

effective June 1, 1962, the initial decision of the hearing examiner did, on the 29th day of July 1963, become the decision of the Commission.

IN THE MATTER OF
THE SESSIONS COMPANY ET AL.

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

Docket 7655. Complaint, Nov. 9, 1959—Decision, Aug. 1, 1963

Order requiring Dallas, Tex., sellers to retailers, jobbers and individual customers of a variety of merchandise including watches, billfolds, jewelry, cameras, small appliances and sporting goods, to cease representing falsely that they sold at wholesale prices by referring to themselves as wholesalers and their

Complaint

63 F.T.C.

prices as wholesale prices in advertising and by use, in their catalog mailed to individuals, of two prices: one a so-called coded selling price stated to be "wholesale" and the other a higher price designated as "retail".

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 The Sessions Company, a corporation, and Hoyt Sessions and Kim Cashion, individually and as officers 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. Corporate respondent The Sessions Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 1800 Good-Latimer Expressway, Dallas, Texas.

Individual respondents Hoyt Sessions and Kim Cashion are officers of said corporation. They formulate, direct and control the policies, acts and practices of the corporate respondent. The address of the individual respondents 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 sale of various articles of merchandise, including such items as watches, billfolds, jewelry, cameras, small appliances, sporting goods and others to retailers, jobbers and individual customers throughout the United States.

Respondents cause, and have caused, their said products, when sold, to be transported from their place of business in the State of Texas to purchasers thereof located in various other States of the United States, and at all times mentioned herein have maintained a course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondents' volume of business in such commerce is, and has been, substantial.

PAR. 3. Respondents, in the course and conduct of their business, are, and have been, engaged in substantial competition in commerce with individuals, corporations, and firms selling similar merchandise in commerce.

PAR. 4. Respondents, in the course and conduct of their business, and for the purpose of inducing the purchase of their products, have advertised the same by means of catalogs and other advertising mat-

333

Complaint

ter circulated by the United States mails in various States and by means of advertisements inserted in newspapers and magazines of general circulation.

PAR. 5. Respondents in all of their said advertising refer to themselves as wholesalers and to their prices for their merchandise as wholesale prices. While respondents do sell to retailers and jobbers, in recent years they have made substantial retail sales to individual consumers, both in Texas and in various other states of the United States.

Among and typical, but not all inclusive, of the statements appearing in respondents' catalog, and in magazine and newspaper advertisements, are the following:

NOW YOU CAN BUY WHOLESALE. INDIVIDUALS, ALL GOVERNMENT EMPLOYEES, FIRMS, UNIONS, ORGANIZATIONS, CHURCHES, AND PROFESSIONAL PEOPLE! LOWEST WHOLESALE "MASS MARKETING" PRICES AT ALL TIMES ON ALL MERCHANDISE!

* * * * *
Your wholesale cost is coded and always follows the letter "C" which is on the same line as retail price.

* * * * *
NO EXTRAS ADDED TO YOUR COST. ALL ITEMS CLEARLY PRICED SHOWING BOTH RETAIL AND YOUR LOW WHOLESALE COST * * *. YOUR WHOLESALE COST IS IN CODE.

PAR. 6. Respondents in referring to the various articles of merchandise, set forth in their catalog which is mailed to individuals, use two prices; one a so-called coded price which is stated to be the wholesale price at which the merchandise is offered for sale, and the other a higher price which is designated as "retail". By means of such pricing method, the aforesaid quoted statements, and others of like import not specifically set out herein, respondents represent, directly or by implication, that they sell all of their merchandise at wholesale prices; that the so-called coded prices, set out in their catalog, at which the merchandise referred to is offered for sale, are wholesale prices; that the prices designated as "retail" in their catalog are the prices at which the merchandise referred to is usually and regularly sold at retail; and that the difference between said prices represent savings from the usual and regular retail prices of said merchandise.

PAR. 7. The aforesaid statements, representations and implications arising therefrom are false, misleading and deceptive. In truth and in fact, respondents do not offer to sell, or sell, many of their articles of merchandise at wholesale prices, but, to the contrary, in excess of wholesale prices. The coded prices of many articles of merchandise set out in respondents' catalog are not wholesale prices but

Initial Decision

63 F.T.C.

are in excess thereof, and the prices designated as "retail" prices for many articles of merchandise are in excess of the prices at which said merchandise is usually and regularly sold at retail. The differences between such prices do not represent savings from the prices at which said merchandise is usually and customarily sold at retail.

