

Complaint

IN THE MATTER OF

LEONARD MARGOLIS ET AL. TRADING AS
SILVO HARDWARE COMPANY

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

Docket 8561. Complaint, Mar. 14, 1963—Decision, Jan. 24, 1964

Order requiring Philadelphia mail-order distributors of hardware, housewares, typewriters, toys, and other general merchandise, to cease representing falsely in catalogs distributed to prospective purchasers that higher prices quoted in juxtaposition with lower stated code prices were the usual retail prices in all the trade areas in which the catalogs were distributed; and by such statements in catalogs as "wholesalers and distributors," "BUY AT WHOLESALE PRICES," that they sold all their merchandise at wholesale prices.

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 Leonard Margolis and Norton Berger, individually and as copartners trading as Silvo Hardware Company, hereinafter referred to as the 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. Respondents Leonard Margolis and Norton Berger are individuals and copartners trading as Silvo Hardware Company, with their principal office and place of business located at 107-109 Walnut Street in the city of Philadelphia, State of Pennsylvania.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of hardware, housewares, typewriters, toys and other items of general merchandise to the public.

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

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PAR. 4. In the course and conduct of their business the respondents have distributed catalogs through the United States mail to prospective purchasers located outside the State of Pennsylvania. The following statements from the catalogs are typical but not all inclusive:

No. 18900 Perm-Grit Hand Sander—20001-S37 P83.....	\$1. 25
Skill Perma-Grit Hand Sander Sheets—18973-S37 P66.....	\$. 99
No. 503 Skil ¼" Drill—503-S37 P1263-5 lbs.....	\$18. 95
No. 549 Skil ¼" Drill—549-S37 P1997-5 lbs.....	\$29. 95
No. H264 Stanley ⅜ H.P. Router—H264-S20 P4897.....	\$69. 95
No. H85 Stanley 8" Heavy Duty Builders' Saw—H85-S20 H6615-20 lbs.....	\$94. 50
No. 60½ Stanley Block Plane—60½-S19 P420.....	\$6. 25
No. X 226 Stanley "100 Plus" "Zig Zag" Extension Rule—X226-S19 P186.....	\$2. 80
No. 6800 Millers Falls Power Router—6800—M19 P3006.....	\$42. 95
Model K700-11 Shopmate Logger Chain Saw—Power Saw—K700-11-P4 H5332.....	\$79. 98
D-95 Disston Lightweight Straightback Hand Saw—D95-D6 P730....	\$10. 95
D-8 Disston Medium Weight Skew Back Hand Saw—D8-D6 P585..	\$8. 75
No. 602 Stanley Magnetic Upholsterer's Hammer—602-S19 P287.....	\$4. 10
No. 20 Stanley Try Squares—20-6-S19 P197.....	\$2. 82
Model 6T Smith-Corona "Galaxie" Portable Typewriter—6T-S12 H10498.....	\$141. 50
Model 5A Smith-Corona "Sterling" Portable Typewriter—5A-S12 H7795.....	\$104. 50
Model 4Y Smith-Corona "Skyriter" Portable Typewriter—4Y-S12 H6099.....	\$74. 50

Page 2 of the respondents' catalog contains the statement that, "all prices shown in the catalog are retail and your cost is shown in code."

The code used throughout the catalog is explained on page 2 of the catalog with the following example for a Stanley plane adapter kit:

H170-S20 P3098 5 lbs.....	\$44. 25
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"H170-S20" is described as the catalog number; "P", or some other letter, is the shipping key; "3098" is the purchaser's cost, the decimal point to be added by counting off two places from the right; "5 lbs." is the approximate weight of the item; and "\$44.25" is the "retail price established by manufacturer or recommended by us."

PAR 5. Through the use of the aforesaid statements the respondents have represented, directly or indirectly, that the higher stated

prices quoted in Paragraph 4 in juxtaposition with the lower stated code prices are the prices at which the merchandise described in Paragraph 4 is usually and customarily sold in all trade areas to which the catalogs are distributed and that a saving will be made of the difference between the two prices.

PAR. 6. In truth and in fact the higher amounts set out for the items listed in Paragraph 4 are not the prices at which said merchandise is usually and customarily sold in all trade areas to which the catalogs are distributed, but are in excess of the price or prices at which said merchandise is generally sold in some of said trade areas, and purchasers of respondents' merchandise in such trade areas would not realize a saving of the difference between the said higher and lower price amounts.

Therefore, the statements and representations as set forth in Paragraphs 4 and 5 hereof were and are false, misleading and deceptive.

PAR. 7. Through the use of such statements as, "wholesalers and distributors", "you will be able to BUY AT WHOLESALE PRICES", "you write the orders, mail them to us with proper remittance (according to your *wholesale cost*) * * *" and "your confidential wholesale prices are printed in CODE" * * * appearing in their catalogs the respondents have represented directly or indirectly that they sell all of their merchandise at wholesale prices.

PAR. 8. In truth and in fact the respondents do not sell, nor do they offer to sell, all of their merchandise at wholesale prices but, to the contrary, the prices of some of their merchandise are in excess of wholesale prices. Therefore, the statements and representations referred to in Paragraph 7 are false, misleading and deceptive.

PAR. 9. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of articles of merchandise of the same general kind and nature as that sold by respondents.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive

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acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Robert A. Mattina, Mr. Morton Nesmith, supporting the complaint.

Mr. Leonard Margolis, in personam, and by acquiescence and partnership authorization for *Silvo Hardware Company* and *Mr. Norton Berger*, as an individual.

INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER

AUGUST 15, 1963

In a complaint issued March 14, 1963, the respondents Leonard Margolis and Norton Berger, individually and as copartners trading as Silvo Hardware Company, were charged with having engaged in unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, all in violation of Section 5 of the Federal Trade Commission Act. The practices with which this complaint is concerned have to do with alleged representations to prospective customers that the goods or merchandise offered for sale by respondents were being sold at wholesale prices, lower than the retail prices usually and customarily paid for such goods or merchandise in the trade areas in which the customers solicited were located. These allegations resulted in two issues, (1) whether respondents' selling prices actually were *wholesale* prices and (2) whether the prices called "retail" by respondents actually were retail prices in the relevant areas of solicitation.

The respondents (hereafter described as Silvo) operate what has come to be known as a catalog house. Their place of business is 109 Walnut Street in Philadelphia, Pennsylvania. They distribute from 25,000 to 30,000 catalogs annually throughout the United States. In 1962, they did a gross business of approximately \$342,000. During the current year, their business is running about 10% below that (Tr. 32, 35-36). Although, as the printed reproduction of portions of the catalog will show, respondents purport to sell to dealers, actually this is not so. There is nothing in this material which suggests that there is any condition attached to buying other than a minimum order of \$10 and payment with the order. Respondents admit they sell to anybody who submits an order and pays for the goods (Tr. 192-193).

The following are extracts reproduced from Pages 2 and 3 of respondents' catalog (CX-4).*

Significant portions of the foregoing extracts point up both the manner in which the respondents conduct their business and the

* Pictorial extracts are omitted in printing.

practices with which this proceeding is concerned. The recipient of the catalog is referred to as a "dealer" and is welcomed to Silvo's "FAMILY OF DEALERS!". But, as mentioned before, one does not have to be a dealer to buy from Silvo or to buy at the prices at which it sells. This literature imposes no such condition and Margolis admitted as much in his testimony (Tr. p. 193). Respondents, in the material pictured, emphasize it by making clear that catalogs are free and that if the recipient or any of his "friends desire an extra copy of this catalog", all that is necessary to send a postcard to Silvo "and a copy will be sent free of charge". In this material, respondents tell their prospective customers that they are "able to BUY AT WHOLESALE PRICES" and that all that they have to do to buy and receive the merchandise is to "write the orders, mail them to (Silvo) with proper remittance (according to your *wholesale cost*)" and Silvo will "in turn * * * ship (the) order promptly".

These blurbs at the left of the first of the reproduced extracts are implemented by the material at its right. This again emphasizes "Confidential Wholesale Prices". Although the "dealer" pretense is repeated by the remark that the catalog can be shown freely to "Customers", this whole dealer angle, in view of the manner in which respondents conduct their business, is primarily an appeal to the guile of prospective customers. Everybody likes to get a bargain, and, if one can be led to believe that he is getting something cheaper from Silvo than he would have to pay elsewhere, he is more likely to purchase from it. In this manner, whether or not there is a deception, trade is diverted from competitors. If there is a deception, there is a violation of the Act.

To lend enchantment to this catalog method of doing business, a ridiculously simple code is portrayed in the right-hand side portion of the first reproduced extract. Thus, in addition to the text material describing the commodity offered for sale, there are the two black-face (in the body of the catalog) groups of arabic numbers here, "3098" and "\$44.25". The \$44.25 is described by respondents as "Retail Price Estab. by Mfr. or Recommended By Us", and the "3098" code figure discloses the price which the solicited customer is expected to pay. He is told, "Your Cost Point Off Two Decimal Places From the Right". In other words, the sum and substance of the whole business is that respondents represent to prospective customers that they can buy, in this instance, a plane adapter kit for \$30.98 from them, whereas, if the kit were bought at retail, they would have to pay \$44.25. If this were so, customers would be saving \$13.27 by buying from Silvo. To repeat, it is charged that the represented retail price was fictitious in that this was not the

price at which the particular item involved usually was sold in the areas solicited and that the purported "wholesale" price in fact was not a wholesale price.

It is now established law "that the use of the term 'manufacturer's list price' represents to the public that that (is) the price at which the product (is) usually and customarily sold by other stores in the area". *Giant Food, Inc. v. Federal Trade Commission* 322 F. 2d 977, CA-DC, June 13, 1963 [7 S.&D. 710], and cases there cited.

Subject to the right of the respondents to disprove any fact of which official notice was taken, the hearing examiner issued, filed and there was served on respondents, a notice of intention to take official notice as follows:

1. "WHOLESALE" is a word generally used and understood to be used as an adjective to describe the business of a person or firm who, or which, normally sells to other persons or firms who are engaged in the business of buying such goods as are sold for purposes of resale, with the exception, however, that it is sometimes used to describe sales in quantity lots to industrial, commercial, institutional or professional users, although such users do not purchase for resale.
2. "WHOLESALE" is a noun generally used and understood to be used to describe the person or firm which engages in a wholesale business.
3. "RETAIL" is a word generally used and understood to be used as an adjective to describe the business of acquiring goods either by purchase, production or manufacture for the purpose of selling the same, generally, but not necessarily, in small quantities to the ultimate consumer or user thereof.
4. "RETAILER" is a noun generally used and understood to be used by a person or firm engaged in retail business.
5. The foregoing words, when used in any other grammatical form, such as verbs, participles, etc., retain the meanings above ascribed to them.
6. When any of the foregoing words are used in close context with words like "price", "cost", etc., they are understood to mean that the word "price" or "cost", or any such similar word, is the amount which governs or determines the money paid or to be paid in order to purchase or receive the article involved in the transaction or the amount usually demanded as a consideration for selling or delivering such article.
7. An offer for sale of a product to the consuming public which utilizes, in connection with the terms of the offer, an expression or word like or similar to the word "wholesale" is generally understood to mean that the price at which it is so represented is the same as the price regularly paid by retailers for such article; and, consequently, that if the purchaser buys the article at that price, he will save the difference between that price and the amount at which the article offered usually is sold at retail in the trade area, or areas, where the offer is made.
8. An offer for sale of a product to the consuming public which utilizes, in connection with the terms of the offer, an expression or word like or similar to the word "retail" is generally understood to mean that the price at which it is so represented is the same as the price regularly paid by purchasers of such articles at retail; and, consequently, that the difference between that price and any lower price at which the article is offered for sale is the amount that the purchaser will save if he makes the purchase from the

offerer and not in the usual and customary retail manner in the trade area, or areas, where the offer is made.

10. A "standard Metropolitan statistical area", as used in the 1958 Census of Business (of which the hearing examiner also takes official notice), is a trade area as the term "trade area" is used for the purpose of considering and ruling upon retail trade practices by the Federal Trade Commission.

11. The Washington, D.C.-Maryland-Virginia trade area consists of Washington, D.C.; Alexandria and Falls Church cities and Arlington and Fairfax counties, Virginia; and Montgomery and Prince Georges counties, Maryland.

12. The Baltimore, Maryland trade area consists of Baltimore City and Anne Arundel, Baltimore, Carroll and Howard Counties, Maryland.

13. The Richmond, Virginia trade area consists of Richmond city and Chesterfield and Henrico Counties, Virginia.

14. Amounts designated by the terms "Mfg. List", "Mfr. List", "Manufacturer's List Price", "Manufacturer's Suggested List Price", "Retail" and "Retail Price" and words of similar import, when used in conjunction with amounts of money or prices, are representations that the amounts of money are the prices at which the products offered or advertised were or are usually and customarily sold at retail in the recent, regular course of business in the trade area, or areas, in which the goods are being offered for sale.

Because of evidence adduced during the hearing, the hearing examiner now qualifies the definitions governing the use of the word "wholesale" in its various forms and connotations by limiting its *price* significance to single-unit or small quantity sales or purchases. This is because it was developed that in many instances manufacturers or distributors set different wholesale or dealer prices for single-unit or small quantity sales than they set for sales in greater quantities (Tr. pp. 192, 311, 502, 517, RX-2a, 2b). Since respondents' sales are primarily single-unit sales to their customers, the hearing examiner has concluded that, in those cases where a manufacturer or a distributor sets and abides by a single-unit or small quantity price for a particular commodity, that is the price to which reference must be made for the purpose of determining if, in fact, respondents' alleged wholesale or dealer price was fictitious. In all other respects the official notice taken by the hearing examiner has not been made to appear improvident or inapplicable to the facts of this case.

During the course of the hearing, respondents contended that the prices published by them in their catalog, whether referred to as wholesale or as retail, were determined by them primarily after reference to literature distributed by the manufacturers or distributors of the articles offered for sale by them. They said that in such literature, the manufacturers or distributors specified either or both the prices at which the commodities were to be sold to dealers and to the retail trade. They said that where they referred either to a dealer price or a manufacturer's list price, in most cases, they obtained such prices from the literature. There were some exceptions, however

(Tr. pp. 182-185, 252). Where the dealer price was such that they could not make a profit, they increased this somewhat in order to allow a profit, but say that such increase always was to a figure below the so-called "retail" or "manufacturer's list price". Also, they say that in cases where a manufacturer did not publish a suggested list price, they undertook to establish as the so-called "retail price" what they thought was a fair and proper price to be charged at "retail" (Answer and Pretrial Order, Tr. pp. 54-55). This is the background of the phrase, "Recommended By Us", quoted above from the reproduced extract. Counsel supporting the complaint expressly stated that in those cases where a manufacturer actually published a suggested retail price, it was not claimed on behalf of the Commission that in any instance respondents incorrectly quoted that figure (Tr. pp. 181, 561-567). No such issue appears in this proceeding.

It may be observed also that there is nothing in the evidence from which it can be concluded that respondents made any study of prices routinely or usually paid for particular merchandise in any particular trade area before "recommending" a so-called "retail price". As a practical matter, this probably would be impossible because of the number of areas in which they distributed their catalog. Consequently, as a matter of law, unless by accident this so-called "recommended" price happened to be the routine, regular retail price in a particular trade area, the very practice of establishing prices in this manner would have to be condemned.

For the purpose of establishing trade areas to prove the contentions set forth in the complaint (*Baltimore Luggage Company v. Federal Trade Commission*, 296 F. 2d 608, 611), Commission counsel offered in evidence a number of invoices showing actual sales made by respondents in Washington, D.C., Baltimore, Maryland, and Richmond, Virginia (CX-6 to 34, inclusive). While not necessarily controlling on the ultimate decision in this proceeding, these sales included various power and hand tools and household appliances and utensils, and toys. The proof extended beyond these to typewriters and fishing gear. Utilization was made of the testimony of manufacturers' representatives or employees, distributors and wholesalers and retailers showing prices in the Washington, D.C. and Baltimore trade areas, and, in a more general sense, elsewhere. This evidence will be discussed in somewhat greater detail below. It was substantial and sufficient to establish the conclusory allegations set forth in the complaint.

Before setting forth details of the evidence, arguments on behalf of the respondents and some other factors must be considered. When

it was made to appear that some prices actually were different from prices published by respondents, they suggested that the changes might have occurred following the publication of a particular catalog. This was discussed not only at the pretrial conference but also during the hearing (Tr. 318-320). The hearing examiner ruled, and adheres to his ruling, that when an advertiser undertakes to make a representation as to price, he does so at his peril. This is particularly the case in this catalog mail-order business. Respondents issue only one main catalog in a whole year, which is supplemented only by a smaller Spring distribution intended mainly to stimulate business. If the price should change during the year that this catalog is in circulation, such a representation becomes untruthful. The fact that it may be impractical, difficult or too expensive to change the catalog or to recall it is wholly immaterial to whether the representation is deceptive or untruthful.

In considering the issues in this case, the hearing examiner has based no finding of fact or determination on evidence of special sales or one-day sales (Tr. 327-329). On the other hand, the contention on the part of the respondents that the District of Columbia area, which was one of the areas involved in this proceeding, is an area in which "outrageous prices" prevail is ill-founded. Assuming that, from the viewpoint of a businessman, particularly a mail-order merchant, prices in the District of Columbia area are outrageously low, he is not compelled to solicit business in this area. However, if he does so solicit business, he may not adopt unrealistic, so-called "manufacturers' list prices" in a manner resulting in representations that they are the usual retail prices in this area. Similarly, the fact that an article is "footballed", *i.e.*, particularly vulnerable to price cutting for loss-leader or other purposes, is immaterial. Finally, as already indicated above, in determining what is a usual wholesale or dealer price or cost, since the business involved in this case was concerned primarily with single-unit purchases and sales, the hearing examiner has disregarded prices based on or resulting from special quantity discounts, distributorship discounts, advertising allowances, and rebates.

Respondents argue also that no remedial action can be taken against them because there was no proof that substantial quantities of the goods with respect to which the evidence was submitted were sold, and, consequently, no proof of diversion of business from competitors. The Commission may infer that false representations induce customers to buy commodities so represented and thus divert business from competitors. But, more important, "Section 5 of the Federal Trade Commission Act declares such deceptive practices

unlawful without regard to their actual effect on competition." In *re Leeds Travelwear, Inc.*, Docket No. 8140 [61 F.T.C. 152]; *Giant Food, Inc. v. Federal Trade Commission*, 322 F. 2d 977, CA-DC, June 13, 1963 [7 S.&D. 710]; and cases there cited.

NARRATION OF EVIDENCE

Typewriters at Wholesale: A typewriter represented by respondents to be sold to its customers at a wholesale price of \$104.98 or \$108.7 was sold at wholesale in the District of Columbia, regularly and routinely, at prices varying from \$86.10 to \$92.77. Another typewriter represented by the respondents as being sold at wholesale at \$75.21 or \$77.95 was sold at wholesale in the District of Columbia, regularly and routinely, as low as \$63.08 and as high as \$67.83. A third typewriter represented by the respondents as being sold at wholesale at \$58.86 or \$60.99 was sold similarly in the District of Columbia and elsewhere as low as \$48.94 and as high as \$52.62. A fourth typewriter represented by the respondents as being sold at wholesale at \$49.95 was sold similarly at \$43.11 (CX-4, p. 85, CX-5, p. 86, RX-1, RX-2 (c); Tr. pp. 7-29, 286-302, 198-220).

Typewriters at Retail, Washington, D.C. Trade Area and Elsewhere: Respondents represented as the retail price one typewriter at \$141.50 or \$149.27, which typewriter sold, regularly and routinely, as low as \$109.95 and no higher than \$129.50; a second typewriter at \$104.50 or \$124.50, which sold, regularly and routinely, as low as \$89.50 and as high as \$98.88 (CX-4, p. 85, CX-5, p. 86; Tr. pp. 8-29, 198-200, 220, 294, 325-328); a third typewriter at \$79.75, which sold, regularly and routinely, at as low as \$49.95 and as high as \$53.57 (RX-4, p. 85; Tr. 286, 287, 325-328 and CX-36). The manufacturer's distributor of all these typewriters testified that the majority of his dealers in the Washington, D.C. and the Baltimore retail trade areas retail their typewriters at less than the manufacturer's list price. (It is to be recalled that the manufacturer's list price was the price which respondents represented to be the usual or routine retail price.) (Tr. pp. 198-200, 220.) Respondent Margolis also conceded that throughout the United States these typewriters are sold around factory cost price and always lower than the manufacturer's suggested list price (pretrial statement, Tr. pp. 166-177).

Fishing Gear: Testimony as to fishing gear was given by the manufacturer's representative. The following table, together with citations to the record, shows respondents represented retail and wholesale prices and the actual retail and wholesale prices in Delaware, Maryland, Washington, D.C., Virginia, West Virginia, and portions of Ohio and Kentucky:

Decision

Item	CX No.	Page	Silvo code price (wholesale)	Alleged retail price	Record page	Actual wholesale price	Usual retail price
Reel No. 1797	4	97	\$14.97	\$24.95	517, 524, 525, 534, 535	\$12.48	\$18.68-20.06
Reel No. 1775	"	"	11.40	18.95	"	9.48	14.21-15.16
Reel No. 1774	"	"	8.99	14.95	"	7.48	11.21-11.96
Reel No. 1928	"	"	8.10	13.50	"	6.75	10.12-10.80
Reel No. 1821	"	"	5.70	9.50	"	4.75	7.12-7.60
Reel No. 1903	"	"	4.20	6.95	"	3.48	5.21-5.56
Reel No. 2090	"	"	27.00	45.00	"	22.50	33.75-36.00
Rod No. 1563L	"	"	8.97	14.95	"	7.48	11.21-11.96
Rod No. 1451	"	"	11.37	18.95	"	9.48	14.21-15.16
Rod No. 1416	"	"	8.97	14.95	"	7.48	11.21-11.96
Rod No. 1234	"	"	13.77	22.95	"	12.98	18.71-19.96
Rod No. 1010	"	"	6.57	10.95	"	5.48	8.21-8.76

Respondents conceded that this fishing gear regularly sold below the list prices (Tr. pp. 166-178, pretrial statement). The manufacturer's representative stated that his personal observation was that retail selling prices ran from 20 to 25 percent below the published catalog prices (Tr. p. 525).

APPLIANCES IN THE WASHINGTON, D.C. TRADE AREA: A *Rotisserie* was represented to wholesale at \$66.12, but it was bought generally at wholesale at about \$57.68 or less. Two witnesses testified that their wholesale prices were \$62.87 and \$62.97 (CX-4, p. 82; Tr. pp. 309-310, 351-352, 360-362, 407-408, 416). Respondents represented this rotisserie to retail at \$89.95, but it retailed generally at prices running from \$62.87 to as high as \$64.97 (CX-4, p. 82; Tr. pp. 351-352, 360-362, 407-408).

A *Clock* was represented to wholesale at \$4.63, but its wholesale price appeared to be \$3.13 in the District of Columbia. Although it was represented to retail at \$6.95, it was sold in the District of Columbia at \$5.45 (CX-4, p. 82, CX-5, p. 82; Tr. p. 352).

A *Cake Mixing Appliance* was represented to wholesale at \$36.07, whereas, in the District of Columbia, its regular and routine wholesale cost was less than \$32. One distributor did, however, testify that his five or less price was \$35.67. The retail price was represented at \$48.95, whereas, in the District of Columbia, it sold as low as \$31.24 and as high as \$36.97 (CX-4, p. 86; Tr. pp. 311, 352, 360-362, 408, 421-423, 428-433).

A *Hair Dryer* was represented by respondents to sell at wholesale at \$22.37 and to retail at \$31.95. Its routine wholesale cost in the District of Columbia was \$19.95, although one distributor did testify that his five or less price was \$22.37 and another testified that his single unit price was \$21.57. This hair dryer generally sold at retail in the District of Columbia as low as \$22.97 and as high as \$23.47 (CX-4, p. 86; Tr. pp. 311, 353-354, 361-362, 408, 422-423, 428-433 and 502-503).

A *Fruit Juicing Appliance*: Respondents represented this to wholesale at \$13.27 and to retail at \$18.95. Its wholesale price fluctuated from \$7.50 to \$8.75. It retailed generally at \$9.99 (CX-4, p. 86, CX-5, p. 83, CX-37; Tr. pp. 309, 354, 361-362, 408, 422-423).

As to these, the respondents also conceded that they are generally sold below the manufacturer's suggested list price (pretrial statement and Tr. pp. 169-173).

The foregoing sets forth specifically, as to particular items, the prices brought out by the evidence. A similar narration of the other evidence could be made, but this would only make this decision

unwieldy and tedious. Wholesale prices in the Washington, D.C. trade area for pressure pans, timers, can openers, another brand of juicing machine, an ice chopper and a thermometer were brought out in detail. As to these, Silvo's "wholesale" price generally was substantially higher than the usual or routine wholesale price at which the particular article was sold. This was with few exceptions. For instance, a timer represented by Silvo to "wholesale" at \$2.63, while generally wholesaling at much less, was wholesaled by one distributor at \$2.50. A can opener, juicing machine and ice crusher also generally sold at substantially less than Silvo's represented "wholesale" price, but one wholesaler did testify that his single-unit price was about the same as that represented by Silvo for these three items (CX-4, p. 84, CX-5, p. 84; Tr. pp. 376, 395-398, 422, 503-505, 540-541, 547).

Retail prices of block planes, rulers, levels, clamps, screwdrivers, propane torches, saws and drills also were brought out in specific amounts for the Washington, D.C. trade area. A representative chain and other dealers testified that their retail selling prices usually were either 10 percent or 20 percent off manufacturers' suggested list prices, which had been adopted by Silvo as "retail" prices. The chainstore representative testified that his company's prices ran from 6 to 12 percent off. However, two localized hardware stores maintained manufacturers' list prices with few exceptions (CX-4, pp. 11, 15 and 16, 26, 31, 32, 53, CX-5, pp. 11, 15 and 16, 26, 31, 32, 53; Tr. pp. 225-226, 240-244, 273-275, 338-343, 434-440).

There was evidence as to retail prices of similar tools in the Baltimore, Maryland trade area. Here again, the chains and larger stores regularly sold the articles at less than the manufacturers' suggested list prices. One of them testified that the practice was to cut these by 10 to 15 percent. On the other hand, there was some testimony to the effect that the list price is maintained generally with the exception of certain especially favored customers, such as known artisans in the trade, employees in the trade, and industrial accounts. An example of an industrial account is a real-estate operator or a company engaged in the building business (CX-4, pp. 10, 11, 25, 26, 28, 29, 31, 53, CX-5, pp. 10, 11, 25, 26, 28, 29, 31, 53; Tr. pp. 101-107, 124-144, 455-469, 487-493).

Thus, it appears in summary that, with few exceptions, with respect to goods upon which evidence was offered, in the trade areas selected, respondents' represented wholesale prices were higher than the usual wholesale prices and respondents' represented retail prices were higher than the usual retail prices. The few exceptions are not

Findings

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sufficient to overcome the preponderance of the evidence to the contrary on the general issues.

The following are ultimate.

FINDINGS OF FACT

1. Respondents Leonard Margolis and Norton Berger are individuals and copartners trading as Silvo Hardware Company. Their principal office and place of business is located at 107-109 Walnut Street in Philadelphia, Pennsylvania.
2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution to the public of general merchandise, including, but not limited to, hardware, housewares, typewriters, fishing gear and toys. Their gross sales exceeded \$340,000 in 1962 and approximated \$390,000 in 1961.
3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their place of business in the State of Pennsylvania to purchasers thereof located in various other States of the United States and in the District of Columbia. They maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.
4. The business of the respondents is a mail-order business developed with the aid of catalogs disseminated through the mails freely to any persons requesting the same. Approximately 25,000 to 30,000 such catalogs are distributed annually.
5. Merchandise is offered by the respondents in said catalogs to prospective customers and recipients thereof. It is set forth in the catalogs, most often pictorially, with descriptive material accompanying the pictures. Each article is identified generally by manufacturer or manufacturer's trade name or trade mark, and by manufacturer's identification number. In addition, each article offered for sale has a Silvo catalog number or stock number, a price in code and a price in dollars and cents, which last price is represented by the respondents to be the retail price established by the manufacturer or recommended by them. The coded price consists of several digits, depending on whether the price is in cents, dollars and cents or dollars even. This coded price is uncoded easily merely by marking off two decimal places from the right. The resulting figure is the amount or price, in dollars and cents, charged to the customer.
6. By utilizing and describing the price referred to as retail price, respondents represent to prospective customers that that is the price

at which the product to which it refers usually and customarily is sold by others in the trade area in which the catalog is circulated.

7. Respondents describe their coded price to prospective customers as being a wholesale price or a wholesale cost.

8. Typical of the method used by respondents for describing an article of merchandise offered for sale is:

No. H170, Stanley Plane Adapter Kit * * * H170-S20 P3098—5 lbs—\$44.25

In this particular instance, the so-called "wholesale price" or "wholesale cost" is found in the group "P3098", which becomes \$30.98 by marking off the two decimal points. The \$44.25 is described as the retail price established by the manufacturer or recommended by Silvo. This is all as more specifically shown in the photographic reproduction from CX-4, which appears at page 2 of this decision.*

9. The purpose as well as the effect of the printing of the coded price in juxtaposition with the invariably higher price represented as a "retail price" is to represent to users of the catalog that and to lead such users to believe that the higher stated "retail" price is the price at which the item offered or pictured in the catalog usually and customarily is sold in the trade areas to which the catalog is distributed. It is further the purpose of the respondents to cause users of the catalog and prospective customers to believe that the difference between the two prices will result in a saving of the amount of that difference to such users and customers, if they should make purchases from the respondents of articles pictured in the catalogs.

10. In truth and in fact, the higher amounts set out for many of the items listed in the respondents' catalogs are not the prices at which the merchandise usually and customarily is sold in all trade areas to which the catalogs are distributed, but are in excess of the price or prices at which it generally is sold in some of, if not all, said trade areas.

11. Purchasers of respondents' merchandise in such trade areas do not and would not realize a saving of the difference between the stated retail and code prices.

12. Respondents have utilized in their advertising literature such statements as "wholesalers and distributors" (describing themselves), "you will be able to BUY AT WHOLESALE PRICES", "you write the orders, mail them to us with proper remittance, according to your *wholesale cost*) * * *" and "your confidential wholesale prices are printed in CODE" * * *. By such advertising, they have represented, directly or indirectly, that they sell all their merchandise at the generally prevailing prices paid by retailers for such merchandise in each trade area to which their catalogs are distributed and that

* Pictorial exhibit is omitted in printing.

customers buying from them save an amount equal to the retailer's profit.

13. In truth and in fact, the respondents do not sell, nor do they offer to sell, all their merchandise at the generally prevailing prices paid by retailers for such merchandise in each trade area to which their catalogs are distributed. On the contrary, the prices of some of their merchandise in several of the trade areas to which their catalogs are distributed are in excess of the generally prevailing prices paid by retailers in such trade areas and purchasers of such merchandise will not and do not realize a saving equal to the retailer's profit.

14. The evidence in this proceeding, while touching upon other trade areas, was concerned mainly with the Washington, D.C.-Maryland-Virginia trade area and the Baltimore, Maryland trade area. The first consists of Washington, D.C., Alexandria and Falls Church cities and Arlington and Fairfax Counties, in Virginia; and Montgomery and Prince Georges Counties in Maryland. The latter consists of Baltimore city and Anne Arundel, Baltimore, Carroll and Howard Counties, Maryland.

15. Respondents have conducted their business in numerous trade areas throughout the United States as well as in the Washington, D.C.-Maryland-Virginia trade area and the Baltimore, Maryland trade area. In the conduct of such business, they have been in substantial competition in commerce in such trade areas with other corporations, firms and individuals engaged in the sale of articles of merchandise of the same general kind and nature as that sold by them.

And from the foregoing are made the following

CONCLUSIONS

A. The statements and representations made by the respondents, as more particularly set forth in the foregoing Findings, were and are false, misleading and deceptive.

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

C. Substantial trade in commerce has been and is being unfairly diverted to respondents from their competitors, and substantial injury has been and is being done to competition in commerce.

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

E. The aforesaid acts and practices of respondents, as herein found and as described in the text of this decision preceding the Findings of Fact, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

Respondents make an impassioned plea that they should not be singled out for prosecution since they are only one of many firms engaged in the catalog business indulging in similar practices. They urge that all members of the catalog industry ought to be made parties to remedial proceedings of this nature and that all such proceedings should be conducted either simultaneously or in consolidation with each other. They pray either that no cease and desist order be entered against them until similar orders are entered against all members of the catalog industry or, in the alternative, that if any cease and desist order be entered against them, such order be held in abeyance and not made effective and operative unless and until similar orders are entered and made effective against all members of the industry. Such pleas are inevitable when the Commission attacks practices widely in use. The fact that the practices are prevalent or in wide use does not make them immune from correction if they are unfair within the meaning of the Federal Trade Commission Act. The Commission obviously cannot, nor is it required to, proceed against all violators at one time merely because they are engaged in the same kind of violation. In *National Candy Co. v. Federal Trade Commission*, 104 F. 2d 999, 1004 (7th Cir. 1939), *cert. denied*, 308 U.S. 610, the Court said:

Petitioner further urges that it would be prejudicially discriminatory against it to permit the order to become operative because its competitors use the same methods. In other words, it argues that unless the Government proceeds against all such offenders at one time, it would be wrong to proceed against it alone. There is no merit in this contention. *Federal Trade Commission v. Winsted Hosiery*, 258 U.S. 483; *Federal Trade Commission v. Keppel & Bro.*, 291 U.S. 304.

In *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411, 413, 414 (1958), the Supreme Court stated:

The question, then, of whether orders such as those before us should be held in abeyance until the respondent's competitors are proceeded against is for the Commission to decide.

* * * * *

If the Commission has decided the question, its discretionary determination should not be overturned in the absence of a patent abuse of discretion.

See also *Clinton Watch Co. v. Federal Trade Commission*, 291 F. 2d 838, 841 (7th Cir. 1961), *cert. denied*, 368 U.S. 952 (1962).

Order

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It is not for the hearing examiner to deviate from a longstanding practice of the Commission, particularly one having consistent high court approval.

Now, therefore, being of the opinion that it is necessary to achieve effective enforcement of the law, the hearing examiner enters the following:

ORDER

It is ordered, That respondents Leonard Margolis and Norton Berger, individually and as copartners trading as Silvo Hardware Company, or under any other name or names, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of hardware, housewares, appliances, typewriters, fishing gear, and other articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any amount is the usual and customary retail or wholesale price of merchandise in any trade area to which the respondents distribute their catalogs when it is in excess of the generally prevailing retail or wholesale price (as the case may be) at which such merchandise is sold in such trade area.

2. Representing in any manner that savings are made available to purchasers of respondents' merchandise when it is offered by them at prices which are identified with, or placed in juxtaposition with, or compared to, prices or figures which purport to be the prices at which the same or similar merchandise is customarily sold by competitors or other vendors in the usual course of business in the trade area or areas where the offerings are made unless such other prices or figures are, in truth and in fact, the actual prices or figures at which such merchandise is customarily sold in the usual course of business in such trade areas.

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

ORDER DENYING MOTION FOR POSTPONEMENT OF ORAL ARGUMENT,
DISMISSING APPEAL, ADOPTING INITIAL DECISION, AND
PROVIDING FOR REPORT OF COMPLIANCE

Upon consideration of respondents' request, received January 21, 1964, for postponement of oral argument on complaint counsel's appeal from the initial decision, scheduled for January 27, 1964, and of complaint counsel's opposition thereto filed January 23, 1964, and of the motion filed by complaint counsel on January 24, 1964, seeking leave to withdraw complaint counsel's appeal, filed October 3, 1963, from the initial decision of the hearing examiner; and

It appearing that respondents have not perfected an appeal from the initial decision as provided for in Section 3.22 of the Commission's Procedures and Rules of Practice (August 1, 1963); and

It further appearing that good and sufficient cause does not exist for the Commission's issuing an order staying the effective date of the initial decision or placing the case on its own docket for review, and that, therefore, the initial decision should forthwith be entered as the final decision of the Commission (see Section 3.21),

It is ordered, That: (1) Respondents' motion for postponement of oral argument is denied; (2) The appeal of complaint counsel from the initial decision is dismissed; (3) The initial decision of the hearing examiner is adopted as the final decision and order of the Commission.

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

By the Commission, Commissioner Anderson not participating