

Complaint

67 F.T.C.

(e) Refusing to sell to dealers or distributors because of the price at which they are known to be, or suspected of, buying respondent's products from any other person.

*Provided, however,* That nothing contained in this Order shall be construed to prohibit respondent from petitioning the Commission to reopen and alter, modify, or set aside, in whole or in part, any provision of this Order on the ground that conditions of fact have so changed as to require such action in the public interest.

*It is further ordered,* That respondent, formerly Sandura Company but recently renamed Del Penn 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 this Order.

Commissioner MacIntyre not concurring.

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IN THE MATTER OF

REVCO D.S., INC., ET AL.

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

*Docket 8576. Complaint, June 13, 1963—Decision, June 28, 1965*

Order requiring a discount drug store chain with retail stores in Michigan, Ohio, and West Virginia, to cease representing falsely in advertisements in newspapers, by radio and television broadcasts, or any other means, that their drugs, foods, cosmetics and devices have been approved or endorsed by an independent research or testing organization engaged in determining the merits of such merchandise, and that they own, operate, or control manufacturing or laboratory facilities.

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 Revco, D.S., Inc., a corporation, and Standard Drug Company, a corporation, doing business as Revco Discount Drug Centers, Bernard Shulman, individually and as an officer of each of said corporations, W. B. Doner and Company, a corporation, and Charles F. Rosen, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

1. Putting into effect, maintaining, or enforcing any merchandising or distribution plan or policy under which contracts, agreements, or understandings are entered into with dealers in or distributors of its products which have the purpose or effect of:

(a) Fixing, establishing, or maintaining the prices at which such products may be sold by dealers or distributors; or

(b) Requiring or inducing any dealer or distributor to assist respondent, by means of reports or otherwise, in preventing or restricting any other dealer or distributor from selling respondent's products at any price selected by said other dealer or distributor; or

(c) Requiring or inducing any dealer or distributor to assist respondent, by means of reports or otherwise, in preventing or restricting any other dealer or distributor from buying respondent's products from any person at any available price; or

(d) Requiring or inducing any dealer or distributor to resell to respondent any unsold stock of respondent's products in the event that business relations between respondent and the distributor or dealer are terminated: *Provided*, That respondent shall not be prohibited from repurchasing such unsold stock at the request of a distributor or dealer or from obtaining an option from a distributor or dealer to repurchase such unsold stock in the event that the distributor or dealer is unable to meet his financial obligations to respondent.

2. Entering into, continuing, or enforcing, or attempting to enforce, any contract, agreement, or understanding with any dealer in or distributor of its products for the purpose or with the effect of establishing or maintaining any merchandising or distribution plan or policy prohibited by paragraph 1 of this order.

3. Engaging, for a period of two years following the date this order shall have become final, either as part of any contracts, agreements, or understandings with any dealers in or distributors of its products, or individually and unilaterally, in the practice of:

(a) Issuing franchises or licenses to dealers or distributors; or

(b) Circulating lists of dealers or distributors of its products to such dealers or distributors; or

(c) Affixing to its products numbers or other identifying marks which designate specific wrapped rolls or other commercially sized items sold as individual units to distributors or dealers; or

(d) Refusing to sell to dealers or distributors because of the price at which they are known to be, or suspected of, selling respondent's products; or

Complaint

67 F.T.C

sale of the merchandise hereinafter mentioned. Respondent Charles F. Rosen is an Officer of this corporate respondent and is the account executive for the respondents referred to in Paragraph One, above. This individual respondent participates in and is primarily responsible for certain acts and practices of this corporate respondent, including those hereinafter set forth. His address is the same as that of the said corporate respondent.

PAR. 5. The respondents act in conjunction and cooperation with one another in the performance of the acts and practices hereinafter alleged.

PAR. 6. In the course and conduct of their said businesses, the respondents have disseminated and caused the dissemination of certain advertisements concerning foods, drugs, cosmetics and devices by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers and other advertising media, and by means of television and radio broadcasts transmitted by television and radio stations located in various States of the United States, having sufficient power to carry such broadcasts across State lines for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of the said foods, drugs, cosmetics and devices; and have disseminated and caused the dissemination of advertisements concerning the said foods, drugs, cosmetics and devices by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of the said foods, drugs, cosmetics and devices in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. Among and typical of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

New REVCO Merchandising Policies Provide 30%-70% SAVINGS ON PRESCRIPTIONS.

Compare Revco Formula 1—ingredients and potencies with the other nationally advertised brand of this 1-per-day vitamin. Then check Revco's price—you'll find you save up to 1.77 on the retail list price of the comparable well-known brand.

<p>Buy Miles' ONE - A - DAY 100's—Retail List 2.94 YOU PAY ONLY 2.00 You Save Up To .94</p>
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<p>COMPARE PRICES</p>
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<p>Buy Revco FORMULA 1 100's—Value 2.94 YOU PAY ONLY 1.17 You Save Up To 1.77</p>
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PARAGRAPH 1. Respondent Revco, D.S., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business located at 5555 Concord Avenue, Detroit, Michigan. Respondent Standard Drug Company, doing business as Revco Discount Drug Centers, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 6803 Pearl Road, Cleveland, Ohio. Respondent Bernard Shulman is an officer of each of these corporations. This individual formulates, controls and directs the policies, acts and practices of these corporate respondents, including the acts and practices hereinafter set forth. The address of this individual respondent is the same as that of the corporate respondent Revco, D.S., Inc.

PAR. 2. Through the corporate respondent Revco, D.S., Inc., and fourteen (14) wholly-owned subsidiaries, including the corporate respondent Standard Drug Company, the respondents referred to in Paragraph One hereof own and operate a number of retail drug stores within the States of Michigan, Ohio and West Virginia.

These respondents are now, and for some time last past have been, engaged in the sale and distribution of various articles of merchandise which come within the classification of foods, drugs, cosmetics and devices, as such terms are defined in the Federal Trade Commission Act.

PAR. 3. The respondents referred to in Paragraph One hereof cause their said merchandise, when sold, to be transported from their place of business in the State of Michigan to their several stores located in various other States of the United States for sale to the purchasing public. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. Respondent W. B. Doner and Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business located at Washington Boulevard Building, 234 State Street, Detroit, Michigan. This respondent is an advertising agency and is now, and for some time last past has been, the advertising representatives of the respondents referred to in Paragraph One, above. As such, it prepares and places, and has prepared and placed, for publication, advertising material as hereinafter set forth, to promote the

Complaint

67 F.T.C.

2. That purchasers of prescriptions will save between 30% and 70% of the usual and customary prices charged by competitors for identical merchandise in the trade area or areas where the said representations are made.

3. That the prices designated "retail list" and "retail" as used in connection with or with reference to merchandise to which respondents compared the prices of their own merchandise, are the prices at which such compared or similar merchandise is usually and customarily sold in the trade area or areas where the representations are made, and that the difference between the higher stated prices for such compared or similar merchandise and respondents' lower advertised prices for their own merchandise is the amount saved by purchasers.

4. That purchasers of respondents' merchandise will save 50% to 70% of the usual and customary prices charged by competitors for compared or similar merchandise in the trade area or areas where the said representations are made.

In truth and in fact, the amounts set out in connection with the words and terms "value," "retail," "retail list," "other" and "chart price" were not the prices at which the merchandise referred to was usually and customarily sold at retail in the trade areas where the representations were made, but were in excess of the prices at which such merchandise was generally sold in such trade areas; purchasers would not realize a savings of the difference between the said higher and lower price amounts; and purchasers would not save between 30% and 70% of the prices at which the merchandise referred to is generally sold in such trade areas.

Moreover, the amounts set out in connection with the words "retail list" and "retail" for merchandise to which respondents compared the prices of their own merchandise were not the prices at which such compared or similar merchandise was usually and customarily sold at retail in the trade areas where the representations were made, but were in excess of the prices at which such compared or similar merchandise was generally sold in such trade areas; purchasers would not realize a savings of the difference between said higher prices and the lower advertised prices for respondents' own merchandise; and purchasers would not save between 50% and 70% of the prices at which compared or similar merchandise is generally sold in such areas.

Therefore, the foregoing representations by respondents were and are false, misleading and deceptive.

115S

Complaint

Compare these typical Rx prices \* \* \*

PROOF OF REVCO SAVINGS!

ITEM*	25's		100's	
	Chart Price	REVCO	Chart Price	REVCO
Butazolidin.....	\$3. 80	\$1. 75	\$10. 70	\$6. 58

\*Chart price is suggested retail price determined from commonly used pricing chart.

Buy Revco Formula 1				
250's.....			Value.....	6. 47
You Pay Only.....				2. 64
You Save Up to.....				3. 83
Buy Revco Formula 77				
100's.....			Value.....	7. 45
You Pay Only.....				2. 58
			You Save.....	4. 87
Buy Revco Formula 22				
100's.....			Retail.....	5. 08
You Pay Only.....				2. 44
			You Save.....	2. 64
Squibb Theragram-m; 100's size.....			Retail.....	7. 89
Everyday Discount Price.....				5. 45
Butazolidin 100's.....			Other*.....	10. 70
			Revco.....	6. 58
			You Save.....	4. 12

\*Other price determined from a commonly used pricing chart.

\* \* \* savings up to 70%.

You'll save up to 70 percent \* \* \*

For instance, if you use 1-milligram Librium Tablets, you may pay as much as \$12.80 per hundred. At Revco you pay only seven eighty-eight. Revco Discount Drug Centers save you 50 to 70 percent.

Through the use of the said advertisements and others similar thereto not specifically set out herein, respondents have represented and are now representing, directly and by implication:

1. That the prices designated "value," "retail," "retail list," "other," and "chart price" are the prices at which the merchandise referred to is usually and customarily sold at retail in the trade area or areas where the representations are made, and that the difference between the higher stated prices and respondents' lower advertised prices is the amount saved by purchasers.

Therefore, the foregoing representations were, and are false, misleading and deceptive.

PAR. 11. A substantial portion of the purchasing public prefers to deal directly with manufacturers in the belief that certain advantages accrue therefrom, including, but not limited to, lower prices, a fact of which the Commission takes official notice.

PAR. 12. In the course and conduct of their businesses, respondents have made certain statements and representations, by means of advertisements disseminated as aforesaid, respecting the number of testimonials which have been received from customers. Included among such statements and representations is the following:

People to People Proof:

(Photographs and Testimonials from 23 persons)—Plus 575,000 more in the first four weeks.

Through the use of the aforesaid statements and representations, respondents have represented, directly and by implication, that they have received in excess of 575,000 testimonials.

In truth and in fact, respondents have received substantially less than 575,000 testimonials.

Therefore, the foregoing representations were and are false, misleading and deceptive.

PAR. 13. In the course and conduct of their businesses, respondents have represented, by means of advertisements disseminated as aforesaid, that an independent research organization had purchased "drugs" from Revco stores and had also purchased identical "drugs" from competitors in the trade areas where the representations were made. Respondents have further represented in said advertising that on the basis of such shopping and comparison, the drugs sold by the respondents referred to in Paragraph One hereof had been certified by the said research organization as being priced below the prices generally charged by competitors for identical drugs.

In truth and in fact, the said research organization did not make purchases or comparisons as represented.

The certification published by respondents in said advertisements differs substantially and materially from the certification issued by the said research organization.

Therefore, the foregoing representations by respondents were, and are false, misleading and deceptive.

PAR. 14. Respondents' aforesaid advertisements were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act.

PAR. 8. In the course and conduct of their businesses, respondents have, through the use of words and a seal of approval bearing the name "Consumer Protective Institute," published in advertising disseminated as aforesaid, represented directly and by implication, that said merchandise has earned the said seal of approval because the said merchandise meets certain minimum standards, has certain qualities or merits, and has been examined and tested by Consumer Protective Institute; that Consumer Protective Institute is an independent research or testing organization; that Consumer Protective Institute is an institute; and that Consumer Protective Institute is an organization whose business is the protection of consumers.

In truth and in fact, the aforesaid merchandise has not earned the said seal of approval, nor was it required to meet any standards, possess any qualities or merits, nor was it examined or tested in any manner. Consumer Protective Institute is not an independent research or testing organization, nor is it an institute, nor is it engaged in a business any part of which is intended to protect or benefit consumers. Consumer Protective Institute was created and is owned, controlled and operated by respondent Charles F. Rosen for the sole benefit of respondents.

Therefore, the foregoing representations were and are false, misleading and deceptive.

PAR. 9. In the course and conduct of their businesses, as set forth in Paragraph Six hereof, respondents have, through the use of words and a seal of approval issued by Scientific Associates, Inc., published in advertising disseminated as aforesaid, represented directly and by implication, that such merchandise had been tested, assayed or analyzed quantitatively and/or qualitatively by the said Scientific Associates, Inc., and that the said merchandise met certain minimum standards or had certain qualities or merits.

In truth and in fact, the said merchandise was not tested, assayed or analyzed by the said Scientific Associates, Inc.

Therefore, the foregoing representations were and are false, misleading and deceptive.

PAR. 10. In the course and conduct of their businesses, respondents have, through the use of photographs and accompanying text, published in advertising disseminated as aforesaid, represented directly and by implication, that the respondents referred to in Paragraph One hereof own, operate or control manufacturing or laboratory facilities.

In truth and in fact such respondents do not own, operate or control any manufacturing or laboratory facilities.



by the parties. These have been carefully reviewed and considered, and such 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. The facts hereinafter set forth are based on the entire record consisting of a stipulation of facts, a record of nearly 2800 pages, and numerous exhibits.

In the caption of the complaint the name of the first-named respondent therein is shown and punctuated as follows: "Revco. D.S., Inc." In Paragraph One of the complaint and in the proposed "Order" attached to the complaint, the name of the same respondent is punctuated as follows: "Revco, D.S., Inc." The parties being agreed that the correct punctuation of the name of said respondent calls for the elimination of the period and/or comma that now appears in the complaint after the name "Revco," the complaint pursuant to oral motion is hereby amended to show the correct punctuation of the first-named respondent herein to be as follows: "Revco D.S., Inc." (Tr. 124, 134, 223-224.)

#### FINDINGS OF FACT

##### 1. Background Facts

Revco D.S., Inc., the key respondent herein, is a company engaged in the operation of chain retail drug stores in the States of Michigan, Ohio, and West Virginia. This respondent, hereinafter referred to as Revco, is a Michigan corporation, with office and principal place of business at 5555 Concord Avenue, Detroit, Michigan. It was incorporated on February 8, 1956, under the name of Regal D.S., Inc., but its name was subsequently changed to its present name of Revco D.S., Inc. It might be stated incidentally that the name Revco is an acronym of "Registered Vitamin Company," a previously related business enterprise and that the "D.S." after Revco is an abbreviation for words "Discount Drug Stores." At all times herein material the correct corporate name of Revco has been and is Revco D.S., Inc. (CX 1, pars. 1, 2, 4, 8; Tr. 223-224-225, 465.)

The history of Revco is largely the personal chronical of the business life and activities of its 38 year old founder, president and chairman of its board of directors, respondent Bernard Shulman. His address is the same as Revco's. Mr. Shulman, a registered pharmacist, owned and operated a single conventional-type drug store in Detroit for a period of years prior to 1956. In the early part of 1956 he decided to change his operations to a discount self-service drug

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

PAR. 16. The dissemination by the respondents of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

*Mr. Garland Ferguson, Mr. Francis J. Charlton, and Mr. A. David Cook* for the Commission.

*Lane, Krottinger and Santora*, by *Mr. Ernest C. T. Santora, Mr. Leonard Lane, and Mr. John E. Purdy* for respondents, Revco D.S., Inc., Standard Drug Company and Mr. Bernard Shulman.

*Covington & Burling* by *Mr. Harry L. Schneiderman and Mr. John E. Vanderstar* for respondent W. B. Doner and Company.

*Scharfeld, Bechhoefer, Baron & Stambler* by *Mr. Arthur Stambler* for respondent *Mr. Charles F. Rosen*.

INITIAL DECISION BY MAURICE S. BUSH, HEARING EXAMINER

JUNE 29, 1964

The general issue in this proceeding with respect to the first three above-named respondents is whether certain representations made by them in advertisements are false and misleading in violation of the Federal Trade Commission Act.<sup>1</sup> The issue as to the falsity or truthfulness of the same representations is also applicable to the last two of the above-named respondents but they also assert the defense that they are not responsible for the making of the said representations. The specific issues under the pleadings will be dealt with serially below.

The complaint herein was issued on June 13, 1963. A three day prehearing conference was held in the matter in December, 1963. Hearing was commenced on February 4, 1964, at Detroit, Michigan and concluded at Cleveland, Ohio on February 26, 1964, with all but four days of the hearing taking place at Cleveland. Thereafter proposed findings of fact, conclusions of law, and arguments were filed

<sup>1</sup> Section 5(a)(1) of the Act, here pertinent, reads: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

Initial Decision

67 F.T.C.

Revco's entrance into the Ohio market was chiefly through the acquisition on July 1, 1961, of all of the outstanding stock of respondent Standard Drug Company, an old and well-known retail chain drug store company, hereinafter called Standard. Through this acquisition Revco took over 41 Standard drug stores, most of which were located in Cleveland and its suburbs. Respondent Standard Drug Company, an Ohio corporation with office and principal place of business at 6803 Pearl Road, Cleveland, Ohio, retained its name after it became a wholly-owned subsidiary of Revco. However, on October 14, 1961, it registered the trade name "Revco Discount Drug Centers" with the secretary of the State of Ohio, and since approximately October 1, 1961, its stores have been doing business under that name. (Tr. 367; CX 1, par. 9.) After the acquisitions, Revco closed down 10 of the 41 Standard drug stores. The gross sales of Revco's subsidiary, Standard, was \$7,410,000 for the six-month period October 1, 1961, through March 31, 1962. (CX 93.) Revco's total sales for the year 1962, including that of Standard and all other Revco subsidiaries, was in excess of \$17,400,000. (CX 4, p. 2, and CX 93.)

Prior to its acquisition of Standard, Revco had initially entered the retail drug store market in Cleveland by opening two drug stores therein, the first in 1958 and the second in 1959, operated under the name of Hudson Vitamin and Cosmetics Distributors and later changed to Hudson Distributors, Inc., a Revco subsidiary, which as will be shown below is involved in actions to test the constitutionality of the Ohio Fair Trade Act of 1959. (CX 4, p. 9; CX 1, par. 14; Tr. 129.)

For all times herein pertinent all stores owned by Revco or any of its subsidiaries have been operated under the trade name of "Revco Discount Drug Centers." (CX 1, par. 9; CX 4, p. 1; Tr. 233.)

Of the 49 drug stores controlled by Revco, six are owned directly by Revco; 31 by Standard; and the remainder by other wholly-owned Revco subsidiaries. None of the subsidiaries, other than Standard, own more than one drug store. (CX 1, pars. 11, 13, 14; Tr. 232, 234.) All of the stores are supplied with their wares from a warehouse maintained by Revco at Detroit, including the stores of Standard, which buys substantially all of its merchandise from Revco. (CX 1, pars. 11 and 12.) Shulman is president of each of the Revco subsidiaries, including respondent Standard. (Tr. 232.)

Respondent Shulman formulates, controls and directs the policies, acts, and practices of the corporate respondents herein, Revco and Standard, and also of the wholly-owned subsidiaries of Revco which

store operation and determined to conduct the new operation under a policy of "high volume, low overhead, low margin method of merchandising." He opened four such discount drug stores in Detroit in 1956. (CX 4 at pp. 2 and 9; CX 1, par. 1; Tr. 227, 301.)

By the end of 1960 the number of Revco operated drug stores had increased to twenty. (CX 1, par. 8.) At the time the Stipulation of Facts herein (CX 1) was executed in January 1964, Revco, and its wholly-owned subsidiaries, owned a total of 49 stores. By that time Revco had geographically extended its operations into the States of West Virginia and Ohio. (CX 1, par. 11.)

At the date of the issuance of the complaint herein on June 13, 1963, Revco, and its wholly-owned subsidiaries, had 16 stores in Detroit and suburbs, one store in Wheeling, West Virginia, and 31 stores in Ohio, chiefly in Cleveland and its suburbs. (CX 1, par. 14, as modified by oral stipulation; Tr. 24, 130-131, 235; CX 1, pars. 12 and 13; Tr. 234.) Under policies established by Shulman, Revco drug stores have no lunch counters, magazine racks, cigar counters, charge accounts and delivery service. The stores are primarily vendors of vitamins, prescriptions, non-prescription drugs, cosmetics and sundry drug items. All purchases and inventories of the store are controlled from Revco's home office. Revco advertises its stores as "America's Only *Total* Discount Drug Chain" (emphasis as in advertisements) which its advertisements explain as meaning that Revco's "discount" prices prevail everyday and not only for special sales; this advertisement claim is shown merely as background; the claim has not been placed in issue by the pleadings. (CX 2, pp. 1, 2, 20-42; CX 3, pp. 1, 2, 21-29, 32-35, 42-51, CX 4, pp. 1, 2, 9; CX 5; CX 92; CX 99 A-C.) Respondents Revco, Standard and Shulman through the operation of these stores have been and are now engaged in the sale and distribution of various articles of merchandise which come within the classification of foods, cosmetics and devices, as such terms are defined in the Federal Trade Commission Act. (CX 1, par. 2.)

Respondents Revco, Standard Drug and Shulman, cause the said merchandise, when sold, to be transported from their place of business in the State of Michigan to their several stores located in Ohio and West Virginia for sale to the purchasing public. These respondents maintain, and at all times mentioned herein, maintained, a course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial. (CX 1, par. 3.)

Initial Decision

67 F.T.C.

2, 3, 4.) Most of the record herein pertains to such advertisements and the relationship thereof to the charges under paragraphs 6 and 7 of the complaint. Thus under the said paragraphs of the complaint our concern will be chiefly with the truthfulness or falsity of respondents' advertisements in Ohio, more particularly in and around Cleveland. Respondents' advertisements of a similar nature as disseminated in the Detroit area are involved herein to only a minor degree. There are, however, certain additional charges under paragraphs 8 through 13 of the complaint which relate to respondents' advertising practices in both Michigan and Ohio. No evidence was presented by complaint counsel to tie in the operations of the single Revco operated drug store in West Virginia with any of the allegations of the complaint.

Ohio is a fair trade State by virtue of the enactment in 1959 of the Ohio Fair Trade Act. Hudson Distributors, Inc., a Michigan corporation and subsidiary (CX 1, par. 14) of Revco with a store operation in Cleveland as heretofore noted, brought two actions in the courts of Ohio for declaratory judgments that the Ohio Fair Trade Act is invalid and unconstitutional, naming as defendants Eli Lilly Company and The Upjohn Company, respectively, in each of said actions. Both of these defendants had complied with the Ohio Fair Trade Act but Hudson had entered into no written contracts with either. The Supreme Court of Ohio in an opinion entered on May 8, 1963, found the Ohio Fair Trade Act of 1959 constitutional. (For copy of Act, see RX 1 A-H.) *Hudson Distributors, Inc., v. The Upjohn Company and Eli Lilly Company*, 174 Ohio St. 487. The United States Supreme Court, having accepted jurisdiction of appeals from the said opinion of the Supreme Court of Ohio on the question of whether the McGuire Act, 66 Stat. 632, 15 U.S.C. § 45(a)(1)-(5), permits the application and enforcement of the Ohio Fair Trade Act against Hudson in support of Upjohn's and Lilly's systems of retail price maintenance, rendered an opinion (32 U.S.L. Week 4419) on June 1, 1964, holding that the Ohio Act, as applied to the facts of these two cases, comes within the provisions of the McGuire Act exempting certain resale price systems from the prohibitions of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 1. In its opinion, the United States Supreme Court states: "The undisputed facts show that Lilly had established a system of resale price maintenance involving written contracts with some 1,400 Ohio retailers." Michigan has no fair trade act applicable to non-signers. (CX 4, p. 2; RX 14, p. 1; RX 15, p. 1; Tr. 2634.)

1158

## Initial Decision

are not named herein as respondents. (CX 1, pars. 1 and 2; Tr. 232.)

For a period of several years from 1959 to the end of 1963, Revco and its subsidiary Standard utilized the advertising services of W. B. Doner and Company, an advertising agency hereinafter called Doner, which represented respondents Revco, Standard and Shulman in matters pertaining to advertising. Doner is a Michigan corporation organized in 1937 and has its office and principal place of business at the Washington Boulevard Building, 234 State Street, Detroit, Michigan. It also maintains offices at Chicago, Illinois and Baltimore, Maryland. During all of the said period, respondent Charles F. Rosen, then and for many years prior thereto, an executive vice president of Doner, served as Revco's and Standard's account executive. In that capacity, Rosen prepared and placed advertising material used to promote the sale of merchandise by Revco, Standard, and Shulman. Rosen's address at the time the complaint was issued was the same as that of Doner's but his present address is now 19320 Suffolk Drive, Detroit, Michigan. Rosen severed his connection with Doner as an officer thereof on December 31, 1963, and on that date he became an executive vice president of Revco. (See Complaint, Par. Four, and Answers, Par. Four; CX 1, pars. 18 and 19; Tr. 443, 445, 448, 457, 2732, 2741, 2744.)

Revco, Standard and Shulman in the course and conduct of their said businesses have disseminated and caused the dissemination of certain advertisements concerning foods, drugs, cosmetics and devices by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers and other advertising media, and by means of television and radio stations located in various States of the United States. These advertisements included advertisements prepared and placed by Doner's then executive vice president, Rosen. (CX 1, pars. 4, 18 and 19; CX 2 thru 11, 29, 96, 97 and 98; Tr. 443-445, 448.)

Revco's advertising expenditures for the period October 1, 1961, through March 31, 1962, totaled \$216,943, of which \$46,041 was expended for newspaper advertisements, \$99,237 for radio advertisements, and \$62,797 for television advertisement. (CX 13.)

Respondents engaged in a massive advertisement campaign in October 1961 and the months following in connection with its taking over the aforementioned 31 Standard drug stores and the re-opening of these stores as "Revco Discount Drug Centers" and much of the advertising expenditures noted above was related to the launching of the Standard drug stores as "Revco Discount Drug Centers." (CX

Cleveland and Detroit are other chain drug store operators as pointed up in complaint counsel's brief at pages 27 through 33.)

In Cleveland, Revco is in competition with two other chain drug store companies, The Marshall Drug Company and The Gray Drug Stores, Inc., which operated as of March 1962, 29 and 22 drug stores, respectively, in the greater metropolitan Cleveland area. In Detroit, Revco has essentially only one chain store competitor, Cunningham Drug Stores, Inc., which is the parent company of the aforementioned The Marshall Drug Company. Cunningham operated 63 drug stores as of September 1962 in the greater metropolitan area of Detroit. (See Telephone Yellow Pages, dated March, 1962 (Tr. 2539) in RX 23 A-G and in "Order Taking Official Notice of Yellow Pages [September 1962]," filed March 4, 1964; Tr. 2224 *et seq.*; CX 1, par. 15.) Revco considers these competing chain drug stores in the greater Cleveland and Detroit areas as its chief competitors in such area. (See complaint counsel's brief at pp. 27 thru 33.)

### 3. Fictitious Pricing Issues at Cleveland

Revco on October 1, 1961, reopened 31 of the drug stores it had acquired from respondent Standard Drug Company as "Revco Discount Drug Centers." (Tr. 2475.) A massive advertising campaign was utilized to advertise the reopening of these stores as Revco drug stores. The first newspaper advertisement on the opening of Revco stores was an advertisement supplement to the Cleveland Plain Dealer issue of Sunday October 1, 1961. The opening page of this advertisement reads as follows: "Starting tomorrow! Every Day Is Savings Day On Everything At Revco! (Formerly Standard Drug Stores) The Proof Is Inside! Revco Discount Drug Centers. America's Only *Total* Discount Drug Chain!" (Emphasis and matter in parenthesis are as shown in advertisement CX 4.)

On the inside of the advertisement, some 475<sup>2</sup> non-prescription items of merchandise are shown. The described advertisement is in evidence as CX 4.

On October 1, 1961, Revco also published, a catalogue consisting of 48 pages advertising some 487<sup>2</sup> non-prescription items for sale at Revco drug stores in and near Cleveland, which is in evidence as CX 2. This catalogue, printed in quantities in excess of 500,000, was distributed between October 1 and December 31, 1961. Another sim-

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<sup>2</sup> The examiner is here accepting the count set forth in Revco's Proposed Findings at page 28, par 64.

## 2. Area Statistics and Competition

Greater Cleveland, Ohio and Greater Detroit, Michigan, where the great bulk of Revco drug stores are located, had populations in 1960 of 1,786,740 and 3,743,447, respectively. *The World Almanac, 1961, p. 103*. In Cleveland, Revco has advertised in *The Plain Dealer*, a newspaper which had a daily circulation in 1960 of about 308,142 and in *The Cleveland Press*, a newspaper with a daily circulation in 1960 of about 388,247. In Detroit, Revco has advertised in *The Detroit Free Press*, a newspaper which had a daily circulation in 1963 of about 509,000 and in *The Detroit News*, a newspaper with a daily circulation in 1963 of about 703,000. *The World Almanac, 1963, p. 542*. (CX 4 thru 8; CX 10; CX 11; CX 96; CX 97.)