PAR. 8. The use by the respondents of the aforementioned false, misleading and deceptive statements and practices has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements were true and into the purchase of substantial quantities of respondents' products because of said mistaken and erroneous belief. As a result thereof, trade in commerce has been, and is being, unfairly diverted to the respondents from their competitors and injury has thereby been, and is being, done to competition in commerce.

PAR. 9. 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. Dan Rogers, of *Thompson, Knight, Wright & Simmons*, Dallas, Tex., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

The complaint herein, issued on November 9, 1959, charges The Sessions Company, a corporation, Hoyt Sessions and Kim Cashion, individually and as officers of said corporation, hereinafter called respondents, with false advertising, in violation of Section 5 of the Federal Trade Commission Act.

Hearings have been held and proposed findings of fact, conclusions of law, and order have been submitted by respective counsel. Subsequent to the filing of proposed findings, upon motion filed by counsel for respondents, the record was reopened for the receipt of additional evidence which had occurred since the conclusion of hearings. After receipt of this evidence, the record was again closed, and the matter is now before the undersigned hearing examiner for initial decision. All proposed findings of fact and conclusions of law not found or concluded herein are denied. Upon the basis of the entire

record, the hearing examiner makes the following findings of fact and conclusions of law, and issues the following order:

FINDINGS OF FACT

1. The Sessions Company is a corporation organized and doing business under the laws of the State of Texas, with its office and principal place of business located at 1800 Good-Latimer Expressway, Dallas, Texas.
2. The individual respondent Hoyt M. Sessions, named in the complaint as Hoyt Sessions, is Chairman of the Board and Executive Officer of said corporation. Mr. Sessions is and has been active in the day-to-day operations and management of the corporate respondent.
3. The individual respondent K. M. Cashion, Jr., named in the complaint as Kim Cashion, is President and Manager of the corporation. Mr. Cashion also has actively participated with Mr. Sessions in the day-to-day operations and management of the corporation. The individual respondents are brothers-in-law. When the corporation was first incorporated in 1957, Mr. Sessions owned 50 percent, the individual respondent Cashion, 10 percent, Mr. Sessions' wife, 30 percent, and Mr. Sessions' father, 10 percent. The only change in the percentage of stock ownership since that time was caused by the death of Mr. Sessions' wife. It is clear from the testimony of Messrs. Sessions and Cashion that these two individual respondents were and have been in active charge of the operations of the corporate respondent, including its advertising, and are responsible for the acts and practices complained about, as hereinafter found.
4. Since its incorporation in 1957, the corporate respondent has been engaged in the sale of a general line of merchandise, including jewelry, watches, cameras, electric appliances, household goods, stoves, refrigerators, toys, sporting goods, leather goods, radios and television receivers, to retailers, jobbers and individual consumers in Dallas, Texas, and other States of the United States. Respondents are and have been engaged in substantial competition in commerce with individuals, corporations, and firms selling similar merchandise in commerce.
5. The evidence shows that The Sessions Company was in operation and distributed a catalog (CX 1) as early as 1955. A catalog (CX 2) was also issued by The Sessions Company in 1956. The evidence does not show whether the business at that time was operated as a partnership, a joint venture, or the exact legal type of ownership. However, in respondents' proposed findings of fact, it

Initial Decision

63 F.T.C.

is stated that The Sessions Company was operated as a partnership until it was incorporated in 1957. In any event, The Sessions Company was in operation at 1800 Good-Latimer Expressway, Dallas, Texas, in 1955, according to the catalog No. 559, issued for the year 1955 (CX 1), prior to its incorporation in 1957. In the early years of its operation, The Sessions Company sold substantial amounts of merchandise to retailers and jobbers, on the one hand, and to individual consumers on the other. However, respondents' selling prices were the same to all purchasers, a so-called "wholesale" price. Commission Exhibits 9A-Q purport to show a breakdown of total sales by The Sessions Company for the years January 1, 1956, through March 31, 1960. The exhibits show the total amount of sales made to retailers and jobbers, as distinguished from individual consumers, both within and outside the State of Texas. These exhibits, as well as the testimony of Messrs. Sessions and Cashion, disclose that respondents' sales of merchandise to purchasers both within and outside the State of Texas in the early years of operation were substantial. However, since 1959, the sales by The Sessions Company to purchasers located outside the State of Texas have diminished until, at the time of hearings, the larger percentage of sales were made over-the-counter in respondents' showroom in Dallas to consumer-customers located within the State of Texas. Messrs. Session and Cahion explained the decrease in sales to purchasers outside the State of Texas as being due to competition from discount houses which had begun business in other States during recent years. Nevertheless, the volume of merchandise continued to be sold and shipped to customers outside the State of Texas, including the New Orleans, Louisiana, trade area, is, and has been, substantial. Invoices which reflect sales to individual consumers in the State of Louisiana were offered and received in evidence as CX 40A through 70B, inclusive. Accordingly, it is found that the respondents have maintained a course of trade in commerce as "commerce" is defined in the Federal Trade Commission Act, and that such volume of trade in commerce is and has been substantial.

6. For the purpose of inducing the sale of respondents' merchandise, respondents prepared and distributed through the United States mails, and by other means, a yearly catalog. These catalogs are marked CX 1, 2, 3, 4, 5, 6, 7, and 71, respectively. CX 8 purports to show a breakdown of The Sessions Company catalogs printed and their delivery to persons both within and outside the State of Texas during the years 1956-57, 1957-58, 1958-59, and 1959-60, respectively. This exhibit shows that the 1956-57 catalog (CX 2) and 1957-58 catalogs (CX 3, 4) received the largest printing and

circulation both within and outside the State of Texas. For the period 1956-57, approximately 764,000 copies of that years' catalog were printed, of which number approximately 518,000 copies were distributed within the State of Texas, and approximately 246,000 were mailed to persons outside the State of Texas. For the period 1957-58, 1,000,000 catalogs were printed, of which approximately 616,000 were distributed within the State of Texas, and approximately 384,000 were mailed to persons outside the State of Texas. In 1958-59, 500,000 catalogs were printed, of which approximately 387,000 were distributed within the State of Texas, and approximately 113,000 were mailed to persons outside the State of Texas. Respondents also placed advertising on radio and television stations, in addition to the advertising in its catalogs. Some of the radio and television advertising was received in evidence as CX 14-19, inclusive. It is respondents' representations contained in the catalogs (CX 1, 2, 3, 4, 5, and 6) and the radio and television advertising (CX 14-19) which constitute the basis of the complaint in this proceeding.

7. The corporate respondent's catalogs and broadcasts emphasize that its selling prices for all merchandise were "wholesale" prices. Various exhibits containing some of respondent's advertising copy were received in evidence, including respondent's catalogs, CX 1, 2, 3, 4, 5, 6, and 7, and some of its broadcast scripts, CX 14-19. On the front and back cover of respondent's catalog for 1955, CX 1, are printed the words "WHOLESALE ONLY". On the front and back cover of CX 2, 3, 4, 5, and 6 is the word "WHOLESALE". Some of the representations contained in respondent's catalogs are the following:

NOW YOU CAN BUY WHOLESALE. INDIVIDUALS, ALL GOVERNMENT EMPLOYEES, FIRMS, UNIONS, ORGANIZATIONS, CHURCHES, AND PROFESSIONAL PEOPLE! LOWEST WHOLESALE "MASS MARKETING" PRICES AT ALL TIMES ON ALL MERCHANDISE!

Your wholesale cost is coded and always follows the letter "C" which is on the same line as retail price.

NO EXTRAS ADDED TO YOUR COST. ALL ITEMS CLEARLY PRICED SHOWING BOTH RETAIL AND YOUR WHOLESALE COST * * * YOUR WHOLESALE COST IS IN CODE.

(The above quotations are taken from CX 3, 4, 5, and 6.)

8. The corporate respondent purchases all of the merchandise which it offers for sale either from the manufacturer, a jobber-distributor, or importer. The corporate respondent has made it a practice, when listing the price of merchandise advertised in its catalogs, to use two prices: One, a coded price, which respondents represent to be the "wholesale" cost to the purchaser of the article

advertised for sale, and the other, a higher price, which is designated as "RETAIL". For example, on Page 26 of CX 4, an Argus camera and kit, identified as "A301, Argus C4-35mm Camera Kit", is pictured, followed by a brief description of the camera and kit. Underneath the picture and description of the camera, the two prices are listed as follows: "C7695 * * * RETAIL \$99.50". Mr. Sessions explained respondents' method of catalog pricing and testified that "C7695" represents corporate respondent's price of the camera to the customer-purchaser, to wit, \$76.95 (which respondents represent in their catalogs and radio and television advertising as "wholesale" price); and "RETAIL \$99.50" is the regular retail price of this camera. This method of pricing is also explained in the catalogs. Mr. Sessions testified that he arrived at the "retail" prices listed in his company's catalogs by using the manufacturer's "list" price or suggested list price. If the manufacturer did not suggest a list price for the item, Mr. Sessions arrived at the "retail" price by what the particular merchandise was selling for by his competitors, "what it is normally retailing for in the better stores". Mr. Sessions further testified that, "If there is no other way of setting it up as to the retail price, you would base it on what the item cost. What we paid for the item." It is clear from Mr. Sessions' testimony that the "RETAIL" price shown in the catalogs is not the price the corporate respondent sells the article for. The Sessions Company sells it at a lower, discounted price, listed in the catalog in code.

9. Counsel supporting the complaint offered the testimony of employees of various wholesale and retail stores to show that the prices for particular items of merchandise advertised in respondents' catalogs as "wholesale" prices were not, in fact, wholesale prices for the particular merchandise, and that the prices advertised in said catalogs as "RETAIL" prices for particular items were not the regular retail prices for particular articles or merchandise then prevailing in the Dallas area and the New Orleans, Louisiana, area, respectively. Some of the testimony of some of the witnesses offered by counsel supporting the complaint pertained to certain merchandise advertised in respondents' catalogs which in the opinion of this hearing examiner were not definitely identified as being merchandise identical with and of the same quality as that then being sold in retail stores in Dallas and New Orleans, respectively, about which the witness testified. For instance, an employee in the men's department of a retail store was requested to examine a picture of "Mens' Nylon Stretch Socks" shown in one of respondents' catalogs. The picture and description in the catalog did not

333

Initial Decision

identify the brand name, if any, of the socks advertised, other than the general description "first quality, full fashioned, heavy rib stay-up tops." The witness did not actually see nor examine the socks advertised in respondents' catalog. He only saw the picture and the above quoted brief description of the socks. With this limited information, the witness was not in a position to testify that the socks advertised in respondents' catalog were identical with the socks sold in his store. Another example is the testimony of a retail store employee who was asked to examine the picture and brief description of a one-carat diamond ring or a diamond watch advertised in one of respondents' catalogs. Without actually seeing and examining the ring or diamond watch pictured in the catalog, the witness could not adequately compare the quality of that diamond ring or watch with the quality and prices of one-carat diamond rings or diamond watches sold in the store where the witness was employed. The hearing examiner has not given any probative weight to this type of testimony. However, there is an abundance of testimony by other witnesses concerning various items of merchandise capable of definite identification so that a comparison as to prices can be made. Some of this testimony will now be discussed.

10. Mrs. Iona Buck, a longtime employee of McKesson & Robbins, a wholesale drug company, with an office in Dallas, testified concerning the prices charged by McKesson & Robbins to its retail drug customers for certain items of merchandise sold by McKesson & Robbins during the period 1957-58. Mrs. Buck identified such items as being identical with similar items advertised in respondents' catalogs for the same period of time, 1957-58, but at different prices from those shown in respondents' catalogs. Mrs. Buck testified: In 1957-58, McKesson & Robbins carried in stock a West Bend Bean Pot Set priced and sold to retailers at \$6.43. This same set is pictured on Page 72 of respondents' 1957-58 Mail Order Catalog (CX 4) at the following prices, "C840 * * * RETAIL \$12.95."¹ According to the instructions in the catalog and the testimony of Mr. Sessions, the "C840" is respondents' "wholesale" cost price to the purchaser, or \$8.40, and the "RETAIL \$12.95" was the then

¹ This same bean set is also pictured on Page 72 of respondents' 1957-58 Showroom Catalog (CX 3) at "C740 * * * RETAIL \$12.95." The coded price "C740" is one dollar less than respondents' coded "wholesale" cost price quoted in the 1957-58 Mail Order Catalog (CX 4). Mr. Sessions explained that the higher "wholesale" cost price quoted for some of the articles pictured in their Mail Order Catalogs was due to the fact that corporate respondent paid the shipping charges on all except C.O.D. shipments. Therefore, the "wholesale" cost prices quoted in the Mail Order Catalogs for the heavier or more weighty items were increased so as to include the shipping charges. Thus, the coded wholesale price "C840" quoted in corporate respondent's Mail Order Catalog was \$1.00 higher than the coded wholesale price "C740" quoted in the Showroom Catalog.

Initial Decision

63 F.T.C.

current retail price of this bean pot set. According to the testimony of Mrs. Buck, McKesson & Robbins' "wholesale" price of this bean set was \$6.43, as against respondents' advertised "wholesale" price of \$8.40.

11. Mr. Aaron Eldridge Childers, a buyer for Cullum & Boren, a wholesale jobber of sporting goods and which also operates a retail sporting goods store in Dallas, testified, among other things, to the following: In 1957-58, Cullum & Boren handled a Chrome Universal Vacuum Pitcher Set which they sold to retailers for \$12.60 during that season. In other words, \$12.60 was Cullum & Boren's wholesale price for this pitcher set. This same set is advertised and pictured on Page 83 of respondents' catalogs CX 3 and 4 at the following prices: "C1450 * * * RETAIL \$19.95." Thus, Cullum & Boren's wholesale price was \$12.60 and respondents' advertised "wholesale" price was \$14.50. Mr. Childers also testified that Cullum & Boren sold a toy gun, pictured on Page 65 of CX 3 and 4, identified as "P1020, Mattel Thunderburp", to its retail store customers at \$1.90 each. In other words, \$1.90 was Cullum & Boren's wholesale price. This same gun is pictured on page 65 of respondents' catalogs CX 3 and 4 at the following prices: "C200 * * * RETAIL \$3.00". Mr. Childers further testified that Cullum & Boren handled the identical alarm clock pictured on page 39 of CX 5 and 6, identified as item "8G902, Fortune Electric Alarm", priced in respondents' catalogs at "C525 * * * RETAIL \$6.95." (CX 5 is respondents' 1958-59 Showroom Catalog, and CX 6 is respondents' 1958-59 Mail-Order Catalog.) Cullum & Boren sold this same alarm clock during the period 1958-59 to its retail customers at \$4.57 each. In other words, \$4.57 was Cullum & Boren's wholesale price for this clock.

12. Cullum & Boren also operates a retail sporting goods store in Dallas, in addition to its wholesale-jobber operation. Mr. Childers also testified with respect to Cullum & Boren's retail prices on certain merchandise, in addition to its wholesale prices for the same merchandise. On page 40 of CX 5 and 6, there is pictured, among other things, a tennis racket, identified as item "8S111", Davis Cup, "C1525 * * * RETAIL \$23.00". Mr. Childers testified that Cullum & Boren sold this identical tennis racket to retail stores at a price of \$12.48 each, and to customers in its Dallas retail store at \$14.40 each. In other words, Cullum & Boren's wholesale price on this racket was \$12.48 each, and its retail price was \$14.40. (Cullum & Boren's retail price was 85 cents less than respondents' advertised "wholesale price.") On the same page of respondents' catalog, item "8S162", a Comet, Wright & Ditson Tennis Racket, is priced at "C745 * * *

RETAIL \$10.95". Thus, respondents represented that their price of \$7.45 was the "wholesale" price and \$10.95 was the "retail" price for this tennis racket. Mr. Childers testified that Cullum & Boren sold this identical tennis racket to retail stores at \$6.39 each, and its price to consumer-purchasers in its Dallas retail sporting goods store was \$7.50 each.

13. Mr. Charles F. Pierce, group supervisor and former buyer of heavy housewares and small electrical appliances from October, 1958, to May 9, 1960, at Sanger Brothers, a large department store in Dallas, testified concerning the cost to Sanger Brothers for certain items of merchandise, including mailboxes and coffee makers, purchased from the manufacturer, and Sanger's retail selling price for the same articles. On page 46 of CX 5 and 6, a mailbox, among other merchandise, is pictured and identified as item "8H114, Mail Box, Jumbo size * * * C560 * * * RETAIL \$8.95." Mr. Pierce testified that, during the period 1958-59, Sanger Brothers sold this same mailbox at retail for \$5.99. Sanger purchased this mailbox direct from the manufacturer, Southern Fabricators Corporation, Shreveport, Louisiana, at a wholesale price of \$3.60 each. Mr. Pierce identified another mailbox pictured on the same page of CX 5 and 6, listed as item "8H109, C350 * * * RETAIL \$6.95." Mr. Pierce testified that Sanger Brothers also purchased this mailbox from Southern Fabricators at a wholesale price of \$2.40 each, and that Sanger's retail selling price for the same mailbox was \$3.99 each, during the period 1958-59. Mr. Pierce also testified concerning a coffee maker pictured on page 67 of CX 5 and 6. The coffee maker is described in CX 5 and 6 as item "8F363, West Bend 24-cup Automatic Coffee Maker, C1995 * * * RETAIL \$29.95." Mr. Pierce testified that Sanger's handled this same coffee maker during the period 1958-59, and that Sanger's cost price was \$13.81, and its retail selling price was \$19.90.

14. Mr. Harold Joseph Bourne, a drug buyer at Schwegmann Brothers' Giant Supermarkets, New Orleans, Louisiana, testified that his employer carried in stock and sold the "New Norelco Speed-shaver" identified as item "B126", pictured on page 23 of CX 4 and priced at "C1397 * * * RETAIL \$24.95." Mr. Bourne testified that Schwegmann Brothers sold this same razor during the period 1957-58, at a retail price of \$14.44, and that Schwegmann's cost price for this razor was \$12.86. Mr. Bourne further testified: Schwegmann carried the Remington Rollectric Shaver identified as item "B100", "C1850 * * * RETAIL \$31.50", shown on page 24 of CX 4; that Schwegmann sold this same razor at a retail price of \$19.93 dur-

Initial Decision

63 F.T.C.

ing the period 1957-58, and that the cost to Schwegmann was \$17.33. Mr. Bourne also testified concerning a Norelco Razor shown on page 23 of CX 6, identified as item "8B126 New Norelco Speedshaver," "C1447 * * * RETAIL \$24.95". Mr. Bourne testified that: Schwegmann carried this same razor in stock during the period 1958-59 and sold it to the retail trade at a price of \$13.44; and Schwegmann's cost on this razor was \$12.86 each. Mr. Bourne also testified that Schwegmann's sold the GE portable mixer pictured on page 66 of CX 6, item "8F467", priced at "C1385 * * * RETAIL \$19.95". Mr. Bourne further testified that Schwegmann sold this same mixer at a retail price of \$14.38 during the period 1958-59, and that its cost on this mixer was \$13.07. Mr. Bourne also testified concerning Schwegmann's selling price of the GE Rotisserie Oven, item "8F480", pictured and priced on page 67 of CX 6, at "C6230 * * * RETAIL \$89.95". Mr. Bourne further testified as follows: Schwegmann sold this same oven during the period 1958-59; Schwegmann's cost on this oven was \$58.90, and Schwegmann's sold the oven at a retail price of \$64.79.

15. Employees from other retail stores in Dallas and New Orleans also testified concerning their stores' costs and retail selling prices of various articles of merchandise sold by their stores, which articles of merchandise were identified as being comparable with merchandise advertised and pictured in respondents' catalogs. The testimony of each of these witnesses will not be discussed in detail because, to do so, would unduly prolong the length of this decision. The evidence and testimony which have been detailed and discussed above are sufficient to indicate that respondents' "coded" prices for merchandise which they have advertised and represented in the catalogs and on radio and television stations as being "wholesale" prices, are not, in fact, wholesale prices, but are in excess of the wholesale prices for the particular merchandise advertised. Also, respondents' use of the word "retail" to designate articles of merchandise listed for sale in their catalogs constitutes a representation to the public that these prices are the generally prevailing retail prices for the articles of merchandise in the trade area or areas where the representation is made. *Leeds Travelwear, Inc.*, Docket No. 8410, July 20, 1962 [61 F.T.C. 152]. See also, *In the Matter of Baltimore Luggage Company*, Docket No. 7683 (1961) [58 F.T.C. 451], 296 F. 608 (4th Cir., 1961) [7 S.&D. 251]. However, the evidence shows that the prices advertised in respondents' catalogs as "retail" prices for certain articles of merchandise are, in many instances, in excess of the prices at which said merchandise is usually

and regularly sold at retail in the Dallas, Texas, and New Orleans, Louisiana, trade areas, respectively. Furthermore, the difference between respondents' advertised "wholesale" and "retail" prices do not represent savings from the prices at which said merchandise is usually and customarily sold at retail. Said statements and representations, herein found, are false and misleading, in violation of Section 5 of the Federal Trade Commission Act.

16. Respondents urge, among other things, that they have not distributed any catalogs or other advertising outside the State of Texas since 1959, and that there is no proof in the record that respondents used the term "wholesale" with respect to prices in their catalogs after 1958, when respondents entered into a Stipulation and Agreement with the Federal Trade Commission to cease and desist from using the words "wholesale", "wholesaler", or comparable terminology in their advertising and catalogs; that, since the execution of this Stipulation and Agreement on August 5, 1958, respondents have complied in all respects with this agreement and have discontinued use and reference to the term "wholesale" or "wholesaler" with respect to prices set forth in respondents' catalogs and other advertising, including radio and television broadcasts and, therefore, say respondents, there is a total absence in the record of any evidence to support the charge that respondents falsely represented in their catalogs and advertising that merchandise could be purchased from them at "wholesale" prices. The Stipulation and Agreement above referred to is in evidence as CX 13A-C.

17. In answer to this contention, it is noted that the Stipulation and Agreement does not proscribe respondents' use of the terms "wholesale" or "wholesaler" in their catalogs or other advertising. Under the terms of the Stipulation and Agreement, The Sessions Company agreed to cease and desist from: (1) Representing as the retail or regular price of an article of merchandise any amount which is in excess of the price at which such article was customarily and regularly sold at retail; (2) Comparing its own coded selling prices with quoted "Retail" prices for articles subject to a Federal Excise Tax, without clearly and conspicuously disclosing that such tax is reflected in the latter price and that its coded prices are exclusive of such tax; and (3) Using the unqualified term "gold" or a similar term to describe watchcases or related articles unless they are composed throughout of fine (24-Karat) gold; etc. It is seen, therefore, that respondents' use of the words "wholesale" or "wholesaler" was not the subject of the Stipulation and Agreement entered into in 1958. Also, even if it should be assumed as true, as respond-

Initial Decision

63 F.T.C.

ents contend, that they did discontinue (beginning with their 1959-60 catalog (CX 7)), referring to their coded selling prices as "whole-sale" prices, this did not validate the false representations as to prices contained in their earlier catalogs and broadcasts (CX 1, 2, 3, 4, 5, 6, and CX 14-19) or make them any the less false, misleading and deceptive. Respondents may not, as in *Argus Cameras, Inc.*, Docket 6199 [51 F.T.C. 405], and *Bell & Howell Co.*, Docket 6729 [54 F.T.C. 108], successfully contend that the complaint should be dismissed on the theory that respondents have voluntarily abandoned the practices complained about and will not be resumed in the future because respondents have not shown any unusual circumstances present in this case which would justify dismissal of the complaint.

18. Respondents also argue that they discontinued the distribution of catalogs after CX 7 was distributed in 1959-60 because respondents' mail-order business had ceased to be profitable. Although the evidence indicates that respondents' volume of sales had begun to decline in 1959, nevertheless, respondents continued to issue a catalog after CX 7 was issued in 1959-60. The evidence shows that respondents issued a catalog (CX 71) for the period 1960-61. This line of argument is unavailing. Besides, the complaint is not directed toward respondents' distribution of catalogs. The complaint is directed toward respondents' false and deceptive representations as to the prices of merchandise advertised in their catalogs and on radio and television broadcasts.

19. Respondents also argue that the sales of The Sessions Company are composed almost exclusively of "over-the-counter" sales made in Dallas and, therefore, its trade area is limited to the Dallas trade area and does not include the New Orleans, Louisiana, trade area; therefore, say respondents, the testimony of the employees of the five New Orleans retail firms as to retail prices of merchandise in the New Orleans trade area does not establish the customary and usual retail prices of this merchandise in the Dallas trade area, where The Sessions Company was doing business. This line of argument ignores the facts established in the record that over a period of years, the respondents have distributed a substantial number of their catalogs outside the State of Texas, some, presumably in the State of Louisiana, and have made a substantial number of mail-order sales of merchandise to customers located in New Orleans and other towns in the State of Louisiana. This merchandise was shipped by The Sessions Company from its place of business in Dallas to these customers located in Louisiana. Even disregarding the testimony of the employees of the New Orleans stores as to the regular retail

prices of merchandise which prevailed in the New Orleans trade area, there is still an abundant amount of testimony from employees of Dallas stores with respect to the retail prices of some of the articles of merchandise advertised in respondents' catalogs to establish the allegations in the complaint that many of the prices of merchandise advertised in respondents' catalogs were false and deceptive.

20. The respondents also argue that, despite respondents' affirmative representations in their catalogs as to the retail price for an article of merchandise, such as "RETAIL \$12.50", there is, in fact, no regular and usual retail price for certain specified articles of merchandise listed in respondents' catalog for the Dallas trading area. This is an anomalous argument. It is based on the testimony by Mr. Cashion to the effect that specified articles of merchandise listed in his company's catalog had no usual and regular retail selling prices in the Dallas trading area. Mr. Cashion gave this testimony notwithstanding the listing in each of respondents' catalogs of a "retail" price for each article of merchandise, in addition to the coded "wholesale" price. According to the testimony of Mr. Cashion's partner, the individual respondent Hoyt M. Sessions (Paragraph 8 hereof), the "retail" prices listed in the catalog were either the manufacturer's list price for the merchandise or the price at which the article was selling for by his competitors. If Mr. Cashion's testimony should be taken at face value, then it is clear that the "retail" prices listed in respondents' catalogs for the specific articles referred to by Mr. Cashion in his testimony are false and deceptive because, according to Mr. Cashion, the specified article, as a matter of fact, did not have any regular retail price. Additional contentions are made by respondents, but their merit does not warrant further discussion.

21. The use by the respondents of the false and deceptive statements and representations as found herein have had and now have the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements are true and into the purchase of substantial quantities of respondents' merchandise because of said erroneous and mistaken belief. As a result thereof, trade in commerce has been unfairly diverted to the respondents from their competitors and injury has been done to competition in commerce.

22. After the original closing of the reception of evidence herein and, subsequent to the filing of proposed findings of fact, conclusions of law and order by respective counsel, upon the motion of counsel for respondents, the record of this proceeding was reopened

Initial Decision

63 F.T.C.

for the reception in evidence of a certified copy of the Adjudication of Bankruptcy of The Sessions Company, No. BK-3-63-3, before Elmore Whitehurst, Referee in Bankruptcy, United States District Court for the Northern District of Texas, on January 30, 1963. Since The Sessions Company is now an involuntary bankrupt, no useful purpose would be served in issuing an order against that respondent. However, an order will be directed toward the individual respondents Hoyt M. Sessions and K. M. (Kim) Cashion, Jr., who, the evidence shows, have at all times controlled and directed the acts and practices of the involuntary bankrupt corporate respondent. *Pati-Port, Inc., et al. v. F.T.C.*, 313 F. 2d 103 [7 S.&D. 639 (4th Cir., 1963)].

CONCLUSIONS

The aforesaid acts and practices of respondents, as herein found, were and are 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.

ORDER

It is ordered, That the individual respondents Hoyt M. Sessions and K. M. (Kim) Cashion, Jr., their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) Through the use of the word "wholesale" or any other word or words of similar import, or in any other manner, that any merchandise is offered for sale or sold at wholesale prices unless the price at which it is offered is, in fact, the price at which said merchandise is usually and customarily sold at wholesale, in the trade area or areas in which the representation is made.

(b) That any amount is the wholesale price of an article of merchandise when such amount is in excess of the price at which said merchandise is usually and customarily sold at wholesale, in the trade area in which the representation is made.

(c) That any amount is the usual and customary retail price of merchandise when such amount is in excess of the

Decision and Order

price at which such merchandise is usually and customarily sold at retail in the trade area or areas where the representations are made.

(d) That any saving is afforded in the purchase of merchandise from the usual and customary retail price in the trade area or areas in which the representation is made unless the price at which the merchandise is offered constitutes a reduction from the price at which said merchandise is usually and customarily sold at retail in the trade area or areas where the representation is made.

2. Misrepresenting, in any manner, the amount of savings available to purchasers of respondents' merchandise or the amount by which the price of said merchandise has been reduced from the price at which it is usually and customarily sold at retail in the trade area or areas where the representations are made.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to the corporate respondent The Sessions Company, an involuntary bankrupt.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having been considered by the Commission pursuant to its order of June 19, 1963, placing the case on its docket for review, and the Commission having now determined that the initial decision of the hearing examiner is adequate and makes an appropriate disposition of this proceeding:

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

It is further ordered, That the respondents Hoyt M. Sessions and K. M. (Kim) Cashion, Jr., 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 in the initial decision.

Complaint

63 F.T.C.

IN THE MATTER OF

UNIVERSAL INTERCHANGE, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT*Docket 6938. Complaint, Nov. 8, 1957—Decision, Aug. 2, 1963*

Order requiring eight corporations—with respective offices in Los Angeles, Chicago, Dallas, New York, Boston, Seattle and Denver—jointly engaged in selling advertising in the "U.S. Buyers Digest", published by the first named respondent, and other advertising media, and other services in connection with the sale and purchase of farm and business properties, to cease—in soliciting and collecting substantial sums of money as fees for, the listing of property for sale and advertisements therefor to be published in said bulletin—making false representations concerning clients' opportunities for sales and profits, services afforded, affiliates, success, refunds, terms, etc., as in the order below set out.

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 the corporations and individuals named in the caption hereof, 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. Universal Interchange, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 4477 Hollywood Boulevard, Los Angeles, California. Respondent Theodore M. Bernardi, whose address is 114 East 32nd Street, New York, New York, is president; respondent Maurice Salomon, whose address is 8556 Trumbull Street, Skokie, Illinois, is vice president, and respondent Paul M. Guyer, whose address is 2412 N. Commonwealth, Los Angeles, California, is secretary-treasurer of respondent corporation Universal Interchange, Inc.; respondent United Interchange, Inc., of Illinois is a corporation organized, existing and doing business under and by virtue of the laws of Illinois with its office and principal place of business located at 1 North LaSalle Street, Chicago, Illinois; respondent United Interchange, Inc., of Texas is a corporation, organized, existing and doing business under and by virtue of the laws of Texas, with its office and principal place of business located at 4232 Herschel Avenue,