

consequently, believes that minimally this matter should be handled in the same manner as Federal Trade Commission Docket No. 8513, *In the Matter of Atlantic Products Corporation, et al* (December 13, 1963) [63 F.T.C. 2237]. Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF
CONTINENTAL PRODUCTS, INC., ET AL.

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

Docket 8517. Complaint, June 29, 1962—Decision, Apr. 23, 1964

Order requiring Chicago sellers of various articles of merchandise, including jewelry, cameras, typewriters, hardware, sporting goods and appliances, to retailers and to the public direct, to cease representing falsely that their merchandise was offered for sale at wholesale prices by such statements in catalogs and circulars as “* * * a wholesale catalog * * * at the lowest wholesale prices * * * general wholesale merchandise * * *.” The evidence is insufficient to support the allegation in the complaint challenging respondent’s use of the term “retail price”.

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 Continental Products, Inc., a corporation, and Garrison Grawoig, Allen Grawoig, Earl W. Grawoig, Richard N. Grawoig and Paul M. Mayer, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the

Complaint

65 F.T.C.

Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Continental Products, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 2030 South Michigan Avenue, Chicago, Illinois.

Respondents Garrison Grawoig, Allen Grawoig, Earl W. Grawoig, Richard N. Grawoig and Paul M. Mayer are individuals and officers of the said corporate respondent. They formulate, direct and control the policies, acts and practices of said corporate respondent, including those hereinafter set out. The address of each individual respondent is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of various articles of merchandise, including jewelry, cameras, typewriters, hardware, sporting goods and appliances, to retailers for resale and to individual members of the public.

PAR. 3. 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 Illinois to purchasers thereof located in various other States of the United States, 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.

PAR. 4. Respondents, in the course and conduct of their business and for the purpose of inducing the purchase of their merchandise, have advertised the same by means of catalogs and circulars, disseminated by and through the United States mails to prospective purchasers located in various States other than the State of Illinois. Among and typical, but not all inclusive, of the statements appearing in respondents' catalogs and circulars are the following:

* * * a wholesale catalog * * * at the lowest wholesale prices * * * a great department store in a catalog * * * general wholesale merchandise * * *

Prices shown are retail prices established by the manufacturer or recommended by us. Your cost is hidden in the stock numbers.

Confidential—Your Net Low Cost is Hidden in the Stock Number—Retail prices * * * have been suggested by the manufacturer as list prices for dealers who are buying for resale. You pay only the coded price.

26-89537-1356 * * * Retail 22.50

PAR. 5. Respondents, for each article of merchandise described in their catalogs and circulars, set forth two prices; one, a so-called coded price and the other, a higher price, designated as "Retail". By means of such pricing methods and the aforesaid quoted statements, and others

of like import not specifically set out herein, respondents represent, directly or by implication, that they are wholesalers who sell all of their merchandise at wholesale prices; that the so-called coded prices, at which the merchandise is offered for sale, are wholesale prices; that the prices designated as "Retail" are the prices at which the merchandise is usually and customarily sold at retail; and that the difference between the coded price and the "Retail" price represents savings from the usual and customary retail price in the trade areas where the representations are made.

PAR. 6. In truth and in fact, respondents do not sell, or offer to sell, all of their merchandise at wholesale prices. To the contrary, the prices of many of their articles of merchandise are in excess of wholesale prices and the said coded prices of such articles are not wholesale prices but are in excess thereof. The prices designated as "Retail" prices, for many of their articles of merchandise, are not actual retail prices but in fact are in excess of the price or prices at which said merchandise is generally sold at retail in the trade areas where such representations are made. The differences between respondents' said coded and "Retail" prices do not represent savings from the generally prevailing retail price or prices. The statements and representations set out in Paragraph Four, and the implications arising therefrom, are therefore false, misleading and deceptive.

PAR. 7. At all times mentioned herein respondents have been, and are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of merchandise of the same general kind and nature as that sold by respondents.

PAR. 8. The use by respondents of the aforementioned false, misleading and deceptive statements, representations 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, and are, true, and into the purchase of substantial quantities of respondents' products because of said mistaken and erroneous belief.

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 methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Mr. William A. Somers and Mr. Edward A. Markus, Jr. supporting the complaint.

Rothschild, Hart, Stevens & Barry, by Mr. Edward I. Rothschild of Chicago for respondents.

Initial Decision

65 F.T.C.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

JUNE 18, 1963

The complaint herein alleges violation of Section 5 of the Federal Trade Commission Act, mainly by the misrepresentation, in effect, that list prices in a mail order catalog circulating throughout most of the states of the Union are prevailing prices, and also by the misrepresentation that the catalog's actual retail selling prices are wholesale prices.

The complaint issued on June 29, 1962. On filing of the answer, the examiner had counsel confer with each other in anticipation of a prehearing conference, which was thereafter held, pursuant to order, resulting in an order containing prehearing directions. On the examiner's certificate, the Commission issued an order authorizing hearings to be held in Ft. Wayne and Milwaukee, as well as Chicago. Respondents filed an extensive motion complaining that the prehearing order directions had not been complied with by complaint counsel, but this motion was, with some reservations, denied.

The hearing was duly commenced by taking testimony in the three cities, but complaint counsel's proof of but one retailer for an item in each city as to the retailer's own price, without reference to other prices, raised a serious question as to adequacy of proof on the case-in-chief. Thereafter, however, complaint counsel filed a petition to reopen, which was at first denied, on conditions, and then granted on his written stipulation that the proof was defective. Complaint counsel also requested the examiner to certify the necessity of reopened hearings in more than one city, but this was denied.

Respondents' counsel, unopposed by complaint counsel, contended that he required time after the closing of complaint counsel's case to prepare the defense. The examiner disposed of this on reopening by noticing the reopened hearing for February 13 and 14, 1963, and giving respondents an extended weekend, *i.e.*, to February 18 and 19, for defense, with rebuttal commencing February 20.

The reopened hearing was held accordingly in Chicago, with no testimony offered on rebuttal. The entire transcript is 1519 pages. On reopening, complaint counsel adduced testimony as to only two of the three cities and reduced the number of items testified to from 89¹ to 49. However, there also was some general testimony on the unreality of the catalog's list prices, which are identical with the manufacturers' list prices. A motion to dismiss was denied and it was held that the burden of going forward passed to the respondents. Re-

¹ As per stipulation of counsel dated June 13, 1963, substituting this for different and differing figures appearing, instead of 89, in their submissions and briefs.

spondents produced a trade expert who actually corroborated the unreality of the list prices, testifying that they were the highest prices obtainable throughout the country by "some" retailers and were fixed so as to accommodate all types of retail outlets.

On the closing of the hearing, leave was given to respondents to submit certain exhibits by a fixed date. Subsequently there was a motion by them to file further exhibits, which was granted but merely to clarify the record. The case was closed on March 20, 1963, conforming to the extended filing date. Time was also fixed for submissions, which was subsequently extended on complaint counsel's motion. Proposed findings, conclusions, order and brief were submitted by each side. There were also extensive answering submissions from each side.

In a general way, the decision herein may be summarized as follows:

I. The testimony that respondents' retail list prices are unrealistic, particularly the testimony of respondents' expert that the prices represent only the highest prices some retailers charge, and the finding that the list prices are a representation of national rather than merely local prevailing prices, all establish the inherent deceptiveness of respondents' list prices, without the necessity of full local area proof, absent adequate proof by the respondents to the contrary.

II. Complaint counsel's effort to prove his case as to retail prices by local area evidence fails, particularly with the reduction on reopening to 49 items and to two cities, together with other deficiencies, and because at the very most the proof relates only to the two city areas proper and does not comprehend the extensive suburbs, which were included in the trade areas by the testimony of his own witnesses.

III. As to wholesale prices, more particularly respondents' use of the word "wholesale" in the catalog to describe their actual selling prices to consumers, complaint counsel has proved his case.

* * * * *

Respondent Continental Products, Inc., hereinafter referred to as Continental, publishes an illustrated mail order catalog, and supplements thereof, circulating admittedly² in 39 States of the United States, and advertising various types of merchandise, including well-known national brands (CX 1, p. 355³), sold by them in the states.

Each item of merchandise is listed in the catalog by a price designated as "Retail", which is the manufacturer's suggested retail price (Tr. 503,4). Continental purchases the merchandise from the manufacturers, or through them.

² Respondents' Proposed Finding 12(c). There also seem to be more than 39 such states.

³ This, the 1961 catalog, lists almost 50 such brands and states: "These are only some of the major nationally advertised brand names represented in the Continental Catalog."

Accompanying each "Retail" price in the catalog is a coded price, easily decipherable once explained, at which the particular article is sold by Continental, both to retailers and to ultimate consumers, including firms buying for ultimate consumers. The coded price is substantially lower than the "Retail" price.

A typical retailer purchasing from Continental would be a general store or similar outlet in a remote community with little competition. Such retailer or outlet pays the coded price and sells at the "Retail" price, or possibly something off that price. It may well keep the catalog on the counter, without carrying actual inventory (Tr. 1485: 1-6), and the customer-consumer, not knowing the code, pays what is asked. Another, and perhaps more recent, example of this type of outlet is a beauty shop (Tr. 1462) selling on the same general basis and under somewhat analogous conditions.—The retailer-user of the catalog as a "counter salesman" is historical in this type of catalog business, going back to years when Continental dealt only with retailers.

Typical ultimate consumers, or firms purchasing for such consumers—all of whom pay the same coded price as a retailer—fall into various classes, some of which are described in paragraph 2 of the answer herein; particularly the second sentence thereof:

2. Respondents admit that they have advertised, offered for sale, sold and distributed various items of merchandise including jewelry, cameras, typewriters, hardware, sporting goods and appliances to retailers for resale. Respondents admit that they have sold and distributed said articles to *individual members of the public*, but allege that such sales have been confined to their Chicago stores, to individuals buying from catalogs distributed to retailers, industrial concerns or other companies, and to individuals who got on their mailing list through such prior purchases. * * * (Our emphasis.)

Another class of non-retailers, testified to by respondent Earl W. Grawoig, one of Continental's principals and respondents' chief witness, consists of cooperatives, purchasing for members. According to him, banks also purchase merchandise from the Continental catalog to be given away as premiums for new deposits. Firms also purchase said merchandise for incentive awards, or for gifts. Even law firms are solicited by Continental for its non-retailer business designed to place its merchandise in the hands of ultimate consumers.⁴ That this type of business is in general, if not in every instance, regarded as directed to consumers, rather than retailers, who by definition sell to consumers, see *L. & A. Mayers Co., Inc.*, 21 F.T.C. 434 (1935), and *Leeds Travelwear, Inc.*, 61 F.T.C. 152 (1962).

The testimony of Mr. Grawoig is that 85 percent (Tr. 1380:9) of the catalog mailing list and of merchandise sales are to business firms. This, the examiner must rule at once, apart from the self-serving character of the testimony, does not support the utterly gratuitous

conclusion, reiterated throughout respondents' proposed findings and brief, that the 85 percent figure relates to retailers. Actually, according to Mr. Grawoig, Continental keeps no tabulation as to which of its customers are retailers and which are not, an order is filled whether coming from a retailer or anybody else, and names for its mailing lists are ordered from professional name companies without any specification whatever as to their being retailers.⁴

Moreover, the Continental catalog contains direct and dramatic appeals, with appropriate drawings, to ultimate consumers or firms and other entities purchasing for distribution to ultimate consumers. The catalog also contains a full explanation of how such consumers may read the coded prices. The catalog, in the same pages devoted to this message, also refers to coded prices as a way in which consumers can buy at "wholesale."

Mr. Grawoig's further testimony, equally self-serving, also is that about 94 percent (Tr. 1371) of Continental sales are in cities with a population of less than 162,000 (Ft. Wayne, brought into the case by complaint counsel), and that Continental concentrates on towns under 100,000⁵ (Tr. 1471) with an emphasis on communities much under 100,000. This again does not warrant, or add weight to, the conclusion that most of Continental's distribution is to retailers. In the examiner's opinion a catalog sent to a small town or community is, for the recent years concerned here, just as likely, or more likely, to be sent to or for the ultimate consumer, than to a retailer, let us say, for instance, the one general store in a small, isolated community using the catalog as a counter-salesman.

I

Fictitious Price System

Highest Prices, National Prices

The complaint herein alleges the dissemination of the Continental catalog and merchandise in various States of the United States.

The complaint, Six, further alleges misrepresentation by the catalog's use of "Retail" prices in that they "are not the actual retail prices but in fact are in excess of the price or prices at which said merchandise is generally sold at retail in the trade areas where such representations are made." It may be noted that the complaint refers to "the"

⁴ The facts will be further detailed below, with page references to the record, under subcaption *A Retail Catalog*.

⁵ Mr. Grawoig at first testified the number was 50,000 and that the orders for names expressly excluded "anything beyond 50,000" (Tr. 1349: 1-3). The examiner requested him to produce orders with any number limitation but none were produced (Tr. 1472).

trade areas, which bears the meaning of all trade areas where such representations are made, namely all the areas in all the states where such representations are made, not merely the local trade area of one or more catalog readers.

Secondly, the complaint, Six, alleges misrepresentation in that the "differences between respondents' said coded and 'Retail' prices do not represent savings from the generally prevailing retail price or prices," but makes no stated reference to trade areas.

There is no reference in the complaint to any specific trade area. Furthermore, there is no reference to areas or localities generally except for two uses of the words "trade areas" without further description. Thus, technically speaking, there was no necessary burden on complaint counsel to supply proof as to any particular areas, even though he did supply such proof for two or three city areas, *i.e.*, following the practice established in numerous pre-ticketing misrepresentation cases, which are uniquely local in nature.

The complaint, Two, is directed to "various articles of merchandise, including jewelry, cameras, typewriters, hardware, sporting goods and appliances." (It may be noted at once here that complaint counsel's specific area retail proof at the hearing did not include jewelry and hardware, and for practical purposes did not include cameras, so that this proof is limited to three of the six product lines named in the complaint.)

The complaint, Two, also alleges distribution to both "retailers for resale" and to "individual members of the public."

The complaint, Eight, alleges deceit of a substantial segment of the "purchasing public," *i.e.*, ultimate consumers.

The main question in this case is whether the use of the word "Retail" in the catalog is a misrepresentation as charged, *i.e.*, in excess of the price at which the article of merchandise generally sells at retail. The alleged misrepresentation as to savings between the coded price (catalog's actual retail price) and the "Retail" price is secondary, flowing out of the main misrepresentation charged.

Under the law as announced in the preticketing cases, in respect to the nature of a list price representation, there can be little doubt that each "Retail" price of the catalog herein is a representation that it is the usual and customary price in the trade area where the representation is made. *Clinton Watch Co. v. Federal Trade Commission*, 291 F. 2d 838 (7th Cir. 1961). The same rule has been announced in a case where the list price was advertised in the local District of Columbia newspapers. *Matter of George's Radio and Television Company, Inc.*, 60 F.T.C. 179 (1962). *Giant Food, Inc.*, 61 F.T.C. 326 (1962). (*Aff'd* C.A.D.C.—June 13, 1963.)

As for the Continental catalog, obviously national rather than local in circulation, in contrast to preticketing for instance, it also follows, in the examiner's opinion, particularly as to national brand products, that each "Retail" price is a representation as to the usual and customary price throughout the country, or most of it, not merely in the area of a particular catalog reader. Incidentally, it also follows that said price is a representation that there is substantially such a usual and customary price throughout the country, or most of it.

Of course, such a representation, if made, does not accord with fact, as the Commission in its expertise knows and respondents themselves hardly deny.

Moreover, the evidence in this case clearly demonstrates that such is not and could not be the fact, since respondents' own expert, Dr. Boyd, testified—generally and irrespective of local areas, although specifically as to the lines of merchandise involved herein—that the manufacturer's suggested retail price, which is Continental's "Retail" price, is the highest retail price, charged by "some" retailers, and is set by the manufacturer high enough to top all other prices. Citations to the record are given below.

Dr. Boyd's testimony may be first considered in the light of certain testimony given, incidentally to be sure, by three Milwaukee retailers called by complaint counsel. This Milwaukee testimony is, of course, fairly local in substance and context, but it has definite undertones as well as some express content suggesting a country-wide situation, at least in sufficiently competitive areas.⁶

One Milwaukee retailer, Mr. Anderson, testified that he fixed his own retail prices by just looking at the various coded catalogs and charging \$2 to \$5 less than their "Retail" price (Tr. 944:4, 12). These catalogs included the Continental catalog (Tr. 945:21), which he checked (Tr. 948:5, 8), Majestic (Tr. 946:7), Millway (Tr. 954:7), and others. These catalogs all have basically the same "Retail" prices; as well as the same coded prices (Tr. 948:23), at least "within a few pennies" (Tr. 972:24), which the witness called "wholesale" prices (Tr. 950:2, 3).

Originally Continental and the other catalogs circulated only among retailers who alone knew the code (Tr. 951:18-22). But the catalogs took over throughout the country (Tr. 952:3), *i.e.*, obviously as consumer catalogs. They encouraged people to give the names of their friends, and never checked who the latter were, nor did they care (Tr. 954:5-11). Thus the catalogs came to circulate among ultimate consumers (Tr. 956:6-12).

⁶ See also the testimony of Mr. Needham, a Fort Wayne retailer. He testified to a historical markup of 40% (Tr. 937:2), for typewriters, which he felt was still now reflected in Continental's "Retail" price (Tr. 938:15-25).

The testimony of Mr. Anderson suggests that the "Retail" price of any of the coded catalogs, including Continental's, would be unrealistic not only in Milwaukee but also in other highly competitive centers.

Another Milwaukee retailer, Mr. Rohr, testified as to coded catalogs, although not specifically as to Continental. He keeps the various catalogs at his store (Tr. 1012:24). People come in and say they can get a desired article at a stated price from one of the other catalogs (Tr. 1013:12-16), and he would beat this price slightly.

Mr. Rohr testified that the catalogs of the different houses have a coded price which is explained right in the catalog itself (Tr. 1014:2-4), and he would sell pennies below that price. He was asked if he was guided by the "Retail" price. His answer was, "No", except that people ask him how much it retails for: "They perhaps want to know how much they are saving—they consider it a savings, you know; but *it really has no bearing, really, on what you have to sell it for * * **". (Tr. 1014:19-24, our emphasis.)

As to whether the "Retail", or manufacturer's retail price, was charged by any store in the city or suburbs, Mr. Rohr answered: "It is conceivable that there might be one black sheep floating around that is going to pay full price. I don't know for sure" (Tr. 1040:14-16).

A third Milwaukee retailer, Mr. Raynor, testifying as to coded catalogs generally, stated as to the "Retail" price therein: "Well, the retail price doesn't mean very much these days" (Tr. 1074:12), that it has not meant anything for three, four or five years (Tr. 1074:19), and that no one would dispute this (Tr. 1074:24; 1075:1). He also testified (sporting goods just happened to be the subject) that the retail price would be the same in different catalogs, and the coded price the same or a few cents off (Tr. 1076:9-17).

Complaint counsel did also adduce from these and other witnesses some specific proof as to prevailing prices in Milwaukee and Ft. Wayne, which will be referred to later. But the examiner, on the general testimony referred to above and on generally known facts, set forth in articles⁷ on historic mark-ups alluded to by him at the hearing (Tr. 959:11, 16), held that as a general matter, entirely apart from specific local areas, enough had been shown to indicate prima facie that the manufacturers' suggested retail prices, and therefore Continental's "Retail" prices, are unrealistic (Tr. 1098:3), and have been so since the advent of discount and other competition commencing in the 50's, in any area having such modern competition (Tr. 1098:5). He accordingly ruled that the burden of going forward shifted to the respondent.

⁷ Harkrader, Fictitious Pricing and the FTC, St. John's Law Review, December 1962, pp. 1, 4, 5, 6, 16, 17; also various citations therein to Fortune and other business periodicals.

ents to explain (Tr 1099:3) or prove the contrary. On the following day the examiner also took official notice to the same effect (Tr. 1176), but expressly limited (Tr. 1176:7) to the same result of shifting the burden of going forward (Tr. 1250:1-17).

The examiner explained in detail the above picture, as to these retail prices, as he saw it (Tr. 1101-1104). Significantly, respondents' counsel apparently agreed, stating (Tr. 1104:20-23) :

MR. ROTHSCILD: In the first place, I think that your general description is probably accurate of the marketing situation in the large metropolitan areas—and not supported by the evidence in this case. * * *

Counsel's qualification as to lack of support by the evidence obviously related to his contention that the specific area retail evidence introduced by complaint counsel was insufficient.

The examiner accordingly urged him to go forward with the facts through Dr. Boyd, respondents' proposed expert (Tr. 1099:6-15), and through Mr. Grawoig, which he undertook to do (Tr. 1112:1-3). Both witnesses were not due to testify for several days due to the long weekend allowed to enable respondents to prepare their defense.

Actually, as will be seen, the expert definitely testified that the suggested retail prices are only the highest prices obtained by some retailers, under an outdated historic mark-up system. In effect he thus stigmatized these prices as being unrealistic even without stating, at least explicitly, any limitation of this situation to large metropolitan cities. Mr. Grawoig, incidentally, did not go into this general question, although he did supply statistics, above referred to, as to the catalog's preponderating circulation in small communities, and among "firms" (now equated with retailers) rather than individuals.

The expert also testified, or attempted to testify, as to the consumer understanding of suggested retail or list price, namely, that it does not mean the usual and customary price in the area, that the consumer in competitive city areas is so subjected to list pricing that he does not compute any savings from it, and the like. However, the examiner refused to receive any such testimony, on the ground that the expert was not an expert on consumer understanding (Tr. 1195:23; 1256:6) nor had he conducted research or consumer interviewing on these matters (Tr. 1210:25), and on the ground that the expertise of the Commission as expressed in adjudicative cases must be regarded as superior to the expert's judgments on consumer preference (Tr. 1197:5; 1256:14).

Dr. Boyd testified—quite generally and apart from any reference to specific local areas—that the manufacturer's suggested retail or list price is "the price that the high cost retailer will charge", and that it is "more or less the upper limit which some retailers will charge" (Tr.

1188:14-18). He stated that this is so as to the price of a "national manufacturer" (Tr. 1191:22). Asked if this was so as to the price "retailers all over the country would be charging", he answered in the affirmative "speaking generally" (Tr. 1192:1-4). Asked if they assumed it is "the highest retail price going", and "throughout the continental United States", he answered "Yes" to both questions (Tr. 1192:5-10). He gave as an example of a retailer obtaining this highest price, a "neighborhood drug store" (Tr. 1203:19), apparently removed from the center of town competition, and a "full service retailer" (Tr. 1203:22) in a good-sized area (Tr. 1204:20), apparently in the midst of competition. Another example would be a shop in a small isolated area.

Dr. Boyd testified that the manufacturers' suggested prices herein, although prices of "integrity" (Tr. 1212:1), were based on historical markups (Tr. 1214-5) which were once realistic, *i.e.*, before the advent of discount houses and today's competition. He testified that the markup might be, for instance, 30 to 35 percent for a high cost retailer of small appliances (Tr. 1215:10) and up to 40 percent for high cost camera retailers (Tr. 1215:20).⁸

Dr. Boyd further testified that the manufacturer has continued with his historical markup, even though discount houses and others have come into the picture charging substantially less than the list price. He states (Tr. 1217:18 to 1218:10) as follows:

Now, through time the manufacturer has been faced with a very serious problem, because into our economy has been injected the discount house. The manufacturer has continued with his suggested retail prices, because he sells through many different kinds of stores. He sells through the small store who has high margin. He sells through stores such as ones here in Chicago, discount houses. He sells through full service stores. He sells through catalog houses. * * * So that a manufacturer is in this dilemma, using all different kinds of stores to sell his product, some high cost, some low cost; so that he has a problem of setting a list price that will accommodate the needs of the high cost retailers.

In giving this testimony, Dr. Boyd explicitly referred to "manufacturers of the kinds of items that we are dealing with here" (Tr. 1217:12).

Incidentally, Dr. Evans, another expert expressly relied on by respondents, has testified that there is no such thing as a usual and customary retail price in today's retail market, apart from resale price maintenance.⁹ Of course, if this is true respondents are in violation for representing that there is indeed a usual and customary retail price.

⁸ "Usually forty per cent" is the historical retail markup according to the St. John's Law Review article (p. 4), *supra*.

⁹ RX 21. Transcript of his testimony (1089:18; 1090:13) in *Majestic Electric Supply Company, Inc.*, D. 8449 (FTC) [64 F.T.C. 1166].

Nationally there is no resale price maintenance. Locally there is in various states but often not enforced or effectively policed by the sellers, as to which respondents here offer no evidence.

Although much of Dr. Boyd's testimony as to list prices was given without reference to specific products, it is clear that his testimony definitely comprehended the products in this case. He expressly testified that he had examined the prices in the Continental catalog (Tr. 1212:12), *i.e.*, with particular reference to list prices of the products involved herein, including the various brands of cameras, typewriters, appliances (also shavers) and sporting goods (Tr. 1212:9-12). Moreover, on other occasions he made specific references in his testimony to products involved herein.

As already fully indicated, it is absolutely clear that Dr. Boyd was testifying as to the general retail market in the country rather than as to any specific trade area. He did testify that as one gets farther away from the large city and closer to "semi-isolated communities", there is a tendency to approach suggested list prices in actual sales (Tr. 1225:6-8). He also testified that "much" list pricing goes on in small "isolated" towns, as to which, however, he did not know what percentage (Tr. 1225:16) nor did he give any measure.

It thus seems tolerably clear, without more, that it has been proved in this case on general evidence, irrespective of specific local area evidence, that the respondents have misrepresented by their use of "Retail" prices.