The classified telephone directory of Cleveland issued in March 1962 shows a total of 626 drug stores listed in the greater metropolitan Cleveland area, including 28 Revco stores. (RX 23 A-G; Tr. 2539.)

The classified telephone directory of Detroit issued in September 1962 shows a total of 815 drug stores listed. (See "Order Taking Official Notice of Yellow Pages" filed March 4, 1964.) The Revco drug stores are shown therein under their former name of Regal Prescription Centers. (Note that the Regal warehouse and office is shown in the Yellow Pages as being at 5555 Concord which is the stipulated address of Revco's principal office in CX 1 at p. 2.)

The record discloses that drug stores primarily compete with other drug stores, rather than with other types of retail stores which may also be engaged in the sale of non-prescription merchandise among other classes of merchandise. As used in this paragraph, the term "drug stores" includes the drug departments of department stores. The record further shows that chain drug stores are in more immediate and direct competition with other chain drug stores than with independently operated drug stores and that discount drug stores are in even more direct competition with other discount drug stores than with non-discount drug stores. But all drug stores, whether they be chain, chain-discount, discount, or independent, are in the most direct and immediate competition with other drug stores located in close proximity to them. Although a limited number of non-prescription drug store items of merchandise is also sold in some volume by supermarkets and variety stores, generally speaking, drug stores are not in direct competition with supermarkets and variety stores on such items of merchandise. (Tr. 2233, 2241-2244, 2622; see also concessions by Revco that its chief competitors in



Initial Decision

67 F.T.C.

retail drug firm, brought about a keener price competition in the retail drug store business in that area than had previously existed. (See CX 99 A-C, which is a letter dated October 25, 1961, by respondent Rosen on letterhead of respondent Doner to Cleveland Better Business Bureau, Inc. The record also shows that some of the Government drug store operator witnesses, with store locations near Revco stores, adopted Revco's prescription advertisements showing Revco's prices on ten well known prescription drugs (*i.e.* CX 3, p. 16, CX 7, CX 9 and CX 11) as their own new prescription price lists. See also RX 2 which reports efforts of Eli Lilly Company to enforce Ohio's Fair Trade Act of 1959 against Revco.)

The issue under consideration, however, is not whether Revco caused a reduction in the prices of drug store merchandise in the Cleveland area, as contended by respondents Revco, Standard and Shulman in their various pleadings, but whether Revco's representations of savings on drug store merchandise sold at its stores as compared with other drug stores are false, misleading and deceptive.

Pursuant to motion filed by complaint counsel on January 24, 1964, official notice was taken at the hearing that the meaning of such words like "retail," "retail list," and "value" when used in comparison with lower advertised prices in advertising merchandise constitutes a representation that there is a usual and customary retail price for the product advertised and that the price designated as "retail" or "retail list" or "value" or by a word of similar import is that usual and customary price. (Tr. 199.) Respondents were given the opportunity to present rebuttal testimony to the facts thus officially noticed but did not avail themselves of the opportunity. (Tr. 197.)

Complaint counsel's case-in-chief in support of the complaint under paragraph seven of the complaint consists of filled-in questionnaires sent to various drug store operators in the Cleveland area during the investigative stage of this proceeding and testimony elicited at the hearing from such drug store operators relating to the subject matter of such questionnaires.

There were two such questionnaires to these various drug store operators. One calls for and shows the prices charged by their drug stores as of October 1, November 1 and December 1, 1961, and January 1, February 1 and March 1, 1962, for the same ten *prescription* drugs advertised by Revco in its above-described advertisements under Revco's own "everyday" price and the higher comparative price

ilar Revco catalogue, also printed in about the same quantity and containing 478<sup>2</sup> advertised non-prescription items, was published on March 1, 1962, and distributed between March 1 and March 31, 1962, and is in evidence as CX 3. (Tr. 244; CX 20, 24, 30.)

The record, in addition, contains an insert, CX 9, to the first catalogue (*i.e.* CX 2) setting forth Revco's prices on ten prescription drug items and the comparative prices of "others" on the same drug. The advertisement makes representations of "savings of 30% to 70%" on these items. The advertisement also gives "notice" to former Standard Drug Store patrons that their prescriptions can now be refilled at the successor Revco stores at the savings and prices indicated. (Tr. 77-88; see also description of CX 9 shown in CX 1, Part II.) The same advertisement (*i.e.* CX 9) was also published in The Cleveland Press on November 8, 1961, and is in evidence as CX 7. The same advertisement was again published in the Cleveland Plain Dealer on November 12, 1961, except that this advertisement does not have the claim of "savings of 30% to 70%," as shown in CX 7 and 9. The latter advertisement in the Plain Dealer is in evidence as CX 11. (No consideration will be given herein to "savings" representations made by Revco in radio advertisements as reflected in CX 98A, B, and F, although relied upon by complaint counsel in their Proposed Findings, p. 9, because there is nothing in the present record to show when these representations were made and because in any event the representations therein relied upon are duplications of representations made in the other advertisements described above. CX 50 A and B "for identification" was intended to show when and where the above-mentioned radio commercials were made but somehow was not made part of the record herein. CX 50 A and B for identification was tentatively identified as CX 99 A and B at prehearing conference. See *Prehearing Conference Exhibit CX 5 F.*)

In each of the above-described advertisements, the advertisement lists both (a) Revco's everyday price for the product and (b) a comparative higher price under such captions as "value," "retail," "retail list," "other" or "chart price." Paragraph seven of complaint alleges that respondents made these representations and charges that they are false, misleading and deceptive. Respondents in their pleading admit making the representations but deny that they are deceptive. As heretofore indicated, the great bulk of the record herein pertains to the charges of paragraph seven of the complaint and the defenses of respondents thereto.

The entrance of Revco on October 1, 1961, into the Cleveland drug store market, with its massive advertisements as a "total" discount

Initial Decision

67 F.T.C.

*scription items* reflected in Revco's above-described advertisements for the period October 1, 1961, through March 31, 1962. (CX 3, p. 5, CX 4, p. 16; CX 7, 9 and 11.) If Revco's advertised comparative prices on the drugs in question prevailed, then its advertised claim of "savings of 30% to 70%" thereon would be justified.

The chart also shows the prices charged by five Sherwood Drug Stores, chiefly purveyors of prescription drugs, on the same drugs for the same period. The examiner assigns complete probity to the testimony given in this proceeding by the vice president of Sherwood Drug on the prices charged by that firm in its five drug stores on prescription drugs during the involved five-month period. The prices charged by Sherwood on the drugs in question remained the same for the entire period here under consideration, except for one insignificant change. (CX 105; Tr. 1102, 1104, 1127, 1128-29, 1172, 1173.) The chart also reflects the charges made by Marshall Drug Company, the largest chain drug store operator in the Cleveland area, for the same drugs during the same period. (CX 120; Tr. 2065, 2067, 2068.)

It is found that the prices charged for prescription drugs by the seven other drug store operator Commission witnesses for the five-month period in question were substantially similar to those charged by Sherwood and Marshall in their questionnaires as shown in the chart below. (See references to complaint counsel's Proposed Finding at pages 13 and 14 to these questionnaires by exhibit numbers and testimony related thereto.) From the evidence adduced at the hearing by Revco and from Revco's Proposed Findings and Brief, it does not appear that respondents are asserting that any fair trade prices existed for the prescription drugs in question in the period involved. But respondents are asserting that the prices charged by most drug stores on prescription drugs during the period in question were determined from published and commonly used formulae which will be discussed below when the defenses of the respondents are reviewed.

Summarized, the chart below shows the prices charged by Revco, together with its advertised higher comparative prices, on ten commonly used prescription drugs for the period October 1, 1961, through March 31, 1962, along with the prices charged by Sherwood Drugs and Marshall Drug Company for the same drugs in the same period and a reiteration by way of a footnote of the finding that all of the other Government drug store operator witnesses charged roughly the same prices as Sherwood and Marshall:

under the designation of "other." The other questionnaire calls for and shows the same information with respect to prices charged by the drug stores for twenty well-known *over-the-counter drugs* such as Bayer Aspirin, or *sundry drug store items*, such as Adorn Hair Spray, all of which were advertised in Revco's aforementioned advertisements under a Revco "everyday" price and a comparative higher price. CX 100 A is a sample of the first questionnaire and CX 100 B is a sample of the second questionnaire. The operators of these drug stores testified that the prices shown for specific dates shown in the questionnaires generally prevailed throughout the period October 1, 1961, through March 31, 1962, and some of the questionnaires have statements to this effect thereon. (CX 100 thru 121; see citations to record in complaint counsel's proposed findings at pages 13 and 14.)

Each questionnaire, before its presentation to the drug store operator, was marked at its top with the following typed matter: "Re: File No. 622 3466 Revco Discount Drug Centers." (Tr. 1286.)

Each of the drug store operators to whom the questionnaires were given considered their stores to be very much in competition with the Revco chain drug stores. They operated twenty-six (26) drug stores in close proximity to Revco drug stores. (With respect to the competitive element between the stores of these drug store operators and the Revco drug stores, see references to transcript in complaint counsel's brief at page 5A, bottom paragraph. With respect to the proximity of the stores of such drug store operators with Revco drug stores, see Tr. 832, 1176, 1179, 1180, 1289, 1402, 1495, 1496, 1497, 1505, 1507, 1871, 2074, 2075, 2076, 2077, 2707 and compare with Revco store locations as shown on CX 1, par. 13 and CX 3, p. 54 and 55.)

Complaint counsel relies on the testimony of nine such drug store operators, some of whom had multiple stores. These operators represented a total of 70 drug stores as to non-prescription items and 75 drug stores as to prescription items. (See references to transcript in complaint counsel's proposed Findings at pages 13 and 14.) Included in this representation were the Cleveland area drug stores of Revco's largest chain store competitors, Marshall Drug Company, Inc., and Gray Drug Stores, Inc. (CX 110, Tr. 1399; CX 120, Tr. 2071, 2073-2080.)

There is shown below a chart depicting Revco's advertised "everyday" price and the advertised higher comparative prices on *ten pre-*

Initial Decision

67 F.T.C.

bottom line of the 1961 Red Book cover reads "Current Fair Trade Practices." The content page of the two Red Books relates pertinent information on "fair trade" practices. From the entire record, it is found that the Red Book is generally in the hands of all drug store operators. As heretofore shown, the Ohio Fair Trade Act of 1959 was found to be constitutional by Ohio's highest court of appeals. The second chart will show the prices charged by Revco's two largest chain competitors on the same twenty items of drug store non-prescription merchandise and will be followed by a finding that roughly comparable prices were charged by the seven remaining Government drug store operator witnesses.

The above-described first chart is shown below:

Size	Product	Revco's every- day price	Revco's retail list	CX 2 (page)	CX 3 (page)	1961 fair trade price	RX 14 (page)	1962 fair trade price	RX 15 (page)
100's.....	Squibb, Theragran.....	\$7.45	\$7.45	32		\$9.45	594	\$7.45	600
100's.....	Squibb, Theragran-M.....	5.45	7.89	35		9.89	594	7.89	600
100's.....	Upjohn, Unicaps.....	2.21	3.11	30		3.11	630	3.11	638
80's.....	Geritol.....	3.43	4.98	33		4.98	265	4.98	267
100's.....	Lilly, Micebrin.....	3.28	4.99	29		5.98	377	5.98	381
50 cc.....	Meads, Poly-vi-Sol.....	2.63	3.29	46		3.59	474	None	478
100's.....	Miles, One A Day.....	2.00	2.94	24		2.94	421	2.94	426
Large.....	Adorn, Hair Spray.....	1.55	2.25	8		2.25	39	2.25	33
6 oz.....	Rinse Away.....	.69	1.00	8		1.00	518	1.00	522
100's.....	Bayer Aspirin.....	.52	.69	12		.69	90	.73	85
100's.....	Bufferin.....	.93	1.20	12		1.23	114	1.23	110
14 oz.....	Listerine Antiseptic.....	.69	.89	11		.89	341	.89	343
Large.....	Mennen, Baby Magic.....	.76	1.00	17		1.00	364	1.00	368
48's Reg.	Kotex.....	1.19	1.73	17		1.73	324	1.73	326
40's Reg.	Modess.....	.98	1.45	17		( <sup>1</sup> )	381	1.45	385
75's.....	Five Day Pads.....	.73	1.10	15		1.10	244	1.10	245
3 oz.....	Mennen Spray.....	.72	1.00	12		1.00	364	1.00	360
9 oz.....	Mennen Skin Bracer.....	.72	1.00	10		1.00	364	<sup>2</sup> 1.00	368
8 oz.....	Pertussin.....	.88	1.19	13		1.19	458	1.19	461
8 oz.....	Pepto Bismol.....	.71	.98	13		.98	455	.98	458

<sup>1</sup> Not shown in 1961 Red Book for "40's Reg.;" shown in 1962 Red Book at \$1.45.

<sup>2</sup> Reduced in size in 1962 Red Book to 7 oz., but price the same as for 9 oz. in 1961.

From the above, it is found that Revco's advertised "retail list" comparative prices on the twenty items of merchandise shown above were the same as the fair trade prices on such merchandise except with respect to four such items for the year 1961. On three of these, Revco's "retail list" was lower than the fair trade price. On the fourth item, Revco's "retail list" was six cents higher (\$1.29) than the fair trade price (\$1.23). This discrepancy is deemed to be due to a typographical error and in any event, as the only discrepancy in twenty items, is regarded as *de minimis*.

1158

## Initial Decision

Size	Product	Revco's <sup>1</sup> advertised price	Revco's <sup>1</sup> advertised comparative price	Sherwood's <sup>2</sup> price	Marshall's <sup>2</sup> price
100's	Butazoladin-----	\$6.58	\$10.70	\$7.90	\$7.80
100's	Diuril, 5 gm-----	6.75	11.05	7.00	7.20
				6.75	
100's	Equanil, 400 mg-----	7.80	11.95	7.00	7.90
100's	Librium, 10 mg-----	7.88	12.80	8.00	9.46
100's	Meticorten, 5 mg-----	20.00	31.35	20.00	21.48
100's	Orinase-----	9.98	15.45	9.50	<sup>3</sup> 4.75
100's	Peritrate, 10 mg-----	3.00	4.95	3.20	3.19
100's	Peritrate, 80 mg. SA-----	8.50	13.70	8.50	9.56
100's	Raudixin, 50 mg-----	3.60	5.80	4.00	3.83
100's	Serpasil, 0.25 mg-----	5.00	8.25	4.50	5.40

<sup>1</sup> As shown in CX 3, p. 5; CX 4, p. 16; CX 7, 9 and 11.

<sup>2</sup> It should be noted again that the prices charged by Sherwood and Marshall for the five month period in question were substantially similar to those charged in the same period by complaint counsel's remaining seven drug store operator witnesses. The prices of Gray Drug Stores for the last three months of 1961 were higher than that of the others, but were reduced to prices more comparable to that of the others in the first three months of 1962.

<sup>3</sup> For 50.

As heretofore noted, the second questionnaire deals with the prices charged by competing drug store operators on twenty nationally known over-the-counter or non-prescription items of merchandise in the five-month period between October 1, 1961, and March 31, 1962. The twenty items listed in the questionnaire are the same items advertised by Revco, among many others, in its above-described advertisements under Revco's own "everyday" price and under an advertised higher comparative price shown under such designations as "retail," "retail list," and "value." The examiner finds that these twenty nationally advertised products constitute a representative cross section of the some 475 non-prescription items advertised by Revco in the advertisements in question. Under Section 5 of the Federal Trade Commission Act, a misrepresentation as to the comparative price of only a single product would be sufficient justification for a cease and desist order.

In connection with these twenty items of merchandise, two charts are set forth below. The first will show (a) Revco's advertised "everyday" price for each of the twenty items, (b) Revco's advertised higher comparative price for each item, and finally (c) the "fair trade price" for such items in the years 1961 and 1962. The latter is derived from the "Drug Topics Red Book" for 1961 and 1962 which are in evidence as RX 14 and RX 15, respectively. The

on cross examination for the development of such objections as there may be to the introduction of the summary into evidence. To make certain that none of the attorneys to this proceeding would be caught unaware of this rule, the examiner at the prehearing conference put all counsel "\* \* \* on notice that summaries or abstracts offered in evidence will not be received into the record unless the underlying data is made available to opposing counsel for inspection and use in cross-examination." (See Prehearing Order filed January 28, 1964, and note paragraph 10 of the attached Joint Memoranda of counsel as to orders made at the prehearing conference herein.)

Complaint counsel have fully complied with this rule of procedure, despite contentions to the contrary by counsel for respondents both at the hearing and in brief on the ground that no underlying documentation has been supplied for some of the questionnaires which were prepared on the basis of memory as aided by a surveillance of shelf prices as of June 1962. Where a summary is prepared solely on the basis of memory and there is no written documentation therefor but the person who prepared such summary from memory is present for cross-examination, there is no sound reason why that summary, if it has any reliability at all in the judgment of the hearing officer, should not be admissible into evidence after inspection and cross-examination thereon, subject to such weight as the hearing officer deems it merits. The opposing party in such a situation would be no more prejudiced than if the witness had appeared and testified and no written summary of the witness' earlier recollection had been offered. In the instant matter, in some instances the Commission drug store operator witnesses refreshed their memories for purposes of answering the questionnaires as to prices prevailing between October 1, 1961, and March 1, 1962, on non-prescription drugs or sundry items from observations of June 1962 shelf prices. The examiner finds this a reasonable and legitimate aid to recollection of prices prevailing in the indicated five-month period. Certainly such June 1962 memories of prices prevailing between October 1, 1961, and March 1, 1962, would be more reliable than purely 1964 recollections at the hearing as to prices prevailing during that period. Obviously if the witnesses had appeared and merely testified from memory on the prices of the commodities in question during the indicated period, such testimony would be admissible. Objections to the reliability of some of the questionnaires showing October 1, 1961, to March 1, 1962, prices on non-prescription drugs based in part on June 1962 shelf prices on the same merchandise goes to the weight to be given such questionnaires and not to their admissibility.

The indicated second chart, as set forth below, shows the prices charged by Revco's two largest chain drug store competitors, the aforementioned Marshall Drug Company, Inc., and Gray Drug Stores, on the same twenty non-prescription drug store items for the same five-month period, October 1, 1961, through March 31, 1962:

Product same size shown above	Marshall's prices <sup>1</sup>	Gray's prices <sup>2</sup>	
Squibb, Theragran.....	\$4.99	\$4.99	-----
Squibb, Theragran-M.....	5.39	5.39	-----
Upjohn, Unicaps.....	2.19	2.19	-----
Geritol.....	3.43	3.43	-----
Lilly, Micebrin.....	4.39	4.39	\$3.95 -----
Meads, Poly-vi-Sol.....	2.62	2.62	-----
Miles, One A Day.....	1.99	1.99	-----
Adorn Hair Spray.....	1.33	2.25	1.55 -----
Rinse Away.....	.69	1.00	.69 -----
Bayer Aspirin.....	.52	.73	.52 -----
Bufferin.....	.95	1.23	.89 \$0.93 -----
Listerine Antiseptic.....	.69	.89	.69 -----
Mennen, Baby Magic.....	.76	1.00	.76 -----
Kotex.....	1.19	1.69	1.19 -----
Modess.....	.98	1.45	.98 -----
Five Day Pads.....	.73	1.10	.73 -----
Mennen Spray.....	.72	1.00	.72 -----
Mennen Skin Bracer.....	.76	1.00	.76 -----
Pertussin.....	.88	1.19	.88 -----
Pepto Bismol.....	.71	.98	.71 -----

<sup>1</sup> CX 121.  
<sup>2</sup> CX 111. As seen, there are three columns of figures under "Gray's Prices." The first column generally shows prices during the last 3 months of 1961; the second column generally represents lowered prices in the first 2 months of 1962; the third column shows an increase in price on a single product.

The examiner finds that the prices charged by complaint counsel's remaining drug store operator witnesses on the same twenty non-prescription drug store merchandise were, with the variations one might expect, roughly comparable to the prices charged thereon by Marshall Drug Company and Gray Drug Stores as shown in the chart above. (CX 100 B, CX 103, CX 108, CX 113, CX 117, CX 119.)

The above-described questionnaires are essentially summaries or abstracts of data pertinent to the issues raised under paragraph seven of the complaint. Before a summary or abstract can be received in evidence, a well known rule of procedure requires that the underlying data for such summary or abstract be submitted during the course of the hearing to opposing counsel for inspection and use



because the Marshall advertisements in question appeared chiefly in the October 1, 1961, issues of Cleveland newspapers which is the date when Revco opened its advertising campaign. Mr. Bates, Marshall's executive vice president, attributed these discrepancies to advertising errors brought about by the confusion arising from the relocation of his company's offices from Cleveland to Detroit. (Tr. 2092-2093.) The specific discrepancies referred to are these. (1) The Marshall questionnaire (CX 121) shows a price of \$4.99 on Squibb Theragram, whereas Marshall newspaper advertisements (RX 19 A, and 20) of October 1 and 11, 1961, shows a price thereon of \$5.49; (2) the Marshall questionnaire shows a price of \$2.19 on Upjohn Unicaps, whereas a Marshall newspaper advertisement (RX 19 B) of October 1, 1961, shows a price thereon of \$2.51; (3) the Marshall questionnaire shows a price of \$5.39 on Squibb Theragram M, whereas a Marshall newspaper advertisement (RX 19 A) of October 1, 1961, shows a price thereon of \$5.79; and (4) the Marshall questionnaire shows a price of 98¢ on Modess, whereas a Marshall newspaper advertisement (RX 20) of October 11, 1961, shows a price thereon of \$1.09.

Similarly, it is found that the prices shown on the Gray Drug Stores, Inc., questionnaire are entitled to be accepted as the prices charged by Gray Drug Stores, Inc., for the times and periods shown on the questionnaire. Mr. Herbert H. Durr, vice president of Gray Drug Stores, Inc., testified with respect to the Gray questionnaire and the examiner finds that this witness was meticulously honest in his testimony and that his testimony is fully reliable and probative. From Mr. Durr's testimony it is established that the Gray questionnaire was prepared in June 1962 from a price list then in existence which has since then been destroyed under a management directive to clean the company files out of old and obsolete documents. Mr. Durr, however, did bring to the hearing room a newspaper advertisement of his company published in the Cleveland Plain Dealer on October 9, 1961, which corroborated the correctness of the prices shown on the questionnaire for seven of the non-prescription items shown thereon. Later, during the course of his testimony which was interrupted by an overnight recess, Mr. Durr found and brought to the hearing room some price bulletins of his company which further substantiated the prices shown on the questionnaire. All of these underlying documents for the questionnaire were made available to counsel for respondents, for their inspection and use in their cross-examination of Mr. Durr. (Tr. 1440-1443, 1454-1455, 1459, 1470, 1488-1489.) But the questionnaire would have been ad-

The examiner finds that other evidence of record corroborates the prices shown in the questionnaires discussed above. As heretofore shown, questionnaires are also of record from Marshall Drug Company, Inc., and Gray Drug Stores, Inc., Revco's two largest competing drug store chains, as to their prices on the involved non-prescription drug store items for the entire period October 1, 1961, to March 1, 1962. Marshall answered the questions in the questionnaire on the basis of a *price list* in use in all Marshall drug stores during the five-month period in question. This price list was made available<sup>3</sup> at the hearing for inspection and for use on the cross-examination of Marshall's executive vice president, William H. Bates, who testifying in behalf of the Commission identified the questionnaire as one prepared from the said price list. The prices shown on the Marshall questionnaire for the twenty prescription items for the involved five-month period are the same as those shown on Marshall's price list for the same items for the same period. (CX 121; Tr. 2070, 2082-2083.)

Although the record discloses, as respondent Revco points out in its proposed findings at pages 31 and 32, some discrepancies between the prices shown on the Marshall questionnaire and the prices advertised by Marshall in the Cleveland newspapers, these disparities are of such insignificance as to not affect in any material way the probity and reliability which the examiner assigns to the Marshall questionnaire. These price discrepancies are insignificant because they relate to only four of the twenty items shown on the Marshall questionnaire, because the price differentials on these four items between the prices shown thereon in the questionnaire and the Marshall advertisements are in themselves relatively small and insignificant, and

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<sup>3</sup> In paragraph 68 of its proposed findings, Revco requests a finding of fact as follows: "In the case of the two (2) exceptions, the non-prescription questionnaires for Marshall Drug Company and Gray Drug Stores, Inc., both identifying witnesses stated that they had relied upon price sheets which had since been 'lost' or 'misplaced' and were consequently not available for cross-examination purposes. (Bates Tr., p. 2067, Durr Tr., p. 1455.)" This proposed finding as to Marshall is contrary to fact and completely erroneous. As shown above, Marshall did produce a price list in effect at all Marshall stores during the period in question which was presented to Revco counsel for inspection and use on cross-examination of the Commission witness from Marshall. It is especially difficult to understand why Revco counsel should fall into the error of asking for a finding that Marshall did not present to them the indicated Marshall back-up price list as they had offered and strenuously sought to have the *presented* price list introduced in evidence. This offer was denied, as an underlying document should not be received in evidence when there are no discrepancies between it and the summary or abstract thereof offered in evidence. (Tr. 2082-2083, 2252, 2255-2257, 2485-2486.) As to Gray Drug, the Revco proposed finding in its said paragraph 68 carries the implication that no underlying or supporting documents for the Gray non-prescription questionnaires was submitted to Revco for inspection and use on cross-examination. The record shows quite the contrary as will appear from subsequent sentences in the body of this initial decision.

Initial Decision

67 F.T.C.

markup. When a manufacturer puts out a new line of merchandise, he obviously establishes prices for such merchandise before he sells any of it. The prices he thus establishes for his merchandise are usually reflected in a price list or catalog which he makes available to his salesmen or distributes to his customers. Invoices may serve as corroborative evidence that the prices reflected in a price list are the actual charges made but the true underlying documentation for prices being charged is the manufacturer's price list or catalog. Similarly in the instant case, the price lists of the Commission drug store operator witnesses are the underlying or supporting data for the prices shown on prescription drug questionnaires here under consideration and not the original prescriptions on such drugs maintained by the drug store operator.

The record shows that some of the small independent drug store operator witnesses testifying for the Commission answered the prescription drug questionnaires of June 1962 on the basis of memory as aided by reference to prices being charged in June 1962 as disclosed by retail prices marked on pharmacy bottles, with such adjustments as necessary from memory to reflect prices prevailing between October 1, 1961 and March 1, 1962. Other small independent drug store operator witnesses adopted the Revco advertisements (such as reflected in CX 3, p. 5, CX 4, p. 16, and CX 7, 9, 10) on the ten involved prescription drugs as their price list, and at least one of these merchants brought an old and tattered Revco advertisement used as his price list to the hearing room for inspection by respondents and use on cross-examination. (See footnote in Revco's proposed findings at page 54.)

The record also shows as heretofore indicated that the questionnaire of the five Sherwood Drug Stores, which are primarily apothecary shops, was based on a price list submitted to respondents at the hearing for inspection and use on cross-examination. The record further shows that the questionnaire of Gray Drug Stores, Inc., Revco's second largest chain drug store competitor, was backed up by a March 29, 1961, price bulletin, effective for the company's eleven stores in the Cleveland area, until superseded by a new price bulletin issued on January 1, 1962, which was effective at least through March 1, 1962. Both of these bulletins were brought to the hearing room and made available to respondents for inspection and for use on cross-examination on the Gray questionnaire. (Tr. 1438-1439, 1450-1452, 1468-1471, 1491-1492.) Finally, the record shows that the questionnaire of Cleveland's largest chain drug store operator, Marshall Drug Company, Inc., was based on a prescription

missible even without the production of underlying documentation where the evidence as here shows that the original documentation is no longer available and the hearing officer is satisfied as here that the questionnaire has probative value. If Mr. Durr had testified solely from memory as to the prices prevailing on the involved twenty non-prescription items during the period in question, there could hardly be any question as to the admissibility of such testimony. Mr. Durr's questionnaire and testimony, backed up as it was with documentation, is doubly probative.

In summary, it is found that the non-prescription questionnaires of the two large chain operators in the Cleveland area, Marshall and Gray, supported by underlying documentation, show prices comparable to those shown on the questionnaires in evidence as prepared by smaller independent drug store operator Commission witnesses.

Turning now to the prescription drug questionnaire, the record discloses that there were objections from all respondents at the hearing to the receipt of these questionnaires in evidence on the ground that the underlying data therefor was not made available to respondents for inspection and use on cross-examination of the Commission drug store operator witnesses. Revco in its proposed findings (par. 104) requests in effect that no weight be given to the prescription drug questionnaires for the same reason. Respondents contend that the "underlying data" for the prescription drug questionnaires are the original prescriptions which under the laws of the State of Ohio must be maintained by drug stores where filled for a period of five years. The record shows that it is the invariable custom of pharmacists to place on such retained original prescriptions the price charged for the prescription.

