magnifier, the deluxe travel iron, and the travel immersion heater kit were usually and customarily sold by the respondent in the recent regular course of her business and that a saving would be made of the difference between the two prices, and further that this saving would amount to a definite percentage of the higher stated prices, sometimes ranging as high as 70% or 71% of the higher stated prices.

PAR. 6. In truth and in fact the respondent has never sold the men's wallets, the calendar bank, the self-illuminating power magnifier, the deluxe travel iron and the travel immersion heater kit at the higher stated prices, and for these items no saving will be made amounting to the difference between the two prices or to any percentage of the higher stated prices. Therefore the statements and representations referred to in paragraphs 4 and 5 are false, misleading, and deceptive.

PAR. 7. Through the use of such statements as, "Wholesale prices and less", "Buy at wholesale and less", appearing on the front covers

of her catalogues the respondent has represented directly or indirectly that she sells all of her merchandise at wholesale prices or less.

PAR. 8. In truth and in fact the respondent does not sell, nor does she offer to sell, all of her articles of merchandise at wholesale prices or less but, to the contrary, the prices of some of her merchandise are in excess of wholesale prices. Therefore the statements and representations referred to in paragraph 7 are false, misleading and deceptive.

PAR. 9. In her catalogue advertisements of cigarette lighters the respondent has used such statements as, "Unconditionally guaranteed", and, "Fully guaranteed".

PAR. 10. In truth and in fact the advertised guarantees for cigarette lighters fail to set forth the nature and extent of the guarantee, the manner in which the guarantor will perform and the identity of the guarantor. Therefore the quoted statements in paragraph 9 are false, misleading and deceptive.

PAR. 11. In her catalogue advertisements for the Sovereign watches the respondent has stated that they are "Made and guaranteed by Benrus Watch Company."

PAR. 12. In truth and in fact the Sovereign watches are manufactured and guaranteed by the Sovereign Watch Company and not Benrus Watch Co., Inc. Therefore, the quoted statement in paragraph 11 is false, misleading and deceptive.

PAR. 13. In the course and conduct of her business and at all times mentioned herein, the respondent has been in substantial competition, in commerce, with corporations, firms, and individuals engaged in the sale of articles of merchandise of the same general kind and nature as those sold by the respondent.

PAR. 14. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's merchandise by reason of said erroneous and mistaken belief.

PAR. 15. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent, Sylvia Abrams is an individual trading as Barclay Distributors with her principal office and place of business located at 170–30 Jamaica Avenue, Jamaica 32, Borough of Queens, in the city of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent, Sylvia Abrams, trading and doing business as Barclay Distributors, or under any other name or names, and her agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of men's wallets, calendar banks, self-illuminating magnifiers, travel irons, travel immersion heater kits, wrist watches, cigarette lighters and any other articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that:

(a) Any amount is the usual and customary retail price of respondent's merchandise when it is in excess of the price at which said merchandise is usually and customarily sold at retail by respondent.

(b) Any saving is afforded in the purchase of merchandise from respondent's retail price unless the price at which it is offered is lower than the price at which said merchandise is usually and customarily sold at retail by the respondent.

2. Misrepresenting, in any manner, the savings available to purchasers of respondent's merchandise or the amount by which the price of said merchandise has been reduced from the price at which it is customarily sold by respondent in the usual course of business.

3. Using the word "wholesale" or any other word or term of similar import or meaning, in connection with the direct or indirect solicitation of sales to individual members of the public or other consumers, to describe a price which is higher than the generally prevailing price at which the merchandise is sold by wholesalers to retailers in the trade area or areas where the representation is made.

4. Representing, directly or by implication, that Sovereign watches are manufactured and guaranteed by the Benrus Watch Company, or in any other manner misrepresenting, directly or by implication, the identity of the manufacturer or the guarantor of any of the respondent's merchandise.

5. Representing, directly or by implication, that any of respondent's products are guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

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

IN THE MATTER OF

REMCO INDUSTRIES, INC.

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

Docket C-199. Complaint, July 26, 1962—Decision, July 26, 1962

Consent order requiring a Newark, N.J., distributor to cease misrepresenting toys by such practices as representing falsely in television commercials that a transistor radio could be constructed from the components contained in its

"Radiocraft Kit" and radio broadcasts transmitted, and that its "Electro Chemistry Science Kit" contained a battery and a glass beaker.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Remco Industries, Inc., a corporation, hereinafter referred to as respondents, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Remco Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 113 North 13th Street, in the city of Newark, State of New Jersey.

PAR. 2. Respondent Remco Industries, Inc., is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of toys and related products, including toys designated "Radiocraft Kit" and "Electro Chemistry Science Kit", to distributors and retailers for resale to the public.

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

PAR. 4. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with other corporations, firms and individuals in the sale of radio kits, science kits, and other toys and related products.

PAR. 5. In the course and conduct of its business and for the purpose of inducing the purchase in commerce of the said "Radiocraft Kit", respondent made certain statements, representations and pictorial presentations with respect thereto, by means of commercials transmitted by television stations located in various states of the United States and in the District of Columbia having sufficient power to carry such broadcasts across state lines.

PAR. 6. Among and typical of the statements and representations made and appearing in said advertisements disseminated as hereinabove set forth are the following:

This REMCO Transistor Radio I made myself.

* * * * * * *

All you have to do is put together all the parts that come in the Remco Kit. The transistor, the tuner, and the separate loud speaker for broadcasting.

* * * * * * *

* * * get your REMCO Radio at your favorite toy store—from $3.95 * * *

* * * * * * *

Can you do your own broadcasting too? Yeah, sure. I'll do the announcing with this microphone * * *

PAR. 7. Through the use of the aforesaid advertisements, and others containing statements and representations of the same import not specifically set forth herein, respondent has represented, directly and by implication:

(1) That it is possible to transmit broadcasts by radio through use of the components contained in each "Radiocraft Kit".

(2) That a transistor radio can be constructed from the components contained in each "Radiocraft Kit".

PAR. 8. An enlargement of a frame extracted from said television commercials, illustrating typical representations with respect to the component parts of the said "Radiocraft Kit" and the manner in which the said toy purports to perform, as alleged in paragraphs 6 and 7 above, is marked Exhibit "A" and incorporated herein by reference.[1]

PAR. 9. Said statements, representations and depictions are false, misleading and deceptive. In truth and in fact:

(1) Radio broadcasts cannot be transmitted through use of the components contained in any "Radiocraft Kit".

(2) A transistor radio cannot be constructed from the components contained in one of the advertised "Radiocraft Kits".

PAR. 10. In the course and conduct of its business and for the purpose of inducing the purchase in commerce of the said "Electro Chemistry Science Kit", respondent made certain statements, representations and pictorial presentations with respect thereto, by means of commercials transmitted by television stations located in various states of the United States and in the District of Columbia having sufficient power to carry such broadcasts across state lines.

PAR. 11. Among and typical of the statements and representations made and appearing in said advertisements disseminated as herein-

[1] Pictorial exhibit "A" not published.

above set forth is the depiction of a battery connected to electrodes in a glass beaker, accompanied by the oral representation:

"Electro Chemistry Science Kit"

PAR. 12. Through the use of the aforesaid advertisements, and others containing statements and representations not specifically set forth herein, respondent has represented, directly and by implication, that the "Electro Chemistry Science Kit" contains a battery and a glass beaker as depicted.

PAR. 13. An enlargement of a frame extracted from said television commercials, illustrating typical representations with respect to the component parts of the said "Electro Chemistry Science Kit" and the manner in which the said toy purports to perform, as alleged in paragraphs 11 and 12 above, is marked Exhibit "B" and incorporated herein by reference.[2]

PAR. 14. Said statements, representations and depictions are false, misleading and deceptive. In truth and in fact a battery and a glass beaker are not components of the "Electro Chemistry Science Kit", and the beaker supplied as a component of the said toy is not as large as the depicted beaker.

PAR. 15. Respondent's toys, including the "Radiocraft Kit" and "Electro Chemistry Science Kit", are designed primarily for children, and are bought either by or for the benefit of children. Respondent's false, misleading and deceptive advertising claims thus unfairly exploit a consumer group unqualified by age or experience to anticipate or appreciate the possibility that the representations may be exaggerated or untrue. Further, respondent unfairly plays upon the affection of adults, especially parents and other close relatives, for children, by inducing the purchase of toys and related products through false, misleading and deceptive claims of their performance, which claims appeal both to adults and to children who bring the toys to the attention of adults. As a consequence of respondent's exaggerated and untrue representations, toys are purchased in the expectation that they will have characteristics or perform acts not substantiated by the facts. Consumers are thus misled to their disappointment and competing advertisers who do not engage in false, misleading or deceptive advertising are unfairly prejudiced.

PAR. 16. The use by respondent of the aforesaid false, misleading and deceptive representations has had, and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said representations were, and are, true

[2] Pictorial exhibit "B" not published.

and into the purchase of substantial quantities of the products of respondent by reason of said erroneous and mistaken belief.

PAR. 17. The aforesaid acts and practices of respondent, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent, Remco Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 113 North 13th Street, in the city of Newark, State of New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Remco Industries, Inc., a corporation, and its officers, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of toys or related

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

1. Representing, by use of any illustration, depiction or demonstration, alone or accompanied by oral or written statements, purporting to illustrate, depict or demonstrate any toy or related product, or the performance thereof, or representing in any other manner, directly or by implication, that any toy or related product contains a component or performs in any manner not in accordance with fact.

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

IN THE MATTER OF

MALE PUBLISHING CORP. ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d) OF THE CLAYTON ACT

Docket C-200. Complaint, July 26, 1962—Decision, July 26, 1962

Consent order requiring ten publishers of magazines and comic books with the same address and a common controlling officer—publishing "Male", "Stag", "My Confessions", "My Romance", "Screen Stars", "True Action", "True Secrets", "Movie World", and "Men" magazines, among others—to cease discriminating in price in violation of Sec. 2(d) of the Clayton Act by paying promotional allowances to certain retail customers—some of whom operated chain retail outlets in railroad, airport, and bus terminals, and outlets in hotels and office buildings, and others of whom furnished services in connection with the handling of respondents' publications such as taking purchase orders and distributing, billing, and collecting—while not making such payments available on proportionally equal terms to their competitors, including drug chains, grocery chains, and other newsstands.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Male Publishing Corp. is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 655 Madison Avenue, New York, N.Y. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including magazines and comic books under copyrighted titles including "Male." Respondent's sales of publications during the calendar year 1960 exceeded one million two hundred thousand dollars.

PAR. 2. Respondent Atlas Magazines, Inc., is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 655 Madison Avenue, New York, N.Y. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including magazines and comic books under copyrighted titles including "Stag" and "My Confessions." Respondent's sales of publications during the calendar year 1960 exceeded one million four hundred thousand dollars.

PAR. 3. Respondent Official Magazine Corp. is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 655 Madison Avenue, New York, N.Y. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including magazines under copyrighted titles including "My Romance", "Screen Stars", "True Action" and "True Secrets." Respondent's sales of publications during the calendar year 1960 exceeded six hundred fifty thousand dollars.

PAR. 4. Respondent Canam Publishers Sales Corp. is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 655 Madison Avenue, New York, N.Y. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including comic books under copyrighted titles. Respondent's sales of publications during the calendar year 1960 exceeded forty-three thousand dollars.

PAR. 5. Respondent Bard Publishing Corp. is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 655 Madison Avenue, New York, N.Y. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including comic books under copyrighted titles. Respondent's sales of publications during the calendar year 1960 exceeded forty-seven thousand dollars.

PAR. 6. Respondent Interstate Publishing Corp. is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 655 Madison Avenue, New York, N.Y. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including magazines and comic books under the copyrighted titles including "Movie World." Respondent's sales of publications during the calendar year 1960 exceeded one hundred forty thousand dollars.

PAR. 7. Respondent Hercules Publishing Corp. is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 655 Madison Avenue, New York, N.Y. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including comic books under copyrighted titles. Respondent's sales of publications during the calendar year 1960 exceeded forty-three thousand dollars.

PAR. 8. Respondent Leading Magazine Corp. is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 655 Madison Avenue, New York, N.Y. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including comic books under copyrighted titles. Respondent's sales of publications during the calendar year 1960 exceeded sixty-one thousand dollars.

PAR. 9. Respondent Zenith Publishing Corp. is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 655 Madison Avenue, New York, N.Y. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including magazines and comic books under copyrighted titles including "Men." Respondent's sales of publications during the calendar year 1960 exceeded seven hundred thousand dollars.

PAR. 10. Respondent Vista Publications, Inc. is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 655 Madison Ave, New York, N.Y. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including magazines and comic books under copyrighted titles. Respondent's sales of publications during the calendar year 1960 exceeded two hundred twenty thousand dollars.

Respondents Canam Publishers Sales Corp., Bard Publishing Corp., Interstate Publishing Corp., Hercules Publishing Corp., Leading Magazine Corp., Zenith Publishing Corp., and Vista Publications, Inc., are members of an unincorporated association known as the Marvel Comic Group. These respondents operate jointly under the trade name and style of Marvel Comic Group. Total sales of publications by the Marvel Comic Group during the calendar year 1960 exceeded one million three hundred thousand dollars.

PAR. 11. Respondent Martin Goodman is the controlling member of a partnership doing business under the trade name and style of Magazine Management Company, with his office and principal place of business located at 655 Madison Avenue, New York, N.Y. Through this partnership, Magazine Management Company, respondent Martin Goodman controls and operates approximately forty-eight corporations engaged, among other things, in the business of publishing and distributing various publications.

Respondent Martin Goodman is an officer of each of the corporations named as respondents above. He formulates, directs and controls the acts and practices of each corporate respondent either directly or through the partnership, Magazine Management Company; and his address is the same as that of each corporate respondent named herein.

PAR. 12. Publications published by all corporations named as respondents herein are distributed by said respondents to customers through their national distributor, Independent News Co., Inc., hereinafter referred to as Independent News.

Independent News has acted and is now acting as national distributor for the publications of several independent publishers, including the corporations named as respondents herein. Independent News, as national distributor of publications published by said respondents and other independent publishers, has performed and is now performing various services for these publishers. Among the services performed and still being performed by Independent News for the benefit of these publishers are the taking of purchase orders and the distributing, billing and collecting for such publications from customers. Independent News also had participated in the negotiations of various promotional arrangements with the retail customers of said publishers, including said respondents.

In its capacity as national distributor for respondents in dealing with the customers of respondents, Independent News served and is now serving as a conduit or intermediary for the sale, distribution and promotion of publications published by respondents.

PAR. 13. Respondents, through their conduit or intermediary, Independent News, have sold and distributed and now sell and distribute their publications in substantial quantities in commerce, as "commerce" is defined in the Clayton Act, as amended, to competing customers located throughout various States of the United States and in the District of Columbia.

PAR. 14. In the course and conduct of their business in commerce, respondents have paid or contracted for the payment of something of value to or for the benefit of some of their customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale or offering for sale of publications sold to them by respondents. Such payments or allowances were not made available on proportionally equal terms to all other customers of respondents competing in the distribution of such publications.

PAR. 15. As an example of the practices alleged herein, respondents have made payments or allowances to certain retail customers who operate chain retail outlets in railroad, airport and bus terminals, as well as outlets located in hotels and office buildings. Such payments or allowances were not offered or otherwise made available on proportionally equal terms to all other customers (including drug chains, grocery chains and other newsstands) competing with the favored customers in the sale and distribution of the publications of respondents. Among the favored customers receiving payments in 1960, and during the first six months of 1961, which were not offered to other competing customers in connection with the purchase and sale of respondents' publications were:

MALE PUBLISHING CORP.

Customer:	*Approximate Amount Received*	
	1960	*(Jan.–June) 1961*
ABC Vending Corp., Long Island City, N.Y.	$45.65	$11.25
Greyhound Post Houses, Forest Park, Ill.	3,711.92	567.82
Union News Co., New York, N.Y.	4,546.74	1,086.76
Garfield News, New York, N.Y.	548.16	128.16
Interstate Hosts, Los Angeles, Calif.	123.48	0
ATLAS MAGAZINES, INC.		
Greyhound Post Houses, Forest Park, Ill.	4,081.48	510.60
Sky Chefs, New York, N.Y.	260.65	27.98
Union News Co., New York, N.Y.	5,316.68	1,453.34
OFFICIAL MAGAZINE CORP.		
Greyhound Post Houses, Forest Park, Ill.	443.55	146.53
Union News Co., New York, N.Y.	1,748.40	390.00

Union News Co., New York, N.Y	2,596.92	1,411.19
Garfield News, New York, N.Y	425.14	100.90
Greyhound Post Houses, Forest Park, Ill	2,144.56	335.58

Respondents made said payments to their favored customers on the basis of individual negotiations. Among said favored customers such payments were not made on proportionally equal terms.

PAR. 16. The acts and practices of respondents as alleged above are in violation of the provisions of subsection (d) of Section 2 of the Clayton Act, as amended.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of subsection (d) of Section 2 of the Clayton Act, as amended, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent, Male Publishing Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 655 Madison Avenue, in the city of New York, State of New York.

Respondent, Atlas Magazines, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 655 Madison Avenue, in the city of New York, State of New York.

Respondent, Official Magazine Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the

State of New York, with its office and principal place of business located at 655 Madison Avenue, in the city of New York, State of New York.

Respondent, Canam Publishers Sales Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 655 Madison Avenue, in the city of New York, State of New York.

Respondent, Bard Publishing Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 655 Madison Avenue, in the city of New York, State of New York.

Respondent, Interstate Publishing Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 655 Madison Avenue, in the city of New York, State of New York.

Respondent, Hercules Publishing Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 655 Madison Avenue, in the city of New York, State of New York.

Respondent, Leading Magazine Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 655 Madison Avenue, in the city of New York, State of New York.

Respondent, Zenith Publishing Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 655 Madison Avenue, in the city of New York, State of New York.

Respondent, Vista Publications, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 655 Madison Avenue, in the city of New York, State of New York.

Respondent Martin Goodman is the controlling member of a partnership doing business under the trade name and style of Magazine Management Company. He is also an officer of each of said corporations and his address is the same as that of said corporations.

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

ORDER

It is ordered, That respondents Male Publishing Corp., Atlas Magazines, Inc., Official Magazine Corp., Canam Publishers Sales Corp., Bard Publishing Corp., Hercules Publishing Corp., Interstate Publishing Corp., Leading Magazine Corp., Zenith Publishing Corp., and Vista Publications, Inc., all corporations, their respective officers, and Martin Goodman, individually, as an officer of each of said corporations and as controlling member of a partnership doing business under the trade name and style of Magazine Management Company, and respondents' employees, agents and representatives, directly or through any corporate or other device, in connection with the distribution, sale or offering for sale of publications including magazines and comic books in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Paying or contracting for the payment of an allowance or anything of value to, or for the benefit of, any customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the handling, offering for sale, sale or distribution of publications including magazines and comic books published, sold or offered for sale by respondents, unless such payment or consideration is affirmatively offered and otherwise made available on proportionally equal terms to all of their other customers competing with such favored customer in the distribution of such publications including magazines and comic books.

The word "customer" as used above shall be deemed to mean anyone who purchases from a respondent, acting either as principal or agent, or from a distributor or wholesaler where such transaction with such purchaser is essentially a sale by such respondent, acting either as principal or agent.

For purposes of this order, the individual respondent named herein shall be presumed to formulate, direct and control the policies, acts and practices of any corporation or other business enterprise in which his beneficial interest exceeds fifty per cent (50%) of the total. The "beneficial interest" of said respondent, within the meaning of the foregoing, shall be deemed to include the beneficial interest of any and all members of his immediate family by blood or marriage. Nothing contained herein shall be construed to prevent a due showing by said respondent that he does not in fact formulate, direct and control

the policies, acts and practices of any corporation or other business enterprise.

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.

IN THE MATTER OF

THOMPSON-HAYWARD CHEMICAL COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC 2(a) OF THE CLAYTON ACT

Docket 7527. Complaint, June 26, 1959—Decision, July 31, 1962

Order dismissing, because of liquidation of the business concerned, complaint charging a manufacturer of liquid laundry bleach, with plants in Kansas and Texas, with price discrimination in violation of Sec. 2(a) of the Clayton Act.

COMPLAINT

Pursuant to the provisions of the Clayton Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Thompson-Hayward Chemical Company, a corporation, hereinafter referred to as respondent, has violated the provisions of subsection (a) of Section 2 of said Act (U.S.C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri. Its office and principal place of business is located at 2915 Southwest Boulevard, Kansas City 8, Mo.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the business of selling industrial and agricultural chemicals, some of which it manufactures, for use, consumption, and resale within various States of the United States. Respondent operates approximately 18 branches or divisions in 12 States, its total annual sales amounting to approximately $24 million.

Among said products which respondent manufactures is bleach, including liquid laundry bleach. One of its bleach plants is located in the State of Kansas and another in the State of Texas.

PAR. 3. Respondent is now, and for some time prior to the year 1954 has been, engaged in commerce, as "commerce" is defined in the Clay-

ton Act, as amended, in that it ships or causes to be shipped bleach from the State of Kansas to purchasers located in other States of the United States.

PAR. 4. During the year 1954 respondent established a bleach plant in Dallas, Texas, and since that time has been engaged in selling bleach to customers, including laundries, in the Dallas-Fort Worth, Texas, trading area. In the course of such sales of bleach, it has been and is competitively engaged with other corporations and with partnerships, firms, and individuals. The liquid laundry bleach manufactured at and sold and shipped from its Dallas plant was and is of like grade and quality with that manufactured at and sold and shipped from its Kansas plant.

PAR. 5. Prior to the year 1954 and since that time, respondent, in its sales of liquid laundry bleach to customers located in the Kansas City, Missouri, area, has charged the following prices:

Quantity	*Price*
1 only five gallon crate	$0.75 per gallon
2 to 4 five gallon crates	.50 per gallon
5 or more five gallon crates	.40 per gallon

Shortly after respondent opened its plant at Dallas, Texas, it began selling liquid laundry bleach in the Dallas-Fort Worth area at a price of $.25 per gallon in five-gallon crates and subsequently cut this price to $.20.

