

Complaint

IN THE MATTER OF
PYRAMID PUBLICATIONS, INC.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d)
OF THE CLAYTON ACT*Docket C-187. Complaint, July 18, 1962—Decision, July 18, 1962*

Consent order requiring a New York City publisher of magazines and paperback books, including "Man's Magazine", to cease discriminating in price in violation of Sec. 2(d) of the Clayton Act by paying promotional allowances to certain retail customers—some of whom operated chain retail outlets in railroad, airport, and bus terminals, and outlets in hotels and office buildings, and others of whom furnished services in connection with the handling of respondent's publications such as taking purchase orders and distributing, billing, and collecting—while not making such payments available on proportionally equal terms to their competitors, including drug chains, grocery chains, and other newsstands.

COMPLAINT

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

PARAGRAPH 1. Respondent Pyramid Publications, Inc. (formerly known as Almat Publishing Corp.), is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 444 Madison Avenue, New York, N.Y. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including magazines and paperback books under copyrighted titles including "Man's Magazine". Respondent's sales of publications during the calendar year 1960 exceeded one million eight hundred thousand dollars.

PAR. 2. Publications published by respondent are distributed by said respondent to customers through its national distributors, Publishers Distributing Corporation, hereinafter referred to as PDC, and MacFadden Publications, Inc., hereinafter referred to as MacFadden.

PDC and MacFadden have acted and are now acting as national distributors for the publications of several independent publishers including respondent publisher. PDC and MacFadden, as national distributors of publications published by said respondent and other

independent publishers, have performed and are now performing various services for these publishers. Among the services performed and still being performed by PDC and MacFadden for the benefit of these publishers are the taking of purchase orders and the distributing, billing and collecting for such publications from customers. PDC and MacFadden have also negotiated promotional arrangements with the retail customers of the publishers they represent, on behalf of and with the knowledge and approval of said publishers, including respondent publisher.

In their capacity as national distributors for said respondent, in dealing with the customers of said respondents, PDC and MacFadden served and are now serving as conduits or intermediaries for the sale, distribution and promotion of publications published by said respondent.

PAR. 3. Respondent Pyramid Publications, Inc., through its conduits or intermediaries, PDC and MacFadden, has sold and distributed and now sells and distributes its publications in substantial quantities in commerce, as "commerce" is defined in the Clayton Act, as amended, to competing customers located throughout various States of the United States and in the District of Columbia.

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

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

Customers:	<i>Approximate Amount Received</i>
Union News Co., New York, N.Y.-----	\$3,199.00
Greyhound Post Houses, Forest Park, Ill.-----	1,343.00
ABC Vending Corp., Long Island City, N.Y.-----	88.00

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

As a further example of the practices alleged herein, respondent, during 1960 and the first six months of 1961, paid a total of four hundred and forty dollars for cooperative newspaper advertising to Kroch's & Brentano's of Chicago, Illinois. Such payments were not expressly offered or otherwise made available on proportionally equal terms to all other customers of respondent competing with Kroch's & Brentano's in the purchase, sale and distribution of respondent's publications.

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

DECISION AND ORDER

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

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

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

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

located at 444 Madison Avenue, in the city of New York, State of New York.

ORDER

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

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

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

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

IN THE MATTER OF

LEEDS TRAVELWEAR, INC., ET AL.

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

Docket 8140. Complaint, Oct. 12, 1960—Decision, July 20, 1962

Order requiring a New York City distributor of luggage and golf and bowling bags to cease deceptively pricing its products, by such practices as showing higher amounts than the prevailing retail prices in the trade areas concerned on price tickets on golf bags sold in department and specialty stores, and

Complaint

in catalog sheets furnished to catalog house customers which carried a "retail" price and a substantially lower "coded" price at which the product was sold. ,

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 Leeds Travelwear, Inc., a corporation, and Irving L. Braverman, 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 Leeds Travelwear, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and place of business located at 185 Madison Avenue, New York, N.Y.

Individual respondent Irving L. Braverman is an officer of the corporate respondent and of its wholly owned subsidiary corporations. He participates in the formulation, direction and control of the acts and practices of said corporate respondent and of its wholly owned subsidiaries. His address is also 185 Madison Avenue, New York, N.Y.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacture, sale and distribution of various types of luggage, golf bags and bowling bags to retail stores and jobbers for resale to the public. Such business is carried on by the respondent corporation and through various wholly owned subsidiary corporations.

In the regular and usual course and conduct of their said business, respondents cause, and have caused, said products, when sold, to be transported to purchasers thereof located in various States of the United States other than the State in which such shipments originate.

Respondents 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. 3. In the course and conduct of their business, said respondents have engaged in the practice of using fictitious retail prices of their said luggage and other products of various types sold under several trade names, including but not limited to the following methods:

The respondents attach, or caused to be attached, price labels or tickets to their luggage or other products thereby representing, directly or by implication, that the price figures so attached are the

regular and usual retail prices for said luggage and other products. Respondents also distribute to jobbers and retailers, who sell by catalog, catalog sheets to be inserted in the catalogs of said jobbers and retailers. Said catalog sheets contain thereon pictures and descriptions of various types of luggage and other products with prices listed in connection therewith as the retail prices thereof. Respondents also distribute their own catalogs to jobbers and retailers, in which retail prices are set out.