The examiner at the hearing rejected as being without merit respondents' contention that the underlying data for the prescription drug questionnaires are the retained original prescriptions. The real underlying data for the prices shown on the questionnaires in question are the price lists maintained and used by the Commission drug store operator witnesses. Obviously when a pharmacist is called upon to fill a prescription, he does not go hunt for a filled prescription on the same drug to find out what he should charge. He would, of course, consult a price list he maintains for determining what the charge should be. He could also rely on his memory as to what his charges are for various prescription drugs. The evidence shows, as will be later elaborated, that most druggists keep published pricing charts showing a formula for determining prices to be charged to customers which are based on the cost of the drug plus a profit

to the Commission drug store operator witnesses requiring them to bring to the hearing a minimum of 2500 such original prescriptions for use in connection with the cross-examination of such witnesses and to reopen the cross-examination for such purposes. (Tr. 2321-2325.)

The offer was declined. (Tr. 2326-2331.)

Ironically when respondent Revco was presenting its defense-in-chief and had occasion to put in evidence the prices charged on the ten involved prescription drugs during the five-month period in question by the few Standard Drug Company stores which Revco chose not to convert into Revco stores and later disposed of, Revco's counsel also chose not to produce the original prescriptions from these few Standard drug stores to prove the prices charged on such drugs by such Standard drug stores in the involved period but relied instead on a pricing chart. (Tr. 2505.)

In summary it is found that the prices charged by the nine drug store operator Commission witnesses, representing not fewer than sixty drug stores in the greater Cleveland area, charged prices on the involved ten prescription drug items and twenty non-prescription items during the period in question comparable to those charged by Revco on the same items during the same period under Revco's advertised "everyday prices" and that none of these Commission witnesses charged the Revco advertised higher comparative prices on the same items under such designations as "other" and "chart" or "retail," "retail list," and "value." It is also found that these Commission drug store operator witnesses are in more or less direct competition with each other and with Revco drug stores in the greater Cleveland area on the described items of merchandise and are under the necessity to keep their prices comparable or lose trade.

We turn now to respondents' defenses to the charges of paragraph seven of the complaint but more particularly to those reflected in the proposed findings of Revco, as Revco is the principal respondent. Respondents rely primarily on two lines of defense. The first relates exclusively to the twenty non-prescription items in the questionnaires received in evidence as Commission exhibits. This defense consists of two parts. The first part is that Revco's advertised higher comparative prices on these non-prescription items, under such designations as "retail," "retail list," or "value," were the actual legal minimum Ohio "fair trade" prices on such non-prescription items, except that with respect to three of the items, Revco's advertised comparative price was actually lower than the minimum fair trade price thereon for the year 1961. (See Revco's proposed finding, par. 76.) The sec-

1158

## Initial Decision

drug price list in use at the time the questionnaire was answered which has since been lost or misplaced due to the moving of the company's main office from Cleveland to Detroit. (Tr. 2067.)

From the record as outlined above, it is held that the prescription drug questionnaires here under consideration were fully supported by underlying data submitted to respondents' counsel *wherever* such supporting data was available. The rule of procedure requiring the submission of underlying data for summaries does not preclude from evidence summaries or questionnaires based on memory or on documentation existing at the time the questionnaires were prepared but no longer available. As heretofore noted, the Commission drug store operator witnesses are highly competitive to each other and to Revco. Under these circumstances, their prices both with respect to prescription and non-prescription items cannot be too far out of line with each other, as is evidenced by the fact that the prices shown on the questionnaires of those witnesses who were unable to supply supporting data for their questionnaires closely parallel the prices of Sherwood Drug Stores whose questionnaire was supported by a wholly unassailable price list for the period involved in the questionnaire. It is noteworthy that Marshall Drug Company, Inc., called attention to its "low" prescription prices in an advertisement in the October 1, 1961, issue of the Cleveland Plain Dealer as follows:

HERE IS WHY \* \* \*  
MARSHALL'S PRICE YOUR  
PRESCRIPTIONS SO LOW!

FIRST, there are no premiums, gimmicks, stamps or other expensive extras that you end up paying for. Marshall's policy is the lowest-cost policy.

SECOND, Marshall's large volume prescription service can operate on a lower margin. That's why nobody can price prescriptions lower than your Marshall's Drug Store.

\* \* \* \* \*

SO, learn exactly how much you will save at Marshall's on your prescribed medication. Stop in and Let Us Price Your Next Prescription!

(RX 19 B.)

Notwithstanding the examiner's ruling that the prescription questionnaires were admissible as Commission exhibits without the production of original prescriptions to corroborate the prices shown on the questionnaires for the ten prescription drugs shown thereon, in view of respondents' insistence that the production of such prescriptions with their price notations was essential for the testing of the probity of the questionnaires, the examiner at the hearing invited a motion from respondents for the issuance of subpoenas duces tecum

Initial Decision

67 F.T.C.

tion prices to the consumer. One such commonly used chart in the State of Ohio, and in Cleveland in particular, is the so-called "Shine Chart," created and compiled by Joseph J. Shine and distributed by a trade publication known as The Central Pharmaceutical Journal. The record contains two such "Shine Charts," to wit, CX 12 A & B which is a 1960 edition and RX 22 which is a later edition of the "Shine Chart." The procedure for determining a retail price on prefabricated tablets, capsules and pills from a "Shine Chart" and others of a similar nature, is as follows: First, the pharmacist determines the cost price per 100 for the particular prescription item as reflected in the aforementioned Red Book, in the appropriate column opposite the cost figure; secondly, the pharmacist determines a preliminary retail price for the particular quantity called for by the prescription; and finally, he adds a 75 cent professional fee to the preliminary retail price to arrive at the final retail price to be charged to the consumer. (Tr. 2513, 2515.)

Prior to the printing and dissemination of the Revco advertisements carrying the representations that other drug stores were charging the higher "chart" prices on the prescription drugs in question, Revco undertook a survey for the purpose of determining whether Cleveland pharmacists were actually using the well-known Shine chart in fixing their prices to the consumer on such prescription drugs. The investigation encompassed inquiries to some 80 Revco pharmacists who had had prior employment at Standard drug stores before they were taken over by Revco or with other drug stores; also inquiries to the representatives of all the various pharmaceutical manufacturers and jobbers who call on drug stores and are generally familiar with retail prices being charged by drug stores on prescription drugs; and similarly inquiries to Revco store managers and area supervisors responsible for current knowledge of prescription prices in their respective areas. (Tr. 329, 331-333, 2521, 2523 et seq., 2527, 2528.) From such investigation, Revco satisfied itself prior to the dissemination of the challenged comparative-price advertisements that the Shine chart prices on the ten involved prescription drugs were the prevailing prices on such drugs in the Cleveland trading area during the five-month period in question.

The record as a whole shows that Revco is in competition with all drug stores in the greater Cleveland area by virtue of its many store locations and extensive newspaper and catalogue advertising, but that Revco is in more immediate and direct competition with other drug stores located in close proximity to Revco stores, as are such other drug stores with respect to Revco stores located close to

ond part of this defense is the legal argument that it must be assumed that the "fair trade" prices on the twenty non-prescription items are the prevailing prices thereon as there is a legal presumption that people obey the law.

There has been set forth above the Ohio "fair trade" prices on the twenty items in question for the years 1961 and 1962 as derived from the universally used "Drug Topics Red Book" for said years. The examiner finds, solely for purposes of this proceeding, that the Ohio "fair trade" prices on these twenty items for the involved five-month period between October 1, 1961, and March 1, 1962, are as shown in the said Red Books as set forth above. The examiner further finds that Revco's advertised higher comparative prices for these twenty non-prescription items under such designations as "retail," "retail list," or "value" were in fact virtually identical with the Ohio "fair trade" prices on these items, except that on three of the items, Revco's advertised higher comparative prices were actually lower than the minimum "fair trade" prices thereon prevailing in the year 1961.

Respondents' second defense to the charges of paragraph seven of the complaint is that Revco, prior to the printing and dissemination of its challenged comparative price advertisements, made an investigation of the prevailing prices among retail drug stores in the greater Cleveland area during the period here in question on both prescription and non-prescription items, including those set forth in the above-described questionnaires, and that from this investigation Revco became reasonably certain that its then planned-to-be-advertised comparative prices would not appreciably exceed the prices at which substantial sales of the items were being made in the area.

The record establishes that Revco, through its responsible officers, made a continuing investigation by means of shoppings as to the prices generally being charged by drug stores in the Cleveland area on non-prescription items during the period here in question and formed the opinion from such investigation that the prevailing prices in Cleveland on non-prescription merchandise, including those here involved, in the period in question were the Ohio fair trade prices on such items. (Tr. 2627, 2632, 2686-88, 2534-2536.)

We turn now to a consideration of Revco's advertised comparative prices on prescription drugs. The record shows that 90 percent of the prescription drug business in the Cleveland area is done by the independent single drug store operator who fills on the average some 44 prescriptions a day. (Tr. 329.) The record further discloses that druggists generally use a "pricing chart" for determining prescrip-



Initial Decision

67 F.T.C.

that the higher price he advertises does not appreciably exceed the price at which substantial sales of the articles are being made in the area—that is, a sufficient number of sales so that a consumer would consider a reduction from the price to represent a genuine bargain or saving. Expressed another way, if a number of the principal retail outlets in the area are regularly selling Brand X fountain pens at \$10, it is not dishonest for retailer Doe to advertise: Brand X Pens, Price Elsewhere \$10, Our Price \$7.50.

As seen from the above, the essential test for determining the existence or nonexistence of a violation of the Federal Trade Commission Act is whether the advertiser is “reasonably certain that the higher price he advertises does not appreciably exceed the price at which substantial sales of the articles are being made in the area \* \* \*” in which he is offering his merchandise. If the answer to this question is in the affirmative, there is no violation; if the answer to the question is negative, then there is a violation.

The “area” here under consideration is the greater Cleveland metropolitan, as all of complaint counsel’s witnesses are from this area. It is obviously not necessary, as Revco appears to contend in its memorandum in support of its proposed findings (at page 6 *et seq.*), that such an “area” encompass all of the areas in which a respondent does business. A violation in any area in which a respondent does business is sufficient to justify a cease and desist order. As seen, Revco is in competition with all drug stores in the greater Cleveland area, although it is in more direct competition with other chain drug stores and with drug stores which are in close proximity to its own locations, whether such nearby drug stores are single, independently owned units or units of a chain store competitor. Wherever else in Ohio, Revco’s challenged comparative advertising was disseminated, the record is clear that the great bulk of such advertising took place in the greater metropolitan area of Cleveland.

The drug store business appears to be the last bastion of the small independent merchant, albeit one that requires professional training on the part of the pharmacist-owner. It is a dispersed business in the sense that drug stores are located in all communities, large or small, wherever people reside or congregate. In this respect the retail drug business is similar to the chain food markets, although more ubiquitous, but unlike the food store chains, retail drug stores are overwhelmingly single proprietary enterprises, as may be observed from the Yellow Pages of the telephone directories for the Cleveland and Detroit of record herein. In an important respect, drug stores are quite dissimilar to department stores in that the great bulk of general merchandise purchasing by the public is

them. The record further shows that Revco's chief chain store competitors in the greater Cleveland area are the aforementioned Marshall Drug Company, Inc., and Gray Drug Stores, Inc. The evidence also shows that these two chains and the Revco chain drug stores are highly competitive to each other, particularly through newspaper advertisements. As heretofore noted, the record also shows that Revco is not in competition to any effective degree on non-prescription and sundry items with supermarkets and variety stores.

#### DISCUSSION AND CONCLUSIONS

We have here a rather odd situation in that although complaint counsel have succeeded in proving all the essential evidentiary facts they sought to prove under the false comparative price charges of paragraph seven of the complaint, the decision on the issues raised by such charges, insofar as they relate to Revco's advertisements in the greater Cleveland area here under consideration, must go to the respondents.

The present standards for judging deceptive pricing cases are those set forth in the "Guides Against Deceptive Pricing," as adopted by the Federal Trade Commission on December 20, 1963, effective as of January 8, 1964, hereinafter referred to as the New Guides which superseded the older "Guides Against Deceptive Pricing," as adopted on October 2, 1958. As this case was heard in February 1964, the New Guides were in effect and controlling when the case was heard, although not in effect when the complaint was issued on June 13, 1963. The latter fact, in the opinion of the examiner, is immaterial because it appears from a comparison of the texts of the New and Old Guides that the standard for judging whether or not a comparative-price advertisement is false and misleading is essentially the same in both the New and Old Guides, except that, procedurally, the burden of proof incumbent upon counsel supporting the complaint under the New Guides has been made more difficult and the burden of successful defense for a respondent has been made easier than under the Old Guides. For a more complete discussion, see undersigned's order of January 29, 1964, entitled "Order Certifying Motion for Dismissal."

The standard set up by the New Guides for judging whether a respondent's comparative price advertisement is in violation of Section 5 of the Federal Trade Commission Act is stated in Guide II thereof as follows:

Whenever an advertiser represents that he is selling below the prices being charged in his area for a particular article, he should be reasonably certain

Initial Decision

67 F.T.C.

It is doubtful that an advertised comparative price on a commodity can ever be successfully assailed as false and misleading where such advertised comparative price is the same or no more than the lawful minimum "fair trade" price on the commodity, in the absence of a showing of a rather complete breakdown of administered "fair trade" prices under a fair trade statute. *Cf. Bulova Watch Company, Inc.*, F.T.C. Docket 7583 (February 28, 1964) [64 F.T.C. 1054].

With respect to the ten prescription drugs on which Revco's comparative pricing has been challenged, there is no claim and no evidence of record that the prices on such drugs are "fair traded." But the evidence adduced by Revco does show that most of the 600 drug stores in the Cleveland area use a "Shine" pricing chart or similar charts for the purpose of determining the retail price to be charged to the consumer for prescription drugs and that Revco's advertised comparative prices under such designations as "chart" or "other" prices were these Shine chart prices or others substantially similar to the Shine chart. The evidence further shows that Revco also made an investigation into the prices charged by most Cleveland drug stores on such prescription drugs from which it became additionally "reasonably certain" that "chart prices" on prescription drugs were in fact the prevailing prices on such drugs. On the basis of the record, the examiner finds that prior to the dissemination of the challenged advertisements Revco was "reasonably certain," to use the phrase of Guide II, from its investigation that "chart" prices were being charged by most drug stores in the Cleveland area on the ten prescription drugs in question.

In summary, it is concluded and found that the respondents herein have not advertised comparative prices, as charged by paragraph seven of the complaint, on the drug store merchandise here involved in excess of the highest prices at which substantial sales were made of such merchandise in the greater Cleveland area. Embraced in this finding is the lesser finding that at the time of the dissemination of the challenged advertisements, respondents had reason to be, and were, reasonably certain that the higher comparative prices shown in their said advertisements on the commodities in question did not appreciably exceed the prices at which substantial sales of the commodities were being made in the greater Cleveland area in which respondent Revco was engaged in the retail drug business as a chain store operator.

It follows and is found that complaint counsel have not sustained their burden of proof under the allegations of paragraph seven of

at relatively few department stores and thus, generally speaking, the "prevailing prices" of consumer goods, other than foods, can be determined from prices charged on such consumer goods in comparatively few department stores. The situation is quite different among drug stores because there are literally hundreds of drug stores in the greater Cleveland area. The Cleveland Yellow Book for 1962 shows 598 drug stores in the greater Cleveland area, exclusive of the 29 Revco chain stores listed therein.

We turn now to the "substantial sales" requirement of Guide II. While it is unquestionably true in the instant case that the drug store operator witnesses called by complaint counsel, representing some 70 drug stores, represent a substantial volume of sales in the greater Cleveland area, it is more than equally certain that the remaining 500 or so drug stores in the Cleveland area represent a far greater sales volume of drug store merchandise (including the items involved in this proceeding) than the 70 drug stores represented among complaint counsel's drug store operator witnesses.

Turning next to the "reasonably certain" features of the New Guides, the record shows that Revco could believe with reasonable certainty, and did so believe, that the 500 or so drug stores in the Cleveland area, other than the drug stores in close proximity to a Revco store and Revco's two biggest chain store competitors, were selling the commodities here involved at the higher comparative prices shown in the Revco advertisements.

With respect to the non-prescription items here involved, this certainty must be partly assumed as a matter of law and partly be attributed to the results of Revco's own investigation into the prices prevailing on such commodities among drug stores in the Cleveland area prior to the release for publication and distribution of the challenged advertisements. Revco could be reasonably certain that the "fair trade" prices on these non-prescription items were being charged by most of the 600 drug stores in the Cleveland area under provisions of the Ohio Fair Trade Act of 1959 because of the well-recognized presumption that persons subject to duties imposed by statute are presumed to obey the law. Stated conversely, the non-compliance with, or nonobservance of, the statutory law or the violation of a contractual duty will not be presumed. *20 Am. Jur., Evidence*, Section 266. In addition, Revco's own investigation prior to the dissemination of its comparative price advertisements on the commodities in question convinced its responsible officers that the fair trade prices on such commodities were in fact the prevailing prices on such commodities among the vast majority of drug stores in the Cleveland area.

Initial Decision

67 F.T.C.

the word "Size," as for example, 29¢ Size," hereinafter generally referred to as a "price-size" designation.

None of the comparative-price quotations from Revco advertisements, shown under paragraph seven of the complaint as the "among and typical" of the challenged portions of the Revco advertisements, include representations as to "price-size," as is primarily involved in CX 96 here under consideration. All of the quotations from the Revco advertisements set forth in the complaint as "among and typical" of the challenged portions of the Revco advertisements, insofar as applicable to non-prescription items, relate solely to prices shown in Revco advertisements under designations of "value," "retail," or "retail list." Timely objection by respondents was made at the hearing to the receipt in evidence of CX 96 on the ground that the "price-size" designations therein were outside the scope of the allegations of paragraph seven of the complaint. (Tr. 406-407; 432-433.) Although for the immediate purposes of the hearing, the objection was overruled, consideration will be given thereto in the "conclusions" shown below. The official notice taken at the hearing and noted at page 11 above with reference to the meaning of such words as "retail," "retail list," and "value" is not applicable to the "price-size" designations found in CX 96 as placed in controversy at the hearing by complaint counsel.

Upon the receipt of CX 96 in evidence, complaint counsel adduced the testimony of two professional shoppers, Mrs. Helen Heinrich and Mrs. Phillis Kimmel, to show the results of their "shoppings" of thirty-five of Revco advertised "price-size" items in CX 96 at competing drug stores for the purpose of showing the actual selling prices of such items at such competing drug stores as compared with Revco's advertised "price-size" thereon and Revco's "everyday price" thereon. Mrs. Heinrich and Mrs. Kimmel, housewives and part-time employees of the Detroit Better Business Bureau, performed the mentioned "shoppings" at the direction of the Bureau (Tr. 548, 574.) The "shoppings" of these witnesses consisted of either an actual purchase of the Revco advertised "price-size" item at a competitive retail drug outlet or an observance of the price charged for such an item by the competing drug outlet. The term is also used in the same sense for "shoppings" made by these women at Revco stores, although such "shoppings" for the items in question were hardly necessary as it could be presumed and is presumed in the absence of any facts to the contrary that all Revco stores sold the merchandise advertised in CX 96 at the "everyday prices" shown therein.

the complaint insofar as such allegations relate to the advertising practices and business operations of respondents in the greater metropolitan area of Cleveland.

Although no claim of either abandonment or discontinuance of the challenged comparative price advertisements hereunder consideration have been made by the respondents, it appears deductively from the record that respondents have not engaged in this same type of advertisement subsequent to March of 1962, since the record as developed by complaint counsel relates only to advertisements of this pattern which were disseminated between October 1, 1961, and on or about March 1, 1962.

#### 4. Fictitious Pricing Issues at Detroit

In Detroit, Revco's principal place of business, complaint counsel also challenged, under paragraph seven of the complaint, two Revco newspaper advertisements published in Detroit newspapers in the month of February 1963 on the ground that they, like Revco's Cleveland advertisements, contain fictitious comparative pricing. The first of these two challenged Detroit advertisements is a Revco twelve-page advertisement supplement to the Sunday, February 3, 1963, issue of The Detroit News, received in evidence as CX 96. The other challenged Revco advertisement is a nearly full page newspaper advertisement in the Detroit Free Press issue of February 7, 1963, received in evidence as CX 97. All testimony offered by complaint counsel in connection with CX 97 was stricken on motion of respondents, but a similar motion with respect to CX 96 was denied. Complaint counsel has requested reconsideration of the ruling of the examiner striking the testimony of Commission witnesses on this advertisement. (See complaint counsel's brief at page 13.) Consideration will be given first to the issues raised with respect to CX 96.

It should be noted that although in the Cleveland phase of this proceeding both prescription and non-prescription items were involved, the Detroit advertisements involve only non-prescription items of drug store merchandise.

A noteworthy and important difference in advertising phraseology should also be noted between the challenged portions of Revco's Cleveland and Detroit advertisements. Under the Cleveland advertisements, complaint counsel's challenge is to such phrases as "Retail 49¢," "Value \$1.19," or "Retail List 89¢." Under the Detroit advertisement as reflected in CX 96, complaint counsel's challenge is, with only one exception, to phrases showing a price accompanied by

## Initial Decision

67 F.T.C.

Product	Revco's ad- vertised price size	Revco's ad- vertised every- day price	CX 96 page reference to pre- ceding columns	Cunningham's selling price	Sam's selling price	Hudson's selling price
1. Geritol 12 oz.....	\$2.98	\$2.06	6G	\$2.09 (Tr. 608)	\$1.88 (Tr. 605-606)	\$1.88 (Tr. 606)
2. Stuart's Formula 1 pt.	2.80	1.87	6G	2.09 (Tr. 615)	1.89 (Tr. 615)	1.87 (Tr. 614)
3. Park-Davis ABDEC Drop 50 cc.	3.51	2.56	6G	2.98 (Tr. 616)	1.99 (Tr. 616)	2.69 (Tr. 616)
4. Mead-Johnson Poly-Visol Tab 100's.	4.55	3.00	6G	3.59 (Tr. 618)	3.29 (Tr. 618)	2.91 (Tr. 618)
5. Upjohn's Unicap M 90's.	3.38	2.29	5G	2.98 (Tr. 627)	2.29 (Tr. 627)	2.04 (Tr. 627)
6. Geritol Tablets 80's.	4.98	3.43	6G	4.09 (Tr. 628)	3.43 (Tr. 627-8)	3.43 (Tr. 627)
7. Listerine 14 oz.....	.89	.69	10G	.75 (Tr. 636)	.59 (Tr. 636)	.57 (Tr. 637)
8. Lavoris 17 oz.....	.89	.67	10G	.66 (Tr. 637-8)	.74 (Tr. 638)	.66 (Tr. 638)
9. Bayer Aspirin 100's..	.73	.52	8G	.59 (Tr. 603)	.54 (Tr. 603)	.44 (Tr. 602)
10. Park-Davis Myadec..	7.79	5.19	4G	4.99 (Tr. 590)	4.89 (Tr. 591)	4.89 (Tr. 590)
11. Lederle Filibon.....	4.73	2.89	6G	3.98 (Tr. 595-6)	4.72 (Tr. 595)	2.89 (Tr. 595)
12. Minut Rub Large....	.89	.67	8G	.89 (Tr. 598)	.69 (Tr. 597)	.89 (Tr. 597)
13. Alka Seltzer 8 oz....	.60	.39	8G	.53 (Tr. 599)	.38 (Tr. 599)	.34 (Tr. 599)
14. Bexel for Children 100's.	2.79	1.68	6G	1.39 (Tr. 619)	1.98 (Tr. 619)	1.98 (Tr. 619)
15. Multicebrin Jr. 100's.	2.18	1.60	6G	2.18 (Tr. 621)	2.23 (Tr. 621)	1.49 (Tr. 621)
16. Miles' Shocks 100's..	3.00	1.97	4G	2.55 (Tr. 624)	2.00 (Tr. 624)	1.97 (Tr. 624)
17. Meade Poly-Vi-Sol 50 cc.	3.59	2.63	4G	2.98 (Tr. 625)	2.39 (Tr. 625)	2.79 (Tr. 625)
18. UpJohns Unicap 100's.	3.11	1.99	5G	2.49 (Tr. 626)	1.88 (Tr. 626)	1.87 (Tr. 626)
19. Geritol Tablets 80's..	4.98	3.43	5G	4.09 (Tr. 628)	3.43 (Tr. 627-8)	3.43 (Tr. 627)
20. Mead-Johnson's Tri-Vi-Sol 50 cc.	3.24	2.40	5G	2.59 (Tr. 628)	2.21 (Tr. 628)	2.21 (Tr. 628)

Of the 20 shoppings shown above, no findings adverse to respondents are made with respect to 2 of these shoppings (*i.e.* Nos. 12 and 15) because the evidence as to the disparity between Revco's advertised "price-size" and the actual prices charged thereon by competitors is equivocal. But from the remaining 18 shoppings, it is found that none of Revco's above-mentioned competitors charged the Revco advertised "price-size" for the items in question. It is further found that the prices charged on these eighteen items by Revco's competitors are substantially below Revco's advertised "price-size" and usually quite comparable to Revco's advertised "everyday price" and in a number of instances less than Revco's "everyday price."

We have dealt above with 20 of the 35 shoppings performed by Mrs. Heinrich and Mrs. Kimmel at competing drug stores or drug

Mrs. Heinrich and Mrs. Kimmel did their comparative shoppings at drug stores operated by Cunningham Drug Company and drug departments in Sam's Inc. Campus Martius Store, and J. L. Hudson Company. All of their shoppings at the stores of these competing firms were done on the Tuesday and Wednesday following the publication of the Revco advertisement in CX 96 as a supplement to the Sunday February 3, 1963, issue of The Detroit News. (Tr. 594-595.) Cunningham, in 1963, as revealed by Yellow Pages (see examiner's Order of March 4, 1964), operated some 63 drug stores in the greater Detroit area and is the largest drug store chain in that area.<sup>4</sup> The shoppings of Mrs. Heinrich and Mrs. Kimmel at Cunningham drug stores were at Cunningham downtown locations. J. L. Hudson Company is Detroit's leading department store and all of the shoppings of Mrs. Heinrich and Mrs. Kimmel were in the drug department of Hudson's main downtown store in Detroit. (Tr. 607.) Hudson also has several other locations in the greater Detroit area. Sam's Inc. is likewise a department store with several locations in the Detroit area. (Tr. 798; official notice of Detroit Yellow Pages for 1963 shows Sam's to have several locations.) As heretofore shown, the greater Detroit area has a total of 815 drug stores. From the record as a whole, it is found that these competing drug stores and drug departments of department stores enjoy widespread patronage from drug store patrons and represent a representative cross section of the shopping centers for drug store merchandise in the greater Detroit area.

Although Mrs. Heinrich and Mrs. Kimmel testified to some 35 comparative-price shoppings on items advertised in CX 96 under designations of "price-size" and Revco's "everyday price," complaint counsel with commendable but perhaps too much brevity have set forth the results of only nine of these shoppings in their brief (at pages 14 and 15.) (There do not appear to be any specific proposed findings with reference to the testimony of these witnesses in complaint counsel's proposed findings.) The examiner has expanded complaint counsel's summary of the results of such shoppings to cover 20 out of the 35 shoppings. These are set forth in the chart<sup>5</sup> below:

<sup>4</sup> Cunningham Drug Company is also the parent company of Marshall Drug Company which is the largest drug store chain in the greater Cleveland area as shown above. (CX 1, par. 15.)

<sup>5</sup> It is observed that if a chart of this sort had been prepared before trial and offered in evidence at the hearing after a few foundation questions had been asked, it would have saved a great deal of time and many pages of transcript, and afforded both counsel and the examiner more time for more substantive aspects of their briefs and the initial decision. A chart of this sort should normally be presented preliminarily at the prehearing conference. At the trial, underlying data for the chart should be brought to the hearing room.



Initial Decision

67 F.T.C.

thousands of items, would make it a practice to be so sensitive to price advertisements of competitors as to immediately go about adjusting their prices to that of an advertising competitor. If they did that sort of thing, they would be changing prices every day, which is contrary to the common experience of drug store patrons. The chart shown above indicates that the level of retail prices among competing drug stores or drug departments is generally the same, with such moderate variations as might be expected from one drug store operator to another. From the record as a whole, it is found that the prices paid by Mrs. Heinrich and Mrs. Kimmel on the items they shopped at competing drug stores were not reduced to meet the advertised Revco "everyday prices" on such items.

The above completes the findings made on the Revco advertisement in evidence as CX 96.

The other Detroit advertisement placed under challenge by complaint counsel under paragraph seven of the complaint is the aforementioned nearly full page Revco advertisement of the February 7 (Thursday), 1963, issue of the Detroit Free Press, received in evidence as CX 97. CX 97 reads in pertinent part as follows:

## A TALE OF THREE TAPES

	Independent drug store	Chain drug store	Revco Dis- count Drug Centers
Q-Tips, 59¢ size.....	\$0. 59	\$0. 59	\$0. 41
Band-Aids, assorted, 69¢ size.....	. 69	. 69	. 47
Alka Seltzer (foil), 12's.....	. 53	. 53	. 39
Sleepeze, \$1.39 size.....	1. 39	1. 23	1. 02
Pepsodent Toothpaste, 69¢ size.....	. 57	. 63	. 56
Bayer Aspirin 300's.....	1. 79	1. 59	1. 39
Tampax, Reg. 40's.....	1. 59	1. 39	1. 21
Natabac Vitamins, 100's.....	4. 50	4. 50	3. 29
Gillette Giant Shave Bomb.....	. 98	. 98	. 75
Bactine, 6 oz.....	. 83	. 77	. 58
Vi-Daylin, 8 oz.....	2. 29	2. 37	1. 63
Bufferin, 225's.....	2. 37	2. 37	1. 79
Nutritive Caps, 100's.....	1. 48	1. 48	. 99
Kaopectate, 10 oz.....	1. 13	1. 13	. 92
Alberto VO-5 Hair Spray, 15 oz.....	2. 35	2. 19	. 72
Vitalis Hair Tonic, Med.....	. 98	. 88	. 77
Total.....	24. 06	23. 32	17. 89

departments of department stores of items advertised by Revco in CX 96 under "price-size" designations.

