

Complaint

IN THE MATTER OF

FEDERATED NATIONWIDE WHOLESALERS SERVICE,
GARYDEAN CORP. TRADING AS FEDERATED
WHOLESALERS SERVICE, ETC.ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 8649. Complaint, Nov. 10, 1964—Decision, June 16, 1967*

Order requiring Lynbrook, N.Y., sellers of mail-order merchandise, selling primarily to consumers, to cease misrepresenting themselves as wholesalers who sell at wholesale prices.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Federated Nationwide Wholesalers Service, Garydean Corp., trading under the names Federated Wholesalers Service, Nationwide Wholesalers Service, and Nationwide-Federated Wholesalers Service, Jay Norris Corp., and Joel Jacobs and Mortimer Williams, individually and as officers of each of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Federated Nationwide Wholesalers Service, Garydean Corp., trading under the names Federated Wholesalers Service, Nationwide Wholesalers Service and Nationwide-Federated Wholesalers Service, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located in Oceanside, New York.

Respondent Jay Norris Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located in Oceanside, New York.

Respondents Joel Jacobs and Mortimer Williams are individuals and are officers of each of the corporate respondents. Said respondents formulate, direct and control the acts and practices of each of the said corporate respondents, including the acts and

practices hereinafter set forth. Their address is the same as that of the corporate respondents.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of articles of general merchandise, including electric fry pans, electric broilers, clock-radios, electric can openers, jewelry, clothing, dinnerware, etc., to the purchasing public.

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

PAR. 4. In the course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of their merchandise, respondents have advertised same by means of circulars and catalogs circulated and disseminated by and through the use of the U.S. Mails to prospective purchasers located in various States of the United States other than the State of New York.

PAR. 5. By and through the use of the trade names "Federated Wholesalers Service," "Nationwide-Federated Wholesalers Service" and "Nationwide Wholesalers Service" separately and in conjunction with statements appearing in their catalogs, circulars and other printed advertising matter, respondents have represented and do represent, directly or by implication, that they are wholesalers and that they sell their merchandise at wholesale prices.

Typical and illustrative, but not all inclusive, of the statements and representations appearing in respondents' catalogs, circulars and letters of solicitation are the following:

Wholesale Catalog No. 908.

Over 1000 items at the lowest wholesale prices GUARANTEED.

Remember: you're getting not ONE, TWO, BUT THREE wholesale catalogs * * *.

BUY YOUR NEXT CAR WHOLESALE AND SAVE UP TO \$1000.

Most people would gladly pay \$10 to \$20 for the privilege of buying wholesale.

PAR. 6. Through the use of the aforesaid trade names and statements, and other statements of like import not specifically set out herein, the respondents have represented, directly or indirectly,

that they are wholesalers, that the prices set out in their catalogs at which the merchandise is offered for sale are wholesale prices and that in each instance the savings afforded is that amount which is realized by purchasers who buy at actual wholesale prices.

PAR. 7. In truth and in fact, respondents are not wholesalers, nor do they offer to sell, or sell, many of their articles of merchandise at wholesale prices but, to the contrary, the prices of many of such items are in excess of wholesale prices. Consequently, in many instances, the savings afforded is less than that amount which is realized by purchasers who buy at actual wholesale prices.

PAR. 8. Respondents, in their circulars and catalogs distributed as hereinabove set forth, make the following representations, among others:

Nationwide Wholesalers Service.

Federated Wholesalers Service.

Don't continue to pay high prices for the things you need and use everyday. There are many wholesalers in this country who will sell to *YOU! YOU* will be able to obtain MANY of the FINEST WHOLESALE CATALOGS free of charge * * *.

To help you receive these many free catalogs and take advantage of the many bargains available, we have established the "NATIONWIDE WHOLESALE BUYING GUIDE * * *." The "NATIONWIDE WHOLESALE BUYING GUIDE" will show you how to get quickly and at the lowest possible price THOUSANDS and THOUSANDS of NATIONALLY ADVERTISED PRODUCTS!

PAR. 9. Through the use of the aforesaid statements, and others of like import not specifically set out herein, respondents represent that they are providing a wholesalers' service whereby they assist purchasers to buy at wholesale prices.

PAR. 10. In truth and in fact, respondents are not providing a wholesalers' service and they do not in many instances assist purchasers to buy at wholesale prices. Therefore, respondents' aforesaid representations referred to in Paragraphs--Eight and Nine are false, misleading and deceptive.

PAR. 11. In the course and conduct of their business and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of articles of general merchandise, including electric fry pans, electric broilers, clock-radios, electric can openers, jewelry, clothing, dinnerware and other articles of merchandise of the same general kind and nature as that sold by respondents.

PAR. 12. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had and now has, the capacity and tendency to mislead mem-

bers of the purchasing public into the erroneous and mistaken belief that said statements were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of the 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(a) (1) of the Federal Trade Commission Act.

Mr. Laurence W. Fenton supporting the complaint.

Bass & Friend, New York, N.Y., by *Mr. Solomon H. Friend*, for respondents.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

NOVEMBER 3, 1965

The complaint herein charges respondents with unfair methods of competition and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act.¹

Specifically, the complaint alleges that in advertising, offering for sale, selling, and distributing articles of general merchandise, including electric fry pans, electric broilers, clock-radios, electric can openers, jewelry, clothing, dinnerware, and similar products, to the purchasing public, respondents have represented and do represent, contrary to the fact, that they are "wholesalers" and that their merchandise is being offered for sale at "wholesale" prices. It is further alleged in the complaint that, contrary to the fact, "respondents represent that they are providing a wholesalers' service whereby they assist purchasers to buy at wholesale prices."

Paragraphs Five through Ten, inclusive, of the complaint assert:

PARAGRAPH FIVE: By and through the use of the trade names "Federated Wholesalers Service," "Nationwide-Federated Wholesalers Service" and "Nationwide Wholesalers Service" separately and in conjunction with statements appearing in their catalogs, circulars and other printed advertising matter, respondents have represented and do represent, directly or by implication, that they are wholesalers and that they sell their merchandise at wholesale prices.

Typical and illustrative, but not all inclusive, of the statements and repre-

¹ 15 U.S.C.A. Section 45(a) (1): "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

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sentations appearing in respondents' catalogs, circulars and letters of solicitation are the following:

"Wholesale Catalog No. 908."

"Over 1000 items at the lowest wholesale prices GUARANTEED."

"Remember: you're getting not ONE, TWO, BUT THREE wholesale catalogs * * *."

"BUY YOUR NEXT CAR WHOLESALE AND SAVE UP TO \$1000."

"Most people would gladly pay \$10 to \$20 for the privilege of buying wholesale."

PARAGRAPH SIX: Through the use of the aforesaid trade names and statements, and other statements of like import not specifically set out herein, the respondents have represented, directly or indirectly, that they are wholesalers, that the prices set out in their catalogs at which the merchandise is offered for sale are wholesale prices and that in each instance the savings afforded is that amount which is realized by purchasers who buy at actual wholesale prices.

PARAGRAPH SEVEN: In truth and in fact, respondents are not wholesalers, nor do they offer to sell, or sell, many of their articles of merchandise at wholesale prices but, to the contrary, the prices of many of such items are in excess of wholesale prices. Consequently, in many instances, the savings afforded is less than that amount which is realized by purchasers who buy at actual wholesale prices.

PARAGRAPH EIGHT: Respondents, in their circulars and catalogs distributed as hereinabove set forth, make the following representations, among others:

"Nationwide Wholesalers Service."

"Federated Wholesalers Service."

"Don't continue to pay high prices for the things you need and use everyday. There are many wholesalers in this country who will sell to YOU! YOU will be able to obtain MANY of the FINEST WHOLESALE CATALOGS free