PAR. 6. Such differences in prices charged resulted in price discrimination. As a result of respondent's said pricing practices a substantial number of customers have been lost by its competitors to respondent, and said competitors have suffered a serious loss of business.

The effect of such discriminations in price made by respondent, as alleged herein, may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which said respondent is engaged, or to injure, destroy, or prevent competition with respondent.

PAR. 7. The foregoing acts and practices of respondent, as above alleged, violate Section 2(a) of the Clayton Act, as amended.

Mr. Brockman Horne supporting the complaint.

Mr. C. E. Lombardi, Jr., of *Caldwell, Blackwell, Oliver & Sanders*, for respondent, Kansas City, Mo.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

The Thompson-Hayward Chemical Company, a corporation, hereinafter called respondent, is charged with price discrimination in the

sale of liquid laundry bleach manufactured and sold by it, in violation of the provisions of subsection (a) of Section 2 of the Clayton Act (U.S.C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936.

In May, 1960, a four-day hearing was held at which time oral testimony and documentary evidence was received in support of and in opposition to the allegations of the complaint. Counsel supporting the complaint did not rest his case-in-chief at this hearing. The proceeding is now before the hearing examiner upon the motion filed by Commission counsel to dismiss the complaint on the ground that the matters in issue have become moot. Naturally, opposition to said motion to dismiss has not been filed.

The motion to dismiss is based upon an affidavit executed by R. S. Thompson, President of Leeds Investment Company, a Missouri corporation, formerly named Thompson-Hayward Chemical Company, the respondent herein. The affidavit, which is attached to the motion to dismiss filed by counsel supporting the complaint states, among other things, the following:

On June 1, 1961, Thompson-Hayward Chemical Company, the corporate respondent, exchanged all of its assets (including all assets used in the manufacture and sale of liquid laundry bleach), with the exception of a certain amount of cash retained for payment of expenses for shares of stock of Consolidated Electronics Industries Corp., a Delaware corporation, representing less than 8% of the total outstanding stock of that company; upon the completion of this exchange, the corporate respondent Thompson-Hayward Chemical Company changed its name to Leeds Investment Co. and distributed to its shareholders all of its assets with the exception of the cash referred to above, and a certain portion of said shares which it is required by the terms of its contract with Consolidated Electronics Industries Corp. to retain for a period of twelve months from June 1, 1961, to secure any claim of the latter company with respect to undisclosed liabilities; the said Leeds Investment Company is in the process of liquidation and upon the completion of the said twelve-month period, its liquidation will be completed; neither the said company nor its stockholders have any intention of entering the bleach business again; that the above-described transactions were entered into by reason of business considerations only, and not for the purpose of frustrating the pending complaint.

The affidavit further states that the assets acquired by Consolidated Electronics Industries Corp. were transferred to a wholly owned subsidiary, a Delaware corporation, which has been named Thompson-

Hayward Chemical Company; that most of the managerial and operating personnel of the old Thompson-Hayward Chemical Company, respondent in this proceeding, have become employees of the new Thompson-Hayward Chemical Company, a Delaware corporation, although Mr. C. T. Thompson, who was the chief executive officer and determined the policy of the old company, is not active in the management of the new company, and policy and operational management of the new company are governed by the Board of Directors and management of Consolidated Electronics Industries Corp. in cooperation with the Board of Directors and local management of its subsidiary, the new Thompson-Hayward Chemical Company; and neither the old company nor its stockholders were in any way related to the new company prior to the above-described transaction.

The motion to dismiss states that the address of Consolidated Electronics Industries Corp. is 100 East 42nd Street, New York 17, New York. The motion further states that, by reason of the facts set out in the affidavit and which are recited above, the case pending against the corporate respondent is moot and no purpose will be served by further prosecution of this proceeding.

The hearing examiner has considered said motion to dismiss and the contents of the affidavit and is of the opinion that it will not be in the public interest to further litigate the acts and practices alleged to have been performed by the corporate respondent prior to its change of name and acquisition by Consolidated Electronics Industries Corp. and dissolution. Accordingly,

It is ordered, That the complaint in this proceeding be, and the same hereby is, dismissed.

DECISION OF THE COMMISSION

Pursuant to Section 4.19 of the Commission's Rules of Practice, effective June 1, 1962, the initial decision of the hearing examiner shall, on the 31st day of July 1962, become the decision of the Commission.

IN THE MATTER OF

GIANT FOOD, INC.

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

Docket 7773. Complaint, Feb. 4, 1960—Decision, July 31, 1962

Order requiring a large chain store distributor of food and other merchandise, with more than 50 retail outlets in Maryland, Virginia, and the District

of Columbia, to cease representing falsely in advertising, by means of comparative price claims—such as setting forth a higher "Reg. Price" or "Mfr." or "Mfg. List" price together with a lower offered price—that the higher amounts were the usual retail prices in the trade area and that customers buying at the lower amounts were afforded savings in the amount of the difference between the two.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Giant Food, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Giant Food, 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 6900 Sheriff Road, Landover, Md.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of food and other merchandise to the public.

PAR. 3. Respondent operates a chain of over 40 retail stores located in the States of Maryland and Virginia and in the District of Columbia. Most of said retail stores are designated as "Giant Food" stores, however, a number of the stores are designated as "Super Giant" stores. The "Super Giant" stores differ from the other stores operated by respondent only in size and in the proportion of non-food items carried. The "Super Giant" stores are all located in the States of Maryland and Virginia; none being located in the District of Columbia.

In the course and conduct of its business respondent now causes, and for some time last past has caused, said food and other merchandise to be shipped from its place of business located in the State of Maryland to its retail stores located in the State of Virginia and in the District of Columbia. Said retail stores are engaged in the sale of said products to purchasers located in a State other than that in which the shipments have, or had, their origin and to customers residing within the District of Columbia.

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

PAR. 4. In the course of conduct of its business, and for the purpose of inducing the sale of its said products, respondent has made certain statements with respect to the pricing of said products, in advertisements in The Washington Post, The Evening Star, and The Daily News, newspapers having a wide circulation in the District of Columbia, the States of Maryland and Virginia, and the various other States of the United States. Among and typical, but not all inclusive, of said statements are the following:

(1) Regina Twin Brush Waxer #400 Reg. Price $66.00. Adv. Price $35.47
(2) Regina Electric Broom #600 Reg. Price $49.95. Adv. Price $25.97
(3) Proctor Steam & Dry Iron #10010 Reg. Price $15.95. Adv. Price $8.47
(4) G.E. Steam, Spray & Dry Iron #F61 Reg. Price $21.95. Adv. Price $12.97
(5) Sunbeam #12 Mixmaster Less Juicer Reg. Price $46.95. Adv. Price $29.97
(6) Sunbeam Large Fry Pan Reg. Price $23.97. Adv. Price $14.97
(7) G. E. Spray Steam Iron—$13.97—Mfg. List $21.95
(8) G.E. Automatic Toaster—$13.27—Mfg. List—$19.95
(9) G.E. Portable Mixer—$13.27—Mfg. List $19.95
(10) G.E. Peek-A-Brew Coffee Maker $13.47—Mfg. List $19.95
(11) Regina Twin Brush Waxer—$35.47—Mfg. List $66.00
(12) Regina Electric Broom—$25.97—Mfg. List $49.95
(13) Regina Polisher & Floor Waxer—$34.97—Mfg. List $64.50
(14) Borg Bathroom Scales—$4.97—Mfr. List $7.95.
(15) Sunbeam Automatic Electric Percolator—$18.97—Mfr. List $27.95
(16) Sunbeam—Medium Fry Pan—$13.37—Mfr. List $19.95—Large Size—$15.97—Mfr. List $23.95
(17) Sunbeam Hand Mixer—$13.97—Mfr. List $21.00
(18) Sunbeam Mixmaster $24.88—Manufacturer List Price $37.95
(19) Sunbeam Toaster—Mfr. List $29.95—19.97
(20) Revere Ware Complete Selection 35% off You Buy For Cash & Save:

	Regular Price	*Super Low Price*	*Giant Price*
A. 1 qt. Covered Sauce Pan	$5.25		$3.41
A. 1½ qt. Covered Sauce Pan	6.25		4.06
A. 2 qt. Covered Sauce Pan	7.50		4.87
B. Revere Egg Poacher	10.95		7.11
C. 1½ qt. Double Boiler	10.50		6.82
C. 2 qt. Double Boiler	11.75		7.63
D. 8 in. Covered Skillet	7.75		5.03
D. 10 in. Covered Skillet	10.75		6.98
D. 12 in. Covered Skillet	13.50		8.77
E. 2½ qt. Tea Kettle	4.95		3.21
F. 6 cup Coffee Maker	11.50		7.47
F. 8 cup Coffee Maker	12.50		8.12
G. 6 qt. Dutch Oven	13.95		9.06

In other advertisements the same prices are set forth in connection with the above Revere Ware with the higher prices designated as "Mfg. List" instead of "Regular Price".

PAR. 5. Through the use of the aforesaid statements, and others similar thereto not included herein, respondent represented that:

1. The amounts designated as "Reg. Price" and "Regular Price" were the prices at which the products advertised had been sold at retail by respondent in the recent, regular course of its business.

2. The amounts designated as "Mfg. List", "Mfr. List" and "Manufacturer List Price" were the prices at which the products advertised were usually and customarily sold at retail.

3. The purchasers of the products advertised are afforded savings equal to the differences between the higher and lower prices listed in said statements.

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

1. Said products had not been customarily and usually sold at retail by respondent in the recent, regular course of its business for the amounts set out in the advertisements as "Reg. Price" and "Regular Price".

2. The amounts designated as "Mfg. List", "Mfr. List" and "Manufacturer List Price" were, and are, substantially in excess of the prices at which said products were, and are, usually and customarily sold at retail.

3. The purchasers of said products are not afforded savings equal to the differences between the higher and lower prices listed in said statements.

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

PAR. 8. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondent from its competitors and substantial injury has thereby been, and is being, done to competition in commerce.

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

tion, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Ames W. Williams for the Commission.

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

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

Giant Food, Inc., respondent, has used false, misleading and deceptive advertising in violation of the Federal Trade Commission Act, as charged in the complaint. This deception should be stopped. A cease and desist order is being issued for that purpose.

PRELIMINARY STATEMENT

The complaint, issued February 4, 1960, charges respondent Giant Food, Inc., with violating the Federal Trade Commission Act by the publication in its advertisements of Manufacturer's List Prices, or "Regular Prices" as a comparative price in close proximity to and juxtaposition to its actual sales price for housewares, electrical appliances and other merchandise in such a manner as to mislead and deceive the purchasers as to the actual savings to be made by purchasing at Giant's sales price. Respondent's answer to the complaint asserted several special affirmative defenses, any one of which, if proven, would have required the hearing examiner to dismiss the proceeding.

In formal hearings Giant presented in full all of its evidence in support of the affirmative defenses. Thereafter, the hearing examiner, on July 15, 1960, in a formal written ruling rejected and denied all such affirmative defenses. The July 15, 1960, ruling is incorporated herein by reference and made a part hereof as though fully set forth.

Giant's defense to its deceptive advertising practices is that the use of a "regular" price as a comparative price has been abandoned and the use of Manufacturer's List Prices in the advertisements are for identification purposes only, and *in fact* do not mislead the prospective purchaser. A small print disclaimer to this effect was published in some of Giant's advertisements and will be discussed later in this decision.

Counsel supporting the complaint completed his evidence in support of the case-in-chief almost a year ago. The proceeding has been protracted by two interlocutory appeals of respondent's counsel. These appeals were an asserted attempt to obtain a subpoena duces tecum

which would have permitted Giant to examine confidential business records of Woodward & Lothrop, the Hecht Company, and S. Kann Sons Co. The evidence was, for the most part, irrelevant to the chief issue in this case. After the Commission had ruled favorably on these stores' motions to quash and limit the subpoena, Giant, at a hearing on September 18, 1961, refused to take a return of the subpoenas and to examine witnesses and papers which had been brought into the hearing room in response to the subpoena.

Giant's overall tactics in this proceeding, its abuse of the subpoena power of the Commission, and attempts to obtain confidential information from its competitors to which it is not entitled require no extensive comment.

Giant has also reasserted in this proceeding a defense which it had unsuccessfully asserted on several previous occasions, and which was rejected by the Federal Trade Commission, namely that Giant is a packer under the Packers & Stockyards Act of 1921, as amended, and therefore exempt from Federal Trade Commission jurisdiction. At the time that it presented the "Packer" defense, Giant knew that the same defense had been rejected previously by the hearing examiner and the Federal Trade Commission in Docket No. 6459, *Giant Food, Inc.* Giant's subterfuge in purchasing 100 shares of Armour & Company stock to lend color to its claimed exclusion from Federal Trade Commission jurisdiction under the Packers & Stockyards Act is apparent.

The complaint alleges that Giant's use in its advertisements of "Regular" or "Manufacturer's List" prices as a basis for comparison with its actual sales price stated in such advertisements is false, misleading and deceptive under the Federal Trade Commission Act. Counsel supporting the complaint has proven the material and essential allegations thereof by a preponderance of reliable, probative and substantial evidence in this record. This decision is based upon a consideration of the whole record.

Counsel have filed proposed findings, conclusion and order in accordance with Commission rules. The findings of fact and conclusions of law stated in this opinion are based upon a consideration of the entire record including the exhibits which have been received. Any findings or conclusions proposed by the parties which are not made in the precise form in which they were proposed, or in substantially that form, hereby are rejected. The fact that no finding or conclusion in this opinion summarizes the evidence in the precise manner in which either of the parties has requested such facts to be summarized does not mean that the hearing examiner has not considered such evidence. It means merely that the examiner deems the

evidence which has been summarized in the findings of facts to be sufficiently preponderant, probative, substantial and material when viewed in the light of the relevant law to dispose of the issues. All motions made by the parties which have not heretofore been ruled upon hereby are overruled and denied. Based upon the entire record, the hearing examiner makes the following:

FINDINGS OF FACT

1. Respondent Giant Food, Inc., a Delaware corporation, with its principal office at 6900 Sheriff Road, Landover, Maryland, operates a chain of more than 50 retail grocery stores and supermarkets concentrated chiefly in the District of Columbia and in the adjoining counties in the States of Maryland and Virginia, but it has stores as far north as Baltimore, Maryland, and as far south as Richmond, Virginia. Its annual sales for the fiscal year ended April 29, 1961, were $146,877,679. Respondent's earnings per share of common stock increased from $1.08 for the fiscal year ending April 29, 1960 to $1.46 for the fiscal year ending April 29, 1961.

2. Giant is principally engaged in the sale at retail of food and non-food merchandise to the consuming public in the Washington Metropolitan Area, Tidewater Virginia, southern Maryland and the Baltimore Metropolitan Area. The Washington Metropolitan Area generally means in this decision the District of Columbia, Arlington and Fairfax Counties, and Alexandria in the State of Virginia, and Montgomery and Prince Georges Counties in the State of Maryland.

3. Giant sells at retail food and food products including meat, meat food products, sausages, beef dinners, pot pies, meat loaf, dairy products (including ice cream), poultry, poultry products, including turkey and chicken dinners and turkey and chicken pot pies, eggs, and all of the other food and non-food items which are usually and customarily sold in the modern chain grocery store or supermarket in the Washington Metropolitan Area. Giant also sells at retail a variety of small durable consumer goods generically described as small housewares and electrical appliances. These include, among other things, radios, toasters, waxers, irons, ironing boards, electric mixers, pots and pans, percolators, and assorted varieties of coffee makers, brooms, skillets, electric clocks, glassware, flatware, dinnerware, and items in similar and related categories. Giant also sells other durable goods and a variety of soft goods, including men's, women's and children's clothing, household linens, cosmetics, drugs, soaps and detergents.

4. Respondent Giant is engaged in commerce as "commerce" is defined in the Federal Trade Commission Act as amended. This pro-

ceeding is in the public interest. Counsel supporting the complaint has proven all of the material and essential allegations of the complaint by a preponderance of reliable, probative and substantial evidence in this record. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding.

5. Giant maintains, and at all times relevant to this proceeding has maintained, a substantial course of trade in its products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

6. In the course and conduct of its business, and for the purpose of inducing the sale of its electrical appliances and kitchen utensils, Giant has made certain statements with respect to the pricing of said products, in advertisements in the Washington Post, the Washington Evening Star, and the Washington Daily News, newspapers having a wide interstate circulation in the Washington Metropolitan Area. Among and typical, but not all inclusive, of said statements are the following:

(1) Proctor Steam & Dry Iron #10010 Reg. Price $15.95. Adv. Price $8.47
(2) G-E Steam, Spray & Dry Iron #F61 Reg. Price $21.95. Adv. Price $12.97
(3) Sunbeam #12 Mixmaster Less Juicer Reg. Price $46.95. Adv. Price $29.97
(4) Sunbeam Large Fry Pan Reg. Price $23.97. Adv. Price $14.97
(5) G.E Automatic Toaster $13.27. Mfg. List $19.95
(6) G.E. Portable Mixer—$13.27. Mfg. List $19.95.
(7) G.E. 'Peek-A-Brew' Coffee Maker $13.47. Mfg. List $19.95
(8) Regina Twin Brush Waxer Adv. price $35.47. reg. price $66.00
(9) Regina Electric Broom #600—24.97 Adv. price. Reg. Price $49.95
(10) Regina Polisher & Floor Waxer—$34.97. Mfg. list $64.50
(11) Borg Bathroom Scales—$4.97. Mfg. List $7.95
(12) Sunbeam Automatic Electric Percolator—$18.97. Mfr. list $27.95
(13) Sunbeam Handmixer—$13.65. mfr. list $21.00
(14) Sunbeam Mixmaster $24.88—mfr. List 37.95
(15) Sunbeam Toaster—mfr. list $29.95. $19.97
(16) Revere Ware Complete Selection 35% off You Buy For Cash & Save:

	Regular Price	*Super Giant Low Price*
A. 1 qt. Covered Sauce Pan	$5.25	$3.41
A. 1½ qt. Covered Sauce Pan	6.25	4.06
A. 2 qt. Covered Sauce Pan	7.50	4.87
B. Revere Egg Poacher	10.95	7.11
C. 1½ qt. Double Boiler	10.50	6.82
C. 2 qt. Double Boiler	11.75	7.63
D. 8 in. Covered Skillet	7.75	5.03
D. 10 in. Covered Skillet	10.75	6.98
D. 12 in. Covered Skillet	13.50	8.77
E. 2½ qt. Tea Kettle	4.95	3.21
F. 6 cup Coffee Maker	11.50	7.47
F. 8 cup Coffee Maker	12.50	8.12
G. 6 qt. Dutch Oven	13.95	9.06

In other advertisements the same prices are set forth in connection with the above Revere Ware with the higher prices designated as "Mfg. List" instead of "Regular Price."

7. In Giant's aforementioned advertisements in which it used the manufacturer's list price as a means of comparison, the following disclaimer appeared at the bottom of the ad in fine print:

The manufacturer's list prices referred to in this advertisement are inserted to assist you in identification of the products and to allow you to compare accurately the selling prices offered here and elsewhere. The use of the term "manufacturer's list" or similar terminology in our advertising is not to imply that Giant has ever sold the advertised products at such list prices or that the products are being offered for sale generally in the area at such list price. Many reputable national brand manufacturers issue to retailers, from time to time, suggested retail list prices that are intended to afford reasonable profits to all retailers based upon their traditional cost of marketing. Giant's employment of self-service, supermarket techniques enables it usually to sell below suggested list prices. Consumers, however, have come to recognize most brand merchandise by the list prices, rather than by model numbers. Consequently Giant includes these manufacturer's list prices so that you may make simple, intelligent comparisons between our selling prices and those of others.

The evidence in this record fails to prove many of the statements made by Giant in the above disclaimer. Commission witnesses testified and the examiner finds as a fact that very few if any of the persons who would read Giant's advertisements would take the trouble to, or did, read the fine print disclaimer. Moreover, there is no proof in this record that the manufacturer's list price furnished a means and was used by the purchasing public as identification of the articles offered for sale. There is consumer evidence to the contrary, *infra*. The evidence proves and the examiner finds that there are non-deceptive identification designations such as model numbers and catalog descriptions which could have been used by Giant in its advertisements. All of Giant's items of merchandise advertised in the exhibits in this record were not usually and customarily sold for the manufacturer's list price or the suggested retail price in its trade area in the recent regular course of business but were in fact sold for less than such list price.

8. Through the use of the aforesaid advertisements and others similar thereto, respondent represented, contrary to the fact, that:

(a) The amounts designated as "regular," "former" or "usual" prices were the prices at which the products advertised had been sold at retail by Giant in the recent, regular course of its business in the Washington Metropolitan Area;

(b) The amounts designated as "Mfg. List," "Mfr. Suggested List" and "Manufacturer List Price" were the prices at which the products

advertised were usually and customarily sold by other retailers in the recent, regular course of business in the trade area involved; and

(c) Giant's customers would save the difference between the sales price and the comparative price by purchasing the advertised articles from Giant in preference to any other retailer in Giant's trade area.

9. Giant's own employees have admitted the deception inherent in its challenged advertisements. At page 357 the following colloquy between counsel supporting the complaint and Mr. Will Y. Belote (a buyer for Giant) took place:

Q. I think you testified with respect to respondent's Exhibit No. 10, that the comparable value stated on there was the manufacturer's list price of those particular items?

A. I think I stated that the prices shown as comparable value and the manufacturer's——

Q. Are the same?

A. Yes, sir.

Q. Do you equate comparable value with manufacturer's prices or suggested list prices, or suggested retail list prices?

A. Well, my opinion—if that is what you are asking for—show *this type of advertising is more misleading*——.

Q. I didn't ask you that, I ask if you——

Mr. DICKEY: Just a minute. He has a right to answer that question. He asked if he equates it, and that is an opinion, and he has a right to give his answer.

HEARING EXAMINER: He may answer.

THE WITNESS: My opinion is that *this type of advertising is more misleading* than if they had put the manufacturer's suggested list. You compare with what? Comparable value. Mrs. Consumer doesn't know what comparable value is in my way of thinking.