The same shoppers also shopped an additional item, or thirty-sixth item, among the many advertised in CX 96. This item is not shown in CX 96 under a "price-size" designation but rather under a comparative price described as "Regular." The official notice taken at the hearing and noted at page 11 above with reference to the meaning of such words as "retail," "retail list," and "value" is also applicable to the descriptive word "Regular." The item to which reference is made is "Kodachrome, 8 MM Roll, 50 feet." The advertisement shows "Revco's Price" on the item as being \$2.09. Along side of this advertised Revco price on the item, appears the following: "Regular \$2.95." This item is one of fifteen "Eastman Kodak films and photo finishing" items shown in CX 96 beneath a banner reading "Shop Revco For Everyday Savings On Eastman Kodak Films and Photo Finishing" and the only item of this character on which complaint counsel presented testimony. All of these fifteen items show a Revco price and a higher price under the descriptive word "Regular." (CX 96 at page 7G.) The examiner finds from the intrinsic evidence of the portion of the Revco advertisement here under consideration and from the motif reflected throughout the entire twelve-page Revco advertisement of which the aforementioned portion is but a part that the Revco advertisement on the Kodachrome film item in question was intended to convey and does convey the representation that Revco's "everyday price" thereon is \$2.09 and that the "Regular" price of said item at other competing drug stores was \$2.95. (Tr. 326-328.)

As against Revco's advertised price of \$2.09 on the described Kodachrome film and its advertised "Regular" price of \$2.95 thereon, Mrs. Heinrich and Mrs. Kimmel testified that in their shoppings they found that the same film could be purchased, within two or three days after the dissemination of the challenged advertisement, for \$2.38 at Cunningham's, \$2.19 at Sam's, and \$2.21 at Hudson's. (Tr. 622-623.)

As heretofore noted, the Revco advertisement in question (CX 96) appeared in a Sunday supplement to The Detroit News issue of February 3, 1963. There is nothing in this record to justify an inference that the prices on the thirty-six items in question shopped by Mrs. Heinrich and Mrs. Kimmel on the Tuesday and Wednesday following the Revco Sunday advertisement were reduced to meet Revco's advertised "everyday prices" thereon. It appears wholly unlikely that drug stores, which the record shows normally stock

states in part that the names of the unnamed independent drug store and chain drug store would be supplied "on request." Complaint counsel did not offer any evidence to establish the identity of the unnamed "Independent Drug Store," or unnamed "Chain Drug Store," or any evidence to show that the prices listed in the three columns were other than shown therein. (Tr. 806, 807-808.)

Instead, complaint counsel showed through the testimony of the aforementioned shopper, Mrs. Heinrich, that other drug stores or drug departments of department stores sold the sixteen items in question on the same day as the Revco advertisement appeared at prices comparable to the prices charged by Revco as shown in the third column of the Revco advertisement, rather than the higher prices shown in the first column thereof ("Independent Drug Store") and in the second column thereof ("Chain Drug Store"). The competing stores at which Mrs. Heinrich shopped these items were Sam's Inc., Randolph Store; J. L. Hudson Company; and A.A.A. Discount (downtown store). (Tr. 743-744, 745-761.) As heretofore shown, the first two mentioned companies are department stores. The last-mentioned store is a discount store. None of the stores shopped by Mrs. Heinrich qualify as an "Independent Drug Store" or a "Chain Drug Store," as that term is ordinarily known. When the question was raised at the hearing as to the relevancy of this testimony to the charges of paragraph seven of the complaint, complaint counsel contended " \* \* \* that the representations in the ad, from the implication in the ad, would lead the consuming public to believe that these [the prices listed in the first two columns of CX 97] are the prices prevailing in the types of stores in the trade area." (Tr. 806.)

Upon motion of respondents, the above-described testimony of Mrs. Heinrich, the Commission shopper-witness, was stricken on the ground that it was immaterial and not within the scope of the charges of paragraph seven of the complaint. (Tr. 804-806, 810-812.) However, a motion to strike CX 97 to which the testimony was related was denied. (Tr. 812.) Complaint counsel's proffer of testimony from other shopper-witnesses, similar to that of Mrs. Heinrich, was denied. If allowed to offer such testimony, these additional shoppers would have testified to shoppings of the items shown on CX 97 at the drug departments and/or drug stores of Sears, Roebuck and Company, Meyer's Rexall Drugs, Anderson Rexall Drugs, and United Mills. (Tr. 807-809.) In complaint counsel's request (brief at page 13) for a reconsideration of the ruling striking the testimony of Mrs. Heinrich on shoppings on the items shown on

1158

Initial Decision

CERTIFIED SHOPPING REPORT PROVES REVCO PRICES  
LOWER IN EVERY CASE. YOU SAVE UP TO 33%!

Certified Shopping Report

A shopper from our company purchased the above 16 drug items at an independent drug store, a chain store, and a Revco Discount Drug Center, all in the Detroit area.\* In each case, the price paid for the items is indicated. We certify that this information accurately represents the results of this project.

Milton Brand and Company

\*Names on request

COMPARE! Item for item, price for price \* \* \* merchandise purchased at an independent Detroit area drug store, a leading Detroit area chain drug store, and Detroit's new REVCO DISCOUNT DRUG CENTERS.

Right from the ring of the register, positive proof that REVCO gives you more value, more savings on vitamins, cosmetics, toiletries and everyday drug needs *every day!*

\* \* \*

REVCO DISCOUNT DRUG CENTERS

(CX 97)

Commission's Exhibit 97 was offered and received in evidence as part of complaint counsel's case-in-chief under the allegations of paragraph seven of the complaint, although here, as in the case of CX 96, timely objection was made by respondents to the receipt of CX 97 in evidence on the ground that the representations therein were dissimilar to the "among and typical statements and representations" charged to respondents. (Tr. 393-394, 432-433, 811.)

As may be seen from the Revco advertisement in CX 97, it contains a representation that the sixteen listed drug store articles were individually shopped by a named professional shopping company through one of its shoppers at an *unnamed* "Independent Drug Store," and at an *unnamed* "Chain Drug Store" and at "Revco Discount Centers." The advertisement under three columns captioned "A Tale of Three Tapes" shows in column one the prices found to prevail on these sixteen items at the unnamed "Independent Drug Store"; in column two, the prices on the same items at the unnamed "Chain Drug Store"; and in column three, the prices on the same items at "Revco Discount Drug Centers." The prices shown under the Revco column on each of the items and their total are substantially lower than those shown in the other two columns. The advertisement contains a certification by the shopping company which

managers. (Tr. 2694.) No testimony was given by these witnesses as to specific "shoppings," whether by purchase or by observation, on the particular drug store articles advertised in CX 96 as testified to at hearing by complaint counsel's shopper-witnesses.

Thus, in review, it is noted that the testimony adduced by complaint counsel from shopper-witnesses and that adduced by respondents' counsel from Revco's corporate officers is in direct conflict with each other as to the prices at which the articles advertised in CX 96 could be purchased in the Detroit area at or about the time the Revco newspaper advertisement in CX 96 was published. The examiner finds that the testimony of complaint counsel's shopper-witnesses is more creditable and reliable than the testimony of Revco's corporate officers on the subject under discussion, and accordingly accepts the former and rejects the latter.

Based on the testimony of complaint counsel's shopper-witnesses, it is found that the prices such shopper-witnesses found being charged for various articles at the drug departments and drug stores they shopped were fairly comparable to Revco's advertised "everyday" prices on the same articles and uniformly and substantially lower than Revco's advertised "price-size" thereon.

Assuming for the moment (but not finding such as a fact) that the involved Revco advertised "everyday prices" on drug store articles as set up in juxtaposition to Revco's advertised higher "price-size" designations thereon constitute a representation by Revco that it is selling such articles below the prices being charged therefor in its area (Detroit), the examiner concludes and finds from the evidentiary facts set forth earlier in this section that Revco at the time of the dissemination of the newspaper advertisement in question (CX 96) had no basis for being "reasonably certain" that the higher prices it set up in such advertisement under designations of "price-size" were prices which did not appreciably exceed the prices at which substantial sales of the articles in question were being made in the area (Detroit) in which Revco was doing business.<sup>7</sup>

Conversely, the examiner concludes and finds from the evidentiary facts set forth earlier in this section that substantial sales of the drug store articles advertised in the Revco newspaper advertisement in question (CX 96) at or about the time of its publication were being made in the Detroit area by Revco competitors at prices which were substantially lower than Revco's advertised "price-size"

<sup>7</sup> The finding set forth in the above paragraph follows substantially the language of a key sentence in Guide II of the Guides Against Deceptive Pricing.

CX 97, they indicate that if they had been allowed to proceed with other such similar shopper-witnesses, they would have shown that Cunningham Drug Company, as Revco's "*only chain store competitor in Detroit*," "did not charge the prices indicated on the cashiers tape for the Detroit chain store reflected in the advertisement in evidence as CX 97" and that this "would have been most significant." (Complaint counsel's brief, p. 13.) Shoppings at drug stores of Cunningham were not included in complaint counsel's aforementioned proffer at the hearing. If allowed to proceed according to their plan, it does not appear that complaint counsel planned to call any witnesses to testify as to shoppings of the items shown on CX 97 at chain stores.

Respondents' defenses-in-chief to the charges of paragraph seven of the complaint, as they relate to the Detroit advertisements (CX 96 and 97) of Revco, is two-fold. One of these defenses is the legal defense that the advertisements reflected in CX 96 and 97 fall outside the scope of the charges of paragraph seven of the complaint. The other defense is evidentiary in character, and the examiner's review thereof will not go beyond the proposed findings (at pages 25 and 26) made thereon by Revco, Standard and Shulman,<sup>6</sup> heretofore and hereafter referred to collectively as Revco. In this connection, Revco relies on the testimony of respondent Charles F. Rosen, and of Mr. Max Bunin and Mrs. Theresa Rogers, vice presidents of Revco in charge of store operations and merchandise coordinating, respectively.

The testimony of Mr. Rosen cited by Revco in its proposed findings (at paragraph 58) is not deemed pertinent or relevant as it merely deals with Mr. Rosen's inquiries to the Detroit Better Business Bureau concerning the acceptability to the Bureau of the "price-size" designations in the then proposed advertisement, now in evidence as CX 97. The record expressly shows that the Bureau did not "okay" the advertisement but apparently registered no objection to its use. (Tr. 509.) Mr. Bunin testified that he shopped from 15 to 20 stores in the Detroit area but could only name 7 or 8 such stores and found that all of the stores he shopped "were charging the prevailing fair trade or manufacturer's retail prices, or over." (Tr. 2657-2658.) (It will be recalled that the State of Michigan does not have a fair trade statute). Mrs. Rogers testified that she gained the same information from conversations with Revco store

<sup>6</sup> The proposed findings of respondents W. B. Doner and Company and Charles F. Rosen are of no assistance in the matters discussed up to this point and in the next few pages, as they are limited to defenses designed to show that they are not responsible for the practices charged by the complaint to respondents Revco, Standard and Shulman.

Initial Decision

67 F.T.C.

tions of the "manufacturer's suggested list prices or the fair trade prices represented by the description 'size' price."<sup>8</sup> (Revco's proposed findings at paragraph 57 and 59; Revco brief at page 12.) In the examiner's view, Revco's "price-size" designations are susceptible both to the interpretation, as contended by complaint counsel, that it is a representation of prevailing prices on articles so marked and to the interpretation, as contended by respondents, that it is merely a representation of a manufacturer's list price (the term "fair trade price" is avoided since Michigan does not have a fair trade act, although it appears true that the articles here under consideration were "fair traded" at the advertised "price-size" prices in other States which do have fair trade acts).

The examiner is also of the opinion that Revco's "price-size" designation is also susceptible to a third meaning, namely, that it is merely an aid for giving a prospective consumer-purchaser a rough "yardstick" for determining how much of a bargain he would be getting by purchasing the article at the seller's advertised selling price. The advertisement of such a "yardstick" when geared to genuine fair trade prices in "fair trade" States could be in the public interest. Much of today's newspaper advertisement is completely devoid of comparative price advertisements, presumably due to the trend of Commission decisions in recent years. Although it is desirable to protect the consumer against fictitious pricing, it would also appear to be in the consumer's interest to allow that degree of comparative pricing advertisement which falls short of being a representation of prevailing prices which were not in fact prevailing but would give the consumer some fair yardstick for measuring the "bargain" element in a seller's advertised selling price.

The examiner makes no decision as to which of the above-described interpretations should be given Revco's "price-size" designations as, a threshold decision on the more frontal of the two involved anterior questions will dispose of the matter. As heretofore noted, respondents made timely objection to the receipt of CX 96 and related testimony on the ground that the challenged "price-size" designations therein fall outside the scope of the charges of paragraph seven of the complaint under which the exhibit and related testimony was offered. A review of the allegations and charges of paragraph seven of the complaint shows rather pointedly that they

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<sup>8</sup> But as shown above, respondents also take the position that Revco's advertised "price-size" designations are not only the manufacturer's suggested list prices on articles so designated but also represent the prevailing prices on such articles in the Detroit area. (Revco's proposed findings at paragraphs 57 and 59; Revco brief at page 12.)

designations and more or less on par with Revco's advertised "everyday prices."

#### DISCUSSION AND CONCLUSIONS

Notwithstanding the above unfavorable finding against respondents that at the time of the involved Revco newspaper advertisement (CX 96) substantial sales of the advertised articles were *not* being made in Revco's trading area at or about the advertised "price-size" prices and the favorable finding for complaint counsel that substantial sales were being made of the same articles by Revco's competitors in the same area at prices comparable to Revco's own advertised "everyday prices" thereon, these findings do not solve the problems here involved under the allegations of paragraph seven of the complaint.

The matter under discussion presents two anterior questions. One of these is whether Revco's "price-size" designations constitute representations that the prices on articles so designated were in fact being sold at such "price-size" prices in the Detroit area at the time of the Revco advertisement. (Tr. 2279.) No consumer testimony was presented by complaint counsel as to the meaning of the words "price-size" to consumers. Complaint counsel, however (in their proposed findings at page 11) contend that " \* \* \* when respondents in their advertisements in evidence as CX 96 gave higher prices designated as 'size' and gave a lower price in conjunction therewith as the selling prices for specific items of merchandise that the size prices were represented as the prices at which the said merchandise was generally sold at retail in the trade area and that respondents' selling price, described as their 'everyday price' was represented as a discount therefrom." No case directly in point is cited by complaint counsel in support of their contention, but they believe that support for their position is found in the following "explanatory footnote" in the Commission's opinion in *Coro, Inc.*, Docket 8346 [63 F.T.C. 1164, 1195]:

Some of the catalogs omit all adjectives before the purported retail price, that is, instead of setting out side by side a "coded" or "your cost" price of \$8.25 and a "Retail \$16.50," they omit from the latter the word "Retail," leaving it to the reader to draw his own inferences as to what the unexplained figure \$16.50 purports to be. The consumer-reader could only infer that, when two prices are set forth together, and the lower of the two is the price he is required to pay, the higher price purports to be the "regular, retail price," and that he is being given a "discount" therefrom.

Respondents, on the other hand, appear to contend that the "price-size" designations in the Revco advertisement are merely representa-



CX 96 consists of perhaps several hundred advertised items of drug store merchandise, most of which are advertised under both a "price-size" designation and under Revco's "everyday price." But as heretofore shown there are included in CX 96 fifteen "film and photo finishing" items. These carry no "price-size" designations but instead the items are shown with the word "Regular" in conjunction with a price, such as "Regular 55¢," after which is shown Revco's everyday price thereon in larger type. As noted above, complaint counsel presented testimony of a shopper-witness with respect to only one of these fifteen items. That item was "Kodachrome-8MM Roll 50 feet." Revco's advertised everyday price thereon was \$2.09, but along side of this is the representation in smaller print "Regular \$2.95." The testimony of complaint counsel's shopper-witness reveals that the same film could be purchased at or about the time of the publication of CX 96 for \$2.38 at a Cunningham chain drug store and for \$2.19 and \$2.21 at two named department stores, respectively.

From these summarized evidentiary facts, the examiner's ultimate finding is that Revco, at the time of the dissemination of the newspaper advertisement reflected in CX 96, had no basis for being "reasonably certain" that the higher price set up on the film item in question in CX 96 under the description of "Regular" was a price thereon which did not appreciably exceed the price at which substantial sales of the same film were being made in the area (Detroit) in which Revco was doing business. Conversely, the examiner concludes and finds from the same evidentiary facts that substantial sales of the film in question were being made in the Detroit area by Revco competitors at prices which were substantially lower than Revco's advertised comparative "Regular" price thereon but at somewhat higher prices than Revco's everyday price thereon.

The examiner finds that the term "regular" is subject to the same official notice as taken of the words "retail," "retail list," and "value" as heretofore set forth at page 1174 above. It is further found that that portion of the advertisements in CX 96 which sets forth "regular" prices on film items comes within the general scope and compass of the allegations and charges of paragraph seven of the complaint although the term "regular" is not expressly set forth therein. But since the film item in question is the only one out of fifteen such items advertised under a "regular" price label in juxtaposition to a Revco everyday price on which evidence was presented and since Revco's price thereon is somewhat lower than that of Revco's indicated competitors although the latter's prices were also

challenge only prices designated as "value," "retail," or "retail list" (or by implication, the word "Regular") on non-prescription merchandise. The alleged "among and typical" quotations from Revco's advertisements reveal only these three terms. There are no quotations from Revco advertisements which have in them the designation or representation of a price plus a size which have heretofore been described as a matter of convenience as "price-size" designations. The fact that the drafters of the complaint were seeking a cease and desist order only against the use of such terms as "value," "retail" and "retail list," where fictitious, appears rather clearly from the following allegation in paragraph seven of the complaint:

Through the use of the said advertisements and others similar thereto not specifically set out herein, respondents have represented and are now representing, directly and by implication:

1. That the prices designated value, retail, retail list, \* \* \* are the prices at which the merchandise referred to is usually and customarily sold at retail in the trade area or areas where the representations are made, and that the difference between the higher stated prices and respondents' lower advertised prices is the amount saved by purchasers.

Similarly, threshold objections were made by respondents to the receipt in evidence of the Revco advertisement reflected in CX 97, the "A Tale of Three Tapes" newspaper advertisement, and related testimony. This advertisement contains no prices designated as "value," "retail," or "retail list." There are no allegations in the complaint which in any way relate to the type of advertisement involved in CX 97.

It is doubtful that the advertisements in CX 96 and 97 were before the drafters of the complaint herein at the time it was drafted or before the Commission at the time the complaint was approved for issuance because it would appear that if they had been, the complaint would have been drafted to clearly encompass the now challenged advertisements in CX 96 and 97.

The ruling made at the hearing, striking the testimony of the Government witness who testified as to shoppings made at competitive retail drug outlets of the items advertised in CX 97, has been reconsidered pursuant to request of complaint counsel and is reaffirmed.

As respondents have not received fair notice in the complaint that charges were being made against them by reason of the Revco advertisements in CX 96 and CX 97, these exhibits and all testimony related thereto are stricken, except for one advertised item in CX 96 and related testimony as shown below.

Initial Decision

67 F.T.C.

involved products being sold by various classes of retailers, to be accorded any weight. The examiner also finds that this witness's testimony on the matter under discussion, and also as to prevailing "fair trade prices" on the involved non-prescription items in the greater Detroit and Cleveland areas, lacks that degree of credibility and reliability required for favorable findings thereon for respondents. (See complaint counsel's brief at bottom of page 15 and top of page 16; also complaint counsel's brief at pages 16 and 17.)

Endeavor has been made in this initial decision to set forth all the facts required for a final decision herein on the issues of fictitious pricing under any hypothesis.

##### 5. "Consumer Protective Institute" Issue

The complaint alleges that respondents in their advertisements have, through the use of words and a seal of approval bearing the name "Consumer Protective Institute," falsely represented, directly and by implication, that the merchandise so advertised

(a) has earned the said seal of approval because the said merchandise meets certain minimum standards, [and therefore] has certain qualities or merits,

(b) has been examined and tested by Consumer Protective Institute;

(c) that Consumer Protective Institute is an independent research or testing organization;

(d) that Consumer Protective Institute is an institute; and

(e) that Consumer Protective Institute is an organization whose business is the protection of consumers.

The respondents in their pleadings substantially admit the dissemination of advertisements containing the name and seal of "Consumers Protective Institute," but deny that they made the representations set forth above and deny that such representations, if made, are false.

The complaint further alleges that the "Consumer Protective Institute was created and is owned, controlled and operated by respondent Charles F. Rosen for the sole benefit of respondents."

Respondents Rosen and Doner admit only that portion of the above allegation which reads "Consumer Protective Institute was created, \* \* \* owned, controlled and operated by respondent Charles F. Rosen \* \* \*" and deny the remaining portions of the allegation. Revco, Shulman and Standard in their joint answer deny the allegation "for want of information sufficient to form a belief."

The challenged seal and name appear in CX 3 at pages 21 through 49 and in CX 96 at page 3 G. It will be recalled that CX 3 is a 55-page Revco catalogue distributed in the Cleveland

substantially lower than Revco's advertised comparative "Regular" price thereon, the examiner finds that the evidence presented by complaint counsel on the item in question is equivocal and of such *de minimis* character as to not justify a cease and desist order thereon. It is doubtful that a complaint would have been issued on such an item standing alone.

Some comment appears desirable on two of Revco's proposed findings of fact shown as numbers 56 and 57. Among these appear the statement: "Twenty-five (25) of the 38 items for which testimony was given by Mrs. Kimmel were identified as uniformly handled by supermarkets and grocery stores in the Detroit area." With this as a premise, Revco requests findings that (a) 53 percent of such non-prescription merchandise is sold by supermarkets and grocery stores, (b) 30 percent by drug stores, and (c) 17 percent by variety stores, department stores, confectionary stores and "stores of like character."

The record references cited by Revco in support of its said proposed findings numbers 56 and 57 are to the testimony of Revco's witness, Max Sossin. Mr. Sossin is a manufacturers' representative of drug store merchandise other than the trade-marked products testified to by Mrs. Kimmel. Revco is one of his customers. (Tr. 2566-2567; 2573-2574.) Mr. Sossin gave his "experience" as the sole basis for his opinions as to the "percentages" set forth above. Mr. Sossin's "experience," as far as the record shows, is simply that of a salesman. There is no evidence that he had ever conducted a survey into the subject matter of his testimony or that he was qualified by education or training to conduct such a survey. More properly, testimony such as Mr. Sossin gave should have come from an economist with special competence on the subject matter or from the sales heads of the trade-marked products here under consideration or from pertinent statistics from reliable sources. The examiner also detected in Mr. Sossin's testimony that free-swinging tendency towards exaggerated statement more characteristic of salesmen anxious to sell than of men who habitually deal with such hard facts as statistics. For example, Mr. Sossin testified that "There are 1200 drug stores in and around the greater metropolitan area of Detroit," whereas the Detroit Yellow Pages for September 1962 shows 815 drug stores. (Sossin, Tr. 2596; Examiner's "Order taking Official Notice of Yellow Pages" filed March 4, 1964; Revco's proposed findings at par. 54.)

The examiner finds that Mr. Sossin lacks the competence required to entitle his opinion-testimony, on the percentages of the

The same type of advertisement is used in CX 96, except that the seal is not placed adjacent to the panel depictions but instead is used as part of the introductory text to Revco's advertisements of its own private-brand vitamin preparations.

The idea behind Consumers Protective Institute, hereinafter called CPI, was originated by Rosen on or about October 1, 1961, and the record shows that CPI has at all times been the alter ego of Rosen while he was functioning as Doner's account executive for the Revco account. (Tr. 443-444, 456, 462, 517-518.) Pursuant to stipulation, it is found that CPI was created, owned, and controlled by Rosen. (CX 1, par. 20.) It is also found, pursuant to the proposed findings of Rosen (p. 10) and Doner (p. 32), that Rosen was or is CPI. In May of 1962, or approximately five months after Rosen authorized Revco to use the CPI seal, Rosen caused CPI to be incorporated and became its president, and his wife and brother-in-law, its other officers. Rosen's residence in Detroit serves as CPI's office, insofar as it requires an office. CPI has never had any employees. (Tr. 519.)

CPI was purportedly set up to furnish to retailers for advertising purposes certified comparisons of their private-label products with that of similar nationally-advertised products with respect to both "Quality" and "Value." When asked by the hearing examiner whether CPI was organized for the benefit of the consumer, Rosen replied: "It was not a philanthropic idea in its original concept. That's right." (Tr. 535-536.) The examiner finds that, insofar as CPI had any purpose other than to serve as an adjunct to Revco's program for advertising its private-label vitamin preparations, CPI was set up as a commercial enterprise, and not for the benefit of consumers. (Tr. 535.) In accordance with Rosen's plan, CPI, for a fee, would make an investigation of a private-label product as to its quality and price and, if satisfied that the private-label product had a "Quality" comparable to the nationally-advertised product and had a "Value" in excess of its advertised lower price, CPI would award its above-described seal to the private-label product and authorize the vendor of the private-label product to use the seal in its advertisement of the product. (Tr. 518-520, 523, 527-528, 534-536.)

CPI has no laboratories for the testing of the "Quality" of private-label products, but instead purports to rely on the manufacturer's certification of the product's quality or content or on an assay of the product by an independent testing laboratory, as

1158

## Initial Decision

area in March of 1962 (see *infra* at page 11) and that CX 96 is a 12-page Revco advertisement supplement to the February 3, 1963, issue of The Detroit News.

The contents of the seals appearing in both CX 3 and CX 96 read as follows:

Value-Proved  
Consumer  
Tested  
By Consumer  
Protective  
Institute

One of the two seals shown in CX 96 also has along side of it the following statement:

VALUE  
Consumer Protective Institute  
compares Revco prices with com-  
petitive brands—assures best  
value.

The seals as shown in CX 3 and CX 96 relate chiefly to vitamin preparations sold by Revco under the Revco label, but in a few instances they also relate to preparations which are of a non-vitamin composition or chiefly of a non-vitamin composition.

In CX 3 the seal appears along side of panel depictions which show on the extreme left a bottle of a nationally advertised vitamin preparation and on the extreme right a bottle of a similar Revco private-label preparation, and in between, the formula for each in terms of the USP unit contents of the various vitamin components of the two preparations. Both are offered for sale by Revco in CX 3.

At the bottom of the panel are two boxes. The left box shows Revco's assigned "Retail" price on the nationally-advertised product and Revco's advertised lower price thereon. The right box shows Revco's price on its own private brand preparation of similar composition and the "Value" price thereon. The "Value" price in all instances coincides with the "Retail" price shown by Revco for the counterpart nationally advertised product. For more graphic illustration, there is shown below two such boxes from CX 3 at page 33.

<p>Buy GERITOL 80's—4.98 You Pay Only 3.43 You Save 1.55</p>	<p>COMPARE PRICES</p>	<p>Buy Revco FORMULA 55 100's—Value 4.98 You Pay Only 2.28 You Save 2.70</p>
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From Mr. Rosen's testimony in this connection and from the further fact that he suffered a heart attack on January 4, 1962, which kept him from work for 90 days or longer, the examiner finds that such assays, if any, of Scientific Associates, Inc., as were made available to Mr. Rosen by Revco, related to only a small fraction of the 22 Revco vitamin preparations advertised in CX 3. (Tr. 521-522, 529-530, 539.)

The record also shows that Rosen did not make or cause to be made any independent investigations as to the truthfulness of the "Value" figures listed by Revco in CX 3 for each of the 22 Revco private-label vitamin products advertised therein but instead accepted such "Value" figures as true because they coincided with what Revco showed in CX 3 to be the "Retail" prices on comparable, nationally-advertised brands. This is evident from Rosen's statement: "The price comparisons I had seen in the catalog which had been prepared by Revco left no doubt about the lower price in Revco's favor." (Tr. 521.)

In the spring of 1962, the respondents became aware of a pending investigation by the Federal Trade Commission into the advertising practices of Revco which eventually led to the issuance of the complaint herein on June 13, 1963. (Tr. 538-539.) At or about the time the investigation was commenced, Rosen employed Milton Brand Co., a Detroit firm of professional comparative shoppers, to make a post-publication check, by comparative shoppings in the Cleveland area on the "Value" figures shown in CX 3 for Revco private-brand vitamin preparations. (Tr. 522, 538-539.) Sometime after the commencement of the Commission's investigation in April 1962, Rosen picked up from Revco the assays it had received from Scientific Associates, Inc., on Revco private-label vitamin preparations for post-publication check-ups on the "Quality" aspects of the Revco vitamin preparations as advertised in CX 3 under the CPI seal. (Tr. 530-531, 539-540.) Rosen testified that these post-distribution investigations satisfied him that CPI's seal of "Quality" and "Value" had not been incorrectly awarded to Revco's vitamin products as advertised in CX 3, despite the lack of thoroughgoing authentication as to these aspects prior to the publication of CX 3. (Tr. 530-531, 539-540.) Respondents did not offer into evidence the assays mentioned in this paragraph or any reports from Milton Brand Co. on the results of their post-publication comparative shoppings for "Value" on the Revco private-brand vitamin preparations advertised in CX 3.

furnished to CPI by the retailer seeking authority to use the CPI seal. (Tr. 518, 521, 524, 528-529.) As there is no evidence of record that CPI sends out any nationally-advertised products (with which it is comparing private-label products) to independent laboratories, for assay testing, it is presumed and found that CPI uses the manufacturer's printed formula on the containers of such products as a basis for the comparison. As requested in Rosen's proposed findings (page 5), it is found that "It was never CPI's intention to make any independent quality tests or assays on its own."

With respect to the "Value" aspect of the CPI seal, it was Rosen's plan that the "value" of the private-label product as against the nationally-advertised product would be determined by comparative shopping. (Tr. 529.)

Revco was the only firm to which CPI authorized the use of the CPI seal. The authorization was granted on December 1, 1961, and the seal was first used by Revco in CX 3, primarily in connection with the advertisements therein of Revco private-brand vitamin preparations. CX 3, it will be recalled, was a Revco catalogue distributed in March of 1962. (Tr. 374-375, 519, 523, 531, 540-541.)

Twenty-two Revco private-label vitamin preparations are advertised in CX 3 along with 22 nationally-advertised products of a similar composition. As heretofore indicated, the nationally-advertised brands show both a "Retail" price and Revco's price thereon, and the Revco private-label products show both a "Value" price and Revco's price thereon. The advertisements also show a "Quality" check-up on Revco's private-brand vitamin products by way of comparison, as heretofore shown, of their formulas with the formulas of nationally-advertised brands of similar composition.

Although the above-mentioned 22 Revco private-brand vitamin products are flagged with CPI seals in CX 3, Rosen's testimony shows that he made no "Quality" check-ups on them prior to the dissemination of CX 3, other than possibly checking the assays on a few of these as furnished to him by Revco. Revco has from time to time engaged the services of Scientific Associates, Inc., an independent testing company, for the assaying of its private-label vitamin products. It was these assays that Rosen had reference to in his testimony. Rosen could not recall at the hearing how many assays of Scientific Associates, Inc., were made available to him by Revco, *prior* to the release of the Revco advertisement in CX 3, for "Quality" checking of Revco private-brand vitamin products, but expressed the belief that "There may be just a few." (Tr. 523.)



Initial Decision

67 F.T.C.

Q. CPI was a commercial enterprise?

A. Yes.

Q. Was it ever organized or did it operate as an educational institution with activities exclusively so devoted?

A. No.

Q. Was it ever formally organized and operated exclusively for consumer benefits and no other?

A. I don't understand that question.

EXAMINER BUSH. \* \* \* Was it organized for the benefit of the consumer?

THE WITNESS. It was not a philanthropic idea in its original concept. That's right. (Tr. 535-536)

#### DISCUSSION AND CONCLUSIONS

As heretofore shown, the complaint (paragraph eight) charges that the respondents, through the use of words and seal of approval bearing the name "Consumer Protective Institute," make certain representations in their advertisements with respect to the merchandise offered for sale in such advertisements, to wit, that the merchandise so advertised:

(a) has earned the said seal of approval because the said merchandise meets certain minimum standards, [and therefore] has certain qualities or merits,

(b) has been examined and tested by Consumer Protective Institute;

(c) that Consumer Protective Institute is an independent research or testing organization;

(d) that Consumer Protective Institute is an institute; and

(e) that Consumer Protective Institute is an organization whose business is the protection of consumers.

It was also noted above that the respondents in their pleadings have denied that they made these representations in their advertisements. However, it does not now appear from the record or from respondents' proposed findings and briefs that respondents are any longer denying that such representations were made, as no evidence or argument has been presented to the contrary.

From the examiner's examination and study of the advertisements in question received in evidence as CX 3 and CX 96 and from the record as a whole, the examiner finds that the representations shown above were made by the respondents, either directly or by implications, in their said advertisements. It has long been recognized that the meaning of an advertisement to the purchasing public can be determined from the advertisement itself and other relevant evidence in the record which aids in interpreting the advertisement. *Zenith Radio Corp. v. Federal Trade Commission*. 143 F. 2d 29 (7th Cir. 1944).

CPI's incorporation took place after the Commission had commenced its investigation into Revco's advertising practices. CPI billed and received \$1200 from Revco for the use of its CPI seal. This also occurred after the investigation had started. (Tr. 527-528.)

CX 3 was the first Revco catalogue to display the CPI seal. An earlier Revco catalogue, received in evidence as CX 2, used the seal of Parents' Magazine.

About a year after the CPI seal was first used in CX 3 which, it will be recalled, was distributed in the greater Cleveland area, Revco utilized the CPI seal in a Detroit newspaper advertisement published on February 3, 1963. The latter is in evidence as CX 96. As far as the examiner has been able to determine, neither of the parties' proposed findings nor the record reflects any detail on CPI's activities in connection with the appearance of the CPI seal in the Detroit newspaper advertisement.

Rosen resigned his position as executive vice-president of respondent W. B. Doner and Company, the advertising agency, on December 31, 1963. Since December 31, 1963, Rosen has been an executive vice-president of respondent Revco in charge of advertising. (Tr. 442-443, 447.) Rosen has not authorized the use of the CPI seal since the issuance of the complaint herein on June 13, 1963, and for some months prior thereto. In view of his present employment with Revco, he testified that he has no intention of "reviving it to activity." (Tr. 534-535.)

Pursuant to motion filed by complaint counsel on January 24, 1964, the examiner, after giving respondents opportunity to be heard in opposition to the motion, took official notice of the following facts:

1. That the word "Institute" in a trade or corporate name means that the business is an organization or association formed for the purpose of promoting research and learning.

2. That through the use of the Consumers Protection Institute seal of approval on advertising, respondents represented that Consumers Protection Institute is an organization devoted to the study and research of protecting or benefiting consumers. (Tr. 180-184, 185-186.)

The respondents offered no evidence in rebuttal of the foregoing officially noticed facts. Mr. Rosen's testimony, as set forth below, in response to questions put to him by his own counsel, shows that he used the word "Institute" in CPI's name in a way wholly alien to the above unrebutted facts of which official notice was taken.

Q. What did you mean when you used the word "Institute," Mr. Rosen, in CPI's name?

A. For a special activity of some kind.

Initial Decision

67 F.T.C.

testing laboratories, pursuant to order and payment therefor by Revco. Revco was to furnish CPI's Rosen with such assays. Rosen was to take these assays and compare them with the formulas shown on the labels of comparable, nationally advertised products and, if the formulas of the Revco and the national brands were for all practical purposes the same, Rosen was to authorize Revco to print the two formulas side by side under the banner of the CPI seal of approval in Revco's advertisements. The examiner sees nothing wrong with this procedure as a procedure and finds that if such procedure were to be actually followed, it would make for honest comparisons of private-labeled merchandise with nationally advertised merchandise.

The difficulty, however, under the facts of the instant case, is that the procedure was not followed with respect to the Revco vitamin products advertised in CX 3 *prior* to its dissemination to the public in the month of March 1962. While it is true that Mr. Rosen had a heart attack on January 4, 1962, which prevented "Quality" authentication prior to the release of CX 3, this did not excuse Revco for publishing the CPI seal of approval in CX 3 when it knew or must have known that Rosen had not been furnished with the requisite assays to make the "Quality" representations shown in CX 3.

Similarly, the examiner is of the opinion that Mr. Rosen must also share the responsibility for the representation made in (a) above, notwithstanding his heart attack of January 4, 1962, in view of the fact that the distribution of CX 3 was not begun until March 1, 1962. It is the examiner's observation that Mr. Rosen is a man of alert, quick and incisive intelligence. There was ample recovery time between January 4, 1962, and March 1, 1962, for Mr. Rosen to make it known to Revco by a telephone call or through a messenger that the CPI seal was not to be used until full authentication could be accomplished. In view of the fact that Rosen had been serving Revco since 1959 in an advertising capacity as an account executive of respondent W. B. Doner and Company, the advertising agency, and in view of the further fact that less than a year later Rosen became vice-president of Revco, it would be surprising, indeed, if Revco officers had not called upon Rosen during his recovery period at the hospital and thus afforded him the full and easy opportunity to let them know by word of mouth that they were not to publish the CPI seal in CX 3 because of the unfinished authentication on the "Quality" aspects of Revco private-label vitamin preparations. But the record fails to show that Rosen at any time notified

The central remaining issue is whether the above representations "were and are false, misleading and deceptive," as charged in the complaint.

Leaving aside for the moment the representation found under (a) above, the examiner concludes and finds that the representations reflected above in (b), (c), (d), and (e) are false, misleading and deceptive. Under (b), the record is clear that CPI has never "examined and tested" the Revco private-brand vitamins, as represented in its seal of approval, as it does not, and never did, have any laboratory or trained personnel for such purpose. Furthermore, the phrase "Consumer Tested" is a representation that CPI has actually tested the Revco private-brand vitamin preparations on consumers. Respondents do not claim that this was done, and the evidence shows that CPI had no facilities for the testing of vitamins on consumers.

Under (c), the record could not be clearer—CPI is not and never has been an independent research or testing organization and there is no claim in the record by any of the respondents that it ever has been such.

Under (d), there is no evidence that CPI is an "Institute" under the commonly accepted meaning of that term in accordance with the official notice taken thereof, to wit: "That the word 'Institute' in a trade or corporate name means that the business is an organization or association formed for the purpose of promoting research and learning." As heretofore shown, none of the respondents have offered any rebuttal to these officially noted facts.

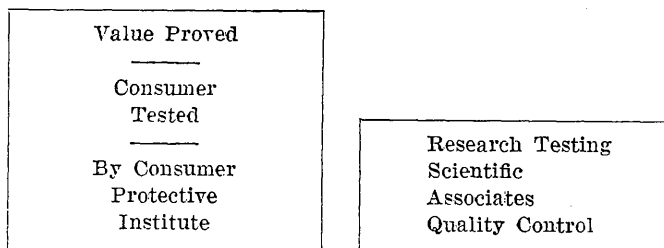
Under (e), the record is free from any doubt that CPI is *not* an organization whose business is the protection of the consumers. Insofar as CPI can even be described as an "organization," the evidence shows that it is a commercial enterprise and that the chief reason for its existence was to help Revco sell its private-brand vitamin preparations.

The question of whether or not the representation shown under (a) above is false, misleading and deceptive presents a somewhat more complicated problem. As heretofore shown, CPI's procedures, insofar as CPI had any bona fide procedures, provided for "Quality" appraisals of Revco private-brand vitamin preparations based upon a comparison of their *verified* formulas with that of similar or comparable, nationally advertised products. The *verification* of the formulas for Revco products was to be by means of assays of the contents of the Revco products as made by independent reputable

Initial Decision

67 F.T.C.

two seals are positioned roughly as follows and contain the following words:



In CX 2 and CX 3, the seal of Scientific Associates, Inc., appears without any explanatory text other than the words in the seal.

In CX 4, the seal (at page 9) is supplemented by the following explanatory text:

Certified Quality Control  
from Scientific Associates  
Your guarantee of quality is the  
SCIENTIFIC ASSOCIATES Quality  
Control Seal. All Revco Vitamins  
are assayed by this independent  
laboratory under the most exacting  
conditions. This is your assurance  
of the finest quality vitamins in  
strict conformity with U.S.  
Government Regulations.

In CX 96, the seal (at page 3 G) is supplemented by the following explanatory text:

QUALITY  
Scientific Associates Seal  
warrants Revco Products are  
produced and tested under highest  
standards of quality control.

Although the respondents in their answers have denied that the seals contain the representations alleged in the complaint, none of the parties to the proceeding have presented any testimony as to the meaning to be accorded to the words in the seal and to the text that accompanies the seal in two of the four involved advertisements.

Revco not to use the seal. Accordingly, Rosen must share in the responsibility for the representation shown in (a) above, notwithstanding his heart attack.

There is still another reason why respondents must share the responsibilities for the representations shown in (a) above. Since complaint counsel have established by the presentation of their case-in-chief that the said representation in CX 3 was false, misleading, and deceptive, the examiner deduces from this an inference that the same misrepresentation is also present in a Revco advertisement published almost a year later as reflected in CX 96. The examiner has been unable to find any evidence in the record to rebut this inference and respondents' proposed findings and briefs appear to be mute on the subject.

The examiner accordingly concludes and finds that the representation made by the respondents in (a) above was and is false, misleading and deceptive.

### 3. "Scientific Associates, Inc." Issue

The complaint (par. 9) alleges that respondents in advertisements of their merchandise have, through the use of words and a seal of approval issued by Scientific Associates, Inc., represented, directly and by implication, that the merchandise so advertised:

(a) had been tested, assayed, or analyzed quantitatively and/or qualitatively by the said Scientific Associates, Inc., and that

(b) "the said merchandise met certain minimum standards or had certain qualities or merits."

The complaint further charges that the said representations "were and are false, misleading and deceptive."

The respondents in their pleadings admit the dissemination of advertisements containing the seal of "Scientific Associates, Inc," and respondent Revco also admits that the said seal is a "seal of approval," but all respondents deny that they made the representations set forth above and deny that such representations, if made, are false.

The record discloses that the seal of Scientific Associates, Inc., appears in a number of Revco advertisements, as reflected in CX 2, CX 3, CX 4, and CX 96. In CX 2, the seal of Scientific Associates, Inc., is linked to the larger seal of Parents' Magazine appearing above it. In CX 3, CX 4, and CX 96, the seal of Scientific Associates, Inc., is linked to the somewhat larger seal of the above-discussed Consumer Protective Institute. In the last mentioned exhibits, the

Initial Decision

67 F.T.C.

(c) The furnishing of such additional assays by Scientific Associates, Inc. as might be required \* \* \*.

The key sentence in the seal of Scientific Associates, Inc., is "Quality Control." The key explanatory sentence as to the meaning of "Quality Control" is stated by Revco in CX 4 as follows: "*All Revco Vitamins are assayed by this independent laboratory [Scientific Associates, Inc.] under the most exacting conditions.*" (Italic supplied.) From this evidence, the examiner finds that respondents in their said advertisements represented, as charged in the complaint, that all of the advertised merchandise (Revco private-brand vitamins)

(a) had been tested, assayed or analyzed quantitatively and/or qualitatively by the said Scientific Associates, Inc., and that

(b) the said merchandise met certain minimum standards or had certain qualities or merits.

Complaint counsel did not call any representatives of Scientific Associates, Inc., to testify as to the extent of that laboratory's activities, if any, in exercising the "Quality Control" of Revco's private-brand vitamin products but instead elicited the testimony of respondent Bernard Shulman, president of respondent Revco, on the subject. This is, of course, proper, as any party to a contractual arrangement may testify to the arrangement and the activities undertaken pursuant to the arrangement.

It will be recalled that Revco commenced business in Cleveland under the trade name of "Revco Discount Drug Centers" for the first time on October 1, 1961, on the occasion of Revco's reopening of 31 drug stores, formerly operated under the name of Standard Drug Company which Revco acquired by purchase on July 1, 1961.<sup>9</sup> (CX 1, pars. 4 and 5.)

Simultaneously with the opening of these 31 drug stores as Revco Discount Drug Centers, Revco caused the publication of the newspaper advertisement shown in CX 4 as an advertising supplement to a Cleveland newspaper edition of October 1, 1961, and also commenced on October 1, 1961, the distribution of the first Revco catalogue as reflected in CX 2. (See *supra*, page 1172.)

CX 4 advertised some 26 Revco private-label vitamin products under the aforementioned seal of approval of Scientific Associates, Inc., and also under the above-quoted explanatory text which emphasizes, as heretofore shown, that "All Revco Vitamins are assayed by this independent laboratory [Scientific Associates, Inc.] under the most exacting conditions."

<sup>9</sup> In Detroit, Revco continued to operate its stores under the name of Regal Prescription Centers until as late as February of 1963, when the names of the Regal stores were changed to "Revco Discount Centers." (See Revco's proposed finding No. 58.) (See also "Order Taking Official Notice of Yellow Pages" filed March 5, 1964.)

Similarly, the parties have also not presented any proposed findings or arguments on brief as to the meaning to be accorded to the seal and the sometimes accompanying explanatory texts.

Under these circumstances, the meaning to be accorded to the seals and texts must be determined from the words used in the seal and the explanatory texts. *Zenith Radio Corp. v. Federal Trade Commission, supra.*

Preliminarily, the examiner finds that the seal of Scientific Associates, Inc., and the mentioned explanatory texts, have been used in the above-noted advertisements only in connection with the advertising therein of Revco private-label vitamin products and not in the advertisement of any other products handled by Revco at its drug stores. It is also noted initially that Scientific Associates, Inc., is an independent, reputable, assaying, testing, and research laboratory located at St. Louis, Missouri. (Tr. 299-300.)

Although complaint counsel have not directly dealt in their proposed findings and brief with the problem of the meaning to be accorded to the words of the seal and the mentioned explanatory texts, it appears from their requested finding No. 13 that they indirectly seek an interpretation of the seal and sometimes accompanying texts to the effect that the Revco advertisements represent (a) that Revco private-label vitamin preparations were *at all times* assayed or analyzed by Scientific Associates, Inc., and (b) that *all* Revco vitamins advertised under the seal of Scientific Associates, Inc., had been tested, assayed and analyzed. This indirect contention appears more pointedly in the "Reasons" given by complaint counsel for the requested finding No. 13 to the effect that the testimony of respondent Shulman shows that Scientific Associates, Inc., "did not test or assay *each* batch of vitamin products in connection with which the seal of approval" appeared in Revco advertisements and that Shulman's testimony also shows only that "some" of Revco's private-brand vitamin products were being assayed and tested during the period June 1961 through February 1962. (*Italic supplied.*)

On the other hand, Revco in its proposed finding No. 31 appears indirectly to contend that the seal and accompanying texts in question should be interpreted to constitute the following representations:

(a) Approval [by Scientific Associates, Inc.] of the method of manufacture followed by the vitamin manufacturer [i.e. Revco's supplier of vitamin preparations] \* \* \*;

(b) Verification of the methods and procedures used by such manufacturer in the assays furnished to Revco in connection with such items \* \* \*; and



Associates Seal warrants Revco Products are produced and tested under highest standards of quality control." As apparently contended by respondent Revco in its proposed finding No. 31, this explanatory text also shows the seal to constitute the following representations:

(a) Approval [by Scientific Associates, Inc.] of the method of manufacture of the vitamin manufacturer [i.e. Revco's supplier of vitamin preparations] \* \* \*

(b) Verification of the methods and procedures used by such manufacturer in the assays furnished by Revco in connection with such items, \* \* \* and

(c) The furnishing of such additional assays by Scientific Associates, Inc., as might be required \* \* \*.

The above representations are not in conflict with the earlier representations made by the respondents as set forth in the opening paragraph of this "Discussion and Conclusions" because they constitute distinctly different representations, and both or either set of these representations could be true or false. In any event the representations in CX 96 cannot be considered as amending or qualifying the earlier representations set forth in CX 2, CX 3, and CX 4, as the two sets of representations were directed to shoppers in wholly different geographical areas and at widely different periods of time. This is evident from the fact that the advertisements in CX 2, CX 3, and CX 4 were disseminated in the greater Cleveland area whereas the advertisement in CX 96 was disseminated in the greater Detroit area approximately a year later. Our concern is not with the meaning of an advertisement intended by the advertiser but by the meaning conveyed to the consumer. The decision under the issue here under consideration will be confined to the question of whether the representations made by the respondents in CX 2, CX 3, and CX 4 are false.

Based on the testimony of Mr. Shulman and Mr. Rosen, as heretofore shown, the examiner concludes and finds that the representations made by the respondents, as set forth in the first paragraph above of this "Discussion and Conclusions," were and are false, misleading and deceptive, and that complaint counsel have sustained their burden of proof under paragraph nine of the complaint. This conclusion receives further support from the failure of respondents to offer in evidence any assays or reports of Scientific Associates, Inc., in corroboration of the advertising claims under discussion, after it was evident that complaint counsel had at least presented a prima facie case that such claims were false. This failure indicates that respondents have never received any assays or reports

CX 2 advertises some 36 Revco private-label vitamin preparations solely under the seal of approval of Scientific Associates, Inc. CX 3, the second Revco catalogue which was distributed between March 1, and March 31, 1962, similarly advertises some 36 Revco private-label vitamin preparations under the same seal of approval. (See *supra*, page 1172.)

Mr. Shulman's testimony, as president of Revco, Standard, and in his own behalf, shows that only a few, if any, of the Revco private-brand vitamin preparations were assayed by Scientific Associates, Inc., between the period of July 1, 1961, to February 1962. (Tr. 306-307.) This coincides with the previous finding made in the preceding section of this decision that Revco made available to Rosen in the same period for use in connection with the alleged functions of Consumers Protective Institute only a few, if any, of the assays of Scientific Associates, Inc., on Revco vitamin products.

Mr. Shulman's testimony also establishes the fact that assays have never been made by Scientific Associates, Inc., for Revco on each and every batch of Revco private-brand vitamin products produced by Revco's manufacturer-supplier. (Tr. 306.)

The record also supports a finding from the testimony of Mr. Shulman that Revco pays Scientific Associates, Inc., a monthly sum of \$100 for consultative services and extra amounts for assays as ordered. Few, if any, such assays were ordered by Revco between the months of June 1961 and March 1962. (Tr. 301, 307-308, 325.)

#### DISCUSSION AND CONCLUSIONS

From his examination and study of the words of the seal of Scientific Associates, Inc., as they appear in each of the four Revco advertisements here under consideration, and from his examination and study of the explanatory text given in CX 4 in connection with the seal, particularly the sentence reading "*All* Revco Vitamins are assayed by this independent laboratory [Scientific Associates, Inc.] under the most exacting conditions." (emphasis added), the examiner concludes and finds that respondents, through the use of the said seal of Scientific Associates, Inc., in their advertisements, have represented to the purchasing public (a) that Revco private-label vitamin preparations were at all times assayed or analyzed by Scientific Associates, Inc., and (b) that all Revco vitamins advertised under the seal had been tested, assayed and analyzed by Scientific Associates, Inc.

It will be recalled that the explanatory text in CX 96 alongside of the seal of Scientific Associates, Inc., reads: "Quality. Scientific

Initial Decision

67 F.T.C.

consideration are contained in CX 2, CX 3, and CX 4. CX 2 and CX 3 are the two heretofore described Revco catalogues which were distributed in the greater Cleveland area in the latter part of 1961 and early part of 1962 in the hundreds of thousands. (See *infra*, page 9.) CX 4, it will be recalled, is the 16-page Revco advertising supplement to a Cleveland newspaper published on October 1, 1961. About a year later, the respondents also caused the publication of the heretofore mentioned 12-page Revco advertising supplement to a Detroit newspaper, a copy of which was received in evidence as CX 96. The latter does not show photographs of manufacturing or laboratory facilities but contains verbal descriptions of such facilities.

The indicated photographs and accompanying texts in CX 2, CX 3, and CX 4 and the mentioned text in CX 96 relate solely to facilities used in the manufacturing and testing of vitamin preparations sold under the Revco label. These exhibits contain no representations of facilities for the manufacture or testing of any other products.

In CX 2, the pertinent matter here under consideration is shown at page 18 thereof. The top of the page reads as follows:

Here is the quality-control laboratory in which REVCO  
vitamins are compounded and produced

All Revco products are formulated from the very freshest materials and ingredients which have their basic origin from organic or natural sources. All raw materials are analyzed to ascertain purity and potency before being released for production. Reproduced below are illustrations and descriptions of a number of the steps taken in the processing of Revco vitamins *in our laboratories*. These are but a few of the steps taken before vitamins are packaged. (Emphasis supplied.)

Beneath the above appears six photographs depicting various phases of the manufacturing and testing processes involved in the production of Revco private-label vitamins. Each photograph, some of which also show manufacturing or testing personnel, is accompanied by a text. The captions of the six texts read "Compounding," "Mixing, granulation & demoiaturizing," "Tablet and Capsule Formation," "Laboratory Disintegration Test," "Tumbling, Coating, and Polishing," and "Incubator Stability Test."

The same advertisement also appears in CX 3, except that the sentence in the opening paragraph of the page in question of CX 2 which reads:

Reproduced below are illustrations and descriptions of a number of the steps taken in the processing of Revco vitamins *in our laboratories*. These

from Scientific Associates, Inc., during the period in question, on Revco private-brand vitamin preparations, as otherwise they would have been and could have been offered in evidence as a complete and effective defense to the charge under consideration.

#### 7. "Manufacturing or Laboratory Facilities" Issue

The complaint (par. 10) charges the respondents herein with having falsely represented, directly and by implication, through the use of photographs and accompanying texts in their advertisements, that respondents Revco, Standard and Shulman own, operate or control manufacturing or laboratory facilities.

Revco, Standard and Shulman admit in their pleadings that they do not own, operate or control manufacturing or laboratory facilities, but deny that their advertisements contain any representations to the effect that they do own, operate or control such facilities. Similarly, the remaining two respondents (Doner and Rosen) in their pleadings also deny that the advertisements charged to all respondents herein contain any representations that Revco, Standard and Shulman own, operate or control manufacturing or laboratory facilities, but they (Doner and Rosen) place in issue the charge of the complaint that Revco, Standard and Shulman do not own such facilities. However, in a subsequent stipulation of fact (CX 1, par. 7), these remaining respondents (Doner and Rosen) admit that Revco, Standard and Shulman do not own, operate or control manufacturing or laboratory facilities.

Inasmuch as Revco, Standard and Shulman do not own, operate or control manufacturing or laboratory facilities and as this is now conceded by all respondents, it follows that if the advertisements charged to the respondents do contain representations that Revco, Standard and Shulman do own, operate or control such facilities, such representations must be deemed false, misleading and deceptive.

Pursuant to official notice taken by the Commission in the complaint (par. 11), it is found that a substantial portion of the purchasing public prefers to deal directly with manufacturers in the belief that certain advantages accrue therefrom, including, but not limited to, lower prices.

Respondents have not presented any evidence in rebuttal to the said official notice.

The Revco advertisements which show the photographs and accompanying texts described in paragraph 10 of the complaint here under

Initial Decision

67 F.T.C.

rect representations that Revco, Standard and Shulman own, operate or control manufacturing or laboratory facilities for the production of vitamin products. Since respondents admit that Revco, Standard and Shulman do not own, operate or control such facilities, the examiner further finds that the representations of the respondents, to the effect that Revco, Standard and Shulman do own, operate and control such facilities, were and are false, misleading and deceptive.

It may be noted in passing that respondent Rosen has presented no proposed findings on the issues dealt with above, although the record establishes that Rosen, through his CPI seal-of-approval device, had an important hand in the development of Revco's advertisements of its private-label vitamin products. Doner in its proposed findings (Nos. 47-50) does not appear to take issue with the charge that the involved representations are false but contends instead that these misrepresentations "cannot be laid at the doorstep of the Doner agency." Although the examiner's findings as heretofore set forth in this and in previous sections of this decision were intended to be, and are hereby expressly declared to be, applicable to all respondents named in this proceeding, a later section of this decision will discuss in more detail the responsibilities of respondents Doner and Rosen for the unlawful practices charged to them in the complaint, in view of the position taken individually by these respondents that Doner, as an advertising agency, and that Rosen, as Doner's account executive in charge of the Revco account, cannot be held responsible for the advertising practices of their client, respondent Revco.

#### 8. "575,000 Testimonials" Issue

The complaint (par. 12) charges the respondents herein with having falsely advertised that they had received in excess of 575,000 testimonials from customers. The complaint quotes the following statement from one of respondents' advertisements:

People to People Proof:  
(Photographs and Testimonials from 23 persons)  
—Plus 575,000 more in the first four weeks.

Respondents Revco, Standard and Shulman in their pleadings generally deny the allegations of the complaint as shown above, including the making of the statement that appears in the quotation. Respondents Doner and Rosen in their separate answers admit the quotation but allege that the quotation is taken out of context and deny, in any event, their individual responsibility for the advertisement containing the quotation.

1158

## Initial Decision

are but a few of the steps taken before vitamins are packaged. (Emphasis supplied.)

is changed in CX 3 (page 20) to read:

Reproduced below are illustrations and descriptions for a number of the steps taken in the processing of Revco vitamins *in the manufacturing and control laboratories*. (Emphasis supplied.)

CX 4 at page 15 contains identical or similar photographs and accompanying texts but its prefatory or opening sentences, although very similar in its message to the counterpart opening sentences in the prior mentioned exhibits, read somewhat differently as follows:

Revco vitamins, according to Bernard Shulman, head of Cleveland's newest drug chain, are constantly watched and tested at every step in their production at the spotless plant in Newark, N.J., where these pictures were taken.

"All Revco products are formulated from the very freshest ingredients which have their basic origin in organic or natural sources," Shulman said. "All raw materials are analyzed to ascertain purity and potency before being used in production."

CX 96 at page 3 G, although it does not carry any photographs of manufacturing and testing facilities, has verbal descriptions of such facilities substantially identical to those shown in CX 2 and CX 3 as accompanying texts to the photographs therein. Similarly, prefatory or opening sentences of CX 96 are substantially identical with those in CX 2 and CX 3.

The record shows that Revco's private-label vitamin preparations were manufactured for Revco at the times here material by Ford Laboratory, Inc., of Newark, New Jersey, an independent manufacturer not affiliated with Revco, which produces vitamin products for other retailers as well as Revco. The photographs in CX 2, CX 3, and CX 4 are photographs of the Newark, New Jersey plant of Ford Laboratory, Inc., and the personnel shown in some of these photographs are the employees of Ford Laboratory, Inc. (Tr. 294-298; CX 44.)

## DISCUSSION AND CONCLUSIONS

Revco, Standard and Shulman in No. 37 of their proposed findings seek a finding that: "The apparent purpose of both catalog pages [CX 2 at page 18 and CX 3 at page 20] was not to represent that Revco was a vitamin manufacturer but merely to inform the potential customer that its private label vitamins were produced under conditions which would assure suitable quality and freshness."

The proposed finding is contrary to obvious fact. It is found that CX 2 is a direct, and that CX 3, CX4 and CX 96, are direct or indi-

Initial Decision

67 F.T.C.

it would be utterly impossible for Revco to receive 575,000 testimonials, as one would suspect even without this testimony. (Tr. 219-220, 288-289.)

The record further shows that respondent Rosen was responsible for placing the newspaper advertisement shown in CX 6 for publication in The (Cleveland) Plain Dealer and that the advertising agency, respondent Doner, of which he was an executive vice-president, billed Revco for agency services in connection with this newspaper advertisement. From the record as a whole, it is found that Rosen was fully familiar with the contents of CX 6 and was fully aware of the fact that Revco had not received anything like 575,000 testimonials from customers in the four weeks preceding the publication of CX 6. (Tr. 480.)

## CONCLUSIONS

From the contents of the advertisement in question, the examiner finds that respondents in said advertisement represented that Revco had received more than 575,000 testimonials from customers in the four-week period prior to the publication of the advertisement.

The examiner further finds that the said representation was false, misleading and deceptive.

## 9. "Certified Shopping Report" Issue

The complaint (par. 13) charges the respondents with falsely representing in their advertising "that an independent research organization had purchased 'drugs' from Revco stores and had also purchased identical 'drugs' from competitors in the trade areas where the representations were made."

The same paragraph of the complaint also charges the respondents with falsely representing in their advertising "on the basis of such shopping and comparison, the drugs sold \* \* \*" by respondents Revco, Standard and Shulman "\* \* \* had been certified by the said research organization as being priced below the prices generally charged by competitors for identical drugs."

Respondents Revco, Standard and Shulman in their joint pleadings deny the above-described charges of the complaint. Respondents Rosen and Doner, while admitting in their individual answers that some advertising of some products sold by Revco contained a **statement or representations** to the effect that an independent marketing research organization had purchased or priced identical products sold in a Revco store and in one or more other drug stores, otherwise deny the allegations and charges of paragraph 13 of the complaint.

The record shows that the above quotation appears in a three-quarter page Cleveland newspaper advertisement by Revco in the Sunday, October 29, 1961, issue of The Plain Dealer, a copy of which has been received in evidence as CX 6. The advertisement appeared approximately a month after Revco had reopened under its own name the 31 drug stores formerly operated under the name of Standard Drug Company.

The top of CX 6 has the caption:

PEOPLE-TO-PEOPLE PROOF:

Every day is savings day on everything at REVCO!

The bottom of the advertisement gives the addresses of 37 Revco drug stores in Ohio, all but 12 of which are in the greater Cleveland area.

The remaining portion of CX 6, covering perhaps about 75 percent of the entire advertisement, is devoted to photographs of 23 named persons in various walks of life, and beneath each photograph is the "testimonial" of the person. The testimonials generally comment on the values and savings the photographed persons found at Revco drug stores.

Alongside of the last row of photographs and accompanying testimonials, prominent and conspicuous space is given in the advertisement to the following statement:

\* \* \* PLUS 575,000 MORE  
IN THE FIRST FOUR WEEKS!  
What more can we say? Your  
friends and neighbors speak  
for themselves \* \* \* and so  
do Revco's savings.

As none of the parties offered any consumer testimony as to the meaning the advertisement would have for the consumer, particularly the statement "PLUS 575,000 MORE IN THE FIRST FOUR WEEKS!," the meaning of the advertisement is subject to an interpretative finding by the examiner based on its contents. *Zenith Radio Corp. v. Federal Trade Commission, supra.*

The testimony of respondent Shulman and the response of his counsel in his behalf with respect to a subpoena duces tecum served upon Mr. Shulman, requiring him to produce all signed testimonials received by Revco to support and substantiate the representations made in CX 6, compels a finding that the 23 testimonials shown in CX 6 were the only testimonials received by Revco up to the time the advertisement in CX 6 was published in a Cleveland newspaper on October 29, 1961. The testimony of Mr. Shulman also shows that



record shows that Miller Drug Stores, Inc., is a chain of ten retail drug stores. (RX 23 E; Tr. 2230.)

Complaint counsel did not call any representatives of the Poss firm to testify in support of the complaint, but did offer in evidence a letter from the Poss firm, dated August 9, 1961, addressed to respondent Shulman, together with its attached one-page report. The letter reads:

This is to certify that our representative on August 9, 1961, purchased these items at the Miller Drug Store at Warren and Detroit, Lakewood, Ohio, at the prices indicated on the attached report.

The attached report, after certain adjustments,\* shows total purchases of the aforementioned seventeen items of drug store merchandise (*i.e.*, the same as those listed in CX 5) from the indicated Miller drug store for \$30.08, which coincides with the same total shown in the left-hand column of CX 5 as the total cost of the items from the unnamed drug stores.

The Poss letter and its attached report were identified for the record (but not received in evidence) as CX 95 A and B, respectively. Although CX 95 A and B were offered in evidence by complaint counsel, they were *not* offered in evidence for the purpose of showing that there were any discrepancies between the figures shown therein on purchases made from the Miller drug store and the figures shown in CX 5 under the tape of purchases made at the unnamed drug stores. Instead, CX 95 A and B were offered *solely and exclusively* for the purpose of showing that the Poss firm had not shopped at a Revco drug store for the same seventeen items, as is apparently stated in the Poss "Certified Shopping Report" shown above as quoted from CX 5, and in support of that part of paragraph 13 of the complaint which charges that "the said research organization [the Poss firm] did not make purchases or comparisons as represented." (Tr. 345; 355-357.)

\* The said attached Poss report shows a total price of \$35.93 for eighteen items of merchandise as against the seventeen items shown in the tape for the unnamed drug stores in CX 5. Included in the \$35.93 is an item of \$3.85 for a prescription drug (Peritrate) not shown in CX 5. But even after a deduction for this item, the total for the remaining seventeen items amounts to \$32.08, or \$2.00 more than the total of \$30.08 shown for the purchases at the unnamed drug stores in CX 5. There is also an additional discrepancy between the report attached to the Poss letter and the tape for the unnamed drug stores shown in CX 5. The report shows a price of \$9.45 was paid for Theragran vitamins at the Miller drug store as against a \$7.45 price shown as the purchase price for the same item at the unnamed drug stores in CX 5. Inasmuch as complaint counsel at the hearing declined to claim that there are any discrepancies between the Poss report to Mr. Shulman and the tape shown for the unnamed drug stores in CX 5, it is assumed that the \$9.45 figure in the Poss report is a typographical error, for which there should be substituted the figure \$7.45. With this additional adjustment, the total shown in the Poss report to Mr. Shulman and the total shown in the column for the unnamed drug stores in CX 5 become the same. (Tr. 342-343; 344-345.)

1158

## Initial Decision

A copy of the advertisement involved under the charges of the complaint is in evidence as CX 5. CX 5 is approximately a three-quarter page newspaper advertisement by Revco in The Cleveland Press issue of Tuesday, October 3, 1961.

CX 5 is entitled "A Tale of Two Tapes" and is similar in design and plan to the heretofore-discussed Revco advertisement in CX 97 which is entitled "A Tale of Three Cities." (See *infra* at page 40.) Both advertisements were planned and designed by Rosen, acting as account executive for respondent Doner, the advertising agency.

CX 5 purports to show two cash register tapes in parallel vertical columns, each of which reflects the purchase of seventeen identical items of drug store merchandise. The column on the right side shows a total of \$20.66 for the seventeen items as purchased at "Revco Discount Drug Centers." The column on the left side shows a total of \$30.08 for the same seventeen items as purchased at unnamed "Drug Stores" indicated by a blank box. Alongside of the blank before the words "Drug Stores" is an asterisk and the pick-up asterisk at the bottom of the advertisement says "Name on request."

At the left bottom part of CX 5 is a boxed text which looks and reads as follows:

<p>CERTIFIED SHOPPING REPORT</p> <p>This is to certify that prices of merchandise itemized herein, are authentically reported as charged at the check-out counter of each store.</p> <p>Peter C. Poss and Staff Research Consultants</p>
--

Conspicuously shown in CX 5, opposite to the above "Certified Shopping Report," are the following statements or representations:

COMPARE! Item for item, price for price—merchandise purchased at a leading chain drug store and at REVCO. Right from the ring of the register, *positive proof* that REVCO DISCOUNT DRUG CENTERS give you more value, more savings on vitamins, prescriptions, cosmetics, toiletries, film, photo finishing and everyday drug needs \* \* \* *every day!* (Emphasis as shown in advertisement.)

From the testimony of respondent Shulman under examination by complaint counsel, it is established that the shopping shown in the left column of the advertisement in CX 5 was performed by a representative of Peter C. Poss and Staff, research consultants, at a store of Miller Drug Stores, Inc. (Tr. 335-338.) Other evidence of

Initial Decision

67 F.T.C.

Similarly, the mere fact that the Poss certification, as published by respondents in CX 5 "differs substantially and materially from the certification issued \* \* \*" (to use the phraseology of the complaint) by the Poss firm under its said letter of August 9, 1961, to Mr. Shulman, does not negative the possibility that a Poss certification identical with the Poss certification shown in CX 5 does not exist. Opportunity was expressly given to complaint counsel to establish by further testimony the charges contained in paragraph 13 of the complaint but the examiner has been unable to find any further testimony in the record on the issue or any reference to such testimony in complaint counsel's proposed findings of fact. (Tr. 355-357.)

CX 95 A and B for identification has been mentioned and described in detail above solely for the purpose of setting forth the examiner's reasons for rejecting the offer thereof by complaint counsel into evidence. The examiner expressly refrains from making any affirmative findings of fact based on the data to be found in the contents of CX 95 A and B for identification.

#### CONCLUSION

By reason of the facts set forth above, the examiner finds that there has been a failure of proof to sustain the charges made under paragraph 13 of the complaint herein.

#### 10. "Doner and Rosen Responsibility" Issue

Respondent Doner has taken the position throughout this proceeding that it cannot be held responsible for any statements or representations made in Revco advertising which Doner prepared or placed, even if Revco is found by reason thereof to have engaged in false advertising, because Doner "did not know or have reason to know that any [such] statements or representations \* \* \* were other than accurate and truthful." (See "Affirmative Defense" in Answer of Doner.)

Rosen for himself has taken a similar position throughout the proceeding.

Doner and Rosen are represented by separate counsel, as is Revco (including Standard and Shulman). Both Doner and Rosen, of course, realize that a successful defense by Revco to the charges of the complaint would also exonerate them and have lent their efforts to show that Revco is innocent of the charges leveled against Revco, but their special defense is that in any event they cannot be held responsible for any false representations made in Revco advertising

Objections were made by respondents to the receipt in evidence of the aforesaid Poss letter to Mr. Shulman and its attached report, which had been marked CX 95 A and B for identification, on the ground that the said documents had not been presented to respondents prior to the hearing in accordance with prehearing procedures established by the examiner which required all parties hereto to exchange with each other within specified time limits all documents then in their possession which they intended to offer in evidence, and further provided that if this were not done, the documents would not be received in evidence, except for good cause shown. (See "Modification of Order Scheduling Hearing and Setting Prehearing Conference," filed October 28, 1963.) These objections were sustained and CX 95 A and B for identification were marked "Offered by the Commission but rejected by the Examiner." (Tr. 345; 347-348; 355-357.)

A further ground for the rejection into evidence of CX 95 A and B for identification was that the Poss letter to Mr. Shulman and its attached report, as reflected in CX 95 A and B, could not in themselves and without further testimony prove the charges of the complaint here under consideration. The mere fact that CX 95 A and B does not show shoppings by the Poss firm on the involved seventeen items of merchandise at a Revco drug store, does not preclude the possibility that the Poss firm did actually perform such shoppings at a Revco store. It should also be noted that the Poss letter shows shoppings at a Miller drug store as of August 9, 1961, and that the evidence in this proceeding shows that Revco did not commence business in the greater Cleveland area under the name of Revco Discount Drug Centers until October 1, 1961. It is thus apparent that the Poss firm could not have done any shoppings at a Revco store on the same date it shopped the Miller drug store and that such shoppings as the Poss firm might have made at a Revco drug store would have had to have been made between October 1, 1961, when Revco started doing business in Cleveland and October 3, 1961, when the advertisement (CX) here under consideration was published in a Cleveland newspaper. (It would appear that an advertised comparison of shoppings at a competitive store as of August 9, 1961, with identical shoppings at a Revco store as of October 1, 1961, would be another basis for a charge of deceptive advertising due to changes in prices that might have occurred in the intervening time, but this is not one of the charges made under paragraph 13 of the complaint here under consideration.)

Initial Decision

67 F.T.C.

new clients, and to hold those the agency already has with satisfactory service. An account executive counsels with clients, advises them on advertising tactics and campaigns, and participates in the provision of creative work in the preparation of advertising material. (Tr. 444.)

Rosen had complete and autonomous charge of the clients he served as account executive for the Doner agency and was under no necessity to consult any superior in the Doner firm as to the advertising services he was rendering to a Doner client. This was pursuant to the Doner agency policy to operate like a partnership, as is evident from the following testimony by Mr. Rosen under examination by complaint counsel:

Q. As an accounting [sic] executive, did you report to any superior with regard to your activities with particular clients?

A. No, because we operate it as partners in the corporation. We handle our own accounts except in terms of consultation with each other in the formal course of business. (Tr. 444: 462.)

Rosen solicited and acquired the Revco account for the Doner agency in 1959. At that time Revco was operating under a different name as a mail-order vitamin company. (Tr. 448, 465-466.) Rosen, as a Doner account executive, has serviced the Revco account from the time it was acquired in 1959 until December 31, 1963, when he separated from Doner. In that period he had the basic responsibility for the advertising of the Revco account as Doner's representative. Also in that period Revco vastly expanded its operations through the opening of many new drug stores, particularly in the State of Ohio, where it opened 31 drug stores on October 1, 1961, under the name of Revco Discount Drug Centers. All this was accomplished under advertising campaigns designed to give the stores a maximum sales thrust. The theme of virtually all of Revco's advertising during this expansion period was *comparison pricing*, that is, representations in Revco advertisements that Revco's "everyday prices" on common prescription and non-prescription drug store merchandise were lower than prevailing prices at competing drug stores in the same trade areas. The record supports the finding and conclusion that Rosen, if he was not the master creative mind behind this comparative-price advertising, he was an active participant therein and fully conversant with the representations made in the Revco advertisements that Revco prices on drug store merchandise were lower than those of other drug stores. The record, as heretofore detailed, further supports a finding and conclusion that Rosen was personally and deeply involved in all other advertising representations charged to the respondents by the complaint.

unless it is shown that they (Doner and Rosen) had knowledge that such representations were false.

In setting forth the facts, as they relate to the responsibilities of Doner and Rosen for the heretofore-described representations in Revco advertising, it becomes necessary to recapitulate some of the facts shown above at various sections of this decision.

Respondent W. B. Doner and Company is a Michigan corporation engaged in business, since its organization in 1937, as an advertising agency, with its principal place of business at Detroit, Michigan, and branch offices at Chicago, Illinois and Baltimore, Maryland. It has only six stockholders, and these function as "partners" in the corporation. (Tr. 444, 462-463.) Respondent Rosen is a principal stockholder of Doner, owning approximately 50 percent of its stock. (Tr. 456.) He has been actively associated with the Doner advertising agency as an account executive for about 20 years and has held stock in Doner since about 1946. (Tr. 2744.)

Rosen has been an executive vice-president of the Doner firm for a number of years, but resigned that position on December 31, 1963, and has held no office in or employment with Doner since that date, although he still retains his approximate 50 percent stock holdings in Doner. He does not plan to become active again in the Doner firm and at the time of the hearing was considering an offer for the purchase of his Doner stock. (Tr. 460-461.)

The day after his resignation as an officer of Doner, Rosen became an executive vice-president of respondent Revco where he participates "in the management level" on all aspects of Revco's business, such as store operations, personnel recruitment, supervision of various functions, and the preparation of package designs for Revco private-label lines, but one of his principal responsibilities at Revco is its advertising program. (Tr. 443, 447, 454.)

In his former capacity as an executive vice-president of the respondent Doner advertising agency, Rosen attended meetings of Doner's board of directors and its executive committee and generally participated in all management decisions, including those affecting the agency's branch offices in Chicago and Baltimore. At one time he had charge of Doner's personnel recruitment. He has attended many civic and professional functions on behalf of Doner and served in various capacities with official and professional organizations related to Doner's business activities. (Tr. 454-455, 457-458, 461.)

Rosen, in his capacity as an executive vice-president of Doner, spent most of his time functioning as an "account executive" to various Doner clients. Part of an account executive's job is to find

Initial Decision

67 F.T.C.

"retail list," "other," and "chart price" are the prices at which the merchandise referred to is usually sold at retail in the trade area or areas where the representations are made, and that the difference between the higher stated prices and respondents' lower advertised prices is the amount saved by purchasers.

The involved advertisements under the above charge were principally disseminated in the greater Cleveland area commencing on October 1, 1961, when Revco opened up 31 Revco Discount Drug Centers in the Cleveland area. These advertisements are chiefly reflected in CX 2 and CX 3, which are Revco catalogues, and in an advertising supplement to a Cleveland newspaper published on October 1, 1961.

These advertisements caused the Cleveland Better Business Bureau, Inc., to write, under dates of October 12 and 25, 1961, letters of criticism to respondent Revco concerning the advertising claims therein. (See opening paragraph of CX 99 A.)

The reply to these criticisms, dated October 25, 1961, was made by respondent W. B. Doner and Company on behalf of Revco on a Doner letterhead under the signature of respondent Charles F. Rosen as Doner's executive vice-president. In the letter, Mr. Rosen makes reference to a two-hour conference he had previously had with officials of the Cleveland Better Business Bureau on the subject matter of the Bureau's complaints. (See third paragraph of CX 99 A.) The contents of Mr. Rosen's letter clearly show Mr. Rosen's complete involvement in Revco's above-described comparative-price advertising, as may be seen from the following quotations therefrom:

Let's get down to specifics. You question our right to use the slogan "Every day is savings day on everything at Revco." This is a statement of fact without equivocation or semantics. Apparently it is difficult for you and your staff to understand the basic concept of this new type of drug merchandising in which all of the items in each store are priced at savings every day of the year. This policy is in contrast to other forms of drug retailing where a substantial number of items are sold at list prices, some at slight discounts, and others as "loss leaders."

We do not say that we have the lowest prices on all items all of the time. We do maintain, however, that the consumer will save money by regular shopping at Revco. I need not point out to you, I presume, that the "loss leaders" are as vicious a form of "bait advertising" as some of the other more flagrant violations.

The slogan mentioned above is merely our way of differentiating our stores from the "sometime" discounts that prevail in other retail drug establishments and department stores.

\* \* \* \* \*

Let us now examine the technique of your shopping service. The organization we hired in Cleveland is, according to all reports, a reputable research organization. They did the shopping and made the report as stated in our

Rosen's total involvement in Revco's *comparative-price advertising* is demonstrated by his creation of the Consumer Protective Institute whose avowed purpose was to furnish independent proof to the consumer that Revco's private-brand vitamins were equal in quality to nationally-advertised brands of vitamins and could be purchased at Revco's "everyday prices" far below the "retail" prices of the national brands. The seal of approval of the Consumers Protective Institute was used to promote and increase the sale of Revco's private-brand vitamin preparations. The examiner finds that Rosen used the CPI seal-of-approval device in his line of duty, as a Doner account executive as he saw it, to advance the sales of respondent Revco. Inasmuch as the record shows that Rosen had full authority to commit the Doner advertising agency of which he was an executive vice-president and half-owner, to any and all advertising programs he worked out for the Revco account, the examiner finds that Doner must share the responsibility for the false and deceptive use of the CPI seal of approval in the Revco advertisements, notwithstanding the stipulation of the parties that "No benefit, financial or otherwise from the existence or operation of Consumers Protective Institute accrued to Respondent Doner." (Tr. 1415.)

Similarly and for the same reasons respondent Doner must also share the responsibility for all other representations in Revco advertising which have been found to be false, misleading and deceptive. Doner cannot escape responsibility for the actions of its executive vice-president and half-owner, respondent Rosen, in the performance of his functions as account executive for Revco.

The fictitious pricing charges under paragraph 7 of the complaint have been resolved above in favor of the principal respondent, Revco, and this, of course, will also result in a dismissal of the same charges against respondents Doner and Rosen, therefore making unnecessary any decision on the special defenses of Doner and Rosen that they are not responsible for the misrepresentations charged under paragraph 7 of the complaint. Nonetheless, in order that the Commission may have before it such additional facts as may be required for a final decision under any hypothesis on the issue of the alleged fictitious pricing, the examiner deems it advisable to make the following additional findings with respect to the role Doner and Rosen played in the misrepresentations charged under paragraph 7 of the complaint.

The chief charge under paragraph 7 of the complaint is that the respondents have misrepresented in their advertisements that the prices shown therein under the designations of "value," "retail,"



Initial Decision

67 F.T.C.

3. The use by the respondents of such statements, representations and practices as have been found above to be false, misleading and deceptive, 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 true and into the purchase of substantial quantities of foods, drugs, cosmetics and devices by reason of said erroneous and mistaken belief.

4. The dissemination by the respondents of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

## ORDER

*It is ordered,* That respondents Revco D.S., Inc., a corporation, and its officers, and Standard Drug Company, a corporation, and its officers, doing business as Revco Discount Drug Centers, or under any other name, and Bernard Shulman, individually and as an officer of said corporations, and W. B. Doner and Company, a corporation, and its officers, and Charles F. Rosen, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of foods, drugs, cosmetics or devices, do forthwith cease and desist from:

I. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which:

(a) Represents, through the use or display of any emblem, insignia, seal, symbol, certification, or otherwise, that respondents' merchandise has been approved or endorsed unless such merchandise has received such approval and endorsement.

(b) Contains the name "Consumer Protective Institute" or any other name of similar import, connotation or meaning, to designate or describe any organization unless such organization is in fact an institute and is engaged in the business of protecting consumers.

(c) Represents, directly or by implication, that respondents, or any of them, own, operate, or control any manufacturing or laboratory facilities.

(d) Represents, directly or by implication, that respondents have received from customers, or others, any number of testimonials in excess of the number actually received.

115S

## Initial Decision

newspaper ad. The date, the bills and the merchandise are all available for your inspection.

Immediately after our advertising appeared, there was a tremendous shifting in the price structure throughout Cleveland. Understandably, everyone wanted to get competitive. We welcome and enjoy clean competition. Subsequent shopping revealed a revision of prices and we did not repeat the ad in question.

\* \* \* \* \*

Now let's talk about prescriptions. Once again we insist that you view this from a total concept and not a few isolated examples. The prescription ad we ran was properly authenticated by a research organization. The dates, stores and prices are a matter of record. In some isolated instances you may find that our pharmacists have not kept abreast of the new pricing instituted from the warehouse, due to the rapidity of the changeover and the personal unwillingness of certain pharmacists to cut the prices in accordance with our newly established policy.

So far as the comparative prices on pharmaceuticals are concerned, you are completely in error in your use of the Blue Book. Our prices are based on the pricing chart published by the Central Pharmaceutical Journal which is used as the standard throughout this area. Here, again, we seriously question your technique, your basic assumption, and your completely illogical conclusions. Moreover, we would be glad to have you survey literally thousands of people who enjoy the new low prescription prices which Revco has brought to the market. We assume that other drug chains will continue to lower their prices for the ultimate good of the buying public. We feel it is totally unreasonable for you to cast aspersions because we pioneered something so definitely in the public interest. (CX 99 A-B)

The above quotations are cited solely to show Rosen's deep involvement in Revco's comparative-price advertising and not for the purpose of establishing as facts the statements made therein, except insofar as such statements serve as corroborations of previous findings made herein.

## CONCLUSION

The examiner finds and concludes that respondents Doner and Rosen are jointly responsible with respondents Revco, Standard and Shulman for the advertising representations hereinbefore found to be false, misleading and deceptive.

## GENERAL CONCLUSIONS

1. The respondents herein have acted in conjunction and cooperation with one another in the performance of the acts and practices hereinbefore found to constitute false, misleading and deceptive advertising.

2. Such of respondents' advertisements as have been found above to contain false and misleading statements were misleading in material respects and constituted "false advertisements," as that term is defined in the Federal Trade Commission Act.

advertising a product, it has been held time and again that the consumer is substantially deceived and the advertisement unlawful. *E.g.*, *Niresk Industries, Inc. v. F.T.C.*, 278 F. 2d 337, 340 (7th Cir. 1960). A common form of bargain advertising is the retail price comparison, where a retailer claims that his price for a particular product is lower than that charged by other retailers in the area. Claims such as "Retail Value \$10—My Price \$5" imply to the average consumer a reduction from the regular, prevailing price in the advertiser's trade area. Deception will result, therefore, if the higher, regular price with which the advertiser compares his lower, bargain price is misrepresented, either because no sales are made at the higher price in the trade area or because so few sales are made at that price that the advertised savings would not be considered a genuine bargain by the consumer.

The principles governing the application of the Federal Trade Commission Act, which prohibits false and deceptive advertising, to retail price comparisons have been well established for many years, and they have been applied by the Commission consistently and without deviation. These principles were codified in Guides Against Deceptive Pricing which the Commission adopted on October 2, 1958:

No statement, however expressed, whether in words, phrases, price figures, symbols, fractions, percentages or otherwise, which represents or implies a reduction or saving from an established retail price \* \* \* should be used in connection with the price at which an article is offered for sale unless \* \* \* the saving or reduction is from the usual and customary retail price of the article in the trade area, or areas, where the statement is made. (P. 2.)

While the 1958 Guides did not define either "established retail price" or "usual and customary retail price," they did make clear that a claim implying a savings from an established retail price should not be used if "the claim is based on infrequent or isolated sales" (p. 3).<sup>3</sup>

The principles of the Guides were elaborated in *Giant Food, Inc.*, 61 F.T.C. 326, aff'd, 322 F. 2d 977 (D.C. Cir. 1963). Respondent, a retailer in the Washington, D. C., area, ran newspaper ads comparing its prices with other, higher prices labeled "regular," "manufacturer's list," and words of similar import. The Commission found that such terms would be understood by many consumers to denote a regular retail price generally prevailing in the area in which respondent was advertising. The crucial issue, therefore, was whether the manu-

<sup>3</sup> See also *George's Radio and Television Co.*, 60 F.T.C. 179, 193, where the Commission noted that "instances in which certain retailers sold at or above the manufacturer's suggested prices were exceptions rather than the general rule."

II. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations or misrepresentations prohibited in paragraphs (a) through (d) above.

*It is further ordered*, That the charges contained in paragraphs seven and thirteen of the complaint be, and the same hereby are, dismissed.

#### OPINION OF THE COMMISSION

JUNE 28, 1965

BY ELMAN, *Commissioner*:

The complaint in this matter, issued on June 13, 1963, charges respondents<sup>1</sup> with false advertising of drugs and other products in violation of Sections 5 and 12 of the Federal Trade Commission Act. 15 U.S.C. §§ 45, 52.<sup>2</sup> On June 29, 1964, after full evidentiary hearings, the hearing examiner rendered his initial decision. The examiner dismissed the charges of deceptive pricing and misrepresentation as to certification by an independent research organization, but upheld the other charges of the complaint and entered an order to cease and desist against all respondents. The matter is before the Commission on cross-appeals by the parties.

### I. DECEPTIVE PRICING: RETAIL PRICE COMPARISONS

#### A. Introduction

Because people love a bargain, promising the consumer a bargain or savings is a widespread and effective selling method. Where the existence or extent of a bargain or savings is misrepresented in

<sup>1</sup> Respondents are Revco D.S., Inc., a corporation which owns and operates a chain of retail drug stores in Michigan, Ohio, and West Virginia, and a wholly owned subsidiary of Revco, Standard Drug Company, both doing business as Revco Discount Drug Centers; Bernard Shulman, an individual who controls Revco; W. B. Doner and Company, a Detroit advertising agency which represented Revco; and Charles F. Rosen, a former officer of W. B. Doner who handled the Revco account.

<sup>2</sup> Section 12 provides: "(a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or (2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics. (b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 5." Section 15, 15 U.S.C. § 55, defines the term "false advertisement" for purposes of Section 12 as an advertisement "which is misleading in a material respect."

prices being charged in his area for a particular article, he should be reasonably certain that the higher price he advertises does not appreciably exceed the price at which substantial sales of the article are being made in the area—that is, a sufficient number of sales so that a consumer would consider a reduction from the price to represent a genuine bargain or saving. Expressed another way, if a number of the principal retail outlets in the area are regularly selling Brand X fountain pens at \$10, it is not dishonest for retailer Doe to advertise: "Brand X Pens, Priced Elsewhere \$10, Our Price \$7.50."

The following example, however, illustrates a misleading use of this advertising technique. Retailer Doe advertises Brand X pens as having a "Retail Value of \$15.00, My Price \$7.50," when the fact is that only a few small suburban outlets in the area charge \$15. All of the larger outlets located in and around the main shopping areas charge \$7.50, or slightly more or less. The advertisement here would be deceptive, since the price charged by the small suburban outlets would have no real significance to Doe's customers, to whom the advertisement of "Retail Value \$15.00" would suggest a prevailing, and not merely an isolated and unrepresentative, price in the area in which they shop.

Guide III of the revised Guides is also relevant to the advertising of retail price comparisons. It deals with the precise factual situation presented in the *Giant Food* case, where a retailer used manufacturers' suggested retail prices as a basis of comparison with his prices:

A retailer competing in a local area has at least a general knowledge of the prices being charged in his area. Therefore, before advertising a manufacturer's list price as a basis for comparison with his own lower price, the retailer should ascertain whether the list price is in fact the price regularly charged by principal outlets in his area.

In other words, a retailer who advertises a manufacturer's or distributor's suggested retail price should be careful to avoid creating a false impression that he is offering a reduction from the price at which the product is generally sold in his trade area. If a number of the principal retail outlets in the area are regularly engaged in making sales at the manufacturer's suggested price, that price may be used in advertising by one who is selling at a lower price. If, however, the list price is being followed only by, for example, small suburban stores, house-to-house canvassers, and credit houses, accounting for only an insubstantial volume of sales in the area, advertising of the list price would be deceptive (P. 4.)

The revised Guides are not intended, of course, to answer every problem of interpretation that might arise in applying the broadly phrased prohibitions of the Federal Trade Commission Act to retail price comparisons. They are not to be interpreted and applied as if their precepts, like those of a statute or formal rule, were "precise statements of law" (revised Guides, p. 1); rather, "[t]he funda-

facturer's list and other "regular" retail prices advertised by respondent were in fact the regular retail prices for the products in question in the area where the advertisements were disseminated, and on this the record showed "a consistent disparity between respondent's advertised manufacturer's list prices and actual selling prices in the trade area." 61 F.T.C., at 351.

The Commission predicated its finding of consistent disparity on testimony of buyers for three large retail sales concerns operating department stores in Washington, D. C., and branch stores in nearby suburbs. The buyers testified that their companies, all substantial competitors of respondent, were charging as their regular retail price a price far below that advertised by respondent as the manufacturer's list price and, by implication, the regular and prevailing retail price in the Washington area. Respondent argued that the buyers' testimony proved "no more than that some retailers in the Washington area sold the listed items for less than the manufacturer's suggested list prices" (*id.*, at 352), but the Commission rejected this argument.

Certainly \* \* \* [complaint counsel] did not have the burden of showing that no retailer in the trading area sold at the list prices. 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. *Ibid.*

The reviewing court agreed: "The Commission did not have to prove that the products never, at any time or in any store, sold at the list price." *Giant Food Inc. v. F.T.C.*, 322 F. 2d 977, 985 (D.C. Cir. 1963).

Effective January 8, 1964, the Commission promulgated revised Guides Against Deceptive Pricing. The revised Guides make no change in the substantive law applicable to the advertising of price comparisons by retailers, but do attempt to explain and elaborate the standards summarily stated in the old Guides. Guide II of the revised Guides states (pp. 2-3):

Another commonly used form of bargain advertising is to offer goods at prices lower than those being charged by others for the same merchandise in the advertiser's trade area (the area in which he does business). This may be done either on a temporary or a permanent basis, but in either case the advertised higher price must be based upon fact, and not be fictitious or misleading. Whenever an advertiser represents that he is selling below the

possible. It would be impractical to attempt to specify any dollar volume or percentage of sales that must be made at the higher price before a price comparison is permissible. In general, however, unless the higher advertised price is in fact the price being charged by many if not most of the principal retail outlets in the trade area, a price comparison will be misleading.

Second, the revised Guides make clear that the test of lawful advertising of price comparison claims by a local retailer is not subjective. He is under a duty to make reasonably certain that the higher price is one at which substantial and significant sales in his trade area are made. If he neglects such duty, he cannot justify a false price representation by asserting "good faith." Conversely, if acting in good faith he ascertains the actual prices prevailing in the market before making price comparison claims, he should have no difficulty in presenting such claims truthfully and fairly. It is thus no defense to a charge of deceptive advertising of price comparisons by a local retailer that he was not aware of his competitors' prices for the same merchandise; he owes it to the consuming public and to his competitors to ascertain the facts before making a price comparison claim.

A manufacturer engaged in national selling and advertising who bases his list or suggested retail price on an honest estimate made in good faith of the actual value of the article will not be charged with deception in advertising that price merely because in some local areas the actual retail price is lower, so long as the nationally advertised price approximates the price at which, in a substantial number of representative communities throughout the country, principal retail outlets are selling the product. But a local retailer in one of the areas where the nationally advertised list price is not widely observed cannot fairly use that price as a basis for making local price comparisons; to do so would mislead consumers as to the prices in fact charged by competing retailers in the particular area. *Giant Food, Inc.*, 61 F.T.C. 326, aff'd, 322 F. 2d 977 (D.C. Cir. 1963).

#### B. Revco's Cleveland Advertising

The deceptive-pricing charges of the present case involve primarily Revco's advertising in the greater metropolitan Cleveland area, which Revco entered in 1961 through acquisition of the Standard Drug Company, a chain of conventional retail drug stores. Revco reopened 31 of the old Standard stores as "Revco Discount Drug Centers," promoting the new operation by an aggressive advertising campaign built around retail price comparisons. Revco desired to establish itself

mental spirit of the Guides will govern their application." *Ibid.*<sup>4</sup> They do, however, dispel two principal sources of uncertainty in the law of retail price comparisons.

First, they recognize that there is rarely a single price at which all sales of a product are made in a retail trade area. Consumers do not understand retail price comparison claims to mean that every retailer in the area except the one advertising the lower price is selling the article at the higher price. Thus, the revised Guides make clear that a higher comparative price may be advertised so long as it is a price at which substantial sales in the trade area are made or at which a large number of the principal retail outlets in the area regularly sell the article in question.

Consumers understand an advertised higher comparative price to be one at which the article is being widely sold in the local area. Hence it is not enough that a few stores regularly charge the higher price, or that some sales are occasionally made at the price. The Guides provide that a price comparison may not be based on infrequent or isolated sales, and specifically require that there be "a sufficient number of sales" in the trade area at the higher price "so that a consumer would consider a reduction from the price to represent a genuine bargain or saving." (P. 3.) No exact quantitative measure of substantiality, applicable to all products and markets, is

<sup>4</sup> Pertinent here is the Commission's recent admonition in *John Surrey, Ltd.*, F.T.C. Docket 8605 (decided March 16, 1965) [pp. 299, 332 herein]:

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

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

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

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



by Revco and substantially below those advertised by Revco as the regular retail prices of the items.

It is doubtful whether the evidence introduced by complaint counsel to show that Revco's comparative prices were not regular retail prices was sufficient to establish a *prima facie* case of false advertising of retail price comparisons. To be sure, complaint counsel was not required to canvass every one of Revco's hundreds of competitors, or even a majority of them. Under the rule of proof laid down in the *Giant Food* case, to which we adhere, it was enough for complaint counsel to elicit the prices charged by a representative cross-section of Revco's competitors for some of the products for which Revco advertised comparative prices. However, the only fully probative evidence relates to the retail prices of Revco's two chainstore competitors (see p. 1241, *supra*), that complaint counsel "took care to elicit from competitors (see note 6, *supra*), and in a market seemingly dominated by independents, it is questionable whether the prices of the chains are likely to be representative. In *Giant Food*, the Commission noted all of the five buyer witnesses an explanation that they continually study the prices of other retailers in order to keep their prices 'competitive'; the Commission concluded from this evidence that "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." In the present case, where complaint counsel did not introduce such evidence, there is scant basis for inferring from the Gray and Marshall prices alone that a preponderant or substantial segment of the Cleveland retailing community did not charge the comparative prices advertised by Revco.

Even assuming that we could enter a finding of illegality in the absence of any evidence in this record except what complaint counsel introduced, we would still have to consider the additional evidence of record, introduced by Revco, which the examiner found rebutted complaint counsel's *prima facie* case. The record establishes that Revco, before making the retail price comparisons in question, conducted a careful and thorough investigation of the prices being charged by Cleveland drug stores, and concluded, on the basis of its investigation, that the comparative prices which it planned to advertise were in fact the regular retail prices in Cleveland.

The results of Revco's investigation are corroborated by the fact that the comparative prices challenged by complaint counsel were either fair trade prices (in the case of the non-prescription merchan-

in the public mind as a *discount* drug chain, regularly selling drugs at substantially lower prices than its competitors; and to do this, Revco was willing where necessary to refuse to adhere to the retail prices established by the major drug manufacturers in Ohio, a fair trade State.

Almost all of the advertisements challenged by complaint counsel appeared during a five-month period, from October 1961 to March 1962. The first major newspaper ad, run in October 1961, is typical. It consisted of a listing of some 475 non-prescription drug items, along with one column of prices designated "retail," "retail list," "value," and "other" and another column of prices designated "Revco's everyday low prices." Another part of the advertisement set forth Revco's prices on a number of prescription items and compared them with higher prices designated as "chart" prices.<sup>5</sup>

The examiner found, correctly we think, that the advertisement would imply to the average consumer that Revco's retail prices were lower than the regular retail prices prevailing in the Cleveland area for the advertised products. The issue, therefore, is whether Revco truthfully and fairly represented the regular prices for these products in the Cleveland area in the period in question.

There are more than 600 drug stores in the greater metropolitan Cleveland area. Most are independents, the only chain drug store operations being Revco (31 stores), The Marshall Drug Company (29), and The Gray Drug Stores, Inc. (22). To prove that the comparative prices advertised by respondent were not in fact regular, prevailing prices in the Cleveland area for the products in question, complaint counsel introduced testimony from nine of Revco's competitors (accounting among them for some 70-75 drug stores and including Revco's two chain store competitors, Marshall and Gray) as to their retail prices for 30 of the advertised products, 20 of which were fair-traded non-prescription items, and the remaining 10 prescription drugs. Their evidence shows with respect to these products that some of Revco's competitors, at least its two chain competitors,<sup>6</sup> were regularly charging prices comparable to those charged

<sup>5</sup> The word "chart" was intended to refer to the so-called Shine charts, a commonly used method in Ohio of computing retail prescription prices.

<sup>6</sup> There is considerable doubt as to the probative value of the testimony of the non-chain retailers. The record indicates that they had neither adequate records nor adequate recollection of the actual prices they charged during the period in which the challenged advertising appeared—that they merely looked at their shelf prices in June 1962, when the Commission's investigator interviewed them, and assumed that the same prices had prevailed earlier. Since the entry of such an aggressive competitor as Revco unquestionably had a large impact on the market, it would be surprising if the same level of prices had in fact prevailed throughout the five-month period. It seems more likely that, during the course of the period, prices were driven down in response to Revco's vigorous competition, and so were substantially lower in June 1962.

Where the respondent in a retail price comparison case introduces in rebuttal to complaint counsel's *prima facie* case evidence that he conducted a careful and thorough investigation, on the basis of which he reasonably believed that his comparative prices were truthful, complaint counsel obviously has a heavier burden to show that those prices were untruthful than where no such rebuttal is made. In the present case complaint counsel introduced probative evidence with respect to only two drug companies, accounting for about 50 out of 600 drug stores in the Cleveland area, and while this evidence may have suggested that Revco's comparative prices might not be regular and prevailing prices, it plainly was not conclusive. When Revco presented substantial evidence indicating that, whatever might be the prices charged by its two chain competitors, most drugs in Cleveland are sold at the comparative prices it advertised, the force of complaint counsel's evidence was largely dissipated. In the present state of the record, it seems more likely than not that while the few chain drug stores in Cleveland may have sold at low regular prices in the relevant period, the vast majority of all the other drug stores, accounting for most of the drug business in Cleveland, sold at the fair trade or chart prices which respondent represented to be the regular retail prices in the price comparisons challenged by complaint counsel.

We repeat that under the old Guides Against Deceptive Pricing, as under the new, it has never been the law that a retail price comparison may be advertised only if all sales of the advertised product in the trade area are made at the higher price. The regular, prevailing, established, or usual and customary price is not necessarily a rigid, undeviating, invariably and universally observed price. Certainly the fact that chain or "discount" drug stores, in an area where the vast majority of the drug stores are independents, do not uniformly sell at high fair trade or chart prices does not mean that the chain or "discount" stores will be deceiving the average consumer in representing that the higher prices charged by most of their competitors are regular and prevailing, not isolated or infrequent, prices. The object of discount sellers like Revco is to undersell regular prices. Unless and until discount selling in a particular area has become so prevalent as to produce a breakdown in the retail price structure (as was the case in *Gimbel Bros., Inc.*, 61 F.T.C. 1051, 1069-70), and what were formerly the regular prices are adhered to by only a few isolated, atypical sellers and are no longer representative of the general price level in the area, retail price comparisons cannot be presumed to be deceptive. On the record as now constituted,

dise) or "chart" prices (in the case of the prescription merchandise; see note 5, *supra*), and that such prices appear to be the prices at which most drug stores in Cleveland regularly sold the products in question during the relevant period. *Cf. Bulova Watch Co., F.T.C. Docket 7583* (decided Feb. 28, 1964) [64 F.T.C. 1054]. Fair trade in Ohio is plainly not a dead letter. The record shows continuous and vigorous efforts by drug suppliers to enforce adherence to fair trade prices under a statute held to be valid by both the Supreme Court of Ohio and the Supreme Court of the United States.<sup>7</sup> With respect to the "chart" prices, the record shows that the smaller druggists (who do 90% of the prescription drug business in Cleveland) generally price according to the Shine charts, and that Revco's comparative prices for prescription drugs were the Shine prices.

We cannot, however, accept the examiner's reasoning that Revco's use of fair trade prices as the basis for its retail price comparisons should not be deemed deceptive because Cleveland drug stores must, as a matter of law, be presumed to have obeyed Ohio's fair trade law and therefore to have adhered to fair trade prices. Any general presumption of obedience to fair trade laws would surely be artificial and unrealistic, since fair trade statutes are often not effectively enforced. There is no privilege to use fair trade prices as a basis for offering bargains to the consumer, if the fair trade price has ceased to be the regular retail price in the community where the advertisement is disseminated. *Cf. Gimbel Bros., Inc., 61 F.T.C. 1051, 1069-70.*

We also reject the reasoning, apparently adopted by the examiner, that the fact that Revco conducted an investigation, and as a result honestly believed that the fair trade and chart prices were the regular retail prices in Cleveland, constitutes an absolute "defense" to the charges of deceptive pricing. As noted earlier, the law applies an objective test to retail price comparisons. A retailer is liable for the deception he creates if in fact his comparative prices do not accurately represent regular retail prices in his trade area. *Cf. Feil v. F.T.C., 285 F. 2d 879, 896* (9th Cir. 1960). "Good faith" requires him to ascertain the truth, by whatever investigation may be appropriate, before making price comparison claims. And where he so ascertains the truth, his claims should not be untruthful or dishonest. Price comparisons that are objectively false or deceptive cannot be defended on an assertion of "good faith" not supported by a responsible effort to determine the actual prices being compared.

<sup>7</sup> *Hudson Distributors, Inc. v. Eli Lilly & Co., Hudson Distributors, Inc. v. Upjohn, 174 Ohio St. 487, 190 N.E. 2d 460* (1963), *aff'd*, 377 U.S. 386.

## II. DECEPTIVE ADVERTISING OF THE "CONSUMER PROTECTIVE INSTITUTE" SEAL OF APPROVAL: THE MERITS

In the early part of 1962 Revco issued and distributed widely in the Cleveland area a 55-page catalogue of drug and related products, which prominently featured advertisements for Revco's own private-brand vitamins. Along with the description of each Revco private-brand vitamin product, there appeared the statement "only Revco vitamins offer this triple guarantee of quality!" Below this was a seal, evidently intended to constitute part of the "triple guarantee," which read "value-proved—consumer tested by Consumer Protective Institute." The seal of Consumer Protective Institute also appeared in advertisements for Revco's private-brand vitamins run in a Detroit newspaper in the early part of 1963. These advertisements also contained the following explanation of the significance of the seal: "Consumer Protective Institute compares Revco prices with competitive brands—assures best value."

The complaint alleges, and the hearing examiner found, that Revco's use of the "Consumer Products Institute" seal constituted a deceptive practice in that it represented falsely that the product had been tested and approved by an independent research or testing organization operating for the benefit of consumers. The basic facts are undisputed. Consumer Protective Institute was created, owned, and controlled by respondent Charles F. Rosen, who at the time served the Doner advertising agency as account executive for the Revco account. As Rosen's counsel puts it, "he [Rosen] in fact was CPI." The Consumer Protective Institute seal was intended by Rosen to certify that a private-brand product (such as Revco's) is equal in quality to a better known advertised brand and, because of its lower price, a superior value for consumers. But, during the brief period of CPI's existence, no effort was made to interest sellers (other than Revco) in CPI's certification service and the CPI seal was never used for any product other than Revco private-brand vitamins.

A number of the contentions vigorously urged by respondents—that Rosen was acting in good faith in creating CPI and in offering the use of its seal to Revco; that Rosen actually satisfied himself, on the basis of probative evidence, that the Revco products met the standard that he had purported to establish for award of the CPI seal; or at least that he intended to so satisfy himself before permitting use of the seal, and was only prevented from doing so by his serious illness—are simply immaterial to the lawfulness under the Federal Trade Commission Act of the use of the CPI seal to adver-

there is inadequate basis for inferring that such a breakdown occurred in Cleveland during the period in question. Accordingly, this part of the complaint must be dismissed for insufficiency of proof. *Cf. City Stores Co.*, 60 F.T.C. 622, 636.

### C. Revco's Detroit Advertising

Also challenged by complaint counsel as allegedly deceptive are certain retail price comparisons made by Revco in an advertisement run in Detroit in February 1963. This ad differs from the earlier Cleveland ads primarily in that what complaint counsel contends are comparative retail prices were in almost every instance designated not by terms such as "retail" or "list," but by terms such as "29¢ size," "69¢ size," etc. The examiner found that the advertised prices were not being charged in a substantial volume of sales in the area, but he declined to find a violation of law, on the ground that this "cent-size" practice was not fairly put in issue by Paragraph 7 of the complaint. Paragraph 7 of the complaint specifies in considerable detail the kind of retail price comparisons being challenged and particular terms denoting comparative pricing claims—"value," "retail," "retail list," "other," and "chart price." It is a close question, but we are inclined to agree with the examiner and Revco that the complaint should not be construed to cover the "cent-size" advertising. Upon examining the complaint in preparation for trial, respondent could reasonably have believed that the Commission had expressly determined not to challenge the "cent-size" type of claim, and concluded that this practice, which on its face purports only to identify the merchandise, is significantly different from the specifically challenged retail price comparisons. Accordingly, while we are clear that the "cent-size" practice is a form of comparative price advertising encompassed by the standards of the Guides, no finding of violation with respect to Revco's use of it will be entered here.

The Detroit ad also included a listing of Kodak products with comparative prices labeled "regular price" and "Revco's everyday low price." The examiner found that "regular" is in substance the same as "retail list," and thus within the scope of the complaint; that the comparison was fictitious under the Guides' standards; but that the one proven violation was *de minimis*. Without necessarily agreeing with the other parts of the examiner's analysis of this question, we agree that it would be inappropriate in the circumstances to enter a cease and desist order on the basis of the single price comparison in this one ad.

Rosen, its advertising agent, and in no respect was the kind of independent and disinterested consumers' organization that many consumers would suppose it to be from its name; and Revco should have known that many consumers would be misled by its use of the CPI seal of approval in its advertising.

#### B. Rosen: The Issue of Abandonment

Respondent Rosen contends that he should be excluded from any cease and desist order respecting the CPI misrepresentations because he has abandoned the challenged practice and does not intend to resume it. The question of whether and in what circumstances abandonment of an unlawful practice without intention to resume may justify the Commission in declining to issue a cease and desist order has been a source of some confusion and misunderstanding on the part of respondents, complaint counsel, and the Commission's hearing examiners. Much of this may stem from the erroneous notion that abandonment of an unlawful practice in good faith prior to issuance of the Commission's complaint (or at some other time) is a defense on the merits in a Commission proceeding. If the Commission has reason to believe that a person or firm "has been" engaged in unlawful conduct and that a proceeding would be in the public interest, it may issue a complaint and, if the allegations of the complaint are proved, a cease and desist order. Federal Trade Commission Act § 5(b), 15 U.S.C. § 45(b). Discontinuance of the unlawful conduct does not cancel out the unlawfulness or preclude entry of an order; it does not render the controversy moot. *F.T.C. v. Goodyear Tire & Rubber Co.*, 304 U.S. 257, 260.

Discontinuance may, however, bear on the appropriate remedy for the unlawful conduct found.<sup>8</sup> The purpose of a cease and desist

<sup>8</sup>The most complete statement on this point is that of the Seventh Circuit in *Eugene Dietzgen Co. v. F.T.C.*, 142 F. 2d. 321, 330-31 (1944):

"The propriety of the order to cease and desist, and the inclusion of a respondent therein must depend on all the facts which include the attitude of respondent towards the proceedings, the sincerity of its practices and professions of desire to respect the law in the future and all other facts. Ordinarily the Commission should enter no order where none is necessary. This practice should include cases where the unfair practice has been discontinued.

"On the other hand, parties who refused to discontinue the practice until proceedings are begun against them and proof of their wrongdoing obtained, occupy no position where they can demand a dismissal. The order to desist deals with the future, and we think it is somewhat a matter of sound discretion to be exercised wisely by the Commission—when it comes to entering its order.

"The object of the proceeding is to *stop* the unfair practice. If the practice has been surely stopped and by the act of the party offending, the object of the proceedings having been attained, no order is necessary, nor should one be entered. If, however, the action of the wrongdoer does not insure a cessation of the practice in the future, the order to desist is appropriate."

tise Revco's products. Regardless of whether Rosen, on the basis of his own examination of the assays of Revco's vitamins and his comparative shopping of other competing products, established to his own satisfaction that Revco's vitamins constituted the best consumer value, Revco's use of the CPI seal plainly involved material misrepresentations.

Suppose that Revco's advertisement had stated the truth about the CPI seal: that all it meant was that one Charles Rosen, an officer of its advertising agency, had determined that Revco vitamins are good values. Obviously, not many consumers would have been persuaded thereby to purchase the advertised products. The ad would have had little, if any, persuasive force beyond the assertion of Revco's own belief in the superiority of its products—for the financial interest of an advertising agency in promoting the sales of its client's product would have been obvious to all. Reference to the seal of approval of Consumer Protective Institute in Revco's advertising was plainly calculated to create the totally false impression that an independent and disinterested organization, devoted to protecting the interest of consumers and not to advancing private business interests, had approved these products. The seller, in other words, "told the public that it could rely on something other than his word concerning \* \* \* the truth of the claim." *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374, 389 (1965). Even though a seller may honestly and reasonably believe that his product can meet the most rigorous standards of comparison, he is not entitled to give his personal judgment or that of his advertising agency—which consumers would, if they were aware of the facts, evaluate and probably discount in the light of his immediate financial interest—the fictitious trappings of an objective and impartial judgment by a consumers' organization. *Cf. Niresk Industries, Inc. v. F.T.C.*, 278 F.2d 337 (7th Cir. 1960).

### III. DECEPTIVE ADVERTISING OF THE CPI SEAL: PARTIES SUBJECT TO THE ORDER

#### A. Revco

Revco unquestionably bears a substantial measure of the responsibility for the misrepresentations involving Consumer Protective Institute. It may be, as Revco suggests, that a seller is not obliged to investigate fully the internal processes whereby an independent organization reaches the conclusion that it can endorse his product. But here there was no independent organization. Revco was fully aware that Consumer Protective Institute was the creature of Charles



a number of years prior to any of the matters dealt with in this proceeding, beginning at a time when Revco operated a mail-order vitamin business rather than retail drug stores. Doner assigned responsibility for the Revco account to respondent Charles Rosen, who had been associated with the agency for about twenty years and had risen to the position of executive vice president. Like the other principal executives of the agency, Rosen was a major stockholder, owning 13% of the outstanding shares. In accordance with the customary operating practices of the agency, Rosen as the account executive had almost complete autonomy in handling the Revco account. No other officer of Doner reviewed Rosen's work or participated in it to any significant extent.

Doner argues first that its lack of responsibility for the CPI misrepresentations is demonstrated by the fact that it played only a minor role in preparing the 1962 catalogue and the 1963 Detroit newspaper advertisement which, so far as the record reveals, were the only Revco material to make use of the CPI seal. It appears that the Doner agency's work on this advertising was limited to designing some art work and laying out the basic format for the comparison between the nationally advertised brand vitamins and the Revco brands. Overall responsibility for production of the catalogue, including the writing of all the detailed copy describing the various vitamin products, was given to Revco's advertising manager, an employee of the company. However, even if we accept completely Doner's statement of its very limited role in producing these two advertising pieces, this does not establish that Rosen's misrepresentations embodied in Revco's advertising of the CPI seal were outside the scope of his functions as Doner's account executive for the Revco account.

The CPI seal was not intended for use only in a single catalogue or a single newspaper advertising, but rather was designed to be an important part of Revco's broad strategy for merchandising its private-brand vitamins. In editions of the Revco catalogue prior to the one that appeared in early 1962, the "triple guarantee of quality" had included the seal of Parents' Magazine, certifying that the vitamins were "commended by the Consumer Service Bureau of Parents' Magazine as advertised therein." Rosen concluded that all the existing seals of approval, such as those of Parents' Magazine and Good Housekeeping Magazine, were inadequate in that they attested only to the quality of the product and did not offer the consumer any assurance of the product's value in relation to its price. We are persuaded that devising the claim that an independent

order is to prevent the recurrence of unlawful conduct. If the circumstances of a respondent's abandonment of the challenged practice are such that there appears to be no likelihood of its resumption, entry of a cease and desist order is not necessary in the public interest and the Commission may, in the exercise of its administrative discretion, dismiss the complaint. See, e.g., *Jacoby-Bender, Inc.*, F.T.C. Docket 8587 (decided February 11, 1965) [p. 106 herein]. Or, discontinuance or a promise of discontinuance may in some circumstances warrant entry of a declaratory rather than a cease and desist order. See, e.g., *Atlantic Products Corp.*, F.T.C. Docket 8513 (Final Order, January 26, 1965) [p. 84 herein].

An argument based on respondent's discontinuance or willingness to discontinue the unlawful practice is, at all events, one properly addressed to the discretion of the Commission in fashioning flexible and effective relief. It is not relevant to the lawfulness *vel non* of a challenged practice, and it is not, we emphasize, a defense on the merits. In the present case, while respondent Rosen has abandoned the specific device found to be deceptive, *i.e.*, Consumer Protective Institute, we are not persuaded that the likelihood of his resuming the deceptive practice in the same or a slightly different form, unless enjoined, is so slight or remote that he should not be included in the cease and desist order we are entering.

### C. The Advertising Agency

We consider next the question whether the respondent advertising agency, W. B. Doner & Company, Revco's agency and Rosen's employer during the period in question, bears any responsibility for the misrepresentations involving Consumer Protective Institute and, if so, whether Doner should be included in the cease and desist order. It is established that an advertising agency is liable under the Federal Trade Commission Act if it participates in the deceptive practice. See *Carter Products, Inc. v. F.T.C.* 323 F. 2d 523, 534 (5th Cir. 1963); *Colgate-Palmolive Co. v. F.T.C.*, 326 F. 2d 517, 523-24 (1st Cir. 1963), *reversed on other grounds*, 380 U.S. 374 (1965). Doner contends, however, that Consumer Protective Institute was a purely personal business venture of Rosen's, entirely unrelated to his duties on its behalf, and that it cannot justly be held responsible for actions that were in no respect intended to further its interests or accrue to its benefit.

Most of the relevant facts are not seriously disputed. Doner is a medium-sized advertising agency maintaining its principal offices in Detroit. It was engaged to perform advertising services for Revco

hundred dollars short of covering his expenses in the project. While the parties stipulated that "no benefit, financial or otherwise, from the existence or operation of CPI accrued to respondent Doner," it is equally plain that no financial benefit accrued to Rosen either. Some time after becoming aware that the Federal Trade Commission was conducting an investigation of Revco's advertising, Rosen had CPI formally established as a corporation. He was the sole owner; he and several relatives were the only officers; and the corporate papers list Rosen's residence in Detroit as the principal office of the corporation. We think that the evidence relating to the incorporation of CPI, coming when it did, does not establish that CPI was an independent venture of Rosen's unrelated to his duties as an account executive for Doner assigned to the Revco account.

The evidence as a whole shows that Rosen, in devising for use in Revco's advertising the claim that CPI had awarded Revco a seal, intended primarily to advance the interests of his client Revco. Even if Rosen also intended at some future time to offer a similar endorsement service to other advertisers as part of a business venture of his own, for which Doner could not be held responsible, such additional intention would not alter Doner's responsibility for misrepresentations devised by its executive Rosen on behalf of Revco, its client.

Doner argues finally that even if it shared some responsibility in the violation of Section 5 of the Federal Trade Commission Act which arose from Revco's use of the CPI seal, no order should be entered against it because of certain subsequent occurrences which have, in its view, mooted the issue. To the extent that Doner relies on Rosen's recent statement of intention to abandon CPI completely, to wind up its corporate existence, and not to resume any future activity in connection with it, our disposition of Rosen's own claim of mootness, see p. 1253, *supra*, is equally applicable here. Doner also suggests that the issue is moot for the further reason that Rosen has resigned as an officer of Doner, that Doner has no intention ever to resume any association with Rosen, and that negotiations are now under way to purchase the entirety of Rosen's shareholdings in Doner. Again, for the reasons set forth above with respect to Rosen's claim, we are of the view that the question here, properly regarded, is not one of mootness at all, but rather whether in the exercise of the Commission's informed judgment and responsible discretion issuance of an order is warranted in the public interest to assure that the illegal practices, in which Doner participated, are halted and not resumed. While Rosen was undoubtedly the primary motivating force in the

organization had attested to the good value of Revco's vitamin products, representing as it did a major decision on advertising strategy, was within the scope of the Doner agency's responsibilities on behalf of Revco even though the details of producing a catalogue may not have been.

The Doner agency's role in developing the broad themes of Revco's vitamin advertisements is most clearly illustrated by a series of radio commercials which were, without question, prepared solely by the agency. It is noteworthy that at least one of the series expressly relied upon the CPI seal—stating that Revco vitamins “bear the Consumer Tested ‘Seal of Value’”—as support for the basic claim that the Revco products were comparable in quality to nationally advertised brands, but far lower in cost.<sup>9</sup>

We conclude that the misrepresentations about CPI that were developed by Rosen for use in Revco advertising arose out of his performance of his regular duties as account executive for the Doner agency, and that Doner must therefore be deemed to have participated in the deceptive practice. Doner appears to argue that, nonetheless, it cannot be held responsible for the CPI misrepresentations because Rosen intended to operate CPI as his personal business venture, entirely independent of, and unrelated to, his duties as an executive of Doner. This argument is based largely on Rosen's testimony that he had in mind to establish CPI as a permanent organization which, for a fee, would offer a similar service—*i.e.*, certifying that private-brand merchandise represents a good value for consumers—to sellers other than Revco.

Whatever Rosen's intentions may have been, CPI was never anything more than an advertising gimmick for the Revco account. As noted earlier, CPI in fact never awarded its seal to any seller other than Revco; nor, so far as the record reveals, did Rosen ever suggest to any other seller the possible availability of the CPI endorsement. Rosen collected only one fee on behalf of CPI—a payment in the amount of \$1,200 from Revco—and he stated that this fell several

<sup>9</sup> The text of the commercial is as follows:

“Have you added up your family vitamin bill lately? No matter what it adds up to, Revco Discount Drug Centers can cut it down by as much as 70 percent. For instance, if your family uses *Squibb ‘Theragran-M’* you may pay as much as 7-89 per hundred. Through Revco you can buy ‘Theragran-M’ for only five dollars, forty-five cents. Better yet, get Revco *Formula 66*—comparable to ‘Theragran-M’—for only three dollars, ninety-seven cents. Imagine! Only 3-97 for Revco, compared to 7-89, the nationally advertised list price for ‘Theragran-M’—Yet, Revco, and only Revco Vitamins bear the Consumer Tested ‘Seal of Value’, Scientific Associates Seal, and unconditional money-back guarantee. So, stop *over-paying* for vitamins. Get all the facts, figures and savings in Revco's *free* Vitamin Discount Catalog at your Revco Discount Drug Center today.

“‘Everyday is savings day on everything at Revco.’” [Emphasis in the original.]

may not in the future wish to accept the representation of sellers of products within the scope of the Commission's order.

#### IV. OTHER ISSUES OF THE CASE

##### A. The Scientific Associates Seal

The catalogues and newspaper advertising for Revco's private-brand vitamins that contained the Consumer Protective Institute seal also included, as another part of the so-called "triple guarantee of quality," a seal bearing the name "Scientific Associates" and the words "research testing" at the top and "quality control" at the bottom. The Detroit newspaper advertising supplement referred to above contained the following explanation of the significance of the "Scientific Associates" seal:

##### QUALITY

Scientific Associates seal warrants Revco products are produced and tested under highest standards of quality control.

The complaint alleges that respondent, by use of this seal and the accompanying explanations, represented that its vitamins "had been tested, assayed, or analyzed quantitatively and/or qualitatively by the said Scientific Associates, Inc., and that the said merchandise met certain minimum standards or had certain qualities or merits." The complaint further alleges that in fact the vitamins were not "tested, assayed, or analyzed by the said Scientific Associates, Inc." The evidence developed during the hearing establishes that Scientific Associates, Inc., is a reputable independent testing and research laboratory and that it was under contract with Revco to make assays and tests of the vitamins produced by Revco's private-brand supplier. The contract was not introduced in evidence but apparently provided for a minimum charge of \$100 per month plus additional charges for assays in excess of some stated number. Revco's president admitted that assays were not conducted by Scientific Associates on each batch of vitamins produced by the private-brand supplier, but the record is unclear as to approximately how many assays were conducted during the relevant periods.

The examiner found that the phrase "quality control" in the Scientific Associates seal constituted in its use by Revco a representation that *all* Revco vitamins were subjected to continuing quality control by Scientific Associates, *i.e.*, that Scientific Associates conducted assays on each batch of vitamins produced. He accordingly found that the use of the seal was false and misleading in a material respect. Revco, on the other hand, now argues that the seal and all

deceptive practices which grew out of the use of the CPI seal, we are unable to conclude that his departure from the Doner agency, in and of itself, is sufficient to assure that similar practices will not be pursued by Doner in the future unless enjoined.

Doner next argues that any order entered against it would have to be limited to its advertising on behalf of Revco (*cf. Carter Products, Inc. v. F.T.C.*, 323 F. 2d 523, 534 (5th Cir. 1963)), and that such an order would be pointless because it has terminated its representation of Revco and has no intention of ever resuming such representation. We think the premise of this argument is incorrect. Neither the Commission nor the courts have ruled that a cease and desist order against an advertising agency found to have participated in the deceptive practice must in every case be limited to the agency's activities on behalf of the particular client involved. Such a rule would be inconsistent with the rationale of advertising-agency responsibility set forth in the Commission's decision in *Colgate-Palmolive Co.*, 59 F.T.C. 1452. The Commission analogized the legal status of an advertising agency to that of an officer or employee of a corporation, who may act solely on behalf of and in the name of the corporation, but who may nonetheless be subjected directly to a Commission order under Section 5. 59 F.T.C. at 1471. It has been the Commission's consistent view that such orders need not and ordinarily should not be limited to the officer's or employee's activities on behalf of the particular corporation with which he was associated at the time of violation, but should extend as well to future activities on behalf of any other business entity. See, *e.g.*, *F.T.C. v. Standard Education Society*, 302 U.S. 112.

Nor did the Fifth Circuit in *Carter Products* purport to lay down such a rule. It did no more than "suggest" (323 F. 2d at 534) to the Commission that, in the circumstances of that case, it might be appropriate to limit the order to activities of the advertising agency on behalf of Carter. Although the court did not explain in detail the reasons for its suggestion, it may well have thought that an order of narrow scope in this respect was desirable as a balance to the rather broad substantive scope of the order. In the present case, however, the order to be imposed with respect to the CPI misrepresentations is relatively narrow in substantive scope and precise in content.

Finally, we are unpersuaded by Doner's contention that an order would be pointless because it now represents no clients engaged in the sale of "foods, drugs, cosmetics, or devices" and is unlikely to do so in the future. Although Doner apparently has prepared little consumer-product advertising, we see no basis for supposing that it

The complaint alleged that this and several similar statements constituted a representation by Revco that it operates or controls manufacturing or laboratory facilities whereas in fact it neither controls nor operates any such facilities.

Almost all of the prior Commission cases with respect to false representations of ownership of manufacturing facilities have involved deliberate attempts by sellers to imply that purchasers would enjoy cost savings by dealing directly with the manufacturer. We agree with Revco that no such deliberate purpose is attributable to it. As it suggests, the page of the catalogue devoted to a description of the vitamin manufacturing process was intended to persuade readers not that Revco could produce vitamins cheaply, but that it could produce them well. We think, however, that this page must be considered in the context of the remainder of the catalogue which, as we have noted, strongly develops the theme that Revco's private-brand vitamins are far cheaper than comparable nationally-advertised brands. There would appear to be at least reasonable probability that some readers, examining the catalogue as a whole, would conclude that Revco's ownership of manufacturing facilities is one of the factors that enables it to afford consumers such savings. In order to remedy these misleading implications we think that the order imposed by the examiner is appropriate.

#### C. Testimonials

A Revco advertisement run in a Cleveland newspaper near the end of its first month of operation in Cleveland was devoted almost entirely to brief testimonials from some 23 persons, along with their names and photographs. In the bottom corner appeared the following text:

*... PLUS 575,000 MORE IN THE FIRST FOUR WEEKS! What more can we say? Your friends and neighbors speak for themselves \* \* \* and so do Revco's savings!*

The complaint alleged that the foregoing advertisement constituted the false representation that 575,000 persons had submitted testimonials to Revco. Respondents readily concede that they did not receive such an extraordinary number of testimonials, but say that they never intended to suggest that they had. Revco's president testified that he never imagined that the advertisement would be interpreted in the manner set forth in the complaint and that it was only intended to represent, truthfully, that 575,000 persons had made purchases in Revco stores within the first four weeks of operations. We find this testimony credible. We note, moreover, that the ad

the accompanying explanations of it constituted no more than the representation that Scientific Associates had satisfied itself by appropriate tests that the *manufacturer* of the vitamins maintained adequate systems of quality control and that this could be determined adequately by thorough testing at the outset of production of each particular type of vitamin and by periodic checks thereafter. If this is the proper interpretation of the significance of the seal, the evidence here would not establish that Revco used the seal in a false and misleading manner.

When an advertiser uses the seal of an independent organization in order to represent to the public that such organization has endorsed or approved his product, and when the endorsing organization is not one with which the public can be expected to be familiar, we think that the advertiser has an obligation to explain completely and clearly just what the significance of the endorser's seal is. Revco's use of the Scientific Associates seal, especially in those instances where it provided no accompanying explanation at all, fell considerably short of this standard—the seal of Scientific Associates is not well known and the phrase “quality control” included in it could well confuse or mislead readers. However, we still have considerable doubt whether the construction placed upon the seal and the accompanying explanation by the examiner is one which would have been put upon it by a substantial segment of the consuming public. Since the misrepresentation specified by the examiner is substantially different from the one which was intended to be put in issue by the allegations of the complaint, we have concluded that it would be more appropriate to dismiss this portion of the complaint rather than to resolve, on a record that is inadequate in many respects, close questions as to whether use of the seal had the capacity or tendency to mislead substantial numbers of purchasers.

#### B. Ownership of Manufacturing Facilities

Each of the Revco drug catalogues in connection with its advertising of Revco's private-brand vitamins contained a one-page description of the process by which the vitamins were produced. The text with accompanying pictures was designed to persuade that the vitamins were produced in a modern, well-equipped plant, under thorough and exacting conditions of quality control. One portion of the text contained the following statement:

Reproduced below are illustrations and descriptions of a number of the steps taken in the processing of Revco vitamins *in our laboratories*.  
[Emphasis supplied.]



the Cleveland area as I understand it from a reading of the majority's opinion.

Revco is a discount drug store operation with thirty-one stores in the Cleveland market, and the advertising which is here in dispute was formulated in an attempt to establish its image as a discounter regularly selling drugs and other commodities at lower prices than its competitors. The challenged representations consisted of comparing prices under the designation "retail," "retail list," "value" and "other," with prices under the heading "Revco's everyday low prices." The prescription drugs were advertised by comparing the so-called chart prices with Revco's lower prices. The examiner and the majority found that this advertising constituted a representation that Revco's retail prices were lower than the regular retail prices prevailing in the Cleveland area.

As the majority notes, there are some 600 drug stores in the greater Cleveland area. There are three drug chains in the area, including Revco (thirty-one stores), The Marshall Drug Company (twenty-nine stores) and The Gray Drug Stores, Inc. (twenty-two stores). Complaint counsel introduced testimony from nine of Revco's competitors accounting for some seventy stores that they were charging prices comparable to those charged by Revco and substantially below those advertised by respondents as the regular retail prices of these items. The majority finds that at least Revco's chain competitors were regularly charging prices comparable to those of respondents.

The majority in effect rejects the testimony of the seven non-chain retailers on the question of their credibility, *i.e.*, inadequate records and recollection.<sup>2</sup> The examiner, however, found that in the case of Sherwood Drug Stores its questionnaire was supported by a "wholly unassailable price list for the period involved" and with respect to the other witnesses he found their testimony credible because:

\* \* \* As heretofore noted, the Commission drug store operator witnesses are highly competitive to each other and to Revco. Under these circumstances, their prices both with respect to prescription and non-prescription items cannot be too far out of line with each other, as is evidenced by the fact that the prices shown on the questionnaires of those witnesses who were unable to supply supporting data for their questionnaires closely parallel the prices of Sherwood Drug Stores whose questionnaire was supported by a *wholly unassailable* price list for the period involved in the questionnaire. \* \* \* (Emphasis supplied.) (I.D., p. 1185.)

<sup>2</sup> The hearing examiner, on the other hand, assigned "complete probity to the testimony given in this proceeding by the vice president of Sherwood Drug on the prices charged by that firm in its five drug stores on prescription drugs during the involved five-month period." (I.D., p. 1176.)

1158

## Dissenting Opinion

was run only once. It may be that if respondents had made similar representations on a continuing basis, they would have had an obligation to explain more clearly just what they meant; but we do not think it necessary to enter an order with respect to this single representation.

Commissioner Reilly concurs in the decision except for the holding that respondent advertising agency, W. B. Doner & Company, should be included in the order to cease and desist.

Commissioner MacIntyre dissented as to that portion of the decision relating to fictitious pricing, and has filed a dissenting opinion.

## DISSENTING OPINION

JUNE 28, 1965

BY MACINTYRE, *Commissioner*:

I regret that I cannot join the Majority's lengthy explanation of what the Revised Pricing Guides really mean. I fear that it is more apt to engender confusion than enlightenment. This is unfortunate; such a sincere expenditure of effort deserves a more positive result. However, the fact remains that the Guides are beset by a number of internal inconsistencies which cannot be dispelled by any amount of exposition.

At the outset I must state my disagreement with the Majority's contention that the Revised Guides made no change in the application of the substantive law applicable to the advertising of price comparisons by retailers but merely attempt to explain and elaborate the standards summarily stated in the old Guides.<sup>1</sup> The Majority's contention does not square with the facts. Objective judgement will prevail on this point. As I pointed out when they were first promulgated, the Revised Guides postulated new tests on the legality of pricing advertising which have demanded definition since their issuance on January 8, 1964.

Before turning to the specifics of my objection to the rule enunciated by the majority, however, it may be helpful to state the factual situation underlying respondents' comparative price advertising in

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<sup>1</sup> The substitution of the concept of substantial sales for the standard of usual and customary price has had a crucial impact on the Commission's law enforcement efforts in this field. As one comment has stated, "the 1964 Guides do more than restate existing law," noting further that the most far-reaching changes pertain to Guide III dealing with the advertising of non-retail distributors. Note *FTC Revised Guides Against Deceptive Pricing Limit Manufacturer Liability*, 39 N.Y.U. L. Rev. 884, 885 (1964). In short, while the Commission cannot change the law itself, it certainly can and has changed its application of the law to the area of deceptive pricing.

Dissenting Opinion

67 F.T.C.

tainly this sample, including the other two chain outlets which should be among the high volume outlets in the area, is presumably a representative one. Furthermore, in my opinion the chain stores with fifty outlets would alone constitute a "substantial" segment of the Cleveland drug market. If the majority is in effect holding here that the two chain stores Marshall and Gray are atypical or unrepresentative, that would be an astonishing idea at a time when discount selling is accounting for an annually increasing share of the market.<sup>4</sup>

However, the significance of the Commission decision in this instance lies not so much in the fact that the fictitious pricing charges will be dismissed. The impact of this decision will be far wider. It is another indication that since the rescission of the Pricing Guides of 1958 the Commission simply has not had a workable or understandable rule under which it can proceed to enforce the law in the area of price advertising. This decision makes it clear that the Guides are so loosely worded that it will take an unprecedented number of cases until both the Commission staff and the business community know what the guidelines for truthful price advertising are. In this instance, the confusion inherent in the Guides is compounded because much of the decision seems to be at variance with the apparent meaning of the text of the Revised Guides.

For example, the majority opinion states that the law applies an objective test to retail price comparisons. Perhaps the law does but I cannot reconcile this statement with the dictum of the Guides that:

\* \* \* [The retailer] should be *reasonably certain* that the higher price he advertises does not appreciably exceed the price at which *substantial* sales of the article are being made in the area— \* \* \* (Emphasis supplied.) (Revised Guides, p. 2.)

This is a subjective test, and the test will always remain subjective until the criteria for defining substantial and significant sales in a trade area have been spelled out. This is precisely what the majority has refused to do in this instance, holding that no "exact quantitative measure of substantiality, applicable to all products and markets, is possible." (Majority opinion, p. 1243.) At least under the usual and customary price concept of the 1958 Guides, which meant the majority of sales in a particular trade area, both the Commission and the business community had a rule of thumb to govern their decisions.

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<sup>4</sup> "From 1960 through 1964 discount-store sales have grown an average of 40 percent annually, while total retail volume has gained 19 percent and department store sales gained 15 percent." The New York Times, Sunday, June 13, 1965, p. E7.

The examiner further notes that he invited respondents to subpoena a minimum of 2,500 original prescriptions from these witnesses for use in cross-examination but that the offer was declined. (I.D., p. 1185.)

The examiner concludes:

\* \* \* the prices charged by the nine drug store operator Commission witnesses, representing not fewer than sixty drug stores in the greater Cleveland area, charged prices on the involved ten prescription drug items and twenty non-prescription items during the period in question comparable to those charged by Revco on the same items during the same period under Revco's advertised "everyday prices" and that *none* of these Commission witnesses charged the Revco advertised higher comparative prices on the same items under such designations as "other" and "chart" or "retail," "retail list," and "value." It is also found that these Commission \* \* \* witnesses are in more or less direct competition with each other and with Revco drug stores in the greater Cleveland area \* \* \* and are under the necessity to keep their prices comparable or lose trade. (Emphasis supplied.) (I.D., p. 1186.)

The majority's reasons—contained in a highly speculative footnote—for reversing these detailed findings<sup>3</sup> are flimsy and unpersuasive, particularly when as a practical matter the examiner's findings involve a question of credibility. He should have been affirmed on this point. Under the circumstances, it is ironic that one of the Commissioners in the majority has stated that as a general rule he would accord greater deference to the findings of hearing examiners on disputed issues of fact whose resolution depends on an evaluation of the evidence. (Remarks of Commissioner Elman, "Agency Decision-Making: Adjudication by the Federal Trade Commission," on September 11, 1964, before the Federal Bar Association, p. 7.)

Nevertheless, the majority finds that in a market "seemingly dominated by the independents" it is questionable whether the prices of the chains are likely to be representative. The majority states further in this connection that there is little or no basis for inferring from the prices of Gray and Marshall alone that a "*preponderant or substantial segment*" (emphasis supplied) of the Cleveland retailing community did not charge the comparative prices advertised by the respondents.

The nine Commission witnesses represented seventy-some stores constituting better than 10 percent of the drug outlets in the Cleveland area. In my view, in the light of the examiner's findings, the Commission should have held that Revco's advertised higher price appreciably exceeds "the price at which substantial sales of the article[s] are being made in the area" (Guide II, Revised Guides). Cer-

<sup>3</sup> Majority opinion, p. 1245.

has been read out of the Guides, for, as a practical matter, a finding of fictitious pricing is precluded unless none, or only a minuscule percentage, of the sales in a particular area are at a higher comparative price. That is a stringent standard, indeed.

There is no need to belabor the point. The Guides themselves are ambiguous and this decision, which in certain respects is in seeming conflict with the Guides, has not clarified the situation. There is a real question concerning the utility of Guides or Rules which are not clear on their face. The ambiguous Rule or Guide which can only be construed with certainty after numerous adjudicative decisions interpreting its meaning does not serve the cause of law enforcement. In short, when a Rule or Guide requires as much interpretation or exposition as the Revised Pricing Guides evidently require, then the Commission might profitably consider its revision.<sup>6</sup>

#### FINDINGS OF FACT; CONCLUSIONS; ORDER

##### FINDINGS OF FACT

The Commission adopts the findings of fact contained in the following portions of the hearing examiner's initial decision as its own findings of fact:

Pages 1165-1189 (to the end of the run-over paragraph); 1208 ("5. 'Consumer Protective Institute' Issue")-1214; 1217 ("Scientific Associates, Inc.' Issue") -1219 (to the end of the third paragraph); 1220 (beginning with the paragraph "It will be recalled that Revco") -1221 (to the end of the fourth paragraph); 1223 ("7. 'Manufacturing or Laboratory Facilities' Issue") -1225 (ending with the phrase "employees of Ford Laboratory, Inc. (Tr. 294-298; CX 44.)"); 1226 ("8. '575,000 Testimonials' Issue")-1228 (to the end of the first full paragraph); 1232 ("10. 'Doner and Rosen Responsibility' Issue") -1234 (to the end of the last paragraph); with the exception of the finding that respondent Rosen owned approximately 50 percent of the Doner stock which is rejected).

The Commission's other findings of fact are set forth in the accompanying opinion.

##### CONCLUSIONS

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

<sup>6</sup> In this connection, it is interesting to note that the National Association of Better Business Bureaus, by letter of January 7, 1965, advised the Commission: "We believe that some of the problems which arise with respect to pricing designations and guarantees are due, in part, to the current FTC position on use of the term 'List Price.' We further believe that these problems would be minimized if the Commission reverted to its original position on 'List Price' as set forth in its Pricing Guides dated October 2, 1953." (Emphasis supplied.)

Hearings Relating to the Marketing of Automobile Tires (1965), Record, p. 769.

No such criteria are available now. Admonishing the retailer that he must obtain "the facts" about his competitors' prices cannot make the test under the Guides objective when he is not told under what set of facts a particular pricing claim would be prohibited or permitted.

The decision is also confusing in that it seems to merge the concepts of "usual and customary price" with the concept of "substantial sales." It was my impression that the Revised Guides had been formulated precisely to eliminate the former concept. In this connection, it is interesting to note that the majority's decision states that Guide III is also relevant to the advertising of retail price comparisons. Guide III, with respect to the criterion of substantiality, states in relevant part that:

\* \* \* if the list price is significantly in excess of the highest price at which *substantial* sales in the trade area are made, there is a clear and serious danger of the consumer being misled by an advertised reduction from this price. (Emphasis supplied.) (Revised Guides, p. 4.)<sup>5</sup>

I, at least, have some difficulty in reconciling this rule enunciated in the Guides with the holding in the majority's opinion here that:

\* \* \* Unless and until discount selling in a particular area has become so prevalent as to produce a breakdown in the retail price structure, and what were formerly the regular prices are adhered to by only a few isolated, atypical sellers and are no longer representative of the general price level in the area, retail price comparisons cannot be presumed to be deceptive. \* \* \* (Majority opinion, p. 1248.)

Does the majority here mean that a price cannot be fictitious unless an overwhelming majority of the sales in the trade area in question are below the higher comparative price? Perhaps the majority here is equating "substantial" with "overwhelming" or, conceivably, it is simply eliminating the concept of substantiality which was introduced in the Revised Pricing Guides. If this sentence signifies what it seems to mean, then in effect the word "substantial"

<sup>5</sup> Illustrative of the problems inherent in construing the Guides is the seeming conflict with the immediately preceding sentence:

"\* \* \* [A list price] will not be deemed fictitious if it is the price at which substantial (that is, not isolated or insignificant) sales are made in the advertiser's trade area (the area in which he does business) \* \* \*." (Revised Guides, p. 4.)

It is conceivable that the "list price" might at one and the same time represent substantial sales of the products in question and, conversely, appreciably exceed the price at which substantial sales are made. Should such a situation occur (for example, 20 percent of sales are made at list price in the trade area while 80 percent of the sales in the market were appreciably below the higher comparative prices), then the question of enforcement could conceivably hinge on the particular sentence in the Guides on which reliance is placed.

Order

67 F.T.C.

(1) Represents, through the use or display of any words, emblem, seal, symbol, certification, or otherwise, that merchandise has been approved or endorsed by an independent organization engaged in protecting the interests of consumers or in determining objectively the merits of such merchandise: *Provided*, That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that such representation is truthful in every material respect.

(2) Represents, directly or by implication, that respondents, or any of them, own, operate, or control any manufacturing or laboratory facilities.

B. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations or misrepresentations prohibited in paragraph A. above.

Respondents 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 the order to cease and desist.

## II

Respondent Charles F. Rosen 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 foods, drugs, cosmetics or devices, do forthwith cease and desist from:

A. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents, through the use or display of any words, emblem, seal, symbol, certification, or otherwise, that merchandise has been approved or endorsed by an independent organization engaged in protecting the interests of consumers or in determining objectively the merits of such merchandise: *Provided*, That it shall be a defense in any enforcement proceeding instituted hereunder for respondent to establish that such representation is truthful in every material respect.

B. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing or which is likely to induce, directly

1158

Order

2. Section 5(a)(1) of the Federal Trade Commission Act provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." Section 12(a) of the Act provides: "It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or (2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics."

3. The evidence of record considered as a whole does not establish that respondents have violated Sections 5 or 12 of the Federal Trade Commission Act in their advertising of retail price comparisons.

4. Respondents have engaged in false and misleading advertising in representing that Revco vitamins have been approved or endorsed by "Consumer Protective Institute," in violation of Sections 5 and 12 of the Federal Trade Commission Act.

5. Respondents have engaged in false and misleading advertising in representing that Revco operates or controls manufacturing or laboratory facilities, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

6. Issuance of the following order to cease and desist, with respect to each of the named respondents, is necessary in the public interest to prevent continuation or resumption of the practices found to be in violation of Sections 5 and 12 of the Federal Trade Commission Act.

## ORDER

*It is ordered, That:*

## I

Respondents Revco D. S., Inc., a corporation, and its officers, and Standard Drug Company, a corporation, and its officers, doing business as Revco Discount Drug Centers, or under any other name, and Bernard Shulman, individually and as an officer of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of foods, drugs, cosmetics or devices, do forthwith cease and desist from:

A. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which:



Complaint

67 F.T.C.

Commissioner Reilly concurring in the decision except for the holding that respondent advertising agency, W. B. Doner & Company, should be included in the order to cease and desist. Commissioner MacIntyre dissented as to that portion of the decision relating to fictitious pricing, and has filed a dissenting opinion.

## IN THE MATTER OF

JOHN A. GUZIAK TRADING AS SUPERIOR  
IMPROVEMENT COMPANY

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

*Docket 8614. Complaint, Jan. 20, 1964—Decision, June 28, 1965*

Order requiring a Little Rock, Ark., distributor of aluminum and simulated stone siding materials to cease making deceptive pricing and discount representations, falsely guaranteeing its products, misrepresenting that it is connected with any aluminum manufacturer, and representing to any prospective purchaser that his house will be used as a "model home."

## 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 A. Guziak, an individual, formerly trading through the instrumentality of General Aluminum Company, a corporation, and now trading through the instrumentality of Superior Improvement Company, a corporation, 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 John A. Guziak is an individual formerly trading through the instrumentality of General Aluminum Company, a Tennessee corporation with his principal office and place of business located at 630 Third Avenue, South, in the city of Nashville, State of Tennessee, and now trading through the instrumentality of Superior Improvement Company, an Arkansas corporation, with his principal office and place of business located at 1605 Main Street, in the city of Little Rock, State of Arkansas.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution