

distress merchandise of a supplier or that fur products are are offered for sale at a savings as a result of unusual circumstances.

8. Represents in any manner, contrary to fact, that special price concessions have been obtained from suppliers with respect to any fur products offered for sale.

9. Represents in any manner, contrary to fact, that the furs contained in fur products offered for sale were obtained directly from a supplier of fur pelts or at an auction of fur pelts.

10. Represents in any manner, contrary to fact, that middleman costs have been eliminated with respect to any fur products offered for sale.

11. Misrepresents in any manner the savings available to purchasers of respondents' fur products.

12. Falsely or deceptively represents in any manner that prices of respondents' fur products are reduced.

C. Making claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based.

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

IN THE MATTER OF

JOHN SURREY, LTD., ET AL.

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

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

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

Complaint

67 F.T.C.

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

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that John Surrey, Ltd., a corporation, and Joseph Ross, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

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

Respondent Joseph Ross is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of various articles of merchandise, including such items as visual control boards, typewriters, pens, electric can openers, radios, checkwriters, electra maids, tools, drill bits, and other articles of general merchandise to the consuming public.

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

PAR. 4. In the further course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their said products, the respondents have caused catalogs to be published and distributed by the United States mails to prospective purchasers of

299

Complaint

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PAR. 13. In truth and in fact:

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

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

Initial Decision

67 F.T.C.

PAR. 14. In the further conduct of their business, at all times mentioned herein, respondents have been in substantial competition in commerce, with corporations, firms and individuals in the sale and distribution of visual control boards, typewriters, radios, electric can openers, electra maids, speed drill bits and articles of general merchandise of the same general kind and nature as those sold by respondents.

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

PAR. 16. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

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

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

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

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

The Pleadings

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

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

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

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

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

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

Initial Decision

67 F.T.C.

Preliminary Matters

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

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

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

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

Basis for Decision

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

FINDINGS OF FACT

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

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

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

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

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

Initial Decision

67 F.T.C.

5. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act (respondents' answer, par. 3; Tr. 47-48, 505-512; CX 50 a-j; 25).

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

Visual Control Board for Half the Usual Price!

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

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

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

Consul Lightweight Portable Typewriter

* * * * *

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

Our Clearance Sale Price \$39.95

Plus 10% Fed. Tax

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

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

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

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

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

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

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

ELECTRIC CAN OPENER at an amazing low price.

Advertised in Life \$19.95.

Our Sale Price \$9.95.

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

299

Initial Decision

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

Reg. \$42.50

NOW \$6.75

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

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

NEW TROY ELECTRA-MAID

Reg. \$29.95

Sale Price \$19.95

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

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

Representations of Prior Sales at Higher Prices

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

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

Representations of Higher Trade Area Prices

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

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

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

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

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

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

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

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

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

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

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

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

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