First, they have misrepresented that the "Retail" prices in the catalog are the prices at which the items of merchandise are "generally sold at retail in the trade areas where such representations are made" (Complaint, Six)—such representations being made wherever the catalog circulates throughout most of the states of the Union, as a consumer reader of the catalog in any particular area might well understand and be misled thereby. This is true where respondents deal directly, through the catalog, with ultimate consumers or, what amounts to the same thing, with purchasers for ultimate consumers. It is also true where respondents deal with retailers who actually obtain the "Retail" price from ultimate consumers on the catalog's representation, chargeable to respondents, that it is the price at which an item is generally sold throughout all the areas of the United States in which the catalog circulates. On this false representation the consumers may be induced not to make even an attempt to shop elsewhere or in a different manner, if only by writing to respondents and asking them to send a catalog directly to them or writing to other mail order houses which make available to consumers the coded or lower price.

Secondly, respondents have also misrepresented that their "Retail" prices are the prices at which the items are generally sold in any trade areas having the modern type of retail competition of today, including discount houses, in respect to such items. The items chiefly involved here are well known national brands, so that they are obviously sold all over the United States and must be sold in any number of trade areas having the modern type retail competition. These modern type trade areas would include not only cities of size but smaller communities, as it is well known that the "retail revolution", commencing in the 1950's, has pushed into all but truly remote and isolated locations. In this second aspect the misrepresentation is one made only to ultimate consumer purchasers directly.

It also follows, of course, and is equally clear, that it has been proved that respondents have misrepresented the amount of savings as being the difference between the coded price of the catalog and the "Retail" price thereof. This again is true where respondents deal with ultimate consumers or purchasers for ultimate consumers. It is also again true where they deal with retailers, say country stores in isolated areas using the catalog as a countersalesman, but selling at something off the "Retail" price.

It should be emphasized that the dissemination of list or suggested retail prices is not held here to be illegal per se, but that the "Retail" prices in this case are illegal because they constitute a false representation as to the usual and prevailing price—locally, nationally, or both—and as to there being a country-wide usual and prevailing price.

The effect of Dr. Boyd's testimony, as above described, was not only to indicate definitely that respondents' "Retail" prices are unrealistic, but to keep the burden of proof from shifting back to complaint counsel. Even if his testimony is strictly construed to attest only to the likelihood, and not the fact, that actual retail prices would generally be lower than the catalog's "Retail" prices, the burden would by reason of his testimony still remain with respondents to prove that actually, for some reason or other, the likelihood has not materialized, or could not reasonably materialize.

Respondents have not met this further burden by Mr. Grawoig's testimony that most of their business is done with smaller communities, since this hardly means that list prices are generally charged in smaller communities or that the strong breath of modern competition has not reached these communities by reason of modern communication, including the mail bringing competing catalogs. Nor have they met this burden by putting on the stand Mr. Pillman who testified that, while he was an employee of respondents and after getting instructions from respondents' counsel (Tr. 1315: 3; 1314: 20), he one

day toured four small towns, each under 10,000 population, and received full list price quotations on various items of merchandise contained in the catalog. He went to only one shop in each town (plus a camera shop in one town), not even trying the drug store (Tr. 1320:3). He never, so far as the record shows, told the salesman he could buy it for less from a specific source such as a catalog, and in a number of places did not even say he could buy it for less (see Tr. 1302:2, 3; 1309:24, 5). He was identified at one shop, at least, as a professional shopper (Tr. 1326:13). He testified to all the various prices and tag listings without notes (Tr. 1318:4), saying he had kept notes but threw them away (Tr. 1318:14).

The above result, reached here in part I of this decision, is consistent with the result reached in part II, below, holding that the specific area proof—as to Milwaukee and Fort Wayne, selected by complaint counsel—is insufficient to show that respondents' "Retail" prices were not the prevailing prices in those areas.

The specific area proof, adduced by complaint counsel, is found to be insufficient because of technical (although altogether substantial) deficiencies—irrespective of any probability that adequate specific proof is or is not obtainable.

Actually, the specific area proof, as far as it goes, lends some support to the present part of the decision. This point is not being pressed here, although it is being presented.

The specific area proof is rejected by the examiner for a number of reasons, which are fully developed in part II, and may be summarized here as follows:

First, the specific area proof is pretty well limited to each city proper. All of the retailer witnesses as to each city were from the city proper. Complaint counsel offered no evidence as to actual retail prices in the suburbs of these cities, even though he himself had his witnesses testify that the trade area is the city plus extensive suburbs.

Secondly, although the retailer witnesses testified that their retail prices were fixed by competition and competitive conditions, in most instances there was only one witness for a product, and the testimony in general fell short of what seems indicated in order to make an appropriate finding in reference to prevailing retail prices—particularly in each full trade area, as distinguished from the city proper.

Thirdly, the specific area proof is limited to 49 possible items, actually covering only three of the six lines of merchandise mentioned in the complaint. Although this coverage might under other circumstances be deemed sufficient, it seems inadequate in this case in view of a substantially larger number of items, including an additional merchandise line, originally proffered by complaint counsel, and in

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view of the six lines mentioned in the complaint, which presumably figured in the Commission's finding of sufficient public interest.

On this summary it seems fairly clear that the specific area evidence must be rejected by the examiner as inadequate. However, it also seems that with a little more evidence, probably not too hard to get, the result might be different.

Actually, respondents, except for challenging the technical sufficiency of the specific local area evidence to prove a case in and of itself, do not seem to be seriously challenging the contention that their "Retail" prices are higher than those generally prevailing in cities like Milwaukee or Fort Wayne, or in larger cities. Their general defense on the real merits rests rather on the theory, as has already been indicated, that most of the catalog's circulation and sales therefrom are in communities smaller even than Fort Wayne, and they point out that their catalog circulation in Milwaukee, at least, is very small.

Accordingly it may be possible to regard the local area proof adduced by complaint counsel as at least a sampling demonstration, considering the strong probabilities of the validity of the general testimony of Dr. Boyd and some of the retailer witnesses as to the unreality of respondents' "Retail" prices, or list prices. The sampling would be limited, of course, to each city proper, Milwaukee (pop. 750,000) and Fort Wayne (pop. 180,000), and by the more serious consideration that the area proof, strictly by itself, is below the recognized standards of legal proof.

* * * * *

In the examiner's opinion the requirements of proof, at least in connection with area, are somewhat different for a catalog case such as this than for the typical preticketing case. The difference has been obscured, perhaps, by the fact that preticketing cases have established the substantive law that list price, by preticketing or otherwise, is a representation of prevailing price.

In a preticketing case the list price is, of course, affixed to the merchandise or packaging itself. It is thus quite ruggedly local in meaning and application. In a catalog case, the list price is lodged in a catalog circulated across the country, and therefore as a representation of value to the reader it is national, or substantially national, in meaning, as well as local.

Accordingly, in the typical preticketing case specific local area evidence seems to be more or less of the essence in proving the general allegations of the complaint,¹⁰ whereas it may not be necessary in a cata-

¹⁰ See *Rayex Corporation v. Federal Trade Commission*, 2 Cir., May 7, 1963, C.C.H. ¶ 70,774, as to a strict statement as to local area proof, in a preticketing case [7 S. & D. 696]. (C.C.H. reference is to Trade Regulation Reports.)

log case involving a representation of a country-wide price irrespective of inevitable local area differentials in one place or the other.

The general proof in the case at bar—supplemented, if necessary, by what local area proof there is—creates far more than a suspicion that the catalog's "Retail" price is deceptive. It shows that the "Retail" price is fictitious as an actual going price generally, as represented, and is deceptive in its essence.

A Retail Catalog

It may be appropriate at this point to say more about the retail nature of respondents' catalog. A mail order catalog such as this, with a circulation of 300,000 (Tr. 90:23) outside Illinois, and yet allegedly not designed for dissemination among ultimate consumers rather than retailers, seems to be a fairly strange animal. However, respondents' able counsel for understandable reasons attempts to minimize the retail function of respondents' catalog. The picture he draws almost suggests that the catalog and its merchandise directly reach ultimate consumers quite fortuitously or in such dribbles as to be of little significance for the purpose of regarding it as a catalog for consumers.

Nevertheless, as already pointed out, the answer (Par. 2) here itself admits the allegation of the complaint that both ultimate consumers and retailers are served, and the answer expressly includes as such consumers certain types of firms purchasing for consumers and not retailing to them. Mr. Grawoig's testimony adds cooperatives as another type of purchaser for consumers.

Moreover, Dr. Boyd, respondents' expert, testified (Tr. 1259:25) that Continental is "certainly similar to a discount seller at retail." He agreed that it may be called a "discount catalog house" (Tr. 1260:2) and a "discount retailer" (Tr. 1260:7). He agreed that Continental's comparative pricing in its catalog was not significantly different from that of "retail stores" (Tr. 1211:5-9). Of catalogs generally, including that of Continental, he declared that they provide a "convenience for some customers who want to do some shopping from their homes" (Tr. 1228:7), and that they are "the equivalent of a store in many cases" (Tr. 1228:12). Mr. Grawoig, in his testimony, affirmed that the Continental catalogs reach a lot of consumers. However, he qualified this by stating: "We also reach a great many more dealers" (Tr. 1373:24), although he was not able to produce figures on any retailers or dealers, and stated that they did not check on this (Tr. 1470:5-9).

It is thus clear that at the very least the catalog has a dual aspect, and that its retail aspect as a direct vehicle to consumers is one at least of definite substance. This means, of course, that a finding is justified

that it is a retail catalog for the direct use of ultimate consumers, even though it may also be a wholesale catalog for some retailers who use it and purchase from respondents at the same coded price as ultimate consumers, which is the one price at which respondents sell to anybody (Tr. 108:1-11).

It is not without significance, too, that Continental sells directly to consumers at the coded price in its nine retail stores in the Chicago area (Tr. 106:20-24)—even though this does not, of course, involve interstate commerce.

In circulating catalogs, Continental orders names, say 100,000 at a time, from concerns which sell lists of names (Tr. 1344-5). But it does not ask for retailers (Tr. 1457:21-23), that is, names of retailer outlets as such, but buys all kinds of names. It does not investigate whether or not the names it gets are such retailers (Tr. 1470:7). It prefers business concerns, or professional people—including lawyers—who could hardly be regarded as potential retailers. Although Mr. Grawoig testified that they do not order individuals, the extensive list of categories of names ordered by Continental lists, among many others, "individuals" (RX 26b, line 56).

Mr. Grawoig also testified that Continental takes credit unions, employees' organizations (Tr. 1457:4-7). They also like premium and gift business (Tr. 1458:12), which is not business with a retailer but with a concern dealing with its employees and making the merchandise available to employees for the coded price.

Accordingly, even if Mr. Grawoig's opinion were accepted as testified to, that 85% of the mailing list and merchandise orders are from business firms and cooperatives, this hardly means that they are from retailers.

Moreover, anyone who writes in for a catalog will get one, no matter who he is (Tr. 1352:9-12). If he buys anything he will be put on the mailing list. If he adheres to a certain norm of purchases, which is hardly rigorous, he will be kept on the mailing list (Tr. 121:10-13).¹¹ Complaint counsel produced as witnesses ultimate consumers of this type who received catalogs and purchased directly.

Actually, the catalog setup is such as vividly to suggest to the examiner that it is designed to lure much ultimate consumer business by making prospective purchasers believe that they are somewhat craftily inducing Continental to give them a special status as trade customers to which they may strictly not be entitled. For instance, a one or two man business or professional concern may easily regard it as

¹¹ The test is the amount bought, the number of times a customer buys, and the last date bought. An amount of \$25 over the year may be acceptable (Tr. 123:7-19).

a bonanza that each member may buy for himself or family use at what seems to be a trade price.

The format of the catalog clearly demonstrates its retail aspect as a direct vehicle for ultimate consumers, as well as any wholesale aspect, with full emphasis on the retail.

Taking the 1961 catalog (CX 1) and perusing *almost* all of its 646 pages, one might well assume that this is just a wholesale catalog designed for the use of retailers, say, retailers using it as a counter-salesman, with the code price known only to the retailer as the price he will pay, and the "Retail" price read by the consumer as the price, or about the price, he will pay.

However, there are a number of yellow pages in the center of the catalog which scream for attention and which boldly bid for the business of the ultimate consumer. These pages also explain how the coded price may be deciphered, how it is available for ultimate consumers, and how this "wholesale" catalog, as it is expressly called, is for the use of ultimate consumers or those buying for them.

These yellow pages are set up in high-pressure style, with illustrations, color, and striking captions, so that there cannot be the slightest doubt that they are directed to ultimate consumers or to the members of non-retailer small firms who will buy for themselves personally, or to firms who will permit their employees to buy through them or using their name, and the like.

The yellow pages open up with the caption "BIG 6 VALUE DIVIDENDS" (p. 351), and this is quickly explained as "*consumer dividends*" (our emphasis). The 15,000 items of the catalog are presented, it is stated, "for your every shopping need" (p. 351). The catalog is described as a "department store in a catalog * * * your personal shopping center." It is further stated: "When you deal with Continental, you have the same friendly feeling that you had when you shopped in the old-fashioned 'General Store'" (p. 352). "You needn't stir from your desk or arm chair * * *" Again, "your department store in a catalog" (p. 353). "You shop in comfort, in privacy, and at leisure * * *" There is also a conditional money-refund guarantee (p. 356), obviously to the consumer, providing for "cash" refund if "for any reason you are not completely satisfied."

Interspersed with all the above are repeated references to "wholesale catalog" and "lowest wholesale prices" as well as "wholesale pricing policy"—all calculated to represent to *ultimate consumers* that they are getting the merchandise for wholesale.

The pitch to ultimate consumers is made absolutely explicit in a detachable card (p. 366) captioned in bold type "confidential information for our customers", explaining how to read the coded price, which

is definitely stated to be the real price, *i.e.*, "your cost." There are instructions alongside this detachable card stating "Please tear it out and hold in your files for reference."

On the reverse side of the card is a statement declaring that the coded prices are available to retailers and also to firms, agents, groups, etc. Ultimate consumers as such are not expressly included in this statement of availability, but the examiner regards the statement as a "come-on" to ultimate consumers to jump for the opportunity of buying under a purported trade status.

There are even solicitations for other consumer customers: "Your colleagues and friends will want to see Continental's catalogs." This is another announcement on the same page, p. 366, and detachable self-addressed cards are provided there for them, requiring no postage.

The 1962 catalog (CX 8), entitled "Fall 1961 through 1962", has comparable center pages, although white in color (with red illustrations), and fewer in number than in the 1961 catalog. The pages contain less copy and illustrations, and no references to "wholesale." These center pages *start* with the confidential card making available the coded price, as well as the self-addressed cards for "your business friends" and "interested associates" to whom catalogs are to be sent.

The latest catalog (RX 22 A), 1962-3,¹² also has the explanatory pages, although in front, together with the detachable card explaining the code and the self-addressed cards for "business friends" and "interested associates." This is followed by a page display showing a man, wife and child, with the caption "Your dollars are BIGGER at Continental." There is another page inviting consumers to buy directly at the Continental catalog stores in and around Chicago.

Even Mr. Grawoig, after somewhat crudely asserting and reiterating (Tr. 1490-93) that these inserts are not appeals to ultimate consumers, finally seemed to admit to the contrary, conceding as to a representative excerpt that it was addressed to "ultimate consumers, concerns, retailers" (Tr. 1493:16).

Incidentally, Mr. Grawoig's prior assertions that the contents of the inserts are not appeals to ultimate consumers make it impossible for the examiner (see Tr. 1487:13) to accept literally and at face value his other testimony, particularly the statistics produced by him, which were prepared by others who did not appear at the hearing to be cross-examined.

It is true that the Continental catalog goes back to the 1920's (Tr. 1343) and it may well be, therefore, that the catalog originally concentrated almost entirely, as claimed by respondents, on retailers. But we are now dealing with the 1960's. In the 1930's Continental, except for

¹² The allegations of the complaint, strictly speaking, do not cover these years.

relatively few items, was not even in the general merchandise business, but was the largest distributor in the United States of automobile parts and accessories, sold directly to dealers (Tr. 1375-6). It was not until the 1940's that Continental got into general merchandise as its main line. It was not until about 1950 that a coded price, in place of an uncoded one, was used with the "Retail" price (Tr. 1343-4). It was not until about 1960 that the catalog included referral cards to send to friends or associates (Tr. 1352:7). In other words, the Continental catalog, in its present form and function, seems to coincide, more or less, with the springing up of discount retailing in the United States commencing with the close of World War II.

II

LOCAL AREA EVIDENCE

As heretofore observed, the complaint herein, TWO, specifies six lines of merchandise, *i.e.*, "various articles of merchandise, including jewelry, cameras, typewriters, hardware, sporting goods and appliances."

In his original presentation at the hearing, complaint counsel offered proof of only four of the six lines, limiting his proof to cameras, typewriters, sporting goods and appliances, and thereby eliminating jewelry and hardware.

In his original presentation, complaint counsel offered retail proof as to 89 items. These appear to have been selected from 266 items,¹³ as to which the respondents prior to the issuance of the complaint had been requested to submit detailed information, as they did. (Tr. 1396-7.)

In the original presentation, complaint counsel, as already noted, pursued a formula of simply calling one retail witness to testify as to the price at which he sold an item in his area—without any further testimony or proof whatever, even as to whether the price was competitive with other prices in the area. This evidence was clearly insufficient, and eventually complaint counsel conceded that it was insufficient in his motion to reopen.

On the adjourned date complaint counsel proceeded to present further testimony. However, as to 50 of the items¹⁴ he never offered further proof, and the examiner holds that by this fact alone he must be deemed to have failed in his proof as to these items. Moreover, on rehearing he offered proof as to only 49 items, of which 39 were old items dealt within the original presentation and 10 were new items.

¹³ 118 on RX 16, 99 on RX 10, and 49 on reopening—a total of 266, as compiled by respondents' counsel.

¹⁴ Computed by the examiner, *i.e.*, the difference between 89 and 39 (on rehearing).

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The examiner agrees with the respondents that it is the proof on the 49 items which should govern, *i.e.*, the proof thereon at the reopened hearing supplemented by any proof in the original presentation as to the same 49 items (*i.e.*, 39 of them).

Accordingly, the examiner adopts respondents' tabulation of retail prices on these 49 items showing the prices testified to both on the reopening and the original presentation. Complaint counsel, after being given full opportunity, has pointed out no errors in this tabulation. The tabulation, with some rearrangement and rewording of captions, is included in and made part of this decision.

Tabulation of Retail Price Testimony

Item	Page	"Re-tail" list price	Coded Price	Fort Wayne witnesses			Milwaukee witnesses			
				Original	On reopening		Original	On reopening		
				No. 1	No. 2	No. 3	No. 1	No. 2	No. 3	No. 4
TYPEWRITERS										
Smith-Corona: Sterling.....	287	104.50	76.40 (74.95)	84.50	-----	89.95	84.50	75.00	73.00	79.00
Skywriter.....	287	78.49	59.96	79.00	-----	-----	62.50	58.00	57.00	61.00
Galaxie.....	287	149.27	109.88	139.00	119.50	127.00	115.00	105.00	105.00	105.00
Royal: Futura.....	286	142.13	109.95 (99.95)	125.00	119.50	128.00	115.00	100.00	105.00	105.00
Royalite.....	286	53.11	49.95	53.55	149.95	-----	49.50	55.00	47.50	49.00
Remington: Quiet Riter.....	286	126.99	106.96	-----	119.50	127.00	115.00	100.00	-----	-----
Monarch.....	286	94.90	79.95	94.90	89.95	89.95	-----	-----	-----	-----
ELECTRIC SHAVERS										
Remington: Lektronic.....	316	35.95	22.85	23.88	35.95	29.95	24.99	22.50	26.90	25.95
Auto-Home.....	316	28.95	18.30	19.88	-----	-----	19.88	19.50	22.90	23.50
Roll-A-Matic.....	316	26.95	17.15	17.88	19.88	22.95	17.88	19.00	21.90	19.75
APPLIANCE:										
Sunbeam: Grill.....	372	39.95	29.56	-----	33.33	-----	32.00	30.76	-----	-----
Opener.....	379	25.95	19.20 (15.33)	-----	23.88	-----	-----	-----	-----	-----
Toaster.....	382	29.95	22.16	29.99	25.99	-----	23.95	21.38	-----	-----
Mixmaster (Chrome).....	384	59.95	44.36	-----	-----	-----	-----	24.61	-----	-----
Mixmaster (White).....	384	49.95	36.96 (35.12)	-----	42.99	-----	39.95	47.75	-----	-----
Egg Cooker.....	378	17.95	13.26	-----	15.33	-----	-----	17.95	-----	-----
Portable Mixmaster (Chrome).....	384	24.50	18.13	-----	-----	-----	19.60	19.95	-----	-----
Portable Mixmaster (Colors).....	384	22.50	16.65	-----	18.99	-----	17.95	17.95	-----	-----
Frypan Tilt-Medium.....	386	24.95	18.46	-----	-----	-----	18.75	19.95	-----	-----
Frypan Tilt-Large.....	386	28.95	21.42	-----	-----	-----	22.50	28.88	-----	-----
Westinghouse: Roaster.....	374	49.95	36.96	-----	-----	-----	39.95	44.95	-----	-----
General Electric: Blender.....	377	39.95	29.56	-----	-----	-----	29.95	34.95	-----	-----
9-Cup C Maker.....	380	31.95	23.64	27.95	29.99	-----	25.60	-----	-----	-----
Peek-A-Brew.....	380	19.95	14.76	-----	17.99	-----	15.95	-----	-----	-----
Toast-R-Oven.....	383	34.95	25.86	-----	31.99	-----	26.50	31.95	-----	-----
Portable Mixer W/.....	384	19.95	14.76	16.95	17.99	-----	15.95	18.95	-----	-----
Frypan.....	386	28.90	21.39	-----	-----	-----	21.55	24.70	-----	-----
Sharpener.....	378	19.95	14.76	-----	17.99	-----	-----	19.95	-----	-----
Automatic Toaster.....	383	21.95	16.24	-----	-----	-----	-----	17.88	-----	-----
Knife Sharpener Attachment.....	384	4.95	3.66	-----	-----	-----	-----	4.00	-----	-----

See footnote at end of table.

Tabulation of Retail Price Testimony—Continued

Item	Page	“Re-tail” list price	Coded Price	Fort Wayne witnesses			Milwaukee witnesses			
				Original	On reopening		Original	On reopening		
				No. 1	No. 2	No. 3	No. 1	No. 2	No. 3	No. 4
SPORTING GOODS										
Wilson:										
Kramer Racket.....	521	18.00	11.99	15.95			15.40	14.95		
3 Snead Woods.....	528	41.00	30.99 (30.66)	35.00			31.50	29.95		
8 Snead Irons.....	528	75.00	55.89 (54.49)	56.00			56.00	52.50		
3 Berg Woods.....	528	41.00	30.99 (30.65)	31.50			31.50	29.95		
2 Berg Woods.....	528	27.50	19.95	21.00			21.00	21.90		
5 Berg Irons.....	528	47.00	33.60	35.00			35.00	32.95		
4 Snead Champion- ship Woods.....	529	82.00	57.99	62.00			62.00	58.00		
3 Snead Champion- ship Woods.....	529	61.50	43.89	46.50			46.50	43.50		
8 Snead Champion- ship Irons.....	529	114.00	79.99	84.80			84.80	79.95		
4 Snead Signature Woods.....	529	104.00	77.74 (75.69)	78.00			78.00	72.00		
8 Snead Signature Irons.....	529	145.00	107.49 (107.48)	110.80			110.80	99.00		
Snead Wedge.....	529	14.25	9.97 (9.89)	14.50			10.60	11.95		
4 Palmer Woods.....	528	68.00	52.00	52.00				49.50		
3 Snead Signature Woods.....	529	78.00	57.99 (56.69)	58.50			58.50	54.00		
6 Snead Champion- ship Irons.....	529	85.50	60.89				63.60	59.50		
Graham Football.....	516	7.70	4.79					4.95		
Low Cut Football Shoes.....	516	14.00	9.49					10.95		
High Counter Football Shoes.....	516	14.00	9.49					10.95		
8 Palmer Irons.....	528	96.00	72.00					69.50		

The price stated for a witness is the highest price testified to by the witness for any of the years covered by him. (Some witnesses testified to prices, *i.e.*, actual retail prices, in 1960, 1961, and 1962; others to such prices in one or two of these years.)

Such stated price if also italic is the same or approximately the same as respondents' "Retail" or list price (as can be checked by referring to the "Retail" list price column).

If a coded price is followed by another coded price in parenthesis the latter indicates a change in respondents' coded price (actual retail price) while its catalog CX 8 was in use. (See RX 14.)

Milwaukee witness No. 2 as to appliances represents 2 witnesses from the same store.

¹ Plus tax.

On reopening, complaint counsel also, as already noted, reduced the number of cities presented by him in the original presentation from three to two, namely Milwaukee and Ft. Wayne. He dropped Gary, even though the reopened hearing was held in nearby Chicago. In explanation, he states in his submission papers that he wished to save expense to the Government and that proof of even one area would be sufficient.

In explanation of his reduction of the items on reopening to 49, complaint counsel states in his submission that proof as to even one item could be sufficient to show a deception practice here—a contention which has altogether alarming possibilities.

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This drop to 49 items is not only a serious matter as to number of items but goes far beyond this. For instance, on reopening, complaint counsel decreased his product lines to three, one-half the number specified in the complaint; he did this by dropping cameras completely and limiting his proof to typewriters, sporting goods and appliances (including electric shavers). Moreover, Spalding sporting goods were dropped completely by him.

For convenience, these three product lines covered at the reopening will be considered here in the six following categories, covering all 49 items: (1) Westinghouse appliances. (2) Wilson sporting goods. (3) Sunbeam appliances. (4) GE appliances. (5) Electric shavers. (6) Typewriters. As will be immediately shown, there were eliminations on reopening within the three merchandise lines retained, *i.e.*, apart from the complete dropping of cameras: (1) Westinghouse items were reduced from 6¹⁵ items (2 Ft. Wayne, 4 Milwaukee) to 1 item, and said item limited entirely to Milwaukee. (2) There was no evidence as to Wilson sporting goods from Ft. Wayne, such evidence (19 items) being limited to Milwaukee. (3) As to Sunbeam appliances, only 5 items were covered in both of the two cities, although 10 items in all. (4) As to GE appliances, only 3 items were covered in both of the two cities, although 9 items were covered in all. (5) As to electric shavers, only 2 items were covered in both cities, and only 3 items in all. (6) As to typewriters, there was a showing as to 5 items as to both cities, and 7 items as to all.

Moreover, on reopening, counsel largely continued with his original policy of one witness per item of merchandise per city, except that he produced two or three witnesses for typewriters and shavers. However, as will be shown below, he did definitely adduce testimony as to the competitiveness of the retail prices testified to, in respect to the various items.

As to number of witnesses the situation is as follows: (1) As to Westinghouse appliances, there was one Milwaukee witness as to the one item (also testified to at the original hearing¹⁶). (2) As to Wilson sporting goods, one Milwaukee witness testified as to 15 items (also testified to at the original hearing) as well as to 4 new items. (3) As to Sunbeam appliances, there was one witness from Ft. Wayne as to 6 items (1 of them testified to originally) and one witness from Milwaukee as to 10 items (8 testified to originally). (4) As to GE appliances, there was one witness from Ft. Wayne on 5 items (2 testified to originally) and one from Milwaukee on 7 items (4 testi-

¹⁵ Perhaps this should be 5 (with corresponding reduction in the figures in parenthesis).

¹⁶ *I.e.*, by a witness from the same city. Same (2) through (6), of this paragraph, *i.e.*, as to parenthetical material.

fied to originally). (5) As to electric shavers, there were two witnesses from Ft. Wayne as to 2 items (both testified to originally) and three witnesses from Milwaukee as to all 3 items (all testified to originally). Respondents apparently regard the number of witnesses in respect to shavers as respectable. (6) As to typewriters, there were two witnesses from Ft. Wayne and three from Milwaukee (all items testified to originally except one in each of two cities), with testimony from both cities as to 5 of the 7 items. Respondents apparently again regard the number of witnesses as respectable and there is no doubt that the typewriter evidence is the most substantial offered by complaint counsel.

* * * * *

Not only was complaint counsel's evidence on reopening limited to two cities, rather than three, but there was very little coverage of the actual trade areas including suburbs.

The witnesses came from the city area proper of each of the two cities. Complaint counsel himself carefully adduced from them testimony that the trade areas for each city range from 20 or 25 miles to from 40 to 50 miles from each of the two cities (Tr. 725-6, 756, 780, 856:16, 912:11, 986:13, 1031:4).

Moreover, the retail witnesses with hardly any exception came from the very center of each of the two cities and the downtown shopping area—not from suburbs, the outlying areas, or the towns and villages comprehended in the trade areas as defined in their testimony.

Respondents' counsel was assiduous in adducing testimony on cross-examination as to the existence of many retailers of the particular items other than those who testified to them. This testimony was adduced on all six categories, although not too strongly on typewriters. The testimony covers appliances, to wit, Westinghouse, Sunbeam and GE appliances (Tr. 521-23, 658, 756-7, 871-2), electric shavers (Tr. 538, 621-2, 828-9), Wilson sporting goods (Tr. 599-601), and typewriters (Tr. 532, 981-2). There is little doubt about the multitude of retail outlets. Appliances, including electric shavers, and even typewriters to some extent, can be bought in drug stores, and sporting goods need not be bought in sporting goods stores. Moreover, all the 49 items can be bought outside the city limits of Milwaukee and Ft. Wayne, the two cities concerned.

The retail witnesses had little, and nothing specific, to say about prices in outlying parts of the full trade area. At least four witnesses, one from the large Ft. Wayne department store, expressly stated that they knew nothing about prices in outlying districts (Tr. 876:20-25; 936:14-17; 1000:7-10; 1039:15-18). One from price-vigilant Gimbel's, Milwaukee, admitted that the store's basic shopping is confined

to the large stores (Tr. 762:1-4), and "although we are all over town", he said, "it would be impossible to have somebody in every place all the time" (Tr. 762-3). The witness from the Ft. Wayne large store said that in comparing the store's prices he was basically thinking of "department stores such as we are" (Tr. 831:24; 832:13; 833:23).

Moreover, although respondents' counsel does not make a point of this, there is no evidence of the total dollar or total unit amount of the sales of any item by a retailer in the area, however defined, nor of the total dollar or unit amount of all retailers selling an item in the area at about the same price, nor of the total dollar or unit amount of all retail sales in the area of an item. Nor was there any other evidence, except here and there, on which one might determine even an approximate percentage relationship of sales at a retailer's price to all sales of the item in the area.

Respondents' counsel does argue strongly against the quality of the retail price testimony on reopening, and contends that the testimony does not differ much from the kind offered at the original presentation, which showed merely the price at which one retailer sells an item—even considering answers elicited by complaint counsel that prices were determined by "competition", or that they were "competitive" on the basis of shopping or reading advertisements. A meticulous analysis of the evidence, which will be made below, sustains this argument.

The examiner will now discuss further, and decide specifically, the various points indicated above relating to the technical sufficiency of the local area evidence.

Numerical Quantity of Evidence

First, the facts as to number of items and of lines of merchandise have been fully set forth above.

As to number of items, respondents' position logically is that even the entire 49 items presented on rehearing would not be "many" within the meaning of the complaint, Six. The examiner does not agree. The total number of items advertised in the catalog is not controlling. A violation as to 49 items, and even less than 49 items, is a violation as to "many" items. How many is "many" is indeed a vexatious question. But considering that these are national brand items, in great demand and well-known in our economy, 49 should definitely be regarded as many, particularly in proceedings designed to protect both competitors and consumers. Moreover, since they are national brand items, it can easily be assumed that the violation practice probably extends to all or most of the fifty national brands admittedly featured by the catalog, embracing a countless number of items. The possible assumption is indulged in here only to illustrate the adequacy of 49 items, or even

less, for purposes of proof. It also must be recognized that there are some practical limitations as to proof in respect to number of items, and there must be a rule of reason. Moreover, if 49 are regarded as too few, 149 or 549 might also be regarded in the same way.

Nevertheless, inasmuch as complaint counsel originally undertook to prove a substantially larger number, selected from a still larger number, the examiner cannot say that he is over-impressed by evidence of 49 at a maximum.

As to the number of merchandise *lines* presented at the reopening, and comprehended within the 49 items, the examiner is even less impressed, and is inclined to rule that the presentation is insufficient by reason of insufficient coverage of the various lines of merchandise.

Only three of the six merchandise lines named in the complaint by the Commission, and presumably supporting its finding therein of sufficient public interest, are covered in the proof. An important brand like Spalding sporting goods is dropped completely, and proof as to Wilson sporting goods is confined to one city. Proof of Westinghouse appliances is reduced to one item in one city.

Complaint counsel not only fails to meet standards of proof at least indicated in the complaint by the Commission, but he fails even to meet his own standards of proof indicated by him, a Commission attorney, in his original presentation.

There is also respondent's further contention that, even if the number of merchandise items and lines might in some sense be regarded as sufficient, nevertheless they are not representative of respondents' "entire operation." It is urged that there was no showing as to random selection and typicality of items; that, indeed, they were national brand items exclusively and the most competitive items; and that most of respondents' business is in small communities.¹⁷

The examiner rejects this contention. There is nothing in the complaint which requires the items of merchandise to be representative, desirable as it is that they should be. Moreover, as national brand items they are representative, even if they are highly competitive. If, indeed, most of respondents' business is in small communities, that does not excuse violations in larger communities, nor can it be held that competitive conditions are necessarily different in, say, the Ft. Wayne area than in smaller communities.

* * * * *

Secondly, as to number of witnesses, the facts have also been fully set forth above. The examiner holds that the general limitation herein

¹⁷ In this connection respondents' counsel also points out that, according to Mr. Grawoig's testimony, the total volume of Continental's sales in commerce of all 49 items was \$40,000 a year (Tr. 1428:18), as against total sales in commerce of about \$10,000,000.

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of one retailer witness to establish retail price, except for shavers and typewriters, serves to negate the value of the testimony, and does not accord with the kind of proof generally found acceptable in analogous cases. This is not because it is theoretically impossible to prove by one retailer witness that a list price is in excess of the price at which the merchandise is generally sold, presumably at or about the retailer's price, but because it is so unlikely that it can be so proved. As will be shown below the testimony of witnesses herein was not too much more than what their own prices were, together with those of some of their competitors.

Full Trade Area Not Covered

Thirdly, not only are only two cities covered of the three originally presented, but, more importantly, there is no coverage of the actual trade areas, including extensive suburbs as defined by the witnesses. Moreover, the proof submitted was supplied almost exclusively by retailers from the heart of each city.

The most favorable conclusion, and the examiner is willing to make it, is that, so far as concerns area, there was sufficient proof as to the two cities, Milwaukee and Ft. Wayne, limited, however, to their strict geographical boundaries.

Having himself defined the trade areas through his own witnesses, complaint counsel should be bound by the definition. However, the examiner does not agree with respondents' counsel that two areas are not enough. The complaint does not speak of "many" areas or cities. A violation in a single trade area might, under proper circumstances, be sufficient basis for establishing a violation and supporting a cease and desist order. Here we have one fairly large and one small city. As already indicated, it is no defense here that respondents may be doing most of their business in smaller communities¹⁸ although this may bear on the issue of public interest. Comparable competitive and pricing conditions may well exist in smaller communities.

Furthermore, as pointed out above, no evidence has been supplied on which a determination may be made as to percentage relationship of sales in the trade area—at or about the price testified to for an item—to total retail sales of the item in the area. The importance of such evidence is indicated in *Sun Gold Industries*, 56 F.T.C. 1368, 1371 (1960). In the examiner's opinion the absence of the evidence is definitely fatal in the case at bar since the trade area is held to be the city plus suburbs, and the proof, whatever it is, essentially relates to the city area proper.

¹⁸ See *Matter of Baltimore Luggage Company*, 296 F. 2d 608 (4th Cir., 1961), affirming FTC Docket No. 7683.

Price Evidence Qualitatively Insufficient

Fourthly, there is the question of qualitative sufficiency.

The examiner rejects the retail price testimony as affording a reliable basis qualitatively for determining that respondents' "Retail" prices, or the identical manufacturers' list prices, were in excess of the prices at which the merchandise sold (even assuming the testimony covers the full trade areas).

The testimony consists largely of the particular retailer's own prices, much as the testimony at the original hearing, except that in varying degrees it shows that the prices were in a general way determined "competitively" or by "competition." The strongest, or least unsubstantial, of all this testimony is that in relation to the prices of Gimbels-Schuster, Milwaukee, but this too is insufficient. Much of the testimony is from discount houses, which of itself is not invalidating, to be sure, but the testimony hardly relates to the prices of other retailers generally.

In order to substantiate the qualitative sufficiency of this "competitive" evidence as to prices, complaint counsel in his answering submission cites a truly large number of page references in the record. In deference to counsel's earnestness, and in the interest of a complete factual foundation for making a determination, the examiner has compiled, mostly by quotation, all of the pertinent testimony on the cited pages, and some additional pages as well. The compilation, which is complete and definitive, is as follows:

Gimbels (Schusters) Milwaukee. Leading department store, Milwaukee. Their prices, *i.e.*, of appliances, set "by what is going on in the particular market" (Tr. 725:13). "* * * somebody would advertise something in the newspaper. That is the price we would put on it, or through our shoppers we would put the price on whatever the market is selling the thing for" (725:18). What determines your prices? "Well, competition entirely. In other words, we base our prices on what other people sell their things for. I am talking about department stores and other stores in the Milwaukee area." (753:10) As to small appliances, "we also have shoppers that go out and shop competition * * * we are jumping around with prices all the time." (753:22) "* * * we will shop in Milwaukee discount houses, we will shop other department stores, we will shop people that are near us." (754:11) "Most of the time we would meet the price." (754:19) What determined your prices on electric appliances? "* * * we did periodic shopping * * * making tours of the different competitors * * *" (780:3) We "meet all of the prices that were sold in a similar type store in the city itself." (780:9)

Wolf & Dessauer, Fort Wayne. Large department store. How do you set your prices for electric razors? "Primarily the competitive position within the town." (824:23) How do you ascertain other prices, " * * * with an ad., competitive ad. or something of that nature * * * or a price suggested as what will be the going price from salesmen covering our territory." (825:2) When you talk about meeting competition, are you talking about other department stores? "Yes, sir." (830:2) Are prices of non-department stores the same as yours? "Well, we do competitive shopping from time to time * * * they are approximately the same or slightly higher." (830:6) Do you shop drug stores and hardware stores? Not as often as we would the department stores." (830:10) What determines your competitive price? "Through my personal shopping and through other competition advertisers." (855:24) Principal competitors are Stillman's Department Store and the Haag Drug Store. But "anyone who sells small appliances has to be a competitor." (856:24) "We check the variety stores, chain stores, drug stores, plus other department stores in our area, and the discount stores." (857:5) Whose advertisements do you check? "Anyone who advertises like merchandise that I am carrying." (857:11)

Erlie & Sons, Inc., Milwaukee. Mainly jewelry; typewriters and razors only 1% of their business (892:12); five employees (891:11). How do you determine your prices of typewriters and razors? "Well, we go according to what the competition sells it for." (890:9) How do you ascertain this? "Well, we check prices in stores, catalogs and newspapers." Who is your competition? "Mainly department stores right now and the catalogs." (890:17) How do the prices of competitors compare "Sometimes they are higher and sometimes they are lower, depending on the sale conditions and deals and so forth." (890:21) Does any other type of business compete with you as to typewriters? "Well, there is the discount stores now." (891:17) Do you meet their prices? "Yes, I do." He does not know what percentage of the typewriter business is handled by the department stores (892:7-9), or by his store and major competitors. (892:17-20) Do you ever do any store to store personal Saturday shopping? "Occasionally." (892:23) A couple of dozen stores handle typewriters. (893:2) Do you shop all of them? "No." Why not? "I don't have the time." (893:6) Do they all advertise? "I don't believe so." How many competitors do you have as to Remington shavers? "That I could not honestly answer because the shavers are handled in all the drug stores and all over, so I wouldn't know exactly." (893:15) "I know that Remington shavers are sold in drug stores and some clothing stores and I know that they never meet

the prices like some of the other stores do." (894:14) They charge higher prices? Yes, "the smaller dealers usually charge higher prices * * *" (894:20) Did you ever lower your prices, on shavers and typewriters, to meet those of the large department stores? "Yes, sir." (908:8, 15)

Needham's Typewriter Company, Fort Wayne. What determines your prices? "I would say basically competition." (911:24) How do you determine competition? "In Fort Wayne this is not too difficult; we even have an association * * * not that we fix prices, but just everybody knows what everybody else sells for." (912:1) What is your competition? "In Fort Wayne, typewriter stores, Sears & Roebuck, department store, one probably, I would say basically that's competition." (912:17) How about the trading area? "Oh, boy * * * nearly every small town of approximately 5000 or over will have a typewriter store * * *" (912:22) In Fort Wayne proper, a dealer is apt to handle only one type of typewriter, "everybody doesn't have every franchise." (913:14-19) Are your prices on portable typewriters based on competition of typewriter stores? "I would say that I do not shop these stores basically" (914:24), but "I base my prices on portable typewriters with the knowledge in catalogs which is all we see in Ft. Wayne, there being no what we call discount houses that handle typewriters * * * we would base our prices on being \$10, \$15 higher than a catalog would offer the same machine at, roughly, because we feel that we have a little more to offer than they do. That's all. I don't pay too much attention to what other people are selling at, to be honest with you." (915:1-10) "People will come in and flop the page down out of a catalog in front of us and say 'I can buy it for this price; what'll you do.'" (917:7)

Art Anderson, Milwaukee. A discount house (978:7-10). How do you fix your price for razors? "Well, I usually establish what the going price is for the average * * * discount house that is in the competition area." (941:9) "I would sell them at just about their price or a little less." (941:14) "I always charge maybe two or three per cent less than the going price in the area." (941:23) How do you ascertain this going price? "Oh, I could, by looking at our catalog, like we have many catalogs in Milwaukee, at department stores, * * * and just by general shopping around with other places of business that were similar to me in nature." (942:3) "And advertisements in the newspapers." (943:5) How did you determine your prices for typewriters? "I just looked at the individual catalogs and I charged them to \$5 less than what the catalogs did." (944:6) Were catalog companies your biggest competition? "They were my biggest competition, yes." (944:15) "Well, I would say any catalog that came into the

industry of Milwaukee was a competitor." (945:5) "I received Continental, but there were several others," (945:21)—including Majestic (946:7). "I would scan any catalog I had that was available, in immediate hand-reach" (948:17), "because they all had basically the same wholesale and retail price in there." (948:23) Were your prices higher or lower than Erlien's? "Sometimes he was higher, and sometimes he was lower." (977:25)

Rohr Jewelers, Milwaukee. Sells portable typewriters. How do you determine your prices? "Well, my competitors' prices in the downtown area were established, and then I would set my prices accordingly." (1011:11) His competitors were catalog houses (1011:19) and retail establishments, mainly department stores (1011:22). Were office supply places competitors? "I never checked into them. I never worried about those places." (1011:24) He keeps all the catalogs at his store (1012:24), including that of Millway and General Merchandise, but not Continental, although he has heard of it. (1012:10, 14, 19) If a customer quoted a catalog price, *i.e.*, the lower or coded price (1014:2, 8) "you would have to fall in line with that particular price", (1013:16) and usually sell "pennies below" the price (1014:12). He might also read a Gimbels advertisement on shavers (1015:6), or a customer might quote him an alleged Gimbels price on typewriters (1015:12-15). What type of stores in Milwaukee sell typewriters? "Well, I would say, mainly your * * * department store." (1015:18)

Dewey Sporting Goods Company, Milwaukee. How do you determine your prices? "Well, we determine our prices by the competition." (1069:20). What is your competition? "Well, our main competition is from these so-called discount houses, and discount catalog houses." (1069:22) How about sporting goods companies? "Well, we have to compete with them; if they advertise a certain price, we try to be within striking distance of it." (1070:22) How many retail outlets for sporting goods are there "in Milwaukee"? "Well, including small ones * * * maybe 25 or 30." (1071:3) How do you determine your competitors' prices? "We both shop them and we also watch their advertising and check their catalog prices." (1071:20) How much of the sporting goods business does your company and two other companies (named) have of "Milwaukee trade area" business? "I would say around a third." (1072:8) The discount houses and catalog houses have most of the balance (1072:15), smaller stores having the rest. In competing with catalogs he uses the lower or coded price (1074:4) and charged "a little lower" (1074:9). Customers "constantly" (1075:9) bring up the catalog prices. As for the catalogs they also "use them in conjunction with shopping some of the other stores" (1075:22). The catalogs they use have the same sporting

merchandise and practically the same coded prices (1076:16), but he has never seen Continental.

III

"WHOLESALE" PRICES

Respondents ceased using the "wholesale" representations commencing midsummer 1961. Repeated assurances have been given that they are willing to bind themselves not to use them, for instance, at the prehearing conference (Tr. 34:20), and in Mr. Grawoig's testimony (Tr. 1412:12-14). Nevertheless, respondent's counsel contends in his main submissions (see p. 47) herein that there is not sufficient proof to sustain the allegations of the complaint as to the "wholesale" representations, or to support a cease and desist order in connection therewith.

The pertinent parts of the complaint as to the use of the word "wholesale" may be completely summarized as follows:

Complaint, Four, quotes the references in the catalog to "wholesale catalog", "lowest wholesale prices", and to "coded price", *i.e.*, respondents' actual retail selling price described in the catalog as "wholesale" (Five, first sentence.)

Five also alleges that by means of such statements and pricing methods respondents represent:

that they are wholesalers who sell all of their merchandise at wholesale prices; that the so-called coded prices, at which the merchandise is offered for sale, are wholesale prices;

and Six alleges that this is misleading for the following reason:

In truth and in fact, respondents do not sell, or offer to sell, all of their merchandise at wholesale prices. To the contrary, the prices of *many* of their articles of merchandise are in excess of wholesale prices and the said coded prices of such articles are not wholesale prices but are in excess thereof. (Our emphasis.)

The following observations may be made as to these allegations in the complaint:

(1) There is no reference to areas, trade areas, or other bounds—*i.e.* in connection with wholesale prices.

(2) The deception according to the first sentence of Six is that respondents do not sell their merchandise at wholesale. The deception according to the second sentence of Six is that the prices are "in excess of" wholesale prices. As will be set forth below, the examiner holds that for all practical purposes, so far as concerns ultimate consumers, their not obtaining the merchandise at wholesale (first sentence) is the same thing as having to pay "in excess of" wholesale prices (second sentence).

(3) Six (second sentence) also alleges a deception in respect to "many" items of merchandise, so that complaint counsel's proof must comprehend "many" items.

Complaint counsel produced his supplier witnesses, as to wholesale prices, at the original presentation—the reopening being reserved, of course, for retail items. Accordingly, complaint counsel's proof as to wholesale prices did not go through any such process of reduction as took place with retail items, lines, or areas.

Complaint counsel devotes his Ninth Proposed Finding to the wholesale aspects of the complaint's charges:

(1) He recites no areas in his proposed finding but in his comment thereon mentions the "areas of Illinois, Indiana and Wisconsin", *i.e.*, where he refers to the testimony of wholesalers called by him as to their wholesale prices for items in the catalog. These state areas would include, of course, all three cities brought into this case—Milwaukee, Fort Wayne, and Gary—together with their suburbs.

(2) Complaint counsel adopts, in his Ninth Proposed Finding, the above quoted wording of the complaint, Six, but combines both sentences together.

(3) By adopting the wording of Six in his proposed finding, including its reference to "many" items, he recognizes his burden of wholesale proof as to "many" items, but of course no greater burden, and he contends that he has met this burden. He introduced evidence as to 90 items.¹⁹

The supplier witnesses testified that the same prices²⁰ are charged by their firms to all dealers, irrespective of the possibility that they may be wholesalers, except that Eastman Kodak gives a standard and modest quantity low net price to certified wholesalers irrespective of quantity (R. 193:25), and except that, although not testified to, Royal McBee may do the same with its special wholesalers covering the Rocky Mountain area found not feasible or profitable to cover directly. (Tr. 169:11-18)

The supplier witnesses, moreover, generally defined a dealer as a retailer selling to ultimate consumers, and referred to Continental as a dealer. The suppliers represented by these witnesses in this particular testimony are Remington Rand (Tr. 136:6; 138:22); Royal McBee (158:5, 23); Eastman Kodak (193:3; 195:14); Spalding (221:19, 22);

¹⁹ This revised number, 90, as per stipulation of counsel, June 13, 1963.

²⁰ Typewriters (Tr. 139:6; 161:20-25; 177:4-12)—Cameras (Tr. 193ff, Eastman: 327:18-21, Bell & Howell)—Sporting goods (R. 223:8, Spalding; 275, Wilson)—Appliances (R. 474:21, Westinghouse; 499:23, GE).

also, although not selling ²¹ to Continental, Westinghouse (471:20) and GE (493:8).

The suppliers represented by these witnesses are the manufacturers, except as to General Electric (Tr. 498:6) and Westinghouse (Tr. 470ff) they are wholly owned subsidiaries of the manufacturers.

All these suppliers do their own distributing to retail dealers, with the two main exceptions alluded to above: Eastman Kodak sells to certified wholesalers, *i.e.*, wholesale drug houses and wholesale photo-finishers (Tr. 193:14), and most drug stores buy through such intermediate source (Tr. 197:9). Royal McBee, a rather lesser exception, sells its typewriters (portable) to wholesalers in Rocky Mountain areas it finds not feasible or profitable not to cover directly (Tr. 169:11-18). There are also other exceptions: Smith Corona sells to dealers some of whom apparently resell to retailers regularly (Tr. 184:16, 21) and, of course, all suppliers sell to dealers who *may* resell to retailers.

Complaint counsel has presented a chart of the prices testified to by the suppliers. The chart has not been objected to by the respondents, although ample opportunity has been afforded to them, and it is incorporated in this decision, although somewhat rearranged for convenience.

Tabulation of Wholesale Price Testimony

	CX 8 catalog page	Coded price	1961		1962		
			Actual price	Rec. page	Actual price	Rec. page	
SPORTING GOODS							
Wilson's Sporting Goods:							
Otto Graham Football.....	516	4.79	3.33	276	3.33	277	
Football helmet.....	516	4.79	3.60	277	3.60	277	
Football shoes (low).....	516	9.49	6.90	277	7.20	278	
Football shoes (high).....	516	9.49	6.90	277	7.20	278	
T.V. Leather basketball.....	517	14.69	10.60	278	10.60	278	
Top notch basketball.....	517	14.49	10.85	278	10.85	279	
Harvey Kuenn glove.....	518	14.69	10.80	279			
Nelson Fox glove.....	518	17.59	15.00	279	13.00	279	
Mickey Vernon glove.....	518	8.89	6.60	280	6.60	280	
Harwick flight racket.....	521	6.47	4.80	281	4.80	281	
Zephyr racket.....	521	4.97	3.60	281	3.60	282	
Jack Kramer pro racket.....	521	11.99	9.00	282	9.00	282	
Sam Snead Blue Ridge 3 Woods.....	528	30.99	20.70	282	20.70	282	
Sam Snead Blue Ridge 8 Irons.....	528	55.89	37.20	282	37.20	283	
Sam Snead Blue Ridge 6 Irons.....	528	41.89	27.90	283	27.90	283	
Patty Berg 3 Woods.....	528	30.99	20.70	283	20.70	284	
Patty Berg 2 Woods.....	528	19.95	13.80	284	13.80	284	
Patty Berg 6 Irons.....	528	41.89	27.90	284	27.90	285	
Sam Snead Championship 4 Woods.....	529	57.99	40.50	285	40.50	286	
Sam Snead Championship 3 Woods.....	529	43.89	30.50	286	30.50	286	
Sam Snead Championship 8 Irons.....	529	79.99	56.40	286	56.40	286	
Sam Snead Signature 4 Woods.....	529	77.74	52.00	286	52.00	287	
Sam Snead Signature 8 Irons.....	529	107.49	72.00	287	72.00	287	
Sam Snead Wedge.....	529	9.97	7.05	287	7.05	288	
Hol-Hi golf balls (dozen).....	530	9.99	9.50	288	9.50	289	

²¹ The record indicates merely that these particular subsidiaries of GE and Westinghouse do not supply Continental.

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Tabulation of Wholesale Price Testimony—Continued

	CX 8 catalog page	Coded price	1961		1962	
			Actual price	Rec. page	Actual price	Rec. page
SPORTING GOODS—continued						
Spalding Sporting Goods:						
John Unitas football.....	516	5.69	4.20	222	4.20	222
John Arnett, Jr. football.....	516	4.89	3.00	222	3.00	223
John Unitas shoulder pads.....	516	4.89	3.60	223	3.60	223
172 "Pro-bilt" basketball.....	517	8.79	6.60	223	6.60	224
"Speed win" basketball.....	517	11.29	8.40	224	8.40	224
Davis cup racket.....	521	15.47	10.20	225	10.20	225
Gonzales signature racket.....	521	7.99	6.00	225	6.00	225
Walter Burkemo 4 Woods.....	529	33.79	20.05	225	20.05	225
Walter Burkemo 3 Woods.....	529	25.35	18.75	226	18.75	226
Walter Burkemo 2 Woods.....	529	16.89	12.50	226	12.50	226
Walter Burkemo 8 Irons.....	529	46.79	34.80	226	34.80	226
Walter Burkemo 5 Irons.....	529	29.25	21.75	226	21.75	226
Walter Burkemo Wedge.....	529	6.59	4.50	227	4.50	227
Walter Burkemo Putter.....	529	5.99	4.35	227	4.35	227
Fay Crocker 3 Woods.....	529	25.35	18.75	227	18.75	227
Fay Crocker 2 Woods.....	529	16.89	12.50	227	12.50	227
Fay Crocker 7 Irons.....	529	40.95	30.45	227	30.45	228
Fay Crocker 5 Irons.....	529	29.25	21.75	228	21.75	228
TYPEWRITERS						
Remington typewriters:						
Quiet-riter.....	286	106.96	78.50	137	72.50	138
Monarch.....	286	79.95	55.00	138	59.00	138
Royal typewriters:						
Royalite.....	286	49.95	39.80	158	43.11	159
Futura 800.....	286	109.95	88.13	162	88.13	163
Smith-Corona typewriters:						
Sterling.....	287	76.40	59.50	174	62.30	174
Skywriter.....	287	59.96	46.50	175	48.30	175
Galaxy.....	287	109.88	85.00	176	85.00	176
Pacemaker.....	287	149.60	113.70	178	113.70	178
CAMERAS						
Eastman-Kodak cameras:						
Motomatic.....	268	87.60	73.00	194	73.00	194
Retina Reflex.....	268	199.90	165.70	200	175.67	200
Electric Eye.....	268	72.50	59.67	199	59.67	199
Retina Automatic III.....	268	103.90	86.33	200	93.00	200
504 Projector.....	271	75.60	66.00	201	66.00	201
Zoom 8 Reflex.....	272	159.60	-----	-----	143.00	201
Zoom 8 8mm.....	273	87.60	73.00	201	73.00	202
8mm Projector.....	277	99.60	83.00	208	83.00	208
Brownie "500" Projector.....	277	74.96	61.43	209	61.43	209
Brownie "AIS" Projector.....	277	47.96	33.43	208	33.43	209
Bell & Howell cameras:						
Infalible Electric Eye.....	267	46.96	34.98	326	34.98	326
Duo-Power Zoomatic (spool load).....	272	199.96	164.34	326	145.17	326
Duo-Power Zoomatic (magazine load).....	272	221.46	174.49	327	158.37	327
8mm Zoomatic (spool).....	273	176.96	141.87	327	135.37	327
8mm Zoomatic (magazine).....	273	193.96	149.47	328	155.07	328
8mm Zoom.....	273	91.96	73.94	328	73.94	328
8mm Lumina Zoom.....	276	155.96	117.17	329	-----	-----
16mm camera.....	277	289.96	233.30	329	233.30	329
APPLIANCES						
Westinghouse appliances:						
Spin jet cleaner.....	350	52.95	51.95	481	51.95	482
Mobile cleaner.....	350	49.95	48.27	482	48.27	482
10 quart roaster.....	374	36.96	34.97	483	35.96	483
General Electric appliances:						
Automatic grill-waffle.....	372	17.72	16.77	490	16.77	490
2 speed blender.....	377	29.56	27.97	491	27.97	491
Sharpener.....	378	14.76	13.97	492	13.97	492
9 cup stainless coffeemaker.....	380	23.64	22.37	493	22.37	493
Peek-a-brew.....	380	14.76	13.97	494	13.97	494
Toast-r-oven.....	383	25.86	24.47	495	24.47	495
Portable mixer.....	384	14.76	13.97	496	13.97	495

The following may be stated generally as to the submissions of the respondents' counsel in respect to the proof as to the "Wholesale" representations: (1) No point seems to be made by him that area coverage as such is insufficient. (2) The contention is made that the proof is insufficient to show that respondents' coded prices (*i.e.*, their actual retail prices) have been in excess of all wholesale prices. (3) No point as such seems to be made that the number of items covered are not "many", *i.e.*, for the purpose of wholesale proof.

Accordingly, the only one of these three points to be resolved is, (2), whether the proof is sufficient to show the coded prices are in excess of wholesale prices, or all wholesale prices.

Respondents' counsel attacks this proof mainly because of the instances in which the supplier represented by the witness as only one of the suppliers (or wholesalers) to retailers.

For instance, he stresses that the witness for GE and the witness for Westinghouse²² each testified that the wholly owned distributor company represented by him was only one of such distributing companies for the parent company. But the Westinghouse witness, after testifying to competition with other distributing companies of Westinghouse (476:14), testified that the prices he had testified to for his company were the "maximum prices" charged (477:6). And the GE witness testified that his was "the only company-owned distribution in this area." (Tr. 498:25) The examiner accordingly is not swayed by the argument as to GE and Westinghouse distribution.

Respondents' counsel similarly stresses the sale by Eastman Kodak to wholesale drug houses and photo-finishers, through which the majority of drug stores get their merchandise. The examiner regards this a substantial factor to be considered—however, not too substantial, since drug stores obviously do not carry the variety of stock of a department or camera store.

Respondents' counsel also refers to Royal McBee's wholesale customers. However, these are the customers in the Rocky Mountain areas not feasible or not profitable to cover directly. These obviously do not concern the area involved in this case, in the examiner's opinion.

Respondents' counsel also refers, by record page reference, to those Smith Corona dealers who apparently resell to dealers as a regular practice. The evidence on this is hazy and without details, but the examiner believes that it presents something substantial to consider in respect to the wholesale price situation.

²² Respondents' counsel also makes the statement that the Westinghouse price on each item is identical with respondents' coded price. This statement appears to be incorrect. See chart.

Respondents' counsel also cites Mr. Grawoig's testimony (Tr. 1424-26) that GE distributors, at least in Chicago, vary their prices according to various conditions (Tr. 1425:15). In the examiner's opinion all that this testimony can support is the conclusion that GE Chicago distributors (wholesalers) will cut prices, in other words, that their prices would be lower, presumably, than those testified to by the GE witness herein. As such, they do not affect the wholesale price question in this case. It has already been noted that the GE witness's company is the only company-owned distribution in the area considered.— Respondents' counsel also asked Mr. Grawoig the leading question as to whether the GE situation as above testified to him applied to "Westinghouse, Sunbeam, Remington, Smith Corona." Mr. Grawoig's answer "Yes, it is very competitive" (1426:19) can, of course, be given no special weight.

Respondents' counsel also points out that no retailer called by complaint counsel testified as to wholesale cost to him, which is true. However, although such evidence would have been desirable, the examiner does not regard it as indispensable.

Respondents' counsel keeps reiterating that the catalog is primarily for retailers, 85 per cent of its business being with retailers. The examiner rejects this completely unsupported conclusion, as he has already fully made clear in the earlier part of his decision under the subcaption *A Retail Catalog*.

A review of all the pertinent evidence leads the examiner to the following conclusions:

(1) The proof is sufficient as to local areas, *i.e.*, the proof relating to Illinois, Indiana and Wisconsin comprehends the full trade areas of Greater Milwaukee, Fort Wayne and Gary, with suburbs, here.

(2) A finding is fully warranted, generally, that respondents do not sell to ultimate consumers at wholesale prices, but at prices in excess of wholesale prices. The examiner holds that the meaning of wholesale price to a consumer is the price at which retailers regularly purchase an item in the area. As to the allegation in the second sentence of Six of the complaint, that respondents' prices are "in excess of wholesale prices", the examiner holds that this is simply a more precise way, or another way, of stating, as the first sentence does, that respondents do not sell "at wholesale prices." The consumer, told that he is obtaining a wholesale price, expects to pay that price (what a retailer would have to pay), not in excess of it.

It is quite clear on the evidence here that the price as to the brand items was generally uniform to all retailers, including respondents, and that generally retailers could buy the items of merchandise herein at the prices respondents paid. There are some product weaknesses

in the evidence, notably as to Eastman cameras sold to drug stores via intermediate wholesalers, but in respect to most of the products presented this evidence is sufficient.

(3) A finding is also justified that "many" of the prices are not wholesale prices but are in excess of wholesale prices. The items are certainly "many" if regarded as representative of other national brand items in the catalog like them.

Accordingly, it is found that respondents' representations to ultimate consumers as to "wholesale" price and "wholesale catalog" have been proved to be false, and that they violate the law, as epitomized in the Guides Against Deceptive Pricing, October 2, 1958, Par. VII, expressly pertaining by its wording to a

"wholesale" price, or other such expression, which represents or implies that the consuming public can purchase the article at the same price that retailers regularly do, * * *.

QUESTIONS AS TO AN ORDER

Respondents request that if an order is issued against them its effective date be postponed so that they will not be subject thereto unless operators of comparable catalogs are subject to similar orders. This request may have substantial merit. An order against respondents, in effect prohibiting them from publishing a dual-price catalog while their catalog competitors do, may well put them out of business or otherwise subject them to irreparable injury while these catalog competitors simply take over their trade, or a large part of it. Of course, as found in this decision, respondents have been violating the law. But so far as concerns consumers they have not been an altogether pernicious influence, and their coded or actual retail prices are often lower than going retail prices, even though not affording the full saving from their "Retail" or list prices. They operate a high grade catalog, with high grade products, affording an excellent distribution system to those customers in remoter and smaller localities. Although their "Retail" prices are fictitious under the adjudicated cases, and therefore the savings represented from "Retail" prices are false, nevertheless it is true that the public is beginning to pay less attention to such list prices. For this and other reasons the postponement of the effective date of the order need not bear so adversely on consumers as it would otherwise.

However, the question of postponement of the effective date of the order is for the Commission proper to pass on, rather than the examiner. The hearing examiner's order is not effective in any event until approved by the Commission.

There may be a question as to whether the individual respondents should be named individually in any order herein issued, or merely as officers of the corporation. However, they are not only the officers, but, as the answer admits, they formulate, direct and control the corporation's policies, acts, and practices. Furthermore, they together own all the stock of the corporation, as the evidence shows.

The five individual respondents are two brothers, a son of each of them, and the son-in-law of one (Tr. 1341,2). This is thus just a family corporation, making it at least reasonably possible that any order herein could be circumvented by a transfer of ownership to or in behalf of the individuals. Under these circumstances, it seems reasonable that respondents should be restrained individually just as they would be if they were members of a partnership owning the business.

As to the contents of the order there is the question as to whether its application should be limited to national brand products as was the proof, instead of applying to merchandise generally. The examiner thinks not. The catalog is largely composed of national brand products, as proclaimed in its pages. The respondents do not ask for a limitation to national brand products, and it is doubtful that they would be any more pleased or relieved with such a limitation than without it. Moreover, an order need not be limited to the exact items, or exact kind of items, proved.

There is also the question as to whether the order should extend to the use of the word "wholesale", since respondents have discontinued this practice and state they will not renew it. However, they discontinued the practice only in 1961, after direct investigation began, and in a publication which would continue for some time to operate as a vehicle of the misrepresentation. Moreover, although respondents have stated that they would not renew the practice, in their submissions after the hearing they actively defend it. The question goes to the discretion of the Commission, and the examiner definitely believes that the order should extend to the use of the word "wholesale." See *Spencer Gifts, Inc. v. Federal Trade Commission*, 302 F. 2d 267, 8 (CA 3d, 1962), where discontinuance took place even prior to investigation.

* * * * *

The examiner's ultimate Findings of Fact follow immediately. Except as contained therein or found above all proposed findings of fact are hereby disallowed. The non-finding or disallowance of a proposed finding of fact does not necessarily mean that the fact has not been proved as a fact in the general sense.

The Conclusions of Law follow thereafter, and then the Order proper.

If there are any pending motions or other questions they are decided only as may be consistent with the decision herein. Any undetermined quotations from the catalog, i.e., other than those set forth in the admissibility of the evidence.

Complaint counsel in his proposed findings follows the wording of the complaint almost literally except that he breaks up the paragraphs and assigns additional numbers to them—and except that he substitutes quotations from the catalog, i.e., other than those set forth in the complaint.

The examiner, after some deliberation and considering the extent of the factual findings in the decision proper, has also decided to follow the wording of the complaint, with slight changes, including some additions to the catalog quotations set forth in the complaint. However, the examiner retains the same numbering as in the complaint, although in Arabic form.

In addition, the examiner has added supplementary findings or finding material after each of the numbered findings following the wording of the complaint, wherever he has deemed this appropriate.

FINDINGS OF FACT

1. Respondent Continental Products, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 2030 South Michigan Avenue, Chicago, Illinois.

Respondents Garrison Grawoig, Allen Grawoig, Earl W. Grawoig, Richard N. Grawoig, and Paul M. Mayer are individuals and officers of the said corporate respondent. They formulate, direct and control the policies, acts, and practices of said corporate respondent, including those hereinafter set out. The address of each individual respondent is the same as that of the corporate respondent.

These individuals are all of the same family, including respondent Paul M. Mayer, by marriage, and together they own all of the stock of the corporation.

2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of various articles of merchandise, including jewelry, cameras, typewriters, hardware, sporting goods and appliances, (1) to retailers for resale and to (2) individual members of the public.

The thrust of the proof herein is as to sales to individual members of the public, that is, to individual consumers and to firms, organizations, or others purchasing for individual consumers, or permitting themselves to be used as a conduit for such purposes. However, there

are sales to retailers, for instance, in remote areas, who resell at retail to ultimate consumers. Such retailers pay respondents exactly the same price as ultimate consumers or those buying for ultimate consumers.

There was no proof in this case, whether general or specific, as to prices of jewelry or hardware. The types of merchandise as to which there was any proof were in all instances rather well-known national brands. Respondents feature well-known national brands in their catalogs and circulars, through which they advertise their merchandise.

3. 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 Illinois to purchasers thereof located in various other States of the United States, 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.

4. Respondents, in the course and conduct of their business and for the purpose of inducing the purchase of their merchandise, have advertised the same by means of catalogs and circulars, disseminated by and through the United States mails to prospective purchasers located in various States other than the State of Illinois. Among and typical, but not all inclusive, of the explanatory statements appearing in respondents' catalogs and circulars are the following:

* * * a wholesale catalog * * * at the lowest wholesale prices * * * a great department store in a catalog * * * general wholesale merchandise * * * Prices shown are retail prices established by the manufacturer or recommended by us. Your cost is hidden in the stock numbers.

Confidential—Your Net Low Cost is Hidden in the Stock Number—Retail prices * * * have been suggested by the manufacturer as list prices for dealers who are buying for resale. You pay only the coded price.

26-89537-1356 * * * Retail 22.50

* * * We are offering our customers the greatest collection of values ever compiled in the pages of wholesale catalog * * *

* * * that the prices listed are as low or lower than any other wholesale catalog.

2. Wholesale only (CX 1, order blank).

In addition, the catalogs and circulars contain other material—wording, illustrations, and solicitations—clearly indicating that respondents definitely appeal to ultimate consumers, and the like, to purchase from them, *i.e.*, at the coded price, supposedly designed for retailers.

5. Respondents, for each article of merchandise described in their catalogs and circulars, set forth two prices; one, a so-called coded price and the other, a higher price, designated as "Retail." By means of such pricing methods and the aforesaid quoted statements, and others

of like import not specifically set out herein, respondents represent, directly or by implication, that they are wholesalers who sell all of their merchandise at wholesale prices; that the so-called coded prices, at which the merchandise is offered for sale, are wholesale prices; that the prices designated as "Retail" are the prices at which the merchandise is usually and customarily sold at retail; and that the difference between the coded price and the "Retail" price represents savings from the usual and customary retail price in the trade areas where the representations are made.

The "Retail" price stated is the very same as the list price or suggested retail price of the manufacturer of each of the national brand items of merchandise involved herein.

The representation that the coded price, respondents' actual selling price to consumers, is a "wholesale" price or that respondents, when selling to or for consumers, are wholesalers, is the less important part of this case. Respondents have discontinued this practice, although only after they definitely knew the Commission was investigating.

"Trade areas where the representations are made" constitutes, it is hereby found, most of the states of the Union, *i.e.*, wherever the catalogs and circulars are distributed. In particular, the "Retail" prices of the national brand products are, as hereby found, represented to be substantially the prevailing retail prices in all these states.

6. In truth and in fact, respondents do not sell, or offer to sell, all of their merchandise at wholesale prices. To the contrary, the prices of many of their articles of merchandise are in excess of wholesale prices and the said coded prices of such articles are not wholesale prices but are in excess thereof. The prices designated as "Retail" prices, for many of their articles of merchandise, are not actual retail prices but in fact are in excess of the price or prices at which said merchandise is generally sold at retail in the trade areas where such representations are made. The differences between respondents' said coded and "Retail" prices do not represent savings from the generally prevailing retail price or prices. The statements and representations set out in paragraph 4, and the implications arising therefrom, are therefore false, misleading and deceptive.

That the coded prices are not wholesale prices, or what for consumers is practically the same thing, that they are not in excess of wholesale prices, was proved herein by complaint counsel by specific area evidence comprehending the full trade areas of Milwaukee, Fort Wayne, and Gary.

The allegations as to "Retail" prices were not technically proved by complaint counsel on such specific local area evidence. The actual local areas, as testified to by complaint counsel's witnesses, were not

covered, only the city areas proper, and then minus Gary. Only 49 items were covered, on rehearing, largely by one witness for each, and with technically insufficient proof in connection with actual prevailing price.

However, the examiner finds, on certain testimony of complaint counsel's witnesses and particularly on the testimony of respondents' chief expert witness, that respondents' "Retail" prices are fictitious, that they are not even intended or designed to represent actual prevailing prices, and that, absent a contrary showing from respondents, the prices cannot possibly represent actual prevailing retail prices in all the states involved.

7. At all times mentioned herein respondents have been, and are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of merchandise of the same general kind and nature as that sold by respondents.

8. The use by respondents of the aforementioned false, misleading and deceptive statements, representations 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, and are, true, and into the purchase of substantial quantities of respondents' products because of said mistaken and erroneous belief.

CONCLUSION OF LAW

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

ORDER

It is ordered, That respondents Continental Products, Inc., a corporation, and its officers, and Garrison Grawoig, Allen Grawoig, Earl W. Grawoig, Richard N. Grawoig and Paul M. Mayer, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(a) 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 usual and customary price at which the merchandise is sold by wholesalers to retailers in the trade areas where the representations are made.

(b) Using the word "retail" or any other word or term of similar import or meaning to describe a price which is in excess of the generally prevailing price or prices at which the merchandise is sold at retail in the trade areas where the representations are made.

(c) Representing, directly or by implication, that any saving is afforded in the purchase of respondents' merchandise from the usual and customary retail price unless the price at which said merchandise is offered constitutes a reduction from the price or prices at which said merchandise is generally sold at retail in the trade areas where the representations are made.

(d) Misrepresenting in any manner the savings available to purchasers of respondents' merchandise or the amount by which the price of merchandise has been reduced from the price or prices at which it is generally sold at retail in the trade areas where the representations are made.

OPINION OF THE COMMISSION

APRIL 23, 1964

Respondents herein, a corporation and its officers engaged in the sale of merchandise through catalogs, have been charged with violating Section 5 of the Federal Trade Commission Act by making false and deceptive representations as to the prevailing retail prices of their merchandise and the savings afforded their customers and by falsely representing that the prices at which they sell to the public are wholesale prices. The examiner held in his initial decision that these allegations had been sustained and included in his decision an order prohibiting the challenged practices. Both sides have appealed. Respondents have taken exception to the examiner's findings and conclusions and counsel supporting the complaint has appealed from the examiner's failure to make certain findings. This matter is now before us for review.

As to the charge that respondents' "Retail" prices were deceptive, the examiner in effect found these prices were fictitious and not even intended or designed to represent actual prevailing prices. In making this finding the examiner apparently relied on the testimony of respondents' own expert as "supplemented by what local area proof there is" to the effect that the manufacturer's suggested retail price,

which is Continental's "Retail" price, is the highest retail price charged by "some" retailers but is set high enough by the manufacturer to top all other prices. If the evidence supported the examiner's finding, the conclusion that respondents engaged in a fictitious use of the term "retail price" would follow even under the Guides Against Deceptive Pricing issued January 8, 1964. However, the Commission does not believe that the record sufficiently supports the examiner's finding in this respect.

We agree with the hearing examiner, however, that the record supports the allegation that respondents have falsely and deceptively represented that the prices at which their merchandise was sold to the public were wholesale prices. Although respondents now contend that they have abandoned the use of the word "wholesale" or similar terms in the operation of their business, we can find no satisfactory basis in the record for concluding that there may not be a resumption of this practice.

To the extent indicated herein, respondents' appeal will be granted and in all other respects it is denied. The appeal of the counsel supporting the complaint is denied. The initial decision will be modified to conform with this opinion.

Commissioner Reilly did not participate for the reason that he did not hear oral argument.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Respondents and counsel in support of the complaint having filed cross-appeals from the initial decision of the hearing examiner, and the matter having been heard on briefs and oral argument; and the Commission having rendered its decision granting in part and denying in part respondents' appeal, denying the appeal of counsel supporting the complaint, and directing modification of the initial decision:

It is ordered, That the initial decision be modified by striking therefrom the following portions:

The second full paragraph on page 365 beginning with the words "In a general way" and ending with the words "proved his case";

That part of the section entitled "FICTITIOUS PRICE SYSTEM" beginning on page 367 with the words "The complaint herein" and ending on page 377 with the words "deceptive in its essence";

All of that section entitled "LOCAL AREA EVIDENCE" beginning on page 381 with the words "As heretofore observed" and end-

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Decision

ing on page 393 with the words "has never seen Continental"; and

Page 399 beginning with the section entitled "QUESTIONS AS TO AN ORDER" and ending on page 405 with the words "where the representations are made."

It is further ordered, That the initial decision be modified by adding thereto the following:

The evidence is insufficient to support the allegation in the complaint challenging respondents' use of the term "Retail" price.

It is further ordered, That the order to cease and desist in the initial decision be modified to read as follows:

ORDER

It is ordered, That respondents Continental Products, Inc., a corporation, and its officers and Garrison Grawoig, Allen Grawoig, Earl W. Grawoig, Richard N. Grawoig and Paul M. Mayer, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of merchandise to the ultimate consumer in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication that said merchandise is being offered for sale at wholesale prices.

It is further ordered, That the allegations of the complaint that the respondents falsely and deceptively represented that the prices designated as "Retail" in their catalogs were the prices at which the merchandise referred to was usually and customarily sold at retail and that the difference between their coded price and "Retail" price represented savings from the usual and customary retail prices in the trade areas where the representations were made, be, and they hereby are, dismissed.

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

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

Commissioner Reilly not participating for the reason that he did not hear oral argument.

Complaint

65 F.T.C.

IN THE MATTER OF

CANNON MILLS COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(a) OF THE
CLAYTON ACT

Docket 7494. Complaint, May 15, 1959—Decision, Apr. 24, 1964

Order dismissing, for failure to prove a prima facie violation, complaint charging a North Carolina manufacturer of finished textile products, such as sheets and towels, with discriminating in price in violation of Sec. 2(a) of the Clayton Act by selling finger-tip towels to some customers in the Portland, Oreg., and Washington, D.C., areas at lower prices than it charged their competitors.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated and is now violating, Section 2(a) of the amended Clayton Act (15 U.S.C., Sec. 13), hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent is a corporation organized, existing, and doing business under and by virtue of the laws of the State of North Carolina, with its principal office and place of business located at Kannapolis, North Carolina.

Respondent directs and controls the sales and distribution policies of its wholly owned sales subsidiary, Cannon Mills, Inc., of 70 Worth Street, New York City.

PAR. 2. Respondent is engaged in the business of manufacturing, distributing, and selling finished textile products, such as sheets and towels. Respondent's gross sales for the year ending December 31, 1957, were in excess of \$175,000,000.

PAR. 3. These products are sold by respondent through its wholly owned subsidiary, Cannon Mills, Inc., 70 Worth Street, New York, New York, for use, consumption, or resale within the United States, and respondent ships or causes them to be shipped and transported from the state of location of its principal place of business to purchasers located in States other than the State in which the shipment or transportation originated.

PAR. 4. Respondent maintains a course of trade in commerce, as "commerce" is defined in the amended Clayton Act, in such products among and between the States of the United States.

Respondent maintains and operates a manufacturing plant at Kannapolis, North Carolina. From this plant it ships and sells, or causes to be shipped and sold, throughout the United States, to vari-