By Mr. Williams:

Q. But your answer is that you do equate it with list price?

A. As an expert in the field, I do, yes. (Italic supplied.)

10. The record contains substantial evidence in the form of testimony of consumer witnesses, which is uncontradicted, to the effect that Giant's advertisements containing the manufacturer's list price of household electrical appliances placed in juxtaposition to the respondent's lower offering prices for the same merchandise, lead readers of such advertisements to believe that the higher price is the price at which the merchandise is usually and customarily sold by the respondent or others in the recent regular course of business in the trade area involved.

Witness Carroll D. Wade testified (Tr. 181 *et seq.*) with reference to an advertisement of a "toastmaster toaster, $14.47, Manufacturer's list, $21.00." "Well, by this I would think that you are selling it for

$14.47 where it normally sells for $21. That this is a bargain, it is a savings."

The witness further indicated that he had not previously noticed the disclaimer in the advertisement (CX–8). After reading the disclaimer, the witness repeated that he thought the advertisement still meant a savings between the two prices given (Tr. 192).

Donald L. Leavitt testified (Tr. 202) that the manufacturer's list price of $64.50 appearing in CX–4 "implied the normal selling price of the article." This price appears in juxtaposition to respondent's offering price of $34.97. Upon cross-examination, this witness stated that the disclaimer of respondent's advertisement was not the kind of thing one would notice and that its meaning was "unclear" (Tr. 210).

Mrs. Barbara Dilley (T. 216) testified that the advertisement for the Cory Jewel Knife Sharpener, $8.97, Manufacturer's Suggested List $19.95 (CX–8) meant that Giant sells knife sharpeners at a lower price than any other retailer would sell them. After reading Giant's disclaimer, Mrs. Dilley was of the opinion that the advertisement meant to her that other retailers sold the knife sharpeners at approximately the manufacturer's list price and Giant sold it for less than the other retailers. "But on the bottom it said that you compare Giant's prices with those of others which to me still suggests that they sell close to the manufacturer's list price but Giant still sells lower."

Mrs. Vera Davis (Tr. 237) testified that Giant's advertisement meant to her that the lower prices would be what she would pay if she went to Giant, and the manufacturer's list prices would be what she would pay if she went to other stores to buy the same article. After having been shown Giant's disclaimer at the bottom of the ad, Mrs. Davis testified (Tr. 245): "I can't answer that because I don't understand what that means." She testified on cross-examination that in her opinion Giant's disclaimer does not in any way ameliorate the deception in the advertisements.

Mrs. Mary K. Hunt testified (Tr. 250) that Giant advertisements meant to her that Giant sells the Toastmaster toaster for $14.47 and other stores sell it for the manufacturer's list price of $21 (CX–8).

Miss Dorothy Bonsall (Tr. 258) testified with respect to the Toastmaster toasters advertisement in CX–8 that the $14.47 price is the sales price and that the article is supposed to sell for the $21.00 list price. Mrs. Bonsall stated on cross-examination that she would not ordinarily, in reading Giant's ad, pay any attention to the fine print disclaimer on CX–8, and that the disclaimer was, as far as she was concerned, "double talk" (Tr. 266).

Miss Elsie Wilkerson (Tr. 269) testified with respect to CX–8 that the advertisement for the toaster for $14 by Giant was "a great saving over the regular price that it sold for of $21-something." Miss Wilkerson, on cross-examination, testified (Tr. 283): "Well, on an ad, if I see the two figures and it has the manufacturer's list price or suggested list price I would think that it was normally sold at that price and whatever the other figure was, the lower figure, was my saving by buying it through the Giant Food Store."

The testimony of each and all of the above witnesses makes it abundantly clear that the public was deceived by Giant advertisements into believing that the prices at which articles were sold by Giant represent a saving from the manufacturer's list price which was published in close proximity to the sales price.

Lawrence Solomon of Giant's staff, admitted (Tr. 9–17) that Giant had used the term "regular price" as a comparative price in its advertisement when in fact this was not the price at which that article had been sold by Giant in the recent, regular course of its business. Around October 1, 1959, the use of the term was abandoned. There is no evidence in this record to justify a finding that the deceptive use of the words "regular," "former" or "usual" or synonyms therefor, by Giant as a comparative price in its advertisements will not be resumed unless the practice is proscribed by a cease and desist order.

It is probable even though irrelevant, and not proven in this record, that a few retailers in Giant's trade area do and did sell the advertised articles at the manufacturer's list price. The greater weight and preponderance of the evidence is to the contrary.

11. Giant has placed in the record as exhibits certain items of housewares, electrical appliances (and sales slips therefor). A representative of Giant testified that he purchased from The B. F. Goodrich Store, 3500 North Fairfax Drive, Arlington, Virginia, and the Firestone Stores, 1100 North Highland Street, Arlington, Virginia, during the course of this proceeding such items for the prices stated opposite the item:

1—14C36 Mixer S.B	$46.95
1—14C35 Mixer S.B	37.95
1—14A162 Coffee Maker S.B	27.95
1—14A364 Fry Pan, SB Large	23.95
1—14C38 G.E. Mixer	19.95
1—14A168 G.E. Peek Brew	19.95
1—14A17 SU Beam Toaster	29.95

Giant offered this evidence to prove that it was possible to buy the articles advertised by it for the manufacturer's list price. However,

Giant's evidence does not support such finding. The best evidence would have been to produce for interrogation representatives from Goodrich and Firestone who could have testified from their own knowledge as to its sales practices and who would have been available for cross-examination.

12. Representatives for the Hecht Company, S. Kann's and Woodward & Lothrop (whom the examiner hereby finds to be competent and qualified to testify thereon) have testified, and that testimony is not contradicted, that the items advertised by Giant were not usually and customarily sold at retail in the recent, regular course of business in the trade area involved at the manufacturer's list prices advertised by Giant, but were sold for less. Allen Schweitzer, small appliance buyer for the Hecht Company, Mrs. Ethel Pillsbury, buyer of small appliances for Kann's, Maurice L. Shofnos, buyer of housewares for Kann's, Renato De Vito, electrical appliance buyer for Woodward & Lothrop, and Elmer N. Cornwell, buyer of household goods and kitchen utensils for Woodward & Lothrop, all testified to this effect. The examiner takes judicial notice of the fact and finds that Woodward & Lothrop, Hecht's, and Kann's operate in the aggregate more than 12 large modern department stores in the Washington Metropolitan Area. These stores sold at less than manufacturer's list price the same items of electrical appliances and housewares which were advertised and sold by Giant.

The merchandise here involved was not sold at the "regular" or "manufacturer's list prices" used in Giant's advertisements in the recent, regular course of business in the trade area involved either by Giant or by most of its competitors.

13. Giant acquired 100 shares of the common capital stock of Armour & Company on March 21, 1958, and continues to hold said shares. Armour & Company is a meat packer, as defined by the Packers & Stockyards Act of 1921, as amended.

There is nothing in this record to indicate that Giant operates its meat departments any differently from the manner in which other large grocery chains and supermarkets (including but not limited to Kroger, Safeway, A & P, Acme, Grand Union, Food Fair, etc.) operate their meat departments in Giant's trade area.

14. Giant has voluntarily filed with the U.S. Department of Agriculture certain forms which are prescribed by that Department for business concerns seeking to register with that Department pursuant to the Packers & Stockyards Act of 1921, as amended (7 U.S.C. 191 et seq.).

15. Giant is not a packer under the Packers & Stockyards Act of 1921, as amended, so as to be exempt from jurisdiction of the Federal Trade Commission in connection with the false, misleading and deceptive acts and practices charged against it in this complaint. (See Examiner's Ruling dated July 15, 1960, on Respondent's Special Defenses; also the Commission's Opinion in Docket No. 6459, Giant Food, Inc., which is incorporated herein by reference and specifically made a part hereof.)

16. Giant competes with many other business establishments in its trade area in the sale of durable consumer goods, small housewares and electrical appliances. Among Giant's competitors are: George's, Todd's, Western Auto, Firestone, Goodyear, Montgomery Ward, Sears Roebuck, Peoples Hardware, Kay-Frank-Ross, Hecht's (May Dept. Stores Company), Woodward & Lothrop, S. Kann & Sons Co., Lansburgh's, Dalmo's, Slattery's, Drug Fair, Peoples Drug Stores, W. Bell & Company, Fields & Company, Spiegel's. Giant also competes with wholesale distributors who retail small housewares and electrical appliances to employees of business firms through private arrangements with such firms. Giant competes with small independent neighborhood business concerns in the sale of small housewares and electrical appliances.

17. Manufacturers of durable goods, including small housewares and electrical appliances, publish documents which they distribute to customers in which they designate the price at which such manufacturers suggest that their merchandise be sold at retail. These prices are interchangeably referred to as "manufacturer's list price," "manufacturer's suggested retail price," "suggested retail price," "list price," or some abbreviations or synonyms therefor. These list prices are sometimes made known to retailers by means of catalogues, price sheets, and price lists. They are also in many instances attached by the manufacturer to the article to be sold by preticketing such article with the suggested retail price. Except in those jurisdictions in which Fair Trade laws are in effect and are enforced by the courts, the establishment and publication of a manufacturer's list price creates no legal obligation upon the retailer to sell the article at the manufacturer's suggested list price, whether that price is stated in a list, catalogue, or by preticketing.

18. The manufacturers advertised the mechandise here involved in the Washington Metropolitan Area with the manufacturer's list price stated, in publications of national circulation such as Life, McCall's, Look and The Saturday Evening Post.

19. The Electric Institute of Washington maintains a display room at Tenth & E Streets, N.W., Washington, D.C., in which many types

of electrical appliances are displayed and demonstrated to the consuming public in the Washington Metropolitan Area. The Institute is a trade association, the members of which include all segments of the electrical appliance industry, that is, manufacturers and distributors as well as retailers, Giant is not a member of the Institute. Attached to the appliances displayed at the Institute there is ordinarily a tag upon which there is inscribed, among other things, a description of the article, the model number, catalogue number, and identifying marks other than the manufacturer's list price of such article. The manufacturer's list prices shown upon the appliances displayed in the Institute are higher than the prices at which such articles are usually and customarily sold in the Washington Metropolitan Area, and the Institute does not in any way represent that the list price shown is the usual and customary retail price in the Washington Metropolitan Area.

20. Many of Giant's retail customers and many of the customers of its competitors live or work in Maryland, Virginia, or the District of Columbia but shop outside of the area in which they live or work.

21. In the conduct of its business at all times relevant to this proceeding, Giant has been in substantial competition in commerce with corporations, firms and individuals in the sale of products of the same general kind and character as those items of housewares and electrical appliances which are the subject matter of this proceeding.

22. Giant's use of false, misleading and deceptive statements and representations in its advertisements has had, and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true; and into the purchase of a substantial quantity of Giant's products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to Giant from its competitors and substantial injury has thereby been, and is being done to competition in commerce.

23. The deceptive acts and practices of Giant which are described in this opinion were, and are, prohibited by the Federal Trade Commission Act and the public interest requires that they should be proscribed by an appropriate cease and desist order.

Discussion

Two separate price deceptions are involved in Giant's advertisements in this record, and they require the application, in part, of slightly differing ratio decidendi:

The words "usual," "regular," or "formerly," or even the words "our price" all imply that the price to which these words are applied is the price at which Giant usually and customarily sold the identical merchandise in the recent, regular course of its business in the trade area involved. See Commission's Opinion of January 17, 1961, in Docket No. 7657, *Arnold-Constable Corp.; Bankers Securities Corp.*, Docket No. 7039; *FTC* v. *Mandel Bros., Inc.*, 359 U.S. 355 (1959); *The Fair* v. *FTC*, 272 F. 2d 609 (C.A. 7); and *Bond Stores, Inc.*, Docket No. 6789, Commission's Opinion of January 7, 1960. The record in this case is undisputed that these words were deceptively used by Giant in the light of the relevant legal precedents. However, Giant seeks to avoid the consequences of this deceptive advertising saying, "We'll never do it again." This is characterized as a plea of abandonment. In order for such plea to be allowed, there must be evidence in the record which would support a finding that the respondent will not resume such practices at a later date. There is no evidence in this record to support such a finding and the plea of abandonment is rejected because the facts do not support such a plea, nor do the accepted legal precedents. See *Argus-Camera, Inc.*, 51 F.T.C. 405 (1954); *Dietzgen Co.* v. *FTC*, 142 F. 2d 321 (C.A. 7, 1944); *Firestone Tire and Rubber Co.*, Docket No. 7020; *Wildroot Co., Inc.*, 49 F.T.C. 1578 (1953); *Bell & Howell Co.*, Docket No. 6729; *United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953). See also Commission's Opinion of March 9, 1961, in Docket No. 7660, *Colgate-Palmolive Co.*

A decision by another hearing examiner of this Commission on June 28, 1961, in Docket No. 8134, *George's Radio & Television Co., et al.*, concludes:

> The use of a manufacturer's suggested retail price in advertising in commerce when such price is placed in juxtaposition with a lower price, constitutes an unfair or deceptive act or practice where such suggested retail price is neither the usual and customary price at which the advertiser sold in the recent regular course of business nor the usual and customary price of a fair cross section of other comparable stores in the trade area * * *.

That examiner issued a cease and desist order and the matter is now on appeal to the Commission. This examiner concurs in the ratio decidendi in the *George's* case, and adopts it legal yardsticks for measuring the deception in the use of manufacturer's list prices as a comparative price in advertising.

It is helpful to measure the deception in using manufacturer's list prices for comparison in advertising by restating certain legal shibboleths:

It is in the public interest to prevent the sales of commodities by the use of false and misleading statements and representations.[1] Capacity to deceive and not actual deception is the criteria by which practices are tested under the Federal Trade Commission Act.[2] To tell less than the whole truth is a well-known method of deception; and he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which it has been accomplished.[3] "A statement may be deceptive even if the words may be literally or technically construed so as to not constitute a misrepresentation * * *. The buying public does not weigh each word in an advertisement or misrepresentation. It is important to ascertain the impression that is likely to be created upon the prospective purchaser."[4] Advertisements are not to be judged by their effect upon the scientific or legal mind, which will dissect and analyze each phrase, but rather by their effect upon the average member of the public who more likely will be influenced by the impression gleaned from a first glance.[5]

There is ample testimony in this record as to the meaning of the representations in the Giant advertisements but even had there not been any such consumer testimony such omission would not materially affect the results.[6] The law is violated if the first contact or interview is secured by deception,[7] even though the true facts are made known to the buyer before he enters into the contract for purchase.[8]

In *Clinton Watch Co., et al.* v. *FTC*, 291 F. 2d 838 (June 19, 1961, C.A. 7), which was a preticketing case, the court, *inter alia*, stated:

> Misrepresentation as to the retail value of merchandise by means of an attached, fictitious price and deception as to savings afforded by the purchase of the product at a substantially lower price than that indicated thereon constitute unfair methods of competition. *Niresk Industries, Inc.* v. *Federal Trade Commission*. 278 F. 2d 337, 340 (7th Cir. 1960), cert. denied 364 U.S. 883; *Harsam Distributors, Inc.* v. *Federal Trade Commission*, 263 F. 2d. 396, 397 (2d Cir. 1959).

The explosive growth of "Discount" establishments in our national business life has, along with other drastic changes in retailing methods, posed as never before the importance of maintaining truthful advertising, particularly in the area of the use of comparative prices.

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[1] *Parke, Austin & Lipscomb* v. *FTC*, 142 F. 2d 437, citing *L. & E. Mayer Co.* v. *FTC*, 97 F. 2d 365, 367.
[2] *Goodman* v. *FTC*, 244 F. 2d 584, 604 (C.A. 9th 1957).
[3] *P. Lorillard Co.* v. *FTC*, 186 F. 2d 52, 58 (C.A. 4th 1950).
[4] *Kalwajtys* v. *FTC*, 237 F. 2d 654, *cert. den.* 352 U.S. 1025.
[5] *Ward Laboratories, Inc., et al.* v. *FTC*, 276 F. 2d 952, 954 (C.A. 2d 1960).
[6] *Charles-of-the-Ritz* v. *FTC*, 143 F. 2d 676 at 680.
[7] *FTC* v. *Standard Education Society*, 302 U.S. 112, 25 F.T.C. 1715.
[8] *Progress Tailoring Co., et al.* v. *FTC*, 153 F. 2d 103, 104, 105 (7th Cir.).

The entire thrust of the "Discount" idea is that the 180 million average Americans who buy at discount houses are getting a discount from Something. Just what is being discounted? The same legal principles which have been restated above will eventually have to be applied with meticulous care to discount house advertising if the Congressional intent with reference to deceptive practises is to be carried out. But that is not before us at this time. It serves only to emphasize the basic problems posed by the use of comparative pricing in advertising, regardless of whether the comparative prices are designated as "regular," "usual," "formerly," or manufacturer's list."

It should be further noted that there is presently pending before a hearing examiner of this Commission, Docket No. 8232, The Regina Corporation, et al., in which the companion problem is presented of whether the manufacturers who promulgate manufacturers' list prices do not furnish the means and instrumentalities by which the retailer is able to practice the deception which has been proved against Giant in this record.

The facts in this record measured against the applicable law justify the following:

CONCLUSIONS

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

2. Counsel supporting the complaint has proven the material and essential allegations of said complaint by a preponderance of the reliable, probative and substantial evidence in this record.

3. Giant's advertising practices as proven in this record are false, misleading and deceptive within the intent and meaning of the Federal Trade Commission Act as amended, and ought to be proscribed.

It is ordered, That respondent, Giant Food, Inc., a Delaware corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of household electrical appliances, kitchen utensils, or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing in any manner that certain amounts are the regular and usual retail prices of merchandise when such amounts are in excess of the prices at which such merchandise has been usually and regularly sold by the respondent at retail, in the recent, regular course of its business;

(2) Representing, through the use of the words "manufacturer's list price," "suggested list price," "factory suggested retail price" or words of similar import and meaning, or in any other manner that any amount is the usual and customary retail price of merchandise, when such amount is in excess of the price at which said merchandise is usually and customarily sold in the trade area or areas where the representation is made;

(3) Representing, directly or by implication, in its advertisements, or otherwise, that any of its prospective retail customers can save the difference between respondent's stated sales price and any other price used for comparison with said sales price unless the comparative price used represents the price at which said merchandise is usually and customarily sold at retail in the trade area involved, or is the price at which respondent sold said merchandise in the recent, regular course of its business.

OPINION OF THE COMMISSION

By ELMAN, *Commissioner:*

This is an appeal from a hearing examiner's initial decision that respondent, a corporation engaged in the sale of food and other merchandise through a chain of more than 50 retail stores in Maryland, Virginia, and the District of Columbia, has violated Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. 45) by publishing advertisements setting forth comparative prices in such a way as to mislead and deceive prospective purchasers as to the savings to be made by purchasing at respondent's stated prices.

Among many other products, respondent markets a variety of electrical appliances and kitchen utensils. In advertising these products in newspapers having a wide interstate circulation in the Washington, D.C., metropolitan area, respondent has frequently compared its actual selling prices with other prices styled by the designations "Regular," "Manufacturer's List," and words of similar import. For example:

G–E Steam, Spray & Dry Iron #F61 Reg. Price $21.95. Adv. Price $12.97.
Sunbeam Large Fry Pan Reg. Price $23.97. Adv. Price $14.97
Regina Electric Broom #600—24.97 Adv. Price. Reg. Price $49.95
G.E. Automatic Toaster $13.27. Mfg. List $19.95
Sunbeam Handmixer—$13.65. mfr. list $21.00
Regina Polisher & Floor Waxer—$34.97. Mfg. list $64.50

In the advertisements in which respondent used a "manufacturer's list price" as the basis for comparison, the following disclaimer appeared at the bottom of the ad in fine print:

The manufacturer's list prices referred to in this advertisement are inserted to assist you in identification of the products and to allow you to compare accurately the selling prices offered here and elsewhere. The use of the term manufacturer's list or similar terminology in our advertising is not to imply that Giant has ever sold the advertised products at such list prices or that the products are being offered for sale generally in the area at such list prices. Many reputable national brand manufacturers issue to retailers, from time to time, suggested retail list prices that are intended to afford reasonable profits to all retailers based upon their traditional costs of marketing. Giant's employment of self-service, supermarket techniques enables it usually to sell below suggested list prices. Consumers, however, have come to recognize most brand merchandise by the list prices, rather than model numbers. Consequently Giant includes these manufacturer's list prices so that you may make simple, intelligent comparisons between our selling prices and those of others.

The hearing examiner found that through the use of the advertising described above, and other similar representations, respondent had created the erroneous impression that amounts designated "regular," "former," or "usual" were prices at which respondent had sold the products in the recent, regular course of business; that amounts designated "Mfg. List," "Mfr. Suggested List," and "Manufacturer's List Price" were prices at which the products were usually and customarily sold by other retailers in the recent, regular course of business in the trade area; and that, by purchasing the advertised articles from respondent, its customers would save the difference between its current prices and the higher comparative prices. The examiner rejected respondent's claim that its lengthy disclaimer cured any tendency that its "manufacturer's list price" advertising might deceive the reader, and he denied respondent's defense of abandonment in connection with its "regular price" representations.

I.

The principal issue contested is the meaning of the term "Manufacturer's Suggested List Price" and expressions of similar import. Respondent contends that they mean simply "list price suggested by the manufacturer;" and that to interpret them, as the examiner did, to mean "usual and customary retail price" in the trade area is "a curious and absurd concept" involving revision or redefinition of "words which have a commonly accepted meaning in the English language." (Respondent's Brief, p. 3)

The Commission agrees with the examiner and adopts his finding as to what "Manufacturer's Suggested List Price" and similar expressions may be understood by many members of the public to mean. In attempting to ascertain the impression which advertising makes on the general public, the Commission does not sit in an ivory tower,

perusing dictionaries and encyclopedias for literal or technical definitions. We try to put ourselves, as much as possible, in the position of those to whom the advertising is addressed. Some may read the advertisement carefully; others may give it no more than a glance, reading as they run. More than two centuries ago Addison observed that "The great art in writing advertisements is the finding out a proper method to catch the reader's eye" (*The Tatler*, No. 224). The art may perhaps have been perfected since then, but its essence remains the same.

Accordingly, as we have recently stated, "The Commission is concerned with protecting the trusting as well as the suspicious, the casual as well as the vigilant, the naive as well as the sophisticated." *Colgate-Palmolive Co.*, Docket 7736 [59 F.T.C. 1452], decided December 29, 1961, opinion, p. 1464. The Commission may insist "upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein.'" *General Motors Corp.* v. *Federal Trade Commission*, 114 F. 2d 33, 36 (C.A. 2), *cert. denied*, 312 U.S. 682. The likely impact on those who view the advertising even casually or distracted by other activities must be taken into account. *Colgate-Palmolive Co.*, *supra*, opinion, p.1463.

Thus it is immaterial here that, as respondent contends, the words "Manufacturer's Suggested List Price" might be taken literally as meaning that the price is merely one suggested by the manufacturer and having no relation at all to that actually charged by retailers. What matters is the meaning which that expression and others like it have to the man in the street or the housewife scanning the ads as she prepares her shopping list. For the Commission this is not a new problem. In a long series of decisions which have been incorporated in "Guides Against Deceptive Pricing," adopted October 2, 1958, we have held that the meaning which many consumers nowadays ascribe to the term "Manufacturer's Suggested List Price" and the like is that it represents the "normal," the "going," the "generally prevailing," or the "usual and customary" price at which the product is being sold in the area.[1]

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[1] See *National Silver Company*, 27 F.T.C. 596; *Firestone Tire & Rubber.*, 33 F.T.C. 282; *Goodyear Tire and Rubber Co.*, 33 F.T.C. 298; *B. F. Goodrich Co.*, 33 F.T.C. 312; *Sears, Roebuck & Co.*, 33 F.T.C. 334; *Western Auto Supply Co.*, 33 F.T.C. 356; *Plaza Luggage & Supply Co.*, 44 F.T.C. 443; *Maxwell Distributing Co.*, 54 F.T.C. 260; *Morris Lober & Associates, Inc.*, 55 F.T. C. 209.

The principle of this line of cases was recently reaffirmed in *George's Radio and Television Co.*, Docket 8134 [60 F.T.C. 179], January 19, 1962, pp. 192, 193, in which the Commission stated:

"The representation 'Mfr's Sug. List' creates the impression that there is a usual and customary retail price for the product in the trade area, and that that price is the specified 'Mfr's Sug. List' price. The soundness of this interpretation is settled law. See

Consumers, or at least a substantial number of them, naturally and justifiably presume that a manufacturer determines a "suggested" resale price not in the abstract but on some concrete basis related to the actual conditions existing in the retail market for his product. Rightly or wrongly, many people believe that a manufacturer's "suggested list price" expresses his considered and expert judgment as to the approximate retail value of his product, a judgment which necessarily would be inexpert and unsound if it did not in fact reflect his knowledge of what the product actually and generally does sell for in the area.

Accordingly, where the advertised "manufacturer's suggested list price" is not in fact the usual or regular price generally prevailing in the area, the public may be misled. As we recently had occasion to point out in *Rayex Corporation*, Docket No. 7346 [60 F.T.C. 664], decided April 2, 1962, opinion, p. 676, "In appraising the capacity of a business practice to deceive and mislead, it is not the understanding or purpose of the manufacturer or distributor or dealer that is of critical importance; rather, it is the public impression created by that practice."

In finding a public understanding that the term "Manufacturer's Suggested List Price" reflects the usual and customary retail price in the trade area, the examiner stated that this finding rested on "substantial evidence in the form of testimony of consumer witnesses." (Initial Decision, p. 335.) If anything, the examiner has engaged in understatement. The consumer testimony supporting his conclusion is not merely "substantial;" it is overwhelming.[2]

Clinton Watch Co. v. *Federal Trade Commission*, 291 F. 2d 838 (7th Cir. 1961); *Baltimore Luggage Co.* v. *Federal Trade Commission*, 296 F. 2d 608 (4th Cir. 1961.)"

The position taken in *George's* was reiterated in *Rayex Corp.*, Docket 7346 [60 F.T.C. 664], April 2, 1962, and *Regina Corp.*, Docket 8323 [p. 983 herein], Oct. 11, 1962.

The Commission's authority—indeed, its responsibility—to make the factual determination of the impression on the public that advertising creates is equally well settled. See, *e.g.*, *Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F. 2d 337 (C.A. 7); *Kalwajtys* v. *Federal Trade Commission*, 237 F. 2d 654 (C.A. 7); *Rhodes Pharmacal Co.* v. *Federal Trade Commission*, 208 F. 2d 382 (C.A. 7). Further, it is not necessary to prove actual deception but only tendency or capacity to deceive. *E.g.*, *Royal Oil Corp.* v. *Federal Trade Commission*, 262 F. 2d 741 (C.A. 4); *Charles of the Ritz Distributing Corp.* v. *Federal Trade Commission*, 143 F. 2d 676 (C.A. 2).

[2] In referring to the consumer testimony in the record here, we do not imply that it was either necessary or desirable that such evidence be adduced. On the contrary, the Commission's determination of the meaning of expressions in advertising like "manufacturer's list price" need not be based on specific supporting evidence in each proceeding that is brought. "This is an area of administration that has evolved to a point at which the accumulated experience and knowledge of the Commission may properly be invoked in exercising its fact-finding function. * * * Further, the requirement that such proof be adduced anew in each case entails, as it did here, the introduction of an abundance of consumer testimony, needlessly delaying the progress of the proceedings and taxing the resources of respondents as well as the Commission." *Manco Watch Strap Co.*, Docket 7785 [60 F.T.C. 495], decided March 13, 1962, opinion, pp. 511, 512.

One witness, for example, was asked what the advertisement "Toastmaster toaster, $14.47, Manufacturer's list $21.00," meant to him. He replied, "Well, by this I would think that you are selling it for $14.47 where it normally sells for $21. That this is a bargain, it is a savings." Another witness was questioned with reference to a comparison between respondent's price of $34.97 for an item and a manufacturer's list price of $64.50. He stated, "To me it implies the normal selling price of the article." Counsel asked, "What is the normal selling price of the article?" The witness answered, "Well, the manufacturer's list as stated here as $64.50."

A secretary testified that an advertisement for the Cory knife sharpener at $8.97 with a manufacturer's suggested list of $19.95 meant to her "that they sell it at a lower price than any other retailing company would." Another witness, when asked about the Toastmaster toaster ad previously mentioned, testified as follows:

Q. What is your impression from those prices?

A. That $14 or whatever it was, would be what I would pay if I went to that store.

Q. And how about the manufacturer's list?

A. Some other place.

Concerning the same toaster ad, another woman expressed the belief that the manufacturer's list price "is the price that it sold at usual stores," while "$14.00 is the one that Giant is selling it for." Another testified, as to this ad, that the $21.00 list price is the price "the article is supposed to sell for * * * [e]verywhere." A typist, also asked about the toaster ad, answered:

Well, if I read the ad and was interested in the Toastmaster I would have thought that $14, whatever the figure was, was a great saving over the regular price that it sold for of $21—something. That would have been my interpretation of the ad.

Normally I would pay $21 or $22—whatever it was, and I was getting it at the Giant for $14.

It is apparent, therefore, that the hearing examiner's interpretation of the disputed language was fully justified by both the precedents and the evidence of record.

II.

We also agree with the examiner that respondent's fine-print disclaimer, quoted above, was inadequate to correct the deceptive impression that may be created by its price representations. The examiner found that "very few if any of the persons who would read Giant's advertisements would take the trouble to, or did, read the fine print disclaimer." (Initial Decision, p. 334.) This finding is supported by

consumer testimony. For example, one witness stated that the disclaimer was "not the sort of thing I would notice." He said he believed the Commission investigator wanted him "to read it much as I read any advertisement in the newspaper, and I didn't read it word for word and didn't examine the fine print." Another witness, referring to the disclaimer in an ad shown her, said she "would not go reading real small print like down in that corner there."

Nor does respondent's disclaimer have the clarifying effect claimed for it even when carefully read. One witness stated that, even as qualified by the disclaimer, respondent's use of "manufacturer's list" would indicate that a saving was being made available. Another characterized the disclaimer as "a little unclear." A third agreed with respondent's counsel that the disclaimer says that the advertisement "does not mean that Giant has sold at the manufacturer's list price nor that the manufacturer's list price is the price generally prevailing in this area," but she also stated "on the bottom it said that you can compare Giant's prices with those of others which to me still suggests that they sell close to the manufacturer's list price but Giant still sells lower." Another witness testified that she did not "understand too much what it (*i.e.*, respondent's disclaimer) meant." Still another said of the disclaimer, "it was double talk to me."

The last-mentioned characterization of the disclaimer is not surprising. One may well sympathize with its draftsman, who had a herculean if not impossible assignment set before him, comparable to drafting a brief arguing that "black" does not necessarily mean "black" and can also mean "white." The draftsman's problem, of course, arose from the fact that the Commission had already made abundantly clear its view that the term "manufacturer's list price" may popularly be understood as meaning the generally prevailing price for the product in the area, and can truthfully be used as a basis for price comparison only when it is in fact that price. It was thus essential, for the draftsman's purposes, that the disclaimer should specifically disavow any such implication. And this it does, in the middle of the paragraph:

> The use of the term "manufacturer's list" or similar terminology in our advertising is not to imply that Giant has ever sold the advertised products at such list prices or that the products are being offered for sale generally in the area at such list prices.

This statement—which, taken in itself, would be a *caveat* to the careful reader that he should not use the list prices as a basis for price comparison—is sandwiched, however, between two directly contradictory assertions in the same paragraph. At the beginning the reader

is told that the manufacturer's list prices are used in the ad "to allow you to compare accurately the selling prices offered here and elsewhere," and at the end that they are included "so that you may make simple, intelligent comparisons between our selling prices and those of others."

Thus, the disclaimer is indeed a curious composition, expressing *parvum in multo*. Written in what laymen would derisively call "lawyer's English," it is inconsistent and contradictory in substance, confusing if not unintelligible. Respondent states in one breath that it does not imply that the list prices are being charged by other retailers, and in the next that it is publishing them so that readers may make simple, accurate, and intelligent comparisons between its selling prices and those of others. Small wonder, therefore, that some readers thought it "a little unclear" and "double talk."

If price comparisons are to be made in advertising a product offered for sale, protection of the consuming public requires that they be clear and honest, not rigged or couched in equivocations. It may be that where "list prices" are so used in advertising, the drafting of an effective disclaimer is not an impossible task, but its enormous, if not insuperable, difficulties are certainly manifest. For one thing, such a disclaimer would have to be so lucid, simple, understandable, and complete as to prevent the advertising from supporting two interpretations, one of which is false and hence deceptive.[3] Further, if the qualifying language contradicts, rather than merely modifies, the price and savings representations made, it will fail adequately to avoid the possibility of deception.[4] In any event, it is apparent that disclaimers such as that here cannot alleviate the misleading tendency of list-price advertising, where the "list price" is not in fact a reliable and truthful index of price comparisons.

Respondent states in its disclaimer, and argues here, that list-price advertising has utility as a means of product identification. This may be so, although to what extent is unclear from the record. But there are obviously other, readily available ways of identifying products that do not contain the same potentialities for consumer deception. For example, respondent's own advertising, quoted at the outset of this opinion, shows the high degree of specificity that can be attained through description by name and model number. Not only are there various alternatives to "list price" as means of product identification,

[3] Compare, *e.g.*, *Rhodes Pharmacal Co., supra,* note 1; *Ford Motor Co.* v. *Federal Trade Commission,* 120 F. 2d 175 (C.A. 6), *cert. denied,* 314 U.S. 668.

[4] Compare, *e.g.*, *United States Navy Weekly, Inc.* v. *Federal Trade Commission,* 207 F. 2d 17 (C.A.D.C.); *El Moro Cigar Co.* v. *Federal Trade Commission,* 107 F. 2d 429 (C.A. 4); *Federal Trade Commission* v. *Army and Navy Trading Co.,* 88 F. 2d 776 (C.A. D.C.).

they are obviously already in extensive commercial use. In view of the serious deceptive potential of "manufacturer's list price" and similar expressions, and the apparent ease of identifying products by other, nondeceptive methods, we think protection of the public requires that respondent be remitted to the latter course.[5]

III.

Respondent points out that proof of violation of Section 5 requires not only a showing that "manufacturer's suggested list price" is understood to mean "usual and customary retail price," but also that the manufacturer's list price advertised is not the usual and customary retail price. While this is true, it does not help respondent; for the record shows a consistent disparity between respondent's advertised manufacturer's list prices and actual selling prices in the trade area.

The testimony on this point was obtained from buyers of electrical appliances and housewares for the Hecht Co., S. Kann Sons Co., and Woodward & Lothrop, Inc., three large retail sales concerns operating department stores in Washington, D.C., and branch stores in nearby suburbs. These buyers testified that it was part of their job to compare the prices of their stores with those of competitive establishments, including major department and discount stores. All considered respondent a competitor. A sample of the evidence they gave concerning their prices on items advertised by respondent appears in the table below.

Item	Hecht Co.	S. Kann Sons Co.	Woodward & Lothrop, Inc.	Price advertised as mfr's list by respondent
G.E. spray, steam and dry iron, F-61	$14. 79	$14. 79	$14. 97	$21. 95
G.E. portable mixer	15. 79	13. 49	----------	19. 95
G.E. Peek-a-Brew coffeemaker	--------	15. 99	15. 99	19. 95
Sunbeam large frypan	17. 99	15. 97	15. 97	23. 95
Sunbeam hand mixer	16. 49	14. 97	13. 49	21. 00
Sunbeam automatic electric percolator	--------	21. 49	18. 97	27. 95
Sunbeam toaster	--------	20. 97	22. 99	29. 95
*One-quart covered saucepan	4. 09	4. 13	4. 13	5. 25
Two-quart covered saucepan	5. 87	5. 96	5. 96	7. 50
One-and-one-half quart double boiler	7. 97	8. 21	8. 21	10. 50
Eight-inch covered skillet	5. 87	5. 96	5. 96	7. 75
Ten-inch covered skillet	7. 17	8. 21	8. 21	10. 75
Egg poacher	--------	8. 63	8. 63	10. 95
Six-cup coffeemaker	--------	8. 96	8. 96	11. 50
Six-quart dutch oven	--------	10. 88	10. 88	13. 95

*This item and all following are Revere-Ware.

[5] It should be emphasized that neither in this case nor in previous decisions (see note 1, *supra*) does the Commission hold that list-price advertising is *per se* deceptive. As is

The striking contrast between the manufacturer's list prices published by respondent and these actual prices charged by competing stores speaks for itself. However, respondent attacks the significance and validity of these figures on two grounds. It contends, first, that this evidence proves no more than that some retailers in the Washington area sold the listed items for less than the manufacturer's suggested list prices. But it is difficult to know what more Commission counsel could have proved. Certainly, he did not have the burden of showing that no retailer in the trading area sold at the list prices.[6] Commission counsel chose instead the eminently sensible course of questioning representatives of concerns competing with respondent on a large scale. Moreover, he took care to elicit from all of the five buyer witnesses an explanation that they continually study the prices of other retailers in order to keep their prices "competitive." If the prices set forth in the table 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. We are satisfied from the evidence, therefore, that the manufacturer's list prices used in respondent's advertising were not the usual and customary retail prices in the trading area.

IV.

Alternatively, respondent argues that the evidence of all of the buyer witnesses should have been stricken from the record. A proper understanding of this contention requires a brief excursion into the chronology of the case.

Examination of the five buyer witnesses took place on November 8, 1960. After the first witness had testified, counsel for respondent

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also true of the comparable practice of manufacturer price preticketing, its legal significance "depends on the factual setting into which it is introduced." *Rayex Corp.*, note 1, *supra, opinion* [60 F.T.C. 675]. "The danger inherent in [list-price advertising] is that, whatever other purpose it may serve, it gives many consumers the impression that the stated price is the retail price generally prevailing in the area. * * * It may be, for example, that the industry in which the practice is undertaken is characterized by price rigidity or uniformity. That is to say, all dealers of a particular product may be content to sell at the same price. If a manufacturer of such a product pretickets [or lists] it at what is in fact the uniform retail price in the area, he is not engaging in false or misleading pricing." *Id.*, p. 675.

[6] *Cf., Consumer Sales Corp.* v. *Federal Trade Commission*, 198 F. 2d 404 (C.A. 2) in which the court rejected respondent's argument that the Commission's case was incomplete because only fourteen housewives were called to testify although thousands of sales were made.

contended that he could not cross-examine effectively because he had not been given time to secure background information. Subject to this objection, however, he agreed to cross-examine to the extent that he was able to do so without further outside investigation. He ascertained that all of the buyer witnesses had obtained their information by reviewing company records, such as "ad books" and "order files." He therefore asked that such records be subpoenaed for use in cross-examining the witnesses. The examiner denied this request.

Subsequently, respondent submitted a written motion to the examiner, asking that the originals or copies "of all documents, books, records, memoranda or other documents in the possession, custody, or control" of the companies employing the buyer witnesses "from which may be computed the prices at which the following items (*i.e.*, those covered in their testimony) were advertised and/or sold" in their respective stores during the period November 1, 1958, to December 31, 1960, be subpoenaed. The motion was denied by an order of the hearing examiner dated February 13, 1961. However, respondent appealed this ruling to the Commission and, by order of April 20, 1961, the appeal was granted as to those records of the three department stores "which would disclose the prices at which certain merchandise had been sold by such stores."

The hearing examiner issued the subpoenas requested by respondent, but the Hecht Co. (and its parent, The May Department Stores Co.) and Woodward & Lothrop filed motions to limit them, claiming that they were in part irrelevant and unduly burdensome. The examiner granted these motions, stating that since the buyer witnesses had testified for the limited purpose of proving that the published manufacturer's list prices were higher than prices usually charged in the vicinity, respondent was entitled only to records bearing on that point.

Again respondent appealed to the Commission. By order of August 4, 1961, the appeal was denied. The order recited that "the only issue to which said records are relevant is whether specific articles of merchandise were usually and customarily sold by the [department stores] at prices less than certain amounts designated in respondent's advertising as 'Mfg. List', 'Mfr. List' and 'Manufacturer List Price'," and the subpoenas as limited "require the production of documents disclosing the prices at which said articles of merchandise were sold by the [department stores]."

When the hearing reconvened on September 18, 1961, the three department stores had witnesses on hand to produce the material called for by the subpoenas, but counsel for respondent declined to take the return of the subpoenas on the ground that he had not been afforded adequate opportunity to cross-examine the buyer witnesses. He moved to strike the testimony of these witnesses and shortly thereafter rested his case.

The position taken by counsel for respondent had been debated at perhaps excessive length at a hearing before the examiner on June 19, 1961. Counsel for respondent repeatedly protested that he should be able to confront the buyer witnesses with their companies' records, not as witnesses of his own but as Commission witnesses whom he could cross-examine. Time and again the examiner responded by assuring counsel that it did not matter to him whose witnesses they were in form. He explained that he was interested only in determining the truth and that, to that end, he would allow counsel to employ leading questions and otherwise treat his interrogation as cross-examination. He also stated that there was no basis for counsel's concern that he would be "bound" by what the witnesses said if he called them as his own, since the case was being tried not before a jury but before an examiner whose sole interest was in an objective appraisal of the value of their testimony. These assurances were repeated at the September 18 hearing.

In summary, the matter comes down to this. When the five buyer witnesses were examined by Commission counsel, counsel for respondent argued that he needed company records to conduct adequate cross-examination. The examiner denied this request but allowed such other cross-examination as counsel wished. The record shows that, as to four of the five, counsel thereupon made full and thorough use of this opportunity. Only such light as could be provided by the department store sales records remained to be shed. Subsequently the Commission ordered the necessary records made available, but the examiner had hitherto ruled cross-examination closed. When respondent's counsel protested, the examiner explicitly offered him all the privileges of cross-examination but he refused to proceed.

We cannot escape the conclusion that respondent's objection, viewed in the context and perspective of the entire record, is an insignificant quibble over a matter not affecting substantial rights or impairing the fairness of the proceedings. Respondent was accorded the usual right of cross-examination in every respect save one, and in that respect it was accorded every right except the right to call it "cross-examination." It is perhaps difficult to see why the hearing examiner balked at using

the label "cross-examination" to describe the procedure he was allowing respondent to follow, when he was in fact withholding from it none of the substance of the right of cross-examination. But it is far more difficult to see why respondent refused to conduct such cross-examination when the opportunity to do so was made available to it in all except name. Accordingly, the contention that the testimony of the buyer witnesses should have been stricken, because respondent was denied adequate opportunity to impeach or controvert it, is insubstantial and must be rejected.

V.

Respondent argues that the Commission cannot restrict its use of "manufacturer's list price" and similar language to indicate only usual and customary price in the trading area while at the same time allowing another respondent to use "manufacturer's list price" if "it is the current list price of the manufacturer for the identical merchandise to which such price is applied." *Filderman Corp.*, Docket No. 7572 [56 F.T.C. 685], December 30, 1959, p. 688. The contention is that "The Commission's action in *Filderman* estops the Commission from entering the Examiner's order against respondent." (Respondent's Brief, p. 5.) This argument has no merit, for a number of reasons.

First, it erroneously assumes that the Commission's concern with the *Filderman* proceeding has ended. In fact, the Commission has issued another complaint (Docket No. 7878) against that firm dealing, *inter alia*, with the same problem of "manufacturer's list price" representations. Second, the gravamen of the complaint in the first *Filderman* proceeding was that the "manufacturer's list" prices published were higher than the actual list prices obtained from the manufacturers. That is not the issue in dispute here. Third, the first *Filderman* proceeding ended in a consent order. It thus lacks the precedent value of a litigated case. Fourth, respondent cannot claim to have relied to its detriment upon the Commission action in first *Filderman*, because the Commission decision was issued on December 30, 1959, and many of the advertisements here in evidence were published months before that date. Finally, even if the facts were otherwise, respondent's argument would be without basis in law. "The administrator is expected to treat experience not as a jailer but as a teacher. *Shawmut Ass'n* v. *Securities & Exchange Commission*, 146 F. 2d 791, 796–797. (C.A. 1). The Commission is not "bound * * * to deal with all cases at all times as it has dealt with some that seem

comparable." *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 228.[7]

VI.

The hearing examiner's order also prohibits respondent from representing "that certain amounts are the regular and usual retail prices of merchandise when such amounts are in excess of the prices at which such merchandise has been usually and regularly sold by respondent at retail, in the recent, regular course of its business." (Initial Decision, p. 343). Respondent protests neither the finding that it has misused the term "regular" in the past nor the appropriateness of the form of order drafted to prevent future violations.[8] Rather, it contends that since it has abandoned the term and promised never again to use it except in conformity with the Commission's standards, this provision of the order is not in the public interest and should not issue.

"That discontinuance of an unlawful practice, of itself, does not necessarily preclude the issuance of a cease and desist order is so well settled as to preclude further argument." *Marlene's Inc.* v. *Federal Trade Commission*, 216 F. 2d 556, 559 (C.A. 7). This being so, it was incumbent upon respondent to show something more. It has failed to do so. It has not, to take examples from cases cited by respondent, demonstrated that the order prohibits "practices long discontinued, and as to which there is no reason to apprehend renewal," *Federal Trade Commission* v. *Civil Service Training Bureau*, 79 F. 2d 113, 116 (C.A. 6), or that respondent "is no longer engaged in the industry in which the unlawful practice occurred * * *." *National Lead Co.* v. *Federal Trade Commission*, 227 F. 2d 825, 840 (C.A. 7).

The discontinuance relied on by respondent here did not occur until after it became aware that its use of the term "regular" was being investigated by the Commission. Moreover, we are not assured by respondent that it will never use the term again, but only that it will not use it deceptively. When the very practice that has, until recently, been pursued in an illegal manner may otherwise be freely

[7] And see, *e.g.*, *National Labor Relations Board* v. *National Container Corp.*, 211 F. 2d 525, 534 (C.A. 2); *Davis, Administrative Law Treatise*, vol. 2, pp. 526–527 (1958).

The cases cited by respondent—*United States* v. *Willard Tablet Co.*, 141 F. 2d 141 (C.A. 7); *George H. Lee Co.* v. *Federal Trade Commission*, 113 F. 2d 583 (C.A. 8); *United States* v. *Piuma*, 40 F. Supp. 119 (D.C.S.D. Cal.), aff'd, 126 F. 2d 601 (C.A. 9), *cert. denied*, 317 U.S. 637— are inapposite. All involve successive suits against the same party and are therefore concerned with the entirely different problem of *res judicata*, as to which see *Manco Watch Strap Co.*, Docket 7785 [60 F.T.C. 495], decided March 13, 1962, opinion, pp. 505–507, and authorities there cited.

[8] See, *e.g.*, *Bankers Securities Corp.* v. *Federal Trade Commission*, No. 13,538, Dec. 18, 1961 (C.A. 3), upholding an order couched in substantially similar terms.

resumed at any time, it is not only appropriate but necessary in the public interest to require by order that its future manifestations be fully in accordance with law. Finally, we note that the publication of "regular" prices in the past has been only one facet of a general comparative-price advertising program conducted by respondent. That form of advertising continues, and an order designed to prevent deception of the public involved in such a program would be inadequate and incomplete without a specific provision dealing with improper advertising of "regular" prices. Unlike the cases cited by respondent, here "no assurance is in sight that [respondent], if it could shake [the Commission's] hand from its shoulder, would not continue its former course." *Sears, Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 307, 310 (C.A. 7). Respondent's plea of abandonment is thus out of place on the facts presented.[9]

VII.

Of respondent's specific exceptions to findings of the hearing examiner, only two of significance have not yet been discussed. The first is that the policy of the Commission in regard to deceptive use of manufacturer's list prices runs counter to that underlying Congressional enactment of the Automobile Information Disclosure Act (72 Stat. 325, 15 U.S.C. 1231), which requires automobile manufacturers to put stickers on new cars showing suggested retail prices. To this it is enough to answer, as the Court of Appeals for the Fourth Circuit recently did, that the indicated Act "is not a statute of general application, but applies solely and specifically to the sale of new automobiles. * * * *Baltimore Luggage Co.* v. *Federal Trade Commission*, 296 F. 2d 608, 611 (C.A. 4). After reviewing the pertinent legislative history, the court concluded, "It is quite obvious that the Automobile Information Disclosure Act was enacted in the effort to remedy a situation peculiar to the automobile industry brought about by wide-spread fraudulent or deceptive practices principally indulged in by retailers." (*Id.*, p. 612)

Secondly, respondent argues that it "is exempt from regulation by the Federal Trade Commission inasmuch as it is a packer as defined by the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. 181, et seq." (Respondent's Exceptions to Initial Decision, p. 5.) Respondent made the same argument in *Giant Food, Inc.*, Docket No. 6459 [58 F.T.C. 977] June 1, 1961. In two opinions canvassing the relevant ma-

[9] To the same effect, see the Commission's recent decisions in *Art National Manufacturers Distributing Co.*, Docket No. 7286 [58 F.T.C. 719], May 10, 1961, p. 3; *Snap-On Tools Corp.*, Docket No. 7116 [59 F.T.C. 1035], Nov. 1, 1961, pp. 12–13.

terials (Dec. 19, 1957, and Feb. 10, 1959), the Commission concluded that respondent "clearly is not a member of the industry group whose practices Congress sought to regulate" in the Packers and Stockyards Act. (Opinion of Dec. 19, 1957, 54 F.T.C. 1881, 1884.) We reaffirm that conclusion. Respondent is not exempt from Commission jurisdiction. *Giant Food, Inc.* v. *Federal Trade Commission*, No. 16,507 (C.A. D.C., June 14, 1962).

VIII.

Finally, respondent asserts that "The order proscribes conduct unrelated to that which the proof disclosed and to that extent is invalid." (Respondent's Brief, p. 6.) This assertion is not supported by the record. The proof shows that by the use of "regular" and similar terms respondent has misrepresented its own prior prices; that by the use of "manufacturer's list" and similar terms respondent has misrepresented the prices of others; and that by the use of these practices respondent has misrepresented to prospective purchasers the savings to be obtained by buying at respondent's advertised selling prices. These are precisely the misrepresentations prohibited by our order. A tailor-made order such as this is well within the bounds of the Commission's authority "to preclude the revival of the illegal practices," *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 430.[10]

For the reasons stated in this opinion, respondent's appeal is denied. The Commission is issuing its own findings as to the facts, conclusions, and order in accordance with the views set forth herein.

Commissioners Anderson and Kern concur in the result.

Findings as to the Facts

1. Respondent Giant Food, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal office at 6900 Sheriff Road, Landover, Md.

2. Respondent is primarily engaged in the retail sale of food and other merchandise through a chain of more than fifty (50) retail stores concentrated chiefly in the District of Columbia and in nearby counties of the States of Maryland and Virginia, but extending as far north as Baltimore, Maryland, and as far south as Richmond, Virginia. In the course and conduct of its business, respondent maintains a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act, and is in competition in "commerce,"

[10] And see, *e.g.*, *Federal Trade Commission* v. *Mandel Bros., Inc.*, 359 U.S. 385, 393; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473.

as defined in the Federal Trade Commission Act, with other firms selling similar products.

3. Included among the merchandise sold by respondent is a variety of small durable consumer goods known as housewares and electrical appliances, such as radios, toasters, waxers, irons, ironing boards, electric mixers, fry pans, percolators, coffee makers, skillets, clocks, pots and pans, and so forth. For the purpose of facilitating the sale of its housewares and electrical appliances, respondent has caused the publication in newspapers having a wide interstate circulation in the Washington, D.C., metropolitan area, of advertisements containing certain statements with respect to the pricing of its products. Among and typical, but not all inclusive, of such statements are the following:

G–E Steam, Spray & Dry Iron #F61 Reg. Price $21.95. Adv. Price $12.97
Sunbeam Large Fry Pan Reg. Price $23.97. Adv. Price $14.97
Regina Electric Broom # 600—24.97 Adv. price. Reg. price $49.95
G.E. Automatic Toaster $13.27. Mfg. List $19.95
Sunbeam Handmixer—$13.65. mfr. list 21.00
Regina Polisher & Floor Waxer—$34.97 Mfg. list $64.50

4. Through the use of these statements, and similar statements not here set out, respondent has created the impression that:

(a) Amounts designated by the terms "Reg. price," "Regular price," and words of similar import were the prices at which the products advertised had been sold at retail by respondent in the recent, regular course of business;

(b) Amounts designated by the terms "Mfg. List," "Mfr. List," "Manufacturer's List Price," and words of similar import were prices at which the products advertised were usually and customarily sold at retail in the recent, regular course of business in the trade area; and

(c) Purchasers of the products advertised were afforded savings amounting to the differences between the actual selling prices and the higher comparative prices set out in the advertisements.

5. In fact, the impressions created by respondent's comparative-price advertising are false, misleading and deceptive.

(a) Amounts designated by the terms "Reg. price," "Regular price," and words of similar import were not prices at which the products advertised had been sold at retail by respondent in the recent, regular course of business.

(b) Amounts designated by the terms "Mfg. List," "Mfr. List," "Manufacturer's List Price," and words of similar import were not prices at which the products advertised were usually and customarily sold at retail in the recent, regular course of business in the trade area.

(c) Purchasers of the products advertised were not afforded savings

amounting to the differences between the actual selling prices and the higher comparative prices set out in the advertisements.

6. Respondent has offered an assurance that it will not henceforth use "Regular price" and words of similar import except in a lawful manner. Respondent did not abandon such terms until after it was aware of the investigation leading to the issuance of the complaint in this case. Further, respondent does not promise total discontinuance of regular-price advertising and it forms only one facet of its more general practice of comparative-price advertising. Respondent's assurance of discontinuance is inadequate to protect the public interest.

7. In conjunction with its advertisements containing pricing representations designated by "Mfg. List," and words of similar import, respondent publishes the following disclaimer in fine print at the bottom of each advertisement:

> The manufacturer's list prices referred to in this advertisement are inserted to assist you in identification of the products and to allow you to compare accurately the selling prices offered here and elsewhere. The use of the term "manufacturer's list" or similar terminology in our advertising is not to imply that Giant has ever sold the advertised products at such list prices or that the products are being offered for sale generally in the area at such list prices. Many reputable national brand manufacturers issue to retailers, from time to time, suggested retail list prices that are intended to afford reasonable profits to all retailers based upon their traditional costs of marketing. Giant's employment of self-service, supermarket techniques enables it usually to sell below suggested list prices. Consumers, however, have come to recognize most brand merchandise by the list prices, rather than model numbers. Consequently Giant includes these manufacturer's list prices so that you may make simple, intelligent comparisons between our selling prices and those of others.

This disclaimer is inadequate to correct the misleading impression created by respondent's manufacturer's list price advertising. Many readers of the advertisements will neglect to read the disclaimer, and, among those who do read the disclaimer, many will find it unclear and confusing. Further, comparative-price advertising is not necessary to identify products advertised. Other means of nondeceptive product identification are readily available and are being used by respondent and other sellers.

8. Respondent was accorded ample opportunity in substance and effect to cross-examine witnesses offered by counsel supporting the complaint. Its failure to do so in some instances is attributable to its own choice rather than to unfairness or defect in the hearing procedure. No substantial rights have been denied respondent; nor was the proceeding in any respect unfair to it.

9. Respondent has taken steps—including voluntary registration with the United States Department of Agriculture and purchase of

one-hundred (100) shares of the capital stock of Armour & Company—intended to bring it within the Packers & Stockyards Act of 1921 (42 Stat. 159, as amended, 7 U.S.C. 181). However, respondent is not by reason of that Act exempt from the jurisdiction of the Commission.

10. In *Filderman Corp.*, Docket No. 7572 [56 F.T.C. 685], December 30, 1959, p. 688, the Commission prohibited the use of "manufacturer's list price" unless "it is the current list price of the manufacturer for the identical merchandise to which such price is applied." For the reasons stated in the accompanying opinion, the Commission is not estopped by the *Filderman* case to enter an order prohibiting respondent from using "manufacturer's list price" and language of similar import except to indicate usual and customary price in the trade area.

11. Respondent's use of false, misleading, and deceptive pricing representations in its advertisements has had, and now has, the capacity and tendency to mislead members of the purchasing public into the mistaken belief that those representations were, and are, true, and into the purchase of a substantial quantity of respondent's products by reason of that mistaken belief. As a consequence, substantial trade in commerce has been, and is being, unfairly diverted to respondent from its competitors and substantial injury has been, and is being, done to competition in commerce.

CONCLUSIONS

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent. The aforesaid acts and practices of respondent, as herein found and as described in the accompanying opinion, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

FINAL ORDER*

It is ordered, That respondent Giant Food, Inc., a Delaware corporation, and its officers, directors, agents, representatives, and employees, directly or through any corporate or other device, in connec-

*NOTE—This order is issued subject to Section 4.22(c) of the Commission's Rules of Practice, which provides as follows:

In any case where the Commission's decision contemplates the entry of an order against a respondent broader in its prohibitions than those, if any, contained in the initial decision, or where the Commission's decision differs from the initial decision in any substantial respect affecting the scope or content of the order which should properly be entered, the Commission will cause a copy of its decision, together with a proposed form of order, to be served upon all parties. Within twenty days after service upon it of the Commission's decision and proposed order, the respondent may file with the Com-

tion with the offering for sale, sale, and distribution of household electrical appliances, kitchen utensils, or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Using the words "regular price," or words of similar import, to refer to any amount which is in excess of the price at which such merchandise has been usually and regularly sold by the respondent at retail in the recent, regular course of its business; or otherwise misrepresenting the respondent's usual and customary retail selling price of such merchandise;

(2) Using the words "manufacturer's list price," "suggested list price," "factory suggested retail price," or words of similar import, to refer to any amount which is in excess of the price or prices at which such merchandise is usually and customarily sold in the trade area where the representation is made; or otherwise misrepresenting the usual and customary retail selling price or prices of such merchandise in the trade area;

(3) Representing in any manner that, by purchasing any of its merchandise, customers are afforded savings amounting to the difference between respondent's stated selling price and any other price used for comparison with that selling price, unless the comparative price used represents the price at which the merchandise is usually and customarily sold at retail in the trade area involved, or is the price at which such merchandise has been usually and regularly sold by respondent at retail in the recent, regular course of its business.

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

Commissioners Anderson and Kern concurring in the result.

Order Entering Final Order Under Rule 4.22(c)

Respondent having filed, under Rule 4.22(c) of the Commission's Rules of Practice for Adjudicative Proceedings, exceptions to the

mission its exceptions to any of the provisions of the proposed order, a statement of its reasons in support thereof, and a proposed alternative form of order appropriate to the Commission's decision. If no exceptions to the Commission's proposed order are filed within twenty days, such proposed order shall become the final order of the Commission. If exceptions to the proposed order are filed by the respondent, counsel supporting the complaint may within ten days after service of such exceptions upon him file a statement in reply thereto, supporting the proposed order. The Commission will thereafter enter its final order.

proposed order in this proceeding and a statement of its reasons in support of those exceptions; and

It appearing that respondent's exceptions and reasons in support thereof are without merit; and

It further appearing that respondent has failed to submit a proposed alternative form of order, as required by Rule 4.22(c),

It is ordered, That the proposed order issued with the decision of the Commission in this proceeding be, and it hereby is, entered and adopted as the Final Order of the Commission.

IN THE MATTER OF

ROYAL PUBLICATIONS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d) OF THE CLAYTON ACT

Docket C-201. Complaint, Aug. 3, 1962—Decision, Aug. 3, 1962

Consent order requiring New York City publishers of "Cars" and "Swank" magazines and paperback books, to cease violating Sec. 2(d) of the Clayton Act by making payments—and on the basis of individual negotiation and not proportionally equal—to certain operators of chain retail outlets in railroad, airport, and bus terminals and outlets in hotels and office buildings, while not offering such allowances on proportionally equal terms to all competitors of such outlets, including drug and grocery chains and other newsstands.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Royal Publications, Inc., is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 26 West 47th Street, New York, N.Y. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including magazines under copyrighted titles including "Cars" and "Swank". Respondent's sales of publications during the calendar year 1960 exceeded three hundred fifty thousand dollars.

PAR. 2. Respondent Lancer Books, Inc., is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 26 West 47th Street, New York, N.Y. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including paperback books under copyrighted titles.

PAR. 3. Respondents Walter Zacharius, Irwin Stein and Seth J. Solomon, all individuals, are President, Vice President and Treasurer, respectively, of respondent Royal Publications, Inc., and Secretary, President and Treasurer, respectively, of respondent Lancer Books, Inc. They formulate, direct and control the acts and practices of said corporate respondents and their address is the same as that of the corporate respondents.

PAR. 4. Publications published by respondents Royal Publications, Inc., and Lancer Books, Inc., are distributed by said respondents to customers through their national distributor, Publishers Distributing Corporation, hereinafter referred to as PDC.

PDC has acted and is now acting as national distributor for the publications of several independent publishers, including respondent publishers. PDC, as national distributor of publications published by said corporate respondents and other independent publishers, has performed and is now performing various services for these publishers. Among the services performed and still being performed by PDC for the benefit of these publishers are the taking of purchase orders and the distributing, billing and collecting for such publications from customers. PDC also has negotiated various promotional and display arrangements with the retail customers of such publishers, with the knowledge and approval of such publishers, including said respondents.

In its capacity as national distributor for said respondents, in dealing with the customers of respondents, PDC served and is now serving as a conduit or intermediary for the sale, distribution and promotion of publications published by respondents.

PAR. 5. Respondent Royal Publications, Inc., and Lancer Books, Inc., through their conduit or intermediary, PDC, have sold and distributed and now sell and distribute their publications in substantial quantities in commerce, as "commerce" is defined in the Clayton Act, as amended, to competing customers located throughout various States of the United States and in the District of Columbia.

PAR. 6. In the course and conduct of their businesses in commerce, respondents Royal Publications, Inc., and Lancer Books, Inc., have paid or contracted for the payment of something of value to or for

the benefit of some of their customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of publications sold to them by respondents. Such payments or allowances were not made available on proportionally equal terms to all other customers of respondents competing in the distribution of such publications.

PAR. 7. As an example of the practices alleged herein, respondent Royal Publications, Inc., has made payments or allowances to certain retail customers who operate chain retail outlets in railroad, airport and bus terminals, as well as outlets located in hotels and office buildings. Such payments or allowances were not offered or otherwise made available on proportionally equal terms to all other customers (including drug chains, grocery chains and other newsstands) competing with the favored customers in the sale and distribution of the publications of said respondent. Among the favored customers receiving payments in 1960 which were not offered to other competing customers in connection with the purchase and sale of respondent's publications were:

Customer:	*Approximate Amount Received*
Greyhound Post Houses, Forest Park, Ill	$1,030.00
ABC Vending Corp., Long Island City, N.Y	365.40
Fred Harvey, Chicago, Ill	[1] 150.30
Barkalow Bros., Omaha, Nebr	[1] 38.82

[1] Received in 1961.

Respondent made said payments to its favored customers on the basis of individual negotiations. Among said favored customers such payments were not made on proportionally equal terms.

As a further example of the practices alleged herein, respondent Lancer Books, Inc., has made payments or allowances to certain retail customers who operate drug chains. Such payments or allowances were not offered or otherwise made available on proportionally equal terms to all other customers (including newsstands, grocery cnains and other drug chains) competing with the favored customers in the sale and distribution of the publications of respondent publisher. Among the favored customers receiving payments in 1961 which were not offered to other competing customers in connection with the purchase and sale of respondent's publications were:

Customer:	*Approximate Amount Received*
Drug Fair, Washington, D.C	$501.66
Sun Ray Drug, Philadelphia, Pa	550.00

Respondent made said payments to its favored customers on the basis of individual negotiations.

PAR. 8. The acts and practices of respondents as alleged above are in violation of the provisions of subsection (d) of Section 2 of the Clayton Act, as amended.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of subsection (d) of Section 2 of the Clayton Act, as amended, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent, Royal Publications, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 26 West 47th Street, in the city of New York, State of New York.

Respondent, Lancer Books, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 26 West 47th Street, in the city of New York, State of New York.

Respondents, Walter Zacharius, Irwin Stein and Seth J. Solomon are officers of said corporations and their address is the same as that of said corporations.

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

ORDER

It is ordered, That respondents Royal Publications, Inc., and Lancer Books, Inc., both corporations, their respective officers, and Walter

Zacharius, Irwin Stein and Seth J. Solomon, individually and as officers of said corporations, and respondents' employees, agents and representatives, directly or through any corporate or other device, in connection with the distribution, sale or offering for sale of publications including magazines and paperback books in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

> Paying or contracting for the payment of an allowance or anything of value to, or for the benefit of, any customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the handling, offering for sale, sale or distribution of publications including magazines and paperback books, published, sold or offered for sale by respondents unless such payment or consideration is affirmatively offered and otherwise made available on proportionally equal terms to all of their other customers competing with such favored customer in the distribution of such publications including magazines and paperback books.

The word "customer" as used above shall be deemed to mean anyone who purchases from a respondent, acting either as principal or agent, or from a distributor or wholesaler where such transaction with such purchaser is essentially a sale by such respondent, acting either as principal or agent.

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.

IN THE MATTER OF

VARIETY, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d) OF THE CLAYTON ACT

Docket C-202. Complaint, Aug. 3, 1962—Decision, Aug. 3, 1962

Consent order requiring the New York City publisher of "trade papers" including "Variety" magazine, to cease violating Sec. 2(d) of the Clayton Act by making payments—and on the basis of individual negotiation and not proportionally equal—to certain operators of chain retail outlets in railroad, airport, and bus terminals and outlets in hotels and office buildings while not offering such allowances on proportionally equal terms to all competitors of such outlets, including drug and grocery chains and other newsstands.

COMPLAINT

The Federal Trade Commission having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Variety, Inc., is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 154 West 46th Street, New York, N.Y. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including magazines or "trade papers" under copyrighted titles including "Variety". Respondent's sales of publications during the calendar year 1960 exceeded one million dollars.

PAR. 2. Publications published by respondent are distributed by respondent to customers through its national distributor, MacFadden Publications, Inc., hereinafter referred to as MacFadden.

MacFadden has acted and is now acting as national distributor for the publications of several independent publishers, including respondent publisher. MacFadden, as national distributor of publications published by respondent and other independent publishers, has performed and is now performing various services for these publishers. Among the services performed and still being performed by MacFadden for the benefit of these publishers are the taking of purchase orders and the distributing, billing and collecting from customers. MacFadden also had participated in the negotiation of various promotional arrangements with the retail customers of said publishers, including said respondent.

In its capacity as national distributor for respondent in dealing with the customers of respondent, MacFadden served and is now serving as a conduit or intermediary for the sale, distribution and promotion of publications published by respondent. "Variety" is the most popular and widely circulated publication of its type in the United States and is distributed throughout various States by MacFadden through local distributors to retail outlets.

PAR. 3. Respondent, through its conduit or intermediary, MacFadden, has sold and distributed and now sells and distributes its publications in substantial quantities in commerce, as "commerce" is

defined in the Clayton Act, as amended, to competing customers located throughout various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent has paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of publications sold to them by respondent. Such payments or allowances were not made available on proportionally equal terms to all other customers of respondent competing in the distribution of such publications.

PAR. 5. As an example of the practices alleged herein, respondent has made payments or allowances to certain retail customers who operate chain retail outlets in railroad, airport and bus terminals, as well as outlets located in hotels and office buildings. Such payments or allowances were not offered or otherwise made available on proportionally equal terms to all other customers (including drug chains, grocery chains and other newsstands) competing with the favored customers in the sale and distribution of the publications of respondent publisher. Among the favored customers receiving payments in 1960, and during the first six months of 1961, which were not offered to other competing customers in connection with the purchase and sale of respondent's publications were:

Union News Company of New York City which received $4,499.00 in 1960 and $1,431.44 during the first half of 1961. Union News operates newsstands throughout many States including New York, Massachusetts, Illinois, Pennsylvania, and the District of Columbia.

Respondent made said payments to its favored customers on the basis of individual negotiations. Among said favored customers such payments were not made on proportionally equal terms.

PAR. 6. The acts and practices of respondent as alleged above are in violation of the provisions of subsection (d) of Section 2 of the Clayton Act, as amended.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of subsection (d) of Section 2 of the Clayton Act, as amended, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent, Variety, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 154 West 46th Street, in the city of New York, State of New York.

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

ORDER

It is ordered, That respondent Variety, Inc., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in connection with the distribution, sale or offering for sale of publications including magazines or "trade papers" in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

> Paying or contracting for the payment of an allowance or anything of value to, or for the benefit of, any customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the handling, offering for sale, sale or distribution of publications including magazines or "trade papers" published, sold or offered for sale by respondent, unless such payment or consideration is affirmatively offered and otherwise made available on proportionally equal terms to all of its other customers competing with such favored customer in the distribution of such publications including magazines or "trade papers".

The word "customer" as used above shall be deemed to mean anyone who purchases from Variety, Inc., acting either as principal or agent, or from a distributor or wholesaler where such transaction with such purchaser is essentially a sale by such respondent, acting either as principal or agent.

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

IN THE MATTER OF

JOHN HAMILTON TRADING AS JOHN HAMILTON AGENCY

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

Docket 8480. Complaint, Apr. 18, 1962—Decision, Aug. 4, 1962

Order requiring an individual in West Hollywood, Calif., engaged in selling printed forms designated as "Last Will and Testament" and "Will Planning Guide" to distributors for resale, to cease representing falsely in magazine advertisements bearing the names and addresses of said distributors, that his said products would afford the purchaser the legal knowledge necessary to enable him to prepare a will that would be valid in all states of the United States.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that John Hamilton, an individual trading as John Hamilton Agency, hereinafter referred to as the respondent, has violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent John Hamilton is an individual trading as John Hamilton Agency, with his office and place of business located at 7777 Sunset Boulevard, West Hollywood, Calif.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of printed forms designated as "Last Will and Testament" and "Will Planning Guide" to distributors for resale to the purchasing public.

PAR. 3. In the course and conduct of his business, respondent now causes, and for some time last past has caused, his said products, when sold, to be shipped from his place of business in the State of California to purchasers thereof located in various other States of the United States and maintains, and at all times mentioned herein has main-

tained, a substantial course of trade in said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his business and for the purpose of inducing the sale of said printed forms, respondent has prepared and placed in magazines of general circulation, advertisements bearing the names and addresses of said distributors and containing the following or similar statements:

HAVE YOU MADE A WILL?

(Pictures of the Will
Planning Guide and Last
Will and Testament)

PROTECT YOUR LOVED ONES!

Don't neglect this duty or your property, bank account, etc., (jointly owned or not), can be tied up in court for months, your wishes misinterpreted and your loved ones left without funds in their most desperate time of need. Order your will kit today, comes complete with easy planning guide legal in all states. Only $1.00 ppd.

PAR. 5. By the aforesaid practices respondent has represented, and has placed in the hands of distributors and others the means and instrumentalities of representing, directly or by implication, that said products will afford the purchaser or user that degree of legal knowledge necessary to enable such person to prepare a last will and testament which would be valid and operative in any or all states of the United States.

PAR. 6. Said statements and representations are false, misleading and deceptive. In truth and in fact said products will not afford the purchaser or user that degree of legal knowledge necessary to enable such person to prepare a last will and testament which would be valid and operative in any or all states of the United States.

PAR. 7. In the conduct of his business at all times mentioned herein, respondent has been in substantial competion, in commerce, with corporations, firms, and individuals in the sale of will forms and other products of the same general kind and nature as those sold by respondent.

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

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair and deceptive acts and practices in commerce, in violation of Section 5(a)(1) of the Federal Trade Commission Act.

Mr. John J. McNally for the Commission.
No appearance filed for respondent.

INITIAL DECISION BY WILMER L. TINLEY, HEARING EXAMINER

The Federal Trade Commission, on April 18, 1962, issued its complaint, charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act by misrepresentations in connection with the sale of printed forms designated as "Last Will and Testament" and "Will Planning Guide". The complaint was duly served upon respondent by registered mail on April 30, 1962, and the respondent has not filed his answer to the complaint within the time required, and is now in default. Pursuant to the provisions of Rule 4.5(2)(c) of the Commission's Rules of Practice for Adjudicative Proceedings, the hearing examiner hereby declares the respondent in default and now finds the facts to be as alleged in the complaint, and issues his initial decision containing such findings, appropriate conclusions drawn therefrom, and order to cease and desist.

FINDINGS OF FACT

1. Respondent John Hamilton is an individual trading as John Hamilton Agency, with his office and place of business located at 7777 Sunset Boulevard, West Hollywood, Calif.

2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of printed forms designated as "Last Will and Testament" and "Will Planning Guide" to distributors for resale to the purchasing public.

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

4. In the course and conduct of his business and for the purpose of inducing the sale of said printed forms, respondent has prepared and placed in magazines of general circulation, advertisements bear-

ing the names and addresses of said distributors and containing the following or similar statements:

HAVE YOU MADE A WILL?

(Pictures of the Will Planning Guide and Last Will and Testament)

PROTECT YOUR LOVED ONES!

Don't neglect this duty or your property, bank account, etc. (jointly owned or not), can be tied up in court for months, your wishes misinterpreted and your loved ones left without funds in their most desperate time of need. Order your will kit today, comes complete with easy planning guide legal in all states. Only $1.00 ppd.

5. By the aforesaid practices respondent has represented, and has placed in the hands of distributors and others the means and instrumentalities of representing, directly or by implication, that said products will afford the purchaser or user that degree of legal knowledge necessary to enable such person to prepare a last will and testament which would be valid and operative in any or all states of the United States.

6. Said statements and representations are false, misleading and deceptive. In truth and in fact said products will not afford the purchaser or user that degree of legal knowledge necessary to enable such person to prepare a last will and testament which would be valid and operative in any or all states of the United States.

7. In the conduct of his business at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of will forms and other products of the same general kind and nature as those sold by respondent.

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

CONCLUSION

The aforesaid acts and practices of respondent, as herein found, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair and deceptive acts and practices in commerce, in violation of Section 5(a)(1) of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent, John Hamilton, an individual, trading as John Hamilton Agency, or under any other name or names, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale and distribution, in commerce, as "commerce" is defined in the Federal Trade Commission Act, of printed forms designated as "Will Planning Guide" and "Last Will and Testament", or any other forms or products purportedly designed to enable the purchaser to prepare a legal document, do forthwith cease and desist from:

1. Representing, directly or by implication, that said products will afford the purchaser or user that degree of legal knowledge necessary to enable such person to prepare a last will and testament or other legal document which would be valid and operative in any or all states of the United States.

2. Furnishing or otherwise placing in the hands of distributors or dealers in said products the means and instrumentalities by and through which they may mislead or deceive the public in the manner or as to the things hereinabove prohibited.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 4.19 of the Commission's Rules of Practice, effective June 1, 1962, the initial decision of the hearing examiner shall on the 4th day of August 1962, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

THE NUARC COMPANY*

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d) OF THE CLAYTON ACT

Docket 7848. Complaint, Mar. 28, 1960—Decision, Aug. 7, 1962

Order requiring a Chicago manufacturer of equipment used in printing, offset printing, and lithography, to cease discriminating among customers in

*Erroneously named in the complaint as Nu Arc Company, Inc.

violation of Sec. 2(d) of the Clayton Act by paying advertising allowances such as payments of approximately $3,000 for advertisements of its products in "Printing Impressions—National Edition", a newspaper owned by a customer.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly described, has violated the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Nu Arc Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 4110 West Grand Avenue, in the city of Chicago, State of Illinois.

PAR. 2. Respondent is now and has been engaged in the manufacture and sale of arc lamps, vacuum frames, light tables and dark room lights. Respondent markets these products throughout the United States through approximately 400 dealers who are sold on a non-exclusive basis and who resell these products in competition with each other. Total sales by respondent for its fiscal year ended August 31, 1959, were in excess of $1,200,000.

PAR. 3. In the course and conduct of its business, respondent has engaged, and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended. Respondent causes its products to be transported to the customers of its distributors in various states throughout the United States and the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent paid, or contracted for the payment of, something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by said respondent and such payments were not made available on proportionally equal terms to all customers competing in the sale and distribution of respondent's products.

PAR. 5. For example, during the period between January 1, 1959 through February 1, 1960, respondent contracted to pay and did pay to Foster Type and Equipment Company, Inc., Philadelphia, Pennsylvania, in excess of $3,000 as compensation or as an allowance for advertising or other service or facilities furnished by or through Foster Type and Equipment Company, Inc., in connection with its offering

for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with Foster Type and Equipment Company, Inc., in the sale and distribution of respondent's products.

PAR. 6. The acts and practices of respondent, as alleged above, violate subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. Lynn C. Paulson for the Commission.
Mr. Eli E. Fink, of Chicago, Ill., for respondent.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondent on March 28, 1960, charging that said respondent has violated the provisions of subsection (d) of section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act. The crux of the charges set forth in paragraphs 4 and 5 of the complaint, which are as follows:

"In the course and conduct of its business in commerce respondent paid, or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by said respondent and such payments were not made available on proportionally equal terms to all customers competing in the sale and distribution of respondent's products.

"For example, during the period between January 1, 1959, through February 1, 1960, respondent contracted to pay and did pay to Foster Type and Equipment Company, Inc., Philadelphia, Pennsylvania, in excess of $3,000 as compensation or as an allowance for advertising or other service or facilities furnished by or through Foster Type and Equipment Company, Inc., in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with Foster Type and Equipment Company, Inc., in the sale and distribution of respondent's products."

In substance the respondent's defense to such charges is as follows:

1. The respondent has not violated Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, inasmuch as respondent did not make payments to or for the benefit of its customers with-

out making such payments available on proportionately equal terms to all other customers competing in the sale and distribution of respondent's products.

2. Payments by respondent to Foster Publishing Company, Inc., and/or its successor in name, North American Publishing Co., in consideration of advertisements of NUARC products placed in Printing Impressions was not a payment to or for the benefit of Foster Type and Equipment Company, Inc., for a service or facility furnished by or through Foster Type and Equipment Company, Inc.

Proposed findings of fact and conclusions of law were filed by counsel in support of the complaint and counsel for the respondent. The hearing examiner has carefully reviewed and considered same. Proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

Upon the entire record in the case, the hearing examiner makes the following:

FINDINGS OF FACT

1. Respondent, THE NUARC COMPANY,[1] is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 4110 West Grand Avenue, in the city of Chicago, State of Illinois.

2. Respondent is now, and has been, engaged in the manufacture and sale of arc lamps, vacuum frames, light tables and darkroom lights. Respondent markets these products throughout the United States through approximately four hundred dealers who are sold on a nonexclusive basis and who resell these products in competition with each other. Total sales for the respondent for its fiscal year ended August 31, 1959, were in excess of $1,200,000.

3. Respondent causes its products to be transported to the customers of its distributors in various states throughout the United States and the District of Columbia.

4. Foster Type and Equipment Company, Inc. (hereinafter referred to as "Foster Type"), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office located in Philadelphia, Pennsylvania. Fos-

[1] The name of the corporaton in the complaint is erroneously stated to be NU ARC COMPANY, INC. Its correct name as set forth in respondent's answer is THE NUARC COMPANY.

ter Type was incorporated in August 1955, and is, and has been, engaged since then in the purchase and sale of printing equipment and supplies to newspapers, printers and other members of the graphic arts industry, and was from January 1, 1959, through February 1, 1960, a dealer of respondent, reselling respondent's products on a nonexclusive basis in the Pennsylvania and New Jersey area.

5. Foster Type was a dealer of respondent purchasing $11,037.46 of respondent's products in 1958, and $8,876.10 in 1959, from respondent, and respondent sold a total of $79,587.28 in 1958, and $219,550.89 in 1959, of its products to its dealers located in Pennsylvania and New Jersey.

6. Foster Publishing Company, Inc., and/or its successor in name, North American Publishing Co. (hereinafter referred to as "North American"), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal offices in Philadelphia, Pennsylvania. Foster Publishing Company, Inc., was organized in April 1958, and on or about August 3, 1959, changed its corporate name to North American Publishing Co.

7. North American is now, and has, since 1958, been engaged primarily in the business of publishing two monthly newspapers designed for distribution to the graphic arts industry. One is a newspaper for distribution to the graphic arts industry in the Delaware Valley area of the United States and is called "Printing Impressions—Delaware Valley Edition". The other is a newspaper distributed to the national graphic arts industry and is called "Printing Impressions—National Edition".

8. During the years 1957, 1958, until May 1, 1959, the officers of Foster Type and Equipment Company, Inc., were Irvin J. Borowsky, President; Alex Borowsky (brother of Irvin), Vice President; Beverly Borowsky (wife of Irvin), Secretary. In the spring of 1959, Hans Weiss became vice president and secretary (replacing Alex and Beverly Borowsky), and Stephen Mucha became vice president, while Irvin J. Borowsky continued as president, owning 100% of the outstanding shares of stock of the company at all times until August 1, 1959, when he transferred 10% of the stock to Hans Weiss, and 10% of the stock to Stephen Mucha, retaining 80%.

9. Since the date of their incorporation, all of the outstanding shares of stock of Foster Publishing Company, Inc., and/or its successor in name, North American Publishing Co., have been owned entirely by Irvin J. Borowsky, president and treasurer of the publishing company. His wife, Beverly Borowsky, is secretary.

10. Irvin J. Borowsky, as president, has at all times exercised control of, supervision of and responsibility for the day to day, week to

week, and month to month operation of Foster Publishing Company, Inc., and/or its successor in name, North American Publishing Co. He has also formulated, directed, controlled and, as president, assumed responsibility for the acts and practices of Foster Type and Equipment Company, Inc., at least until February 1, 1960.[2]

11. On or about May 19, 1958, respondent received a letter dated May 19, 1958, from Printing Impressions, published by the Foster Publishing Company, Inc., signed by I. J. Borowsky, its president, which letter contained the following statements:

> Printing Impressions was started for the purpose of diversifying our present operation and as a cooperative means of furthering our printing equipment business and the manufacturers we represent.
>
> Advertising will not be accepted from anyone competitive to our equipment company, or from manufacturers we do not represent, and are in competition to the line we sell in our Foster Type and Equipment Co.
>
> * * * * * * *
>
> Furthermore, every dollar you spend in our publication, we will have our Foster Type & Equipment Co. buy back in your products as a NuArc display.[3]

12. During the period from January 1, 1959, through February 1, 1960, respondent placed fourteen monthly advertisements of its products in Printing Impressions—National Edition and paid to Foster Publishing and/or its successor North American, for said monthly advertisements a total of $3,290.

13. THE NUARC COMPANY did not offer or otherwise make available such payments to its customers who were in competition with

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[2] This is the date on which Irvin J. Borowsky and the two corporations filed their answers with the Commission and in substance made this admission re Foster, Docket 7698. In Lifetime Cutlery Corp., Docket 7292, it was stated by the hearing examiner in taking official notice of certain facts:

"Official notice * * * allows many facts to be recognized and adopted as true which are beyond the realm of common knowledge, and may well be disputed. Moreover, official notice comes to us not from the common law, but by sanction of the Administrative Procedure Act, and is specifically intended to meet the complex and widely-varying needs of the administrative agencies. Official notice is the act of a Governmental agency, *or* its hearing official, in recognizing facts which have been proved to be true in precedent proceedings, as presumptively true in a pending proceeding. The use of official notice is desirable because it avoids the necessity of re-proving that which had already been shown to be true and brings to bear upon the issue all the accumulated knowledge and expertise relating thereto. No undue abrogation of traditional rights results from the taking of official notice, because opportunity is given for the affected party to show the contrary of the facts officially noticed."

In the NUARC case there can be no prejudice in the taking of official notice since Borowsky testified fully in this case as well as in the Foster case on the subject of his supervision and control over these corporations. He now claims he delegated extensive authority to others, and that the independent identity and operation of both companies evolved. This evidence, however, must be probatively weighed with what appears to be his prior inconsistent admissions in answering the complaint in the Foster case, Docket 7698. (See answer of Foster and Borowsky to paragraph one of the complaint.)

[3] Commission's Exhibit 17(A–D). See also Commission's exhibit 16(A–B) a follow-up letter of May 26, 1958.

Foster Type and Equipment Company, Inc. Customers of THE NUARC COMPANY who competed with Foster Type and Equipment Company, Inc., when the payments of $3,290 were made, were T. J. Murphy Company; Roberts & Porter, Inc.; Penn Dell & Co.; R. W. Hartnett Co.; Phillips & Jacobs Co.; and Eastman Kodak Stores, Inc.

14. Respondent knew, or should have known, that the Foster Type and Equipment Company, Inc., the Foster Publishing Company, Inc., and/or its successor in name, North American Publishing Co., all continued to be under the management and control of Irvin J. Borowsky, as president, as well as under his proprietary control because of his 100% or majority interest in the capital stock of the foregoing corporations as hereinbefore set forth.

15. Respondent knew, or should have known, that there was no change in the mutually beneficial cooperative corporate relationship between the Foster Type and Equipment Company, Inc., and the Foster Publishing Company, Inc., or its successor in name, North American Publishing Co., following respondent's receipt of a letter dated May 19, 1958, heretofore quoted (in part), since the cooperative policy enunciated therein was never revoked formally in writing or in evidenced practice.[4]

16. Respondent knew, or should have known, that placing advertising with the Foster Publishing Company, Inc., and/or its successor in name, North American Publishing Co., was tantamount to the granting of advertising allowances to the Foster Type and Equipment Company, Inc., as evidenced in the May 19, 1958, letter received by respondent from "Printing Impressions".

DISCUSSION OF EVIDENCE AND APPLICABLE LAW

In the case of Foster Publishing Company, Inc., et al., Docket 7698, the examiner found that illegal payments were induced by the Foster companies or successors and, in addition, that the respondent herein made some of the illegal payments for advertising. Unless the evidence herein varies, the Foster case is substantially dispositive of the issues herein.

It was stipulated by counsel that the respondent sold its products to six companies in the Philadelphia area who were competitors of its

[4] The only evidence of change is a claimed oral revocation and uncorroborated general statement that the publishing company and type and equipment company were operating independently although Borowsky continued his managerial control of both companies as president after the employment of a general manager for Foster Type and Equipment Company, Inc. See also footnote 2 re Lifetime Cutlery, Docket 7292.

customer, the Foster Type and Equipment Company, Inc., and that respondent did not make payments to these companies similar to those made to the Foster Type and Equipment Company, Inc.

However, in substance, respondent argues the evidence indicates it refused to purchase advertising from Foster Publishing Company, Inc., predecessor of North American Publishing Co., for the benefit of Foster Type and Equipment Company, Inc., its customer, when it was apprised by the written proposal of Foster Publishing Company, Inc., publisher of Printing Impressions, on or about May 19, 1958, that both companies were part of a joint venture, exclusively owned by Irvin J. Borowsky, and managed by him as president. Respondent concedes it did purchase advertising from North American Publishing Co., successor to Foster Publishing Company, Inc., when it was orally advised that the cooperative arrangement between the publishing company and type and equipment company was terminated, and that after June 1958, North American and Foster Type have operated as separate and independent corporate enterprises. Respondent therefore appears to claim, that having been assured its customer Foster Type would not be a benefactor, it advertised in "Printing Impressions", published by North American.

Respondent correctly asserts the general rule in regard to piercing the corporate veil as stated in *National Lead Company* v. *F.T.C.* 227 F. 2d 825 (7th Cir. 1955), *cert. den.* 351 U.S. 964 (1956):

> To come within the applicable rule, there must be evidence of such complete control of the subsidiary by the parent as to render the former a mere tool of the latter, and to compel the conclusion that the corporate identity of the subsidiary is a mere fiction.

Respondent, however, overlooks the fact that, as evidenced, Borowsky not only continued in control of both companies to the extent of owning 100% of the capital stock of one corporation and 80% of the other, but also continued to assume responsibility for the management control of these corporations by actively retaining his position as president of both. In the light of these facts, the previously conceded joint venture of these corporations makes their separate identities a mere fiction. Furthermore, there is no evidence having probative weight which would indicate the conceded cooperative relationship between the two companies had changed after May 19, 1958.[5] Borowsky, as president and sole owner of the publishing company, had a very vital continuing interest in advertising for the benefit of the type and equipment company, which he also managed as president and controlled as 100% owner and then as 80% owner of the capital stock.

[5] See Finding No. 11 herein.

Borowsky's original appraisal of the mutual interest of both companies in issuing the letter of May 19, 1958, is undoubtedly the correct one. Respondent knew, or should have known, that in the absence of facts indicative of a change of mutual interest, it could not assume that there was a complete severance of the dependence of the type and equipment company on the advertising devices of the publishing company under the same proprietorship and management unless there was in good faith a formal abrogation of the formally announced cooperative arrangement or joint venture set forth in the May 19 letter as distinguished from the casual and uncorroborated conversations claimed.

The recent cases of *P. Lorillard Co.* v. *F.T.C.*, 267 F. 2d 439 (3rd Cir. 1959), *cert den.*, 361 U.S. 927, and *Swanee Paper Company* v. *F.T.C.*, 291 F. 2d 833 (2d Cir. 1961) involve situations where a supplier made payments to a third party, and it was held that under the facts of each case such payments were actually to the benefit of a favored customer for facilities furnished by the favored customer. An examination of these opinions further substantiates the Commission's theory that if a benefit accrues to a favored customer a violation of Section 2(d) is apparent.

In the *Swanee* case the respondent paid money to the owner of an animated display sign under an arrangement whereby Grand Union, the favored customer, would receive a cash rebate and also valuable advertising space at a nominal cost. The court found that Swanee knew, or should have known, that it was, in fact, conferring a benefit upon its favored customer, and that facilities were furnished by the favored customer because Grand Union had leased the entire sign, had the right to select its participants and also gave in-store promotions of Swanee products in Grand Union Stores.

In *P. Lorillard Co.* case, the court upheld a violation of Section 2(d) where grocery chains signed contracts with broadcast networks to give the chains "free" broadcast time in consideration for the right of the networks to designate in-store promotional displays of the chains. The suppliers were induced to purchase broadcast time and the networks offered them the right to display their products in the in-store promotional displays granted to the networks by the grocery chains. The court held that the crucial question involved was whether the suppliers made payments to someone which actually were of benefit to their favored customers, and the court sustained the Commission's findings that the entire arrangement was a plan whereby the suppliers' payments to the networks benefited the chains with free adver-

tising, and were partially made in consideration of the furnishing of the in-store promotions by the chain.

As correctly urged by respondent's counsel, the *P. Lorillard* and *Swanee* cases also established the law with respect to the relevancy of a supplier's intention and knowledge in connection with the proof of a violation of Section 2(d). They held that the intention, purpose or motive of a supplier in making its payment for advertising is not relevant to a consideration of whether an advertising payment actually benefits a favored customer, but the fact that a supplier knew, or should have known, that an advertising payment in fact inured to the benefit of its favored customer is relevant to the proof of a violation of Section 2(d). Thus, even though a supplier intends to benefit a favored customer by the payment of advertising allowances, no violation of Section 2(d) can exist unless the allowance is in fact paid to or benefits the favored customer. In accord with this precedent the evidence in the within proceeding does establish a conceded benefit accruing to Foster Type and Equipment Company, Inc., because of the announced joint venture with the publishing company which advertised respondent's products that Foster Type and Equipment Company, Inc., had for sale. In fact, the Foster Publishing Company, Inc., sought the advertising on the basis of assuring purchases by Foster Type and Equipment Company, Inc., to meet the cost of advertising, as a guarantee of the cooperative arrangement.

It is difficult to believe respondent in good faith relied on the general statements of the disassociation of the two companies without corroborative factual details they knew they should acquire because of previous and continued dealings with Borowsky, as president of both companies.[6]

On the question of Section 2(d) violations of the suppliers, there are striking parallels in the evidence herein and the facts in *State Wholesale Grocers, et al.* v. *The Great Atlantic & Pacific Tea Co., et al.*, 258 F. 2d 831 (7th Cir. 1958) *cert. denied*, 358 U.S. 947 (1959). In that case, The Great Atlantic & Pacific Tea Co., *a Maryland corporation*, wholly owned and controlled the defendant The Great Atlantic & Pacific Tea Co., *a New Jersey corporation*, and owned as well all of the capital stock of defendant Woman's Day, Inc. Thus, under this complaint it was held that grocery suppliers who placed advertising in a magazine owned by corporate subsidiary of the national grocery company and distributed exclusively through such company stores thereby violated Section 2(d) of the Clayton Act proscribing payment for services or facilities for processing or sale unless they made similar

[6] See Tr 249–250

payments available on proportionately equal terms to other grocery companies even though such companies did not publish magazines, and that the evidence failed to show that they so made payments available.

Respondent contends that the Atlantic & Pacific case, *supra*, is not in point. In this connection, it is reasoned in part that Printing Impressions was not a promotional operation of Foster Type and that it did not exist even partially for the benefit of Foster Type. To the contrary, the May 19, 1958, letter from Printing Impressions received by respondent, received in evidence, asserts "Advertising will not be accepted from anyone competitive to our equipment company * * *". That Foster Type and Equipment Company, Inc., was a benefactor of Printing Impressions must be unequivocally concluded.

CONCLUSIONS

In the course and conduct of its business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of one of its customers as compensation or in consideration for services or facilities furnished by or through such customer in connection with its offering for sale or sale of products sold to it by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products, and respondent has therefore violated Section 2(d) of the Clayton Act, as alleged. The acts and practices of respondent, as proved, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

It is further concluded that this proceeding is in the public interest, and that the following order shall issue:

ORDER

It is ordered, That the complaint be amended by changing the name of the corporate respondent from NU ARC COMPANY, INC., to THE NUARC COMPANY as set forth in the respondent's answer.

It is further ordered, That the respondent THE NUARC COMPANY, a corporation, and its officers, representatives, agents and employees, acting for or in behalf of respondent corporation, directly or through any corporate or other device, in or in connection with the sale, in commerce, as "commerce" is defined in the Clayton Act, of arc lamps, vacuum frames, light tables, darkroom lights and other products of respondent do forthwith cease and desist from paying or contracting for the payment of anything of value to or for the benefit of a customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with

the processing, handling, selling or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Opinion of the Commission

By Kern, *Commissioner:*

This matter is before the Commission on the appeal of respondent from the inital decision sustaining the allegations of the complaint charging that respondent's payments to customers for services were violative of Section 2(d) of the Clayton Act, as amended.

Respondent, The Nuarc Company, erroneously named as Nu Arc Company, Inc., in the complaint, is engaged in the manufacture and sale of equipment used in printing, offset printing and lithography. The evidence in this proceeding relates to Nuarc's payments of approximately $3,000 for advertising services allegedly made to its customer, the Foster Type and Equipment Company, Inc.,[1] in the period January 1959 to February 1960.

Respondent on appeal contends, in effect, that the payments in issue here were, in fact, made to the Foster Publishing Company, Inc.,[2] a third party insofar as the supplier-customer relationship is concerned, although the same individual was president of Foster Type and of Foster Publishing and held 100 per cent of the stock of each corporation at the time the payments challenged by this proceeding commenced. It is respondent's position that the payments challenged herein were made to an independent trade publication and not to a customer. On the basis of the foregoing contentions, respondent argues that its payments were not to or for the benefit of a customer for services or facilities furnished by the customer and, therefore, not within the ambit of Section 2(d).

The crucial issue here presented, therefore, is whether Nuarc's payments for advertisements placed in Foster Publishing Company's "Printing Impressions" were tantamount to payments to, or for the benefit of, its customer for services or facilities furnished. The resolution of this question requires an analysis of the relationship of the two corporations to each other as well as the relationship of both to Irvin J. Borowsky, their president and sole stockholder.[3]

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[1] Hereinafter referred to as Foster Type.

[2] Foster Publishing Company, which was renamed North American Publishing Company on August 3, 1959, is hereinafter referred to as Foster Publishing.

[3] Borowsky held 100 per cent of the stock in Foster Type till May of 1959 and thereafter 90 per cent of the stock in that corporation in the remainder of the period relevant to this proceeding.

We are persuaded that the record herein supports a finding that Foster Type and Foster Publishing, despite their separate incorporation, did in fact constitute one enterprise and that their separate corporate identity was fictitious. We further hold that this state of affairs was in effect during the period in which the payments challenged herein were made.

The record establishes beyond a doubt that Borowsky by two letters in May of 1958, soliciting advertisements for Foster Publishing's "Printing Impressions", documented the relationship between Foster Type and Foster Publishing and thereby in effect expressly informed respondent that the two corporations were to be considered as one for practical business purposes. Clearly, the proposals that competitors of Foster Type and its suppliers would not be permitted to advertise in "Printing Impressions" and that Foster Type would reciprocate the supplier's expenditures for advertising with purchases of equipment equivalent to the amount of such advertisements [4] compel the inference that Borowsky so dominated the two corporations that he was in a position to manipulate the operations of each so that either could be maneuvered into a position where it would be forced to conduct its affairs in a manner not necessarily to its own best interest but rather to further Borowsky's business as a whole. The record herein, therefore, goes beyond the mere documentation of the fact that the same individual held office in both corporations or that these corporations were jointly owned by him. On the basis of this evidence, we hold that both corporations operated as an integrated enterprise or as the alter egos of Borowsky and that neither had an existence independent of him. Accordingly, on receipt of these letters, respondent could be under no illusion but that payment to one corporation was inevitably a payment to Borowsky or to his enterprise as a whole.

Respondent argues that in any case the separate corporate identity of Foster Type and Foster Publishing should have been recognized at least in the period when the payments challenged herein were made, on

[4] Borowsky's letter of May 19, 1958, states in part:

"PRINTING IMPRESSIONS was started for the purpose of diversifying our present operation and as a cooperative means of furthering our printing equipment business and the manufacturers we represent.

"Advertising will not be accepted from anyone competitive to our equipment company, or from manufacturers we do not represent and are in competition to the line we sell in our Foster Type & Equipment Co.

* * * * * * *

"Furthermore, every dollar you spend in our publication, we will have our Foster Type & Equipment Co. buy back in your products as a Nuarc display."

And his letter of May 26, 1958, states in pertinent part as follows:

"In these 'tight money' times our proposal to buy back every dollar you spend in advertising should be most beneficial to you.

"We will certainly have to sell your products, otherwise we will not be able to meet our $5,000.00 per month publishing costs."

the ground that the proposals embodied in the May 1958 correspondence had not been put into effect and that each company, in all respects, operated as a separate and independent concern. The contention is without merit for at best the evidence shows that the announced program had not been put into effect because it did not accomplish what it was supposed to do, namely, attract supplier advertising. The admission of Lou Page, general manager of Foster Publishing, that a demand by a supplier for reciprocal purchases by Foster Type on the basis of the offers made in Borowsky's letters would be honored, despite the decision that this represented the wrong approach, compels the conclusion that the two corporations had not regained a viable identity of their own, which would, in the case of each concern, permit it to formulate policy in its own best interest. It is inconceivable that Foster Publishing could compel such performance by Foster Type if the two concerns were, in fact, independent of each other. In short, although the record does not disclose that the proposals overtly manifesting the subservience of the two corporations to Borowsky were the direct cause for the payments by Nuarc, the evidence does justify the conclusion that at the time of the payments, Borowsky's domination of the two concerns continued uninterrupted, depriving each of the opportunity to formulate its business policies independently.

It may be true that the two concerns did preserve some of the external indicia of separate corporate existence such as separate payrolls, tax returns, etc. However, if the separate exercise of certain corporate functions is to be the determining factor in a decision as to whether two corporations in fact exist independently so as to preclude the application of Section 2(d), even in those cases where the crucial element of decision-making does not repose separately in such corporations, the effectiveness of the statute in preventing discriminatory practices may well be largely eroded. We do not think the Congressional intent can be so readily subverted. Where, as here, the outward manifestations are not a true reflection of internal business operations and policies, the Commission may, and indeed is required to, disregard external appearances.

We now turn to consider in detail the respondent's effort to establish with the testimony of its president, and secretary, as well as that of Irvin Borowsky and Lou Page, the general manager of Foster Publishing, that the joint venture between Foster Type and Foster Publishing manifested in Borowsky's letters of May 19 and May 26, 1958, had been abrogated, that the two concerns were, in fact, independent of each other, and that Nuarc's officials had reason to believe

in good faith that the two corporations were transacting their business separately and independently before the payments challenged herein commenced.

Respondent claims on appeal that the hearing examiner disregarded the testimony of its witnesses on this point. The contention is without merit for it is clear from the initial decision that the hearing examiner considered but found the evidence wanting in credibility. The Commission, as a general rule, accepts the hearing examiner's evaluation of the credibility of witnesses whose demeanor he has had the opportunity of observing during the course of the hearings. In this instance, from our review of the testimony in question, we are persuaded by certain inconsistencies and the manner in which certain of the testimony was presented, that the hearing examiner correctly evaluated the probative worth of the evidence.

The testimony of Borowsky and Page does not support respondent's position despite their assertion in general terms that "Printing Impressions" was independent of Foster Type, for on the crucial issue of this case their testimony does not support a finding that Borowsky had abandoned the commanding position through which he exercised the control permitting him to disregard the corporate entities and treat the two corporations as one. On the contrary, certain admissions by the witnesses permit only the opposite conclusion.

In concrete terms their testimony reveals little more than that the unfavorable reaction of potential advertisers to the offers to exclude competitors from the publication and to buy back an amount of merchandise equal to the amount of advertising placed decided them not to continue such offers. The admission of Page cited above that requests for reciprocal purchasing on the basis of Borowsky's letters would be honored is inconsistent with the contention of these witnesses that the two corporations were, in fact, independent of each other.

As to the position of Borowsky, the record is clear that in the period with which we are primarily concerned, i.e., January 1959 to February 1960, Borowsky was ultimately responsible for the policies and practices followed by Foster Publishing, and it is equally clear on Borowsky's express statement in this proceeding that he was responsible for the affairs of Foster Type until at least May of 1959,[5] when two individuals, Weiss and Mucha, were brought into the latter corporation on the agreement, according to Borowsky, that they would take responsibility for operating the business. It is to be noted that the hearing examiner erred in finding that 10 per cent of Foster Type's

[5] The payments challenged herein, it may be noted, commenced well before that date.

stock was transferred to Mucha. The stock was never transferred on the company's books, and he subsequently recovered the partial payment he had made therefor. Borowsky testified that after May 1959, Foster Type's operations were controlled by Weiss and Mucha despite his retention of that concern's presidency and 90 per cent of its stock. However, this contention of the witness is vitiated by his admission that after disagreement between Weiss and Mucha, he determined which of the two was to stay with the corporation. Finally, Borowsky's disclaimer of responsibility for the operations of Foster Type is not worthy of belief, as the hearing examiner found, in the light of his prior inconsistent statement in his answer to the Commission's complaint in *Foster Publishing Company, Inc., et al.*, Docket 7968, filed February 1, 1960, of which official notice was taken in the initial decision. In that answer, Borowsky admitted that he formulated, controlled and directed the acts and practices of both Foster Type and Foster Publishing.

The hearing examiner in this instance correctly refused to deliberate in a vaccum when relevant facts concerning the witnesses' testimony were available to him in a related proceeding of which he properly might take official cognizance. Respondent does not on appeal except to the official notice taken in the initial decision in this connection, and, considering all the circumstances surrounding this procedure, we find that respondent was not prejudiced thereby. Although, in general, it is preferable for the examiner to announce his intention of taking official notice prior to closing the record, the procedure followed herein complies with the requirement of Section 7(d) of the Administrative Procedure Act that opportunity be afforded on timely request to show the contrary of the facts officially noted. Such requests may be made on appeal to the Commission from the hearing examiner's initial decision which, of course, does not finally dispose of the proceeding in any case prior to action by the Commission. In this instance, on oral argument, respondent's counsel expressly informed the Commission that he failed to raise the point because he felt it unnecessary. Counsel is undoubtedly correct in this position, for the record shows that respondent was aware of the pleadings in the *Foster* case prior to putting Borowsky on the stand to testify precisely on the issue of which official notice was taken, i.e., the relationship of the two corporations to each other and to Borowsky.

Respondent also contends that it only placed advertisements in "Printing Impressions" on assurance to its president given to him at a trade show in October 1958, by Lou Page, general manager of the publication, that the two companies were absolutely divorced, that

each was operated as a free and independent business venture and that he, Page, was in charge of the publication. However, Nuarc's president, Weisman, during his first appearance on the stand, and its secretary, Shultheis, merely testified vaguely that Page had assured them that the "policy" had changed.[6] At this point the testimony of the two witnesses who had apparently both conferred with Page on this subject at the trade show was not inconsistent.[7] This evidence, however, throws no light on the critical question of whether the business of Foster Type had in actuality been divorced from that of Foster Publishing prior to the payments which are the subject of this proceeding. On the contrary, despite rather leading questions by Nuarc's counsel, the witness Shultheis stated that Page had said nothing concerning the connection between Foster Type and "Printing Impressions".[8] This testimony, therefore, flatly contradicts the claim made on appeal that Page had given assurances that the two corporations were divorced. It should be noted that upon completion of Shultheis' testimony and a recess, Weisman, who had preceded Shultheis on the stand, was recalled by respondent's counsel and at that time proceeded to testimony that Page had assured him the two companies were absolutely divorced and there was no connection between them. At this juncture, apparently in an attempt to drive his point further home, respondent's counsel asked the witness:

Q. Just to confirm the character of this testimony, do you recall, Mr. Weisman, that we walked over here this morning from my office on Jackson Boulevard, and on the way over I asked you——

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[6] E.g., Shultheis testified:

"* * * he [Page] advised us of the fact that the policy had changed completely, that he was running the publication, and what had gone on in the past was no longer in vogue.

"HEARING EXAMINER BUTTLE: Did he explain what he meant by that?

"THE WITNESS: No, he didn't. He just said, 'From here on in,' he said 'I am running the publication, and this is what we have to offer. This is our circulation and the rates, and we would like to have you as an advertiser.' "

[7] It may be noted that Weisman stated that Shultheis could corroborate him as to the nature of the assurances given by Page on this point.

[8] "Q. Did he say anything about Foster Type and Equipment Company Incorporated?

"A. No.

* * * * * * *

"Q. You don't recall whether or not he indicated that Foster Type and Equipment Company was no longer a part of Printing Impressions that was indicated in the letter which you examined, which you state was rather foolish in substance?

* * * * * * *

"A. As I recall, I don't believe it was mentioned at all. He just intimated to us that he was running the publication. But as far as I recall, offhand I don't recall that.

By Mr. Fink:

"Q. He didn't say anything about the connection between Foster Type and Equipment Company and Printing Impressions?

"A. No, as I recall, he did not."

(Continuing)—I asked you if Mr. Page told you or didn't tell you at the Show in New York in 1958 that there was or was no connection between Printing Impressions and Foster Type and Equipment Company. Do you remember that I asked you——

* * * * * * *

Q. Do you recall that?

A. Yes, he guaranteed me there would be no connection whatever.

Q. Isn't that what you told me this morning coming over here, on Jackson Boulevard?

A. Those very words.

The examiner, after that response, stated, as well he might, that if, in fact, the witness had made such statements to counsel previously that morning, he did not understand how the witness could have failed to make this response his first time on the stand. We share the examiner's incredulity.

The hearing examiner found that respondent did not offer or otherwise make available payments such as those challenged herein to its customers competing with Foster Type and that finding is not in dispute here. The evidence fails to show that respondent's other customers competing with Foster Type operated publications such as "Printing Impressions" as part of their over-all business or that any alternative form of promotional allowance was made available to them. However, another issue requiring consideration on this appeal is the question of whether or not the advertising furnished by Foster Publishing is a service coming within the scope of the statute. In view of the fact that we have found that the two corporations must be considered as one enterprise, it is immaterial that the publication's entire operations did not redound to the benefit of Foster Type in its resale of respondent's equipment. Furthermore, although "Printing Impressions" may have acquired some of the characteristics of an independent trade paper by virtue of the fact that it accepted advertising from and ran features about Foster Type's and its supplier's competitors, the fact remains that "Printing Impressions" did run advertising of respondent's equipment sold by Foster Type. The statute does not require that either the advertisement or the publication in which it is run specify the customer by whom the service is furnished. The language of the Act pertinent to the facts of this case states:

* * * it shall be unlawful for any person * * * to pay or contract for the payment of anything of value to * * * a customer of such person * * * for any services or facilities furnished by or through such customer in connection with the * * * sale * * * of any products * * * sold * * * by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products * * *

We accordingly hold that the requirements of the Act have been met and that the advertising furnished here was a service within the scope of the statute.

The ruling herein, of course, is not to be construed as holding that a supplier's payments for advertising come within the statutory scope of Section 2(d) in any and all cases where such advertising is placed in media connected by corporate or other relationship to the seller's customer. The question of whether the corporate entity is to be respected or whether the service performed is one coming within the scope of the statute must be decided on the facts of each case.

Respondent finally contends that, in the event the Commission concludes the allegations of the complaint have been sustained, it should nevertheless vacate the order entered in the initial decision as too broad and substitute therefor an order limited to the particular practices found to have violated the Act.

The contention is without merit for contrary to respondent's argument, Nuarc's payments involved herein, unlike those in *Swanee Paper Corporation* v. *Federal Trade Commission*, 291 F. 2d 833 (2nd Cir. 1961), *cert. denied*, 368 U.S. 987 (1962), do not involve an uncertain area of the law insofar as enforcement of Section 2(d) is concerned. The instant case lacks the distinguishing feature of *Swanee*, viz., payments to a third party not related to the seller's customer. Nuarc's payments, as we have found, were made to the Borowsky enterprises as a whole and not to an isolated segment thereof, despite respondent's assertion of separate corporate identity for its component parts. These payments, therefore, were necessarily made to the respondent's customer and the more complex considerations governing a determination as to whether payments were for the benefit of the customer are not relevant here. The proposition that the trier of fact may go beyond the corporate entity where the circumstances of the case so warrant is, of course, not a novel proposition either in the law generally, the antitrust field or specifically in the area of the Robinson-Patman Act.

Where, as in this instance, the practice found to have violated Section 2(d) is clearly unlawful and where that statute itself constitutes a very narrow definition of the illegal practices prohibited, incorporating the applicable statutory language in the order will not shift to the courts the burden of deciding issues whose resolution has been entrusted to the Commission.

The views expressed in *Vanity Fair Paper Mills, Inc.*, Docket No. 7720 (1962), and *Shulton, Inc.*, Docket No. 7721 (1961), *rev'd on other grounds*, 305 F. 2d 36 (7th Cir. 1962), as to the proper framing of Sec-

tion 2(d) orders in light of the Clayton Act Finality Act (P.L. 86–107, 86th Cong., July 23, 1959) apply here.

Respondent, despite its plea that the order be revised to limit the prohibitions to the precise practice found to have violated the law, has not submitted a proposed order for our consideration, and we cannot envisage an effective order in this instance prohibiting only the exact method by which respondent violated the statute. However, in order to clarify respondent's obligations under the order to the greatest extent possible consistent with an effective remedy, we will limit the scope of its prohibitions to arc lamps, vacuum frames, light tables and dark room lights as well as to other equipment used for printing, offset printing, and lithography, and further limit its application to advertising services or facilities furnished by its customers.

The appeal of respondent is denied and the initial decision as modified in accordance with the views expressed in this opinion is adopted as the decision of the Commission.

Commissioner Anderson concurred in the result of the decision of this matter, and Commissioner Elman dissented.

Dissenting Opinion

By Elman, *Commissioner:*

I.

An understanding of the issues in this proceeding requires description of the relationships of the corporations and individuals involved. The Commission and the respondent differ in their interpretations of some of the facts, but there is also a substantial area of agreement.

Among the facts not in dispute are these. The respondent is The Nuarc Company (hereinafter "Nuarc"), a firm engaged in the manufacture and sale of arc lamps, vacuum frames, light tables, and darkroom lights. Among Nuarc's customers is a firm called Foster Type and Equipment Company (hereinafter "Foster Type"), which is a dealer in the products Nuarc makes. The third corporate entity involved is the Foster Publishing Company (renamed North American Publishing Company and hereinafter called "Foster Publishing"), which publishes trade newspapers for distribution to the graphic arts industry. The nexus between Foster Type and Foster Publishing is provided by Mr. Irvin J. Borowsky who, during the period here relevant, was president of both firms and owned 100% of the stock of Foster Publishing and never less than 80% of the stock of Foster Type.

This case arises out of the placing of advertising by respondent Nuarc in the National Edition of Foster Publishing's newspaper, "Printing Impressions". The context and significance of this action are in controversy. Respondent contends that it was an ordinary advertising transaction whereby it simply placed advertisements in a trade paper catering to ultimate users of its products, and paid the standard rate for the advertising service rendered. The Commission has determined, however, that the relationship between Nuarc and Foster Publishing constituted a violation of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act (38 Stat. 730, as amended, 15 U.S.C. 13(d)), which makes it unlawful

> for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Admittedly, Foster Publishing is not a customer of Nuarc, but Foster Type is. The Commission concludes that, because Borowsky is the principal shareholder, president and controlling figure in both, Nuarc's payments for advertising in "Printing Impressions" are payments "to or for the benefit of a customer", and that the advertising obtained for these payments was a service "furnished by or through such customer". Respondent disputes these conclusions, arguing that, despite Borowsky's control of both Foster Type and Foster Publishing, they are operated as unrelated entities.

The Commission supports its position primarily by reference to a proposal made by Borowsky to Nuarc in May of 1958. Borowsky there explained that "Printing Impressions" was started as a means of promoting Foster Type's printing equipment business; that "Printing Impressions" would not accept advertising from competitors of Foster Type or from manufacturers whose lines Foster Type did not carry; and that Foster Type would buy enough equipment from Nuarc to reimburse it for advertising in "Printing Impressions". Respondent replies that it refused to advertise in "Printing Impressions" on this basis. It asserts that it began advertising in January 1959 only after securing assurances that "Printing Impressions" would accept advertising from anyone in the industry, and that it would be operated independently of Foster Type. The hearing examiner and the Commission find respondent's evidence on this alleged policy revision on the part of Foster Publishing unconvincing.

Thus, as the Commission views the facts: Borowsky has at all times pertinent to this proceeding been the owner and guiding spirit of both Foster Publishing and Foster Type; Foster Publishing's "Printing Impressions" was conceived as a promotional satellite of Foster Type; and respondent's evidence offered to prove that Foster Publishing and Foster Type were independently operated and that respondent had reason so to believe in good faith is not credible.

II.

The Commission's finding of a violation of Section 2(d) rests squarely on its determination that Foster Publishing and Foster Type were "operated as an integrated enterprise or as the alter egos of Borowsky and that neither had an existence independent of him." [1] (Opinion, p. 387.) In the Commission's view this is "the crucial issue of this case". (Opinion, p. 389.) I would suggest, however, that the Commission is altogether too occupied with the role of Mr. Borowsky in these enterprises. Of course, his influence over Foster Type and Foster Publishing is important in appraising the relationship of the companies, but it is hardly a sufficient basis for issuance of an order. There remain the questions—but briefly and sketchily mentioned by the Commission—whether respondent paid anything "to or for the benefit of a customer" in return for a "service" "furnished by or through such customer".

Certainly the mere fact that Borowsky derives the ultimate profit from both businesses is no basis for a determination that the statute has been violated. This may be illustrated with a hypothetical situation. Let us suppose that Nuarc manufactures not only printing equipment but also bakery equipment, and that Borowsky sells printing equipment through his company, Foster Type, and also publishes a trade paper for the bakery equipment industry through his other company, Foster Publishing. If Nuarc were to place ads in his bakery trade paper, Borowsky would reap the profit, but Section 2(d) would not be violated because Nuarc's bakery equipment ads would have no "connection with" (to use the language of Section 2(d)) Borowsky's sale of Nuarc's printing equipment. In this context, it would make no legal difference if the Commission were to find that Borowsky operated both businesses as "an integrated enterprise" in which "neither had an existence independent of him". (Opinion, p. 387)

[1] The Commission elsewhere characterizes the "separate corporate identity" of each firm as "fictitious". (Opinion, p. 387.) I take it that no more is meant than that both corporations were, as indicated in the quotation from page 388 of the Commission's opinion, largely controlled by a single person in matters of policy.

The difference between that hypothetical case and the one before us, of course, is that the bakery publication can never be operated to further the sale of printing equipment. But the point of the example is that it also applies in instances in which the necessary connection could be proved but has not. That is to say, the Commission is no nearer to showing a violation in this case than it is in the hypothetical if it does not show how Nuarc paid something "for the benefit of a customer" of its printing equipment in return for a service "furnished by or through" that customer "in connection with" the sale of Nuarc's equipment. *Cf.*, *General Foods Corp.*, 52 F.T.C. 798, 828.

The Commission's evidence on these central questions consists of Borowsky's proposal in May of 1958 to operate "Printing Impressions" solely for the benefit of Foster Type and its suppliers. I agree that proof of an illegal motive is a good beginning. I agree also that the examiner and the Commission have a right to disbelieve witnesses who say that this motive changed. But there is tangible evidence that this purpose was never carried into effect, whether or not it was subjectively abandoned. The Commission specifically finds (opinion, p. 389) that the unfavorable reaction of potential advertisers caused discontinuance of the plan to exclude competitive advertisers and to tie advertising to equipment sales. And this is the entire content of Borowsky's May 1958 proposal.

On this state of proof, we have a standoff. Commission counsel's evidence shows that Borowsky intended to obtain a "benefit" for Foster Type in return for a service "furnished by" Foster Type to Nuarc "in connection with" the sale of Nuarc's equipment. But respondent's evidence shows, as the Commission finds, that this intention could not be brought to realization. Proof of an illegal objective is one thing; proof of an illegal objective that failed is quite another. At this point the burden shifts back to Commission counsel to show evidence of some other illegal aim, or, better yet, of some illegal conduct.

Everything the Commission has to say on this subject is summed up in its observation "that 'Printing Impressions' did run advertising of respondent's equipment sold by Foster Type." (Opinion, p. 392.) From this single fact, coupled with Borowsky's control of both businesses, the Commission concludes "that the requirements of the Act have been met and that the advertising furnished here was a service within the scope of the statute." (*Ibid.*) Thus, mere publication in Borowsky's trade paper of advertising placed by a supplier of Borowsky's printing equipment business constitutes a violation of the statute. I cannot believe either that this is so, or that the Commission believes

it to be so. If it really so believed, it surely would have omitted from the opinion its extended discussion of Borowsky's May 1958 proposal, since that proposal is totally unnecessary to a decision needing no more support than the objective facts of central control of the two businesses by Borowsky plus publication of respondent's advertising.

The sparseness of the evidence relied on here is illustrated by contrasting it with the evidence present in the leading cases in point—cases cited by the hearing examiner in support of the order against respondent but conspicuously absent from the Commission's discussion of this problem. In the first of these, *State Wholesale Grocers* v. *Great Atlantic & Pacific Tea Company*, 258 F. 2d 831 (C.A. 7), the court determined that Section 2(d) was violated when certain suppliers of "A & P" grocery stores ran advertisements in "Woman's Day", a magazine published and distributed by A & P at a price far below that of comparable publications. In reaching this conclusion, the court found that: (1) "Woman's Day" was obtainable only at A & P stores; (2) since its inception "Woman's Day" was identified as the A & P magazine; (3) for a time it carried the words "The A & P Magazine" on its cover; (4) all of its food advertising was of products sold by A & P stores; (5) it was an effective medium for advertising A & P stores themselves and for creating good will for A & P; (6) it existed "solely for competitive benefit of A & P's retail stores." (258 F. 2d, at 834) In other words, the tie between A & P and "Woman's Day" was patent and complete. It thus directly benefited A & P and indirectly benefited its suppliers, who were enabled by A & P's cut-price, mass distribution of "Woman's Day" to reach millions in the very stores where their products were sold.

In *P. Lorillard Co.* v. *Federal Trade Commission*, 267 F. 2d 439 (C.A. 3), commonly known as the "Chain Lightning" cases, the violation arose out of an advertising scheme concocted by certain national radio and television broadcasting companies. The broadcasting companies contracted to give certain grocery chains free advertising time in return for the promise of in-store promotional displays for products to be agreed upon. Then the broadcasting companies solicited manufacturers and sellers of grocery products to purchase radio and television time, offering as an inducement the in-store promotional displays arranged under the contracts with the grocery chains. Thus, the food manufacturers in effect purchased advertising time for the grocery chains and in return received promotional displays of their products in the stores operated by the chains.

A similar exchange of benefits is apparent in *Swanee Paper Corp.* v. *Federal Trade Commission*, 291 F. 2d 833 (C.A. 2). There the

Grand Union Co., a grocery chain, arranged with an advertising agency to take space on a "spectacular" advertising sign at a very low rate on condition that it find other paying customers who would also use the sign. Swanee Paper Corp., a supplier of Grand Union, was among those solicited. The court found that the advertising outlay by Swanee was for the benefit of Grand Union since the latter thereby obtained valuable space on the sign at a nominal cost, plus valuable advertising elsewhere and cash fees from the agency that operated the sign. That the advertising service was provided to Swanee by Grand Union was shown, first, by the fact that Grand Union leased the entire sign, parceling out a portion of it to Swanee, and, second, that as part of the arrangement, Grand Union provided in-store displays for Swanee's products.

These cases illumine the area of necessary proof in a Section 2(d) case involving a supplier-advertising medium-customer arrangement of the sort here in question. Unless the facts of this case show a similar flow of benefit from supplier to customer, and of service from customer to supplier, in connection with the sale of the supplier's goods, it is not governed by these other cases. The Commission's case is incomplete without a showing that the "benefit" conferred by Nuarc's advertising somehow passed through Foster Publishing to Foster Type and that the advertising service provided to Nuarc by Foster Publishing was somehow "furnished by or through" Foster Type.

As I read the record, the evidence is all to the contrary. Certainly no tangible benefits could have moved from Nuarc through Foster Publishing to Foster Type, because the latter two firms had virtually no business dealings with one another. The companies filed separate tax returns, maintained separate payrolls, books, and records, and leased separate office space. They did not loan funds to each other. They did not borrow employees from each other. Foster Type advertised in "Printing Impressions", but only on payment of a standard rate, equally available to its competitors and others. Thus, the advertising advantage so significant in *P. Lorillard* and *Swanee Paper* is not present here.

Nor is this a case, like *A&P*, in which the merchandiser obtained good will through association with the publication. "Printing Impressions" was not distributed from Foster Type's premises and it was not billed as Foster Type's newspaper. Indeed, the paper never bore Foster Type's name and its mast-head proclaimed: "Printing Impressions is a completely independent monthly newspaper dedicated to helping the vast industry of the graphic arts—its progress and development—by the factual reporting of all news, trends and events

of national and international interest to the trade." If anything, ill will rather than good will for Foster Type was generated by Borowsky's initial solicitation letter to Nuarc and a few other companies. The reaction was uniformly unfavorable, and some of the firms approached were so displeased that they never did place advertising in "Printing Impressions". Further, to correct any mistaken impressions as to Foster Publishing's dependence upon Foster Type, the name of the former was changed to North American Publishing Co.

It is equally difficult to see what service was provided to Nuarc by Foster Type. Nuarc paid the standard fee for its advertising in "Printing Impressions". Unlike the advertisers in *P. Lorillard* and *Swanee Paper*, Nuarc received no special promotion in connection with Foster Type's sales of its equipment.[2] It obtained no special advantage in its dealings with Foster Type by advertising in "Printing Impressions". Conversely, Nuarc obtained no favors from "Printing Impressions" by reason of its role as a supplier of Foster Type. Advertising of, and stories about, its competitors were published by "Printing Impressions", from its first issue forward, whether or not they were suppliers of Foster Type.

The conclusion is inescapable that this case has none of the essential features of the leading cases in point or of the practice prohibited by the statute. The only service provided to Nuarc was the creation of the newspaper in which to place its advertising. The only benefit conferred by Nuarc was that by advertising its own products it promoted their sale through all its outlets, of which Foster Type happened to be one. In other words, Foster Publishing—or, if the Commission prefers, Borowsky—did no more for Nuarc than if Foster Type had not existed at all, while Nuarc did no more for Foster Type—*i.e.*, for Borowsky's printing equipment sales business—than if it had advertised not in "Printing Impressions" but in some trade paper having no connection whatever with Borowsky or Foster Type. The advertising expenditures by Nuarc that eventually made their way into Borowsky's pocket were paid to him solely in his role as a publisher. It is fair to say here, as the Commission held in *General Foods Corp.*, 52 F.T.C. 798, 828, that "These payments do not violate Section 2(d) for the reason that they are not payments made to [Borowsky] as a customer and are not made in connection with the resale of goods bought by him from respondent."

Thus, neither the supplier of the goods (Nuarc) nor its customer (Foster Type, or, in the Commission's eyes, Borowsky d/b/a Foster

[2] It seems fair to conclude that this special promotion factor was present in the A & P case as well, since the advertisers in "Woman's Day" got the benefit of the sale of the low-priced magazine in the same store where their products were sold.

Type) received any special advantage over competitors of the sort that the statute was designed to prevent. For, as the House Judiciary Committee Report on Section 2(d) explained, an allowance for advertising services "becomes unjust when the service is not rendered as agreed and paid for, or when, if rendered, the payment is grossly in excess of its value, or when in any case the customer is deriving from it equal benefit to his own business and is thus enabled to shift to his vendor substantial portions of his own advertising cost, while his smaller competitor, unable to command such allowances, cannot do so." H.R. Rep. No. 2287, 74th Cong., 2nd Sess. 7 (1936). No one has suggested that Nuarc's advertising involves the first two evils mentioned in the Report, and, as I have shown, the facts of record in this proceeding disprove the presence of the third. It appears, therefore, that respondent's conduct is not among the practices which Section 2(d) was intended to forbid.

For the Commission to draw the opposite conclusion is particularly puzzling in light of its disposition of *United Cigar-Whelan Stores Corp.*, 53 F.T.C. 102. There the complaint charged that a firm which operated a large chain of retail drug stores and tobacco shops had knowingly induced or received unlawful advertising allowances from many of its suppliers in that it had accepted compensation from those suppliers for placing television advertising for them through an advertising agency which it also owned. The order of the hearing examiner, adopted by the Commission, prohibited knowing receipt or inducement by the store chain and its advertising subsidiary of unlawful allowances from the chain's suppliers in connection with television or radio programs which were either sponsored by the store chain or which advertised or promoted the store chain. The order specifically exempted from its coverage advertising placed with the advertising agency subsidiary of the store chain by the chain's suppliers which was not sponsored by the chain and did not advertise or promote it. In *United Cigar*, therefore, the Commission recognized and even preserved by order precisely the distinction between arrangements having a special discriminatory mutuality of benefit to supplier and customer (as in *A & P, P. Lorillard*, and *Swanee Paper, supra*) and the straightforward, harmless use by a supplier of a customer-owned advertising medium such as we have in this case. The distinction was a sound one at the time of the *United Cigar* case and nothing has happened since to impair its validity.[3]

[3] The *United Cigar* case was disposed of by consent agreement, but that does not detract from its precedent value for purposes of this proceeding. In the first place, it still represents assent by the Commission to the proposition that the distinction here rejected by the Commission is appropriate. Further, it goes beyond the simple expedient, common in

III.

In finding a violation on the state of facts, or lack of facts, before us in this proceeding, the Commission establishes a rule that cannot help but have sweeping consequences of a highly disruptive nature for American advertising and journalism. Even in the limited sphere of trade papers, the reverberations are bound to be considerable, but there is nothing in this case that restricts its effect to such publications. The principle adopted here cannot help but apply in every case in which a newspaper, magazine, radio station, television station, or other medium of advertising is owned and controlled by a person who also owns and controls some other enterprise engaged in selling goods. Those who supply such enterprise with products that it markets will be unable to advertise those products in the newspaper, magazine, or other medium without violating Section 2(d), except in the highly unlikely event that they can work out advertising arrangements with competing customers "on proportionally equal terms". This interference with general advertising appears to run contrary to an express congressional desire not to inhibit advertising activity that did not bring about disguised customer favoritism. H. R. Rep. No. 2287, 74th Cong., 2nd Sess. 16 (1936), states that "there is nothing in this section or elsewhere in the bill . . . to limit the freedom of newspaper or periodical advertising generally, so long as not employed in ways calculated to defeat the purposes of this bill."

The Commission's caveat that each case must turn on its facts (opinion, p. 393) is small consolation. On the one hand, it creates confusing uncertainty as to the reach of the Commission's ruling, and on the other it detracts not one whit from the principle established by the case, *i.e.*, that a medium of communication cannot carry advertising by an advertiser who is also a supplier of goods for resale by a firm owned and controlled by the owner and operator of the advertising medium.

I can only hope that no owner of a newspaper, magazine, radio or television station, etc., also happens to own a department store! Since a supplier of any item sold in his department store would violate the law by advertising in his newspaper, magazine, or other medium, the Commission's decision here—in what might seem to be an unimportant, technical Section 2(d) case—will have upon him an effect equivalent to a divestiture decree. Certainly that is the effect it must

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consent settlements, of simply omitting to cover certain aspects of the practices alleged in the complaint to be unlawful. Instead, it affirmatively permits them to continue. The Commission would have been without authority to take such action unless it had considered the practices condoned to be lawful.

have upon Mr. Borowsky, even though he is not a party to the proceeding. If no supplier of Foster Type can advertise in "Printing Impressions" while Borowsky's hand is on both tillers, he has no recourse but to loosen his grasp on one of them. One feels reasonably sure that such a strange and disturbing result was not within the contemplation of Congress when it enacted the Robinson-Patman Act.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission, for the reasons stated in the accompanying opinion, having denied the appeal of respondent and modified the initial decision to the extent necessary to conform to the views expressed in the said opinion:

It is ordered, That the initial decision be modified by striking from paragraph number 8 on page 379 thereof the phrase "and 10% of the stock to Stephen Mucha, retaining 80%" and adding the sentence: "Mucha made partial payment for 10% of the stock, which, however, was not transferred on the company's books to him and he subsequently recovered such part payment."

It is further ordered, That the initial decision be modified by striking paragraphs 14, 15, and 16 of the Findings of Fact on page 381 and substituting therefor the following:

14. Their president and sole or majority stockholder, Irvin J. Borowsky, dominated Foster Type and Equipment Company, Inc., and Foster Publishing Company, Inc., to the extent that they were unable to formulate policy independently and their separate corporate identity was no more than a sham.

15. Respondent was put on notice that the two corporations in fact constituted one enterprise by Borowsky's letters of May 1958 (heretofore referred to in paragraph 11 of the Findings). The two corporations had not attained a true separate corporate identity at the time respondent's payments for advertising in Printing Impressions commenced, and respondent must have been aware of that fact since it could not in good faith rely on the vague and uncorroborated statements documented by this record to the effect that the two corporations were independent of each other.

16. Since the corporate identities of Foster Publishing Company, Inc., and Foster Type and Equipment Company, Inc., were fictitious, a payment to the former was a payment to Borowsky's

business as a whole, including that segment thereof, Foster Type and Equipment Company, Inc., which purchased and resold respondent's goods.

It is further ordered, That the initial decision be modified by striking therefrom that portion entitled "DISCUSSION OF EVIDENCE AND APPLICABLE LAW".

It is further ordered, That the order contained in the initial decision be, and it hereby is, modified to read as follows:

It is ordered, That respondent The Nuarc Company, a corporation, erroneously named as NU ARC COMPANY, INC., in the complaint, and its officers, employees, agents and representatives, directly or through any corporate or other device in or in connection with the offering for sale, sale or distribution of arc lamps, vacuum frames, light tables, dark room lights, and other of respondent's products manufactured for printing, offset printing or lithography, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to or for the benefit of a customer of respondent as compensation for or in consideration of any advertising services or facilities furnished by or through such customer in connection with the handling, offering for sale, sale or distribution of said products, unless such payment or consideration is affirmatively made available on proportionally equal terms to all other customers competing in the distribution of such products.

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

It is further ordered, That respondent, The Nuarc Company, a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist contained in the initial decision as modified.

Commissioner Anderson concurring in the result, and Commissioner Elman dissenting.