Respondents by the aforesaid practices represented, and now represent, directly or by implication, that the price figures so attached and so used are the regular and usual retail prices for said luggage and other products in the trade area or areas where the representations are made; when, in truth and in fact, the said price figures are not the usual and retail prices for said luggage and other products in the trade area or areas where the said representations are made but are fictitious and exaggerated prices.

By such acts and practices respondents place in the hands of retailers and jobbers means and instrumentalities by and through which they may deceive and mislead the purchasing public as to the usual and customary retail prices of said luggage and other products.

PAR. 4. Respondents, in the course and conduct of their business, are in substantial competition in commerce with other corporations, firms and individuals likewise engaged in the sale and distribution of luggage, golf bags and bowling bags.

PAR. 5. The aforesaid acts and practices of respondents had, and now have, the capacity and tendency to mislead and deceive members of the purchasing public with respect to the usual and customary retail prices of their luggage, golf bags and bowling bags and into the purchase of their said products as the result thereof. As a consequence thereof, trade has been unfairly diverted to respondents from their competitors and substantial injury has thereby been done, and is being done, to competition in commerce.

PAR. 6. 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 and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Garland S. Ferguson supporting the complaint.

Mr. Alfred W. Putnam, and *Mr. E. Brooks Keefer, Jr.*, of Philadelphia, Pa., for respondents.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

This proceeding was brought under Section 5 of the Federal Trade Commission Act by the issuance of a complaint on October 12, 1960, charging the corporate respondent and the individual respondent, one of its officials, with unfair acts and practices in the pricing of luggage, golf bags, and bowling bags. Paragraph 3 of the complaint charges specifically that respondents issue catalogs or catalog sheets showing "retail" prices and preticket the products sold to jobbers and retailers by affixing a tag showing "retail" prices. These prices are allegedly fictitious and exaggerated, and are not the usual retail prices in the trade area in which the products are sold. It is further charged that members of the purchasing public tend to be deceived and that trade has been unfairly diverted to respondents from their competitors. The allegations of the complaint containing the specific charge have been placed in issue by the answer, but the formal allegations concerning the identity of the respondents, the character of their business, the existence of jurisdiction because of interstate commerce, and the existence of substantial competition are either admitted in terms or admitted in substance.

Respondents' first line of defense appears to be that unfair acts and practices cannot be established by proof of fictitious pricing where injury to competition is also not established. In respondents' view, such injury cannot be established when all of respondents' competitors engage in pricing practices of the same character. Respondents' reserve lines of defense are: that it has not been proved that prices in the trade area were lower than the preticketed prices, that the Commission's evidence with respect to bowling bags is non-existent and that pertaining to luggage is limited to catalog sales by catalog houses to incidental retail customers. Respondents claim that department store sales of luggage are customarily made at preticketed prices; hence, that any order issued should be limited in scope to the sale of golf bags if any order at all is to be issued.

Hearings were held at the instance of counsel supporting the complaint in Philadelphia, Pa., on February 27 and 28, 1961, and at New York, New York, March 1, 1961. Hearings at respondents' request were held at Washington, D.C., April 24 and 25, 1961; at New York, New York, June 27 and 28, 1961, and at Philadelphia, Pa., August 21, 1961. At the Philadelphia hearing, counsel supporting the complaint called an attorney examiner for the Commission in rebuttal. Proposed findings of fact and conclusions of law were filed September 20, 1961.

Counsel for respondents submitted a motion to dismiss in writing on April 24, 1961, and a substantial brief in support thereof. The matter was argued at the hearing in Washington, D.C. on that date and ruling was reserved. The motion is now denied.

The cooperation of counsel in the authentication of documents and in the stipulation of statistical data was excellent and materially shortened the presentation.

As the evidence developed at the hearings, it became clear that there were in reality two different classes of alleged illegal pricing charges relating to luggage. This circumstance deserves some preliminary discussion.

The first class dealt with luggage sold to catalog houses. This luggage was not preticketed but was advertised in jobbers catalogs (made up with respondents' assistance) which were made available to industrial customers, their employees and to incidental retail customers as well as to smaller retail dealers. These catalogs contained a "retail" price and a lower "coded" price. Merchandise was sold at the coded price to all comers, dealers, industrial customers, employees of industrial customers and some customers who came "right off the street." This luggage was not identical to the "regular" line and was not preticketed.

The second class of luggage was that sold to substantial retailers such as department stores. This luggage was preticketed, and it was also included in a Leeds catalog which showed a "retail" price identical to the preticketed price. Except in a few special cases or where there was a close-out, this luggage was generally sold at the preticketed price.

There was no such differentiation shown in the case of sales of golf bags distributed by Leeds under the Fairway name, all bags were preticketed, and the bags were generally sold or offered for sale at a price lower than the preticketed price which was identical to the catalog "retail" price.

The evidence concerning the trade areas involved also deserves some preliminary discussion. From the sampling of catalog houses called, for example, it would seem that these establishments sell by catalog nationally and also sell at their stores in Philadelphia. The retail trade at the stores is relatively small. These catalog houses have their stores in an area not described as a good retail area but which is within easy walking distance of some of Philadelphia's largest stores. Viewed from the standpoint of the Camden, New Jersey commuter into Philadelphia, his workaday market area includes these stores and the large department stores. Viewed from the department store exec-

utives point of vantage, the market area may extend as far as 100 miles. Viewed from the catalog house, its competition is primarily another catalog house and their trade areas are co-extensive. However, viewed from the point of view of the Commission, which was created to prevent unfair acts and practices affecting commerce, the area would seem to include any point where there are any reasonable number of merchants seeking the same customer's trade, and where, by unfair practices, one merchant could divert trade by false and misleading tactics. Hence, the issues concerning trade areas, while perhaps crucial in other situations, are here of much less significance.

On the basis of the entire record, the hearing examiner makes the following findings of fact, conclusions therefrom, and order. All findings and conclusions not specifically found or concluded in terms or in substance are disallowed as erroneous or immaterial.

FINDINGS OF FACT

1. Respondent, Leeds Travelwear, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and place of business located at 185 Madison Avenue, New York, N.Y.

2. Individual respondent, Irving L. Braverman, is an officer of the corporate respondent and of its wholly owned subsidiary corporations. He participates in the formulation, direction and control of the acts and practices of said corporate respondent and of its wholly owned subsidiaries. His address is also 185 Madison Avenue, New York, N.Y.

3. Respondents are now, and for some time last past, have been engaged in the manufacture, sale and distribution of various types of luggage to jobbers and to various types of retail stores for resale to the public. They also distribute golf bags made to their order to jobbers and to retail stores. Such business is carried on by the respondent corporation and through various wholly owned subsidiary corporations.

In the regular and usual course and conduct of their business, respondents cause, and have caused, said products, when sold, to be transported to purchasers thereof located in various States of the United States other than the State in which such shipments originate.

Respondents 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. During the year 1959, the volume of sales was in excess of seven million dollars, and in 1960 approximately nine million dollars.

Initial Decision

61 F.T.C.

The corporate respondent describes itself as the world's largest manufacturer of zippered luggage.

4. Respondents, in the course and conduct of their business, are in substantial competition in commerce with other corporations, firms and individuals likewise engaged in the sale and distribution of luggage, golf bags and bowling bags.

5. For several years prior to and up to the time of filing of the complaint herein, the corporate respondent (hereinafter sometimes referred to as Leeds) has affixed tickets showing the "retail" price of its regular luggage line, its bowling bags and its golf bags to such products prior to shipment of such products to purchasers for resale. Its promotional and jobbers line of luggage was not preticketed, nor were its lines made up for sale under private label of others.

6. During such period, Leeds has supplied catalog sheets (for jobbers and catalog houses who preferred to compile their own catalogs), material from which catalog sheets could be printed (for jobbers and catalog houses who preferred to print up their own catalogs), and in addition has supplied its own catalogs to many other customers or prospective customers who purchased Leeds' merchandise for resale. In 1959, some 4,000,000 sheets were printed for distribution to 130 to 140 accounts.

7. The catalogs or catalog sheets and material from which catalog sheets could be printed all contained "retail" prices. The "retail" price for each article described in the catalog was identical to the price on the tag affixed to the article by Leeds prior to shipment where such article was preticketed. In addition to the "retail" price, a wholesale price, coded price, or dealer's cost price (hereinafter referred to as "coded" price) was also specified in catalog house catalogs. This "coded" price was less than the "retail" price but greater than the price which Leeds charged its jobber customers and listed on a confidential jobbers price sheet or the confidential store price sheet which was furnished to department stores who handled Leeds' "regular" line.

8. Among Leeds' customers are: catalog houses, discount houses, chain stores, department stores, industrial customers, and specialty stores (sporting goods or luggage). Sales are also made to military and naval Post Exchanges and to surplus stores.

9. Catalog houses are generally in the wholesale business. They are, however, in the retail business to this extent. They sell to industrial customers who do not sell but give away the products as awards or presents, and they also sell to identified employees of industrial

customers. Some catalog houses will sell indiscriminately to anyone who seeks to buy from them. However, indiscriminate retail sales are relatively infrequent and the volume of such sales is small in comparison to sales to dealers and to industrial customers and their employees.

10. A number of catalog houses located in the center of Philadelphia sell to all classes of customers Leeds' luggage (made for jobbers), bowling bags and golf bags at the coded price which is less than the "retail" price.

11. Department stores in Washington, D.C., in the Philadelphia area and in the New York area generally sell Leeds' regular luggage at the preticketed "retail" price except for discontinued, promotional, or irregular items.

12. The price at which sales of Leeds' luggage is made by luggage specialty stores in the New York and Philadelphia areas has not been established. In Washington, D.C., according to uncontradicted testimony, a witness testified that his luggage and gift shop sold Leeds' luggage at the preticketed price.

13. Sporting goods stores, discount houses, and certain department stores in the New York area sell Leeds' products at prices lower than the preticketed prices or catalog "retail" price.

14. The catalog houses located in Philadelphia, whose representatives testified in support of the complaint in this proceeding that sales of Leeds' merchandise were made at retail at less than the "retail" price, purchased approximately \$31,484.69 worth of merchandise in the year 1960, out of total sales in Philadelphia amounting to \$306,154.35. In the preceding year, such accounts purchased \$21,045.83 out of total sales of \$297,261.82. Hence such purchases amounted to approximately seven percent of respondents' sales in Philadelphia in 1959 and ten percent in 1960.

15. The organizations located in the New York area, whose representatives testified in support of the complaint that sales of Leeds' merchandise were made at retail at less than the preticketed price, purchased \$156,041.07 worth of Leeds' merchandise in the calendar year 1960, out of a total of \$675,205.65. The same accounts purchased \$230,445.35 worth of merchandise in the year 1959, out of total sales in New York City of \$1,011,937.66. Hence the sales in New York by such firms for both years were approximately twenty-three percent of the total sales in that area.

16. Certain but not all of respondents' competitors utilized preticketing in the sale of their golf bags and luggage.

17. The presence of the price tickets on merchandise constitutes a representation of the merchant making the sale that such price is the usual and regular price at which he sells the merchandise.

18. The individual respondent and the corporate respondent, because of his knowledge, were aware that merchandise so preticketed was not being sold currently at the preticketed price by merchants who sold it at retail.

19. The respondents preticketed the merchandise at the factory and placed the preticketed article in cartons which in many instances were not opened until they were displayed by the retailer to the customer.

20. This method of preticketing and packing the merchandise had a tendency to insure that the preticketing would not be disturbed until the merchandise reached the hands of the retailer.

21. While pricing practices in the sale of luggage differ from the pricing practices utilized in the sales of sporting goods, respondents' control and method of utilization of preticketing and of catalog preparation showing "retail" prices is substantially the same with respect to both prices in both instances, except that some luggage is not preticketed.

22. No special circumstances other than claimed industry practice have been established indicating reasons why respondents should price sporting goods merchandise in a manner different from luggage.

23. The prices of golf bags in both the Philadelphia area and the New York area were generally lower than the "retail" prices contained in Leeds' catalog and catalog sheets.

24. The prices of Leeds' regular luggage in department stores in the Philadelphia and New York areas were generally the same as the preticketed prices and the "retail" prices contained in the Leeds catalog. The prices of Leeds' jobber luggage in catalog houses in the Philadelphia area were generally substantially below the "retail" prices contained in the material or catalog sheets prepared by Leeds for inclusion in catalog house catalogs.

25. While the services rendered by department stores differ materially from the services rendered by catalog houses to incidental customers, and some of the witnesses from department stores did not regard them as competition, the physical propinquity of the department stores and the catalog houses in the Philadelphia area indicate that certain of the customers are common to both types of establishment.

26. There was no proof of actual divergence of trade.

27. The use of "retail" price in a catalog had a tendency to make the customer believe that he was securing a bargain, not generally

available, when he was permitted to make purchases at the "coded" rather than the "retail" price; although in most instances, where the "coded" prices were made available to customers, the "coded" price was the regular price at which the article was sold by the establishment making the sale.

28. The affixing of tickets listing the "retail" price to merchandise placed in the hands of the distributor who was selling at the "coded" price or the supplying of catalog sheets showing "retail" and coded prices were instrumentalities for misrepresentation.

29. The downtown section of Philadelphia constitutes a competitive area insofar as persons whose offices are located in that area are concerned; hence, customers would tend to go to both department stores and catalog stores in that area. The use of unfair and misleading practices would tend to divert customers from one store to another.

30. Catalog houses customarily sold products at the coded price rather than at the "retail" price.

31. Sale at such coded price in the presence of price tickets or catalog sheets showing the higher "retail" price has a tendency to deceive purchasers unto believing that they are securing a saving from the usual and customary price of the person making the sale or from the usual and customary price at which similar goods are sold in the trade area by merchants of a similar class.

32. There was no saving from the usual and customary prices charged by the catalog house concerned or by other catalog houses in the sale of luggage, all customarily selling to all comers at the "coded" price.

33. The "coded" price, insofar as luggage was concerned, represented a saving from the price usually charged by department stores.

34. The "retail" price for golf bags is an entirely theoretical price at which golf bags were never, or almost never, sold. It was customary to sell golf bags below that price.

35. Respondents ceased preticketing golf bags with "retail" price tags following the commencement of the investigation into this matter, and after the complaint was filed.

36. Other manufacturers of luggage and of golf bags have supplied catalog sheets and material for catalogs to catalog houses and they have also preticketed luggage and golf bags from time to time.

37. Respondent Braverman testified that respondent Leeds attached tickets only to merchandise where "we can influence the moral aspect of the price we put on our merchandise." This indicates that he was aware that the catalog houses were not following the "retail"

prices in their catalogs in making sales at retail. Clearly, however, Braverman was referring to luggage items only as his later testimony showed. The physical evidence and testimony from both Commission and respondents' witnesses demonstrates that Leeds' price tickets were attached to golf bags offered for sale at less than the preticketed price until recently. The attorney examiner who conducted the investigation of this matter testified that Braverman had told him that the prices represented on the price tickets did not represent the usual and regular selling price for the golf bags. The price represented a higher price than the merchandise generally sold for. This practice was also known to Addis, the Eastern Sales Manager of respondent Leeds.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the person of the respondents and of the subject matter of this proceeding. Respondents are engaged in commerce as "commerce" is defined in the Federal Trade Commission Act, and the acts and practices hereinafter referred to take place in commerce within the meaning of such Act. The proceeding is in the public interest.

2. The findings of fact heretofore made have been made on the basis of substantial and reliable evidence.

3. The use by respondents of "retail" prices in preticketing operations and in catalogs where it is known that such prices are not the usual or customary "retail" price is an unfair method of competition in commerce. *The Clinton Watch Company et al. v. F.T.C.*, June 19, 1961 (7th Cir.), (F.T.C. Docket 7434); *Niresk Industries, Inc. v. F.T.C.*, 278 F. 2d 337, 340 (7th Cir. 1960), *cert. denied*, 364 U.S. 883; *Harsam Distributors, Inc. v. F.T.C.*, 263 F. 2d 396, 397 (2d Cir. 1959), and *Consumer Sales Corporation v. F.T.C.*, 198 F. 2d 404 (2d Cir. 1952).

4. The use by respondents of preticketing and the listing of "retail" prices in catalogs, material for catalogs or catalog sheets places in the hands of retailers and catalog houses the means of misleading members of the purchasing public into the erroneous belief that the "retail" price or preticketed price is the price at which purchasers from respondents' customers sell their product and that the purchasing public is realizing a saving. The use of preticketing and the labeling of a "retail" price in catalogs distributed in the circumstances present in this case, are accordingly unfair or deceptive acts or practices in commerce. *Chicago Board Co. v. F.T.C.*, 253 F. 2d 78 (7th Cir. 1958) and *Winsted Hosiery v. F.T.C.*, 258 U.S. 483 (1922).

5. It is unnecessary to establish that there has been any divergence of trade because there is a natural tendency, by reason of the inherent character of respondents' acts and practices, that commerce will be diverted. *F.T.C. v. Winsted Hosiery Co.*, 258 U.S. 483 (1922); *Charles of the Ritz v. F.T.C.*, 143 F. 2d 676 (2d Cir. 1944); *Rudin & Roth et al.*, 53 F.T.C. 207 (1956), and *The Orloff Co., Inc., et al.*, 52 F.T.C. 709 (1956).

6. The fact that others in the industry may be engaged in activities which are substantially similar does not justify respondents' adopting a similar illegal method or practice. *F.T.C. v. A. E. Staley Mfg. Co., et al.*, 324 U.S. 746 (1945) and *International Art Co. et al. v. F.T.C.*, 109 F. 2d 393, *cert. denied*, 310 U.S. 632.

7. The preticketing, showing the "retail" price, has a tendency to mislead the purchaser into believing that the reduced price which he is securing from the catalog house is a reduction from the prevailing price for the product elsewhere in the same trade area, and it is immaterial that in other places and in stores of another character the preticketed price may be charged. *The Baltimore Luggage Company, et al.*, Docket No. 7683, March 15, 1961.

8. It is immaterial that the corporate respondent does not preticket all classes of its merchandise, or that all of its preticketed merchandise is not regularly and customarily sold at less than the preticketed price. It is sufficient to justify issuance of an order that the respondents with knowledge that certain of their dealers or jobbers are utilizing the preticketed merchandise of a particular class in a manner calculated to deceive retail customers into the belief that such retail customers are securing a bargain price not available to all retail customers, continue to supply preticketed merchandise to such dealers or jobbers.

9. It is sufficient to justify the issuance of an order that the respondents, with knowledge that their catalog house customers are selling to retail customers at less than the "retail" price stated in their catalogs continue to supply to such catalog houses catalog sheets and material for catalogs which have been used as instrumentalities tending to mislead retail customers into the mistaken belief that such retail customers are securing a bargain price, when, in fact, they are securing the regular catalog house price.

10. It is not necessary to establish actual sales made to particular customers of the catalog houses; the testimony of proprietors as to the prices charged on sales is adequate for the purpose of establishing such prices.

Initial Decision

61 F.T.C.

11. The cessation of the practice of preticketing golf bags does not constitute abandonment in the circumstances of this proceeding. *F.T.C. v. Wallace*, 75 F. 2d 733, 738 (8th Cir. 1935); *F.T.C. v. Good-year Tire & Rubber*, 304 U.S. 257 (1938); *Hershey Chocolate Corporation v. F.T.C.*, 121 F. 2d 968 (3d Cir. 1941), and *Stanley Laboratories, Inc. v. F.T.C.*, 138 F. 2d 388 (9th Cir. 1943).

12. The doctrine of *de minimis* has no application to this proceeding. *Consumer Sales Corp. v. F.T.C.*, 198 F. 2d 404 (2d Cir. 1952).

13. In the absence of special circumstances justifying different treatment (cf. *Swanee Paper Corporation v. F.T.C.* (2d Cir. June 22, 1961), Matter of Quaker Oats, Docket 8119), an order sufficiently broad to prevent fictitious pricing of all products is proper, even though in its regular line of luggage respondents' preticketing was not utilized for purposes of misleading retailers customers. It is sufficient that preticketing in the golf bag line was used in a manner tending to mislead retail customers, and that respondents assisted in the preparation of catalog house catalogs which also had a tendency to mislead customers into a mistaken belief that they were making savings from the catalog houses' regular retail prices. *F.T.C. v. Rubenoid*, 343 U.S. 470, 473 (1952) and *Niresk Industries et al. v. F.T.C.* 278 F. 2d 337 (7th Cir. 1959).

14. The individual respondent's continuation of the misleading practices for which he had responsibility with knowledge of their misleading character fully justifies the issuance of an order against him personally, as well as in his capacity as an officer of the corporate respondent. *Consumer Sales Corp. v. F.T.C.*, 198 F. 2d 404 (2d Cir. 1952).

ORDER

It is ordered, That Leeds Travelwear, Inc., a corporation, and Irving L. Braverman, 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 and distribution of luggage, golf bags, bowling bags, or any other product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, by means of preticketing or in any other manner, that any amount is the usual and customary retail price of merchandise when such amount is in excess of the price at which said merchandise is usually and customarily sold at retail in the trade area or areas where the representations are made.

2. Furnishing to others any means or instrumentality by or through which the public may be misled as to the usual and customary prices of respondents' merchandise.

3. Putting into operation any plan through the use of which retailers or others may misrepresent the usual and customary retail price of merchandise.

OPINION OF THE COMMISSION

By Dixon, *Commissioner*:

The complaint in this matter charges respondents with misrepresenting retail prices in their sale of luggage, golf bags and bowling bags in violation of Section 5 of the Federal Trade Commission Act. In his initial decision, the hearing examiner found that the allegations of the complaint were sustained by the evidence and ordered respondents to cease and desist from this practice. The matter is before the Commission upon exceptions to the initial decision filed by respondents.

Respondents manufacture and distribute three different lines of luggage, a regular line, a jobber line and a special or so-called "promotional" line. Their golf bags are manufactured for them on a contract basis in substantially the same three separate lines. It is undisputed that luggage and golf bags in their regular line, which is sold to retail outlets such as department stores and chain stores, are preticketed with an amount which purports to be the retail price of the article. Although the hearing examiner concluded that the luggage in respondents' regular line was generally sold at retail at the preticketed price, he found that the generally prevailing prices for golf bags in respondents' regular line were substantially below the prices set forth on the tickets attached to such items. Respondents contend that the evidence does not support this finding.

Six witnesses from New York City testified as to their retail sales of respondents' regular line of golf bags. Without exception, these witnesses stated that they always sell these products to the public at less than the prices set forth on respondents' tickets.

Respondents introduced evidence showing that their sales of golf bags to the six New York witnesses in 1960 amounted to about \$14,000, whereas their total sales of these items in New York City in the same year were about \$75,000. Thus, they argue that the volume of sales by these six witnesses is not sufficient to establish a pattern of retail sales of golf bags below the preticketed price. We think that it is. Moreover, other evidence of record leaves no doubt that the preticketed prices on respondents' golf bags were in excess of the

generally prevailing prices for these items not only in the New York City area but in all trade areas in which these products were sold.

Respondents' own witnesses, testifying as to their experiences in the sale of respondents' golf bags in department and specialty stores in Philadelphia and New York City, stated that they always sold these items at prices lower than the preticketed price. Mr. Addis, respondents' sales manager, acknowledged that this was generally the case in his sales territory which includes New York City, Philadelphia, Baltimore, Washington, D.C., and New Jersey. Moreover, there is evidence in the nature of an admission by individual respondent, Mr. Irving L. Braverman, that the preticketed prices were higher than the prices at which respondents' golf bags were usually and regularly sold. Respondents' argument on this issue must be rejected.

Respondents next argue that no violation of law has been established since the record contains no evidence of actual injury to competition as a result of the preticketing practice. In substance, they contend that since the misrepresentation here involves prices rather than the nature or character of a product, it is incumbent upon counsel supporting the complaint to prove competitive injury. This argument is without merit. As we stated in our opinion in *The Baltimore Luggage* case,¹ a representation that a product is being offered for sale at a reduced price is an important factor in effecting the sale of that product. We think it clear that such a representation may well induce a person to purchase a product. It is well settled that the use of a fictitious and excessive price on a ticket or tag attached to a product has a tendency to deceive the public as to the usual and customary retail price of the product and as to the savings afforded by the purchase thereof.² Section 5 of the Federal Trade Commission Act declares such deceptive practices unlawful without regard to their actual effect on competition. Moreover, the courts have repeatedly held that injury to competition may be inferred from the use of such practices.³ Respondents' further contention that such an inference cannot be made here for the reason that the preticketing practice is generally followed in the golf bag industry is also without substance. This same argument was rejected by the court in the *International Art Co.* case,⁴ wherein it stated that "It is also immaterial that competitors employ the same or similar methods. If such be the case, it

¹ In the Matter of *The Baltimore Luggage Company*, Docket No. 7683 (1961), 296 F. 2d 608 (4th Cir. 1961).

² *The Clinton Watch Company v. Federal Trade Commission*, 291 F. 2d 838 (7th Cir. 1961).

³ *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 483 (1922); *Federal Trade Commission v. Raladam Co.*, 316 U.S. 149 (1942).

⁴ *International Art Co. v. Federal Trade Commission*, 109 F. 2d 393 (7th Cir. 1940).

would afford the basis for an argument that such competitors should be dealt with likewise, not that petitioners should escape."

The evidence clearly establishes that respondents have misrepresented the retail prices of the golf bags in their regular line and by their preticketing practice have placed a means of deception in the hands of their dealers.

We turn next to a consideration of respondents' sales of their jobber line of merchandise. The testimony of respondents' witnesses discloses that those customers which respondents designate as jobbers are principally, if not exclusively, catalog houses. The products in this line, which include luggage, golf bags and bowling bags, have certain differences in construction from those in the regular line and are specially produced exclusively for these jobbers. The catalog house jobbers distribute their catalogs and resell respondents' products, along with those of other manufacturers, to four general classes of purchasers, i.e., industrial accounts which distribute the items as premiums or as incentive awards; individual employees of industrial firms; small retailers, and persons who "just walk in off the street."

Respondents furnish many of their catalog house customers with pages or sheets advertising Leeds' products for insertion in the customers' catalogs. For each item offered on these sheets there is an amount, placed there by respondents, which is designated as the "Retail" price. In addition, respondents set forth a "coded" price for each article. This "coded" price is actually a combination of the identification or stock number of the item with certain price figures. In an example taken from one of respondents' catalog sheets in evidence, the designation "30J1350" in connection with an item means that the identification number is 30J and the price amount is \$13.50. This "coded" price is always substantially lower than the "Retail" price for an item. In the example just given, the advertised "Retail" price is \$22.50. The catalog houses are furnished a confidential price list by respondents and purchase at less than the "coded" price.

In 1960, respondents distributed approximately 2,300,000 insert sheets, advertising all three of their jobber line products, to about 130 catalog house customers throughout the country. The testimony of record discloses that these catalog houses distribute as many as 25,000 catalogs yearly and that all four classes of customers to whom they sell had access to and used these catalogs in making their purchases.

Representatives from six of respondents' catalog house customers located in the city of Philadelphia testified in this proceeding. Five of these six use catalog insert sheets supplied by respondents. It appears from their testimony that the line of luggage which these customers purchase from respondents is not preticketed. However,

one of these witnesses testified that the golf bags which he purchased from respondents were preticketed by respondents with a price which was the same as the "Retail" price given on the catalog insert sheet furnished by respondents for the same item.

It is the testimony of each of the six catalog house witnesses that they always sell the products offered in their catalogs at the "coded" price. Respondents contend, however, that these catalog houses are wholesalers and, therefore, the prices at which they sell are not determinative of retail prices. A review of the testimony of these six witnesses leads to a contrary conclusion. Two of these witnesses testified that approximately fifty per cent of their sales are at retail, a third estimated his volume of retail sales at forty per cent, and of the remaining three, one estimated twenty-five per cent and the other two made no estimate.

A small percentage of the sales which these witnesses classified as being at retail are to that class of customer which they identified as persons who "just walk in off the street." The largest part of their retail sales are to employees of industrial firms. These persons have been issued identification cards by their employers pursuant to an arrangement with the catalog houses. Each such employee is thereby entitled to make individual purchases for his own use directly from the catalog house. The fact that such a person is required to have a means of identification in order to make the purchase obviously does not mean that such a sale is not a retail, as respondents seem to argue.

As we have previously noted, the catalog houses in addition to their retail sales, sell to industrial concerns and to small dealers. This, however, constitutes only a small percentage of their over-all sales, estimated by one witness as ranging from twelve per cent to eighteen per cent of his sales. Thus, the fact that there is no evidence in this record from which it can be determined whether or not these dealers resell at the "Retail" prices represented on respondents' catalog sheets is immaterial.

In contrast with their volume of sales to dealers, all six witnesses testified that a substantial portion of their total sales are made to industrial accounts for use as premiums or as incentive awards. As to these sales, respondents strongly urge that they are wholesale transactions, citing in support of their argument the court's definition of a wholesaler in the *L. & C. Mayers* case.⁵ This argument likewise is

⁵ "A wholesaler * * * is one who sells to the trade for resale and seldom, if ever, to the purchasing public, with the exception that sales to industrial concerns, public utilities, banks, and other similar organizations, which purchase in quantity lots, i.e., simultaneous sales of more than one of a given item, not for resale, but for use by such organizations, are considered as wholesale transactions. (*L. & C. Mayers Co., Inc. v. Federal Trade Commission*, 97 F. 2d 365 (2nd Cir. 1938)).

of no avail to respondents. In our view, it makes no difference whether these sales are treated as wholesale or retail sales. The point at issue here is whether or not the items offered in respondents' catalog sheets which are sold at retail are usually and regularly sold at the represented "Retail" price. Considering the fact that a large percentage of sales by catalog houses are made at retail, and the further fact that all such sales admittedly are made at the "coded" prices, the conclusion is inescapable that the generally prevailing retail price of respondents' catalog house merchandise is substantially less than that represented by respondents on their catalog sheets as the "Retail" price. In this connection, it is to be noted that the individual respondent, Mr. Braverman, acknowledged that respondents have no way of knowing and no way of controlling the ultimate selling price to the public of the merchandise they sell to catalog houses. Be this as it may, it is nevertheless clear that by furnishing insert sheets to the catalog houses, respondents have provided these customers with a means of deceiving the public as to the usual and regular retail price of the line of products which respondents designate as their jobber line. As we stated in the *Rayex* case,⁶ respondents may not so casually and indifferently place a tool of deception at the disposal of their dealers.

The complaint charges that the retail price amounts on respondents' catalog sheets are not the usual and regular prices for the items in the trade area or areas where the representations are made. To sustain this charge, it is not necessary to limit the trading area to the downtown section of Philadelphia, as did the hearing examiner. As we have previously noted, the products which respondents sell to catalog houses differ in construction from those in their regular line and are specially made for the catalog houses. The two lines are sold to entirely different classes of purchasers. The evidence supports a finding that the represented "Retail" prices of respondents' catalog house merchandise were not the usual and regular prices of such merchandise in the Philadelphia trading area and the initial decision will be modified in this respect.

The final issue presented by respondents relates to the scope of the order. They contend that the hearing examiner's order is too broad in that it prohibits price misrepresentation in the sale of all of their products. It is their position that an order limited to the golf bag aspect of their business is adequate to protect the public interest. In view of our finding that in the insert sheets furnished to catalog houses, respondents have misrepresented the retail prices of their lug-

⁶ In the Matter of *Rayex Corporation*, Docket No. 7346 (1962).

gage and bowling bags as well as their golf bags, this argument must be rejected.

Respondents in this case are shown to have engaged in the unfair trade practice of price misrepresentation, thereby placing a means of deception in the hands of others. Specifically, respondents have misrepresented the usual and regular retail price of the golf bags in their regular line and the golf bags, luggage and bowling bags in the line which they sell to catalog houses. It is settled law that where a respondent has been shown to have engaged in an illegal practice in the sale of one product, the Commission may prohibit the future use of that practice in the sale of all of the respondent's products.⁷ We think that such a remedy is appropriate and necessary here. We recognize, of course, that such an order would encompass respondents' regular line of luggage which is preticketed with a retail price which has not been shown to be deceptive. However, our order is not directed against preticketing in and of itself, but is intended to prevent the use of tickets bearing prices which are in excess of the generally prevailing retail prices of the items. This is the practice which the Commission is authorized to prohibit.⁸ From the standpoint of public interest, having once established that respondents have engaged in that practice, a separate suit should not be necessary should respondents in the future misrepresent the retail price on the tickets attached to the luggage in their regular line.⁹

We have determined that the hearing examiner's order is appropriate in scope. However, we believe that certain revisions in form are necessary to more clearly delineate the practices proscribed. Our order will contain the necessary modifications.

The hearing examiner concluded that respondents knew that their represented retail prices were excessive. While we agree that the evidence supports this conclusion, such knowledge is not necessary in order to establish a violation of Section 5. We have found that both the tickets and the catalog sheets are prepared and furnished by respondents for the purpose of being displayed to members of the purchasing public to induce the purchase of respondents' products. The amounts set forth on the tickets and the amounts designated as "Retail" in the catalog sheets constitute respondents' representation to the public that these are the generally prevailing retail prices for the articles in the trade area or areas where used. Where, as here, such amounts are in excess of the generally prevailing retail prices, the prac-

⁷ *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F. 2d 337 (7th Cir. 1960).

⁸ 15 U.S.C. § 45(b).

⁹ In the Matter of *Colgate-Palmolive Company*, Docket No. 7736 (1961).

tice has a tendency or capacity to deceive. This is the test of legality under Section 5. Knowledge on the part of respondents is not a material consideration under these circumstances.

In view of the foregoing, respondents' exceptions to the initial decision are denied. As modified in accordance with this opinion, the initial decision will be adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon respondents' exceptions to the initial decision and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission having ruled on said exceptions, and having determined that the initial decision should be modified to conform with the views expressed in the accompanying opinion:

It is ordered, That the initial decision be modified by striking therefrom the second sentence of finding number 24 on page 160.

It is further ordered, That the initial decision be modified by striking therefrom finding number 25 on page 160 and substituting the following:

25. Luggage, golf bags and bowling bags are included in respondents' jobber line of merchandise which they sell to catalog houses. The products in this line differ in construction from those in respondents' regular line and are specially made for the catalog houses. The two lines are separate and distinct from each other and are sold by respondents to entirely different classes of customers. A substantial portion of the retail sales of respondents' special line of catalog house merchandise in the Philadelphia area is made by the catalog houses at the "coded" price. The represented retail prices in catalog sheets furnished by respondents to catalog house customers in the Philadelphia area for display to retail purchasers are substantially in excess of the generally prevailing retail prices of the products in that line of merchandise in that area.

It is further ordered, That the initial decision be modified by striking therefrom finding number 29 on page 161 and finding number 33 on page 161 and by renumbering the remaining paragraphs accordingly.

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

It is ordered, That Leeds Travelwear, Inc., a corporation, and Irving L. Braverman, 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 luggage, golf bags, bowling bags, or any other product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. The act or practice of preticketing merchandise at an indicated retail price when the indicated retail price is in excess of the generally prevailing retail price for such merchandise in the trade area or when there is no generally prevailing retail price for such merchandise in the trade area.

2. Supplying to, or placing in the hands of, any distributor, dealer or other purchaser, catalog sheets or other materials which are displayed to the purchasing public and which contain an indicated retail price for respondents' merchandise when the indicated retail price is in excess of the generally prevailing retail price for such merchandise in the trade area or when there is no generally prevailing retail price for such merchandise in the trade area.

3. Furnishing to others any means or instrumentality by or through which the public may be misled as to the generally prevailing retail prices of respondents' merchandise.

4. Putting into operation any plan through the use of which retailers or others may misrepresent the generally prevailing retail price of respondents' merchandise.

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

It is further ordered, That respondents, Leeds Travelwear, Inc., and Irving L. Braverman, 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 contained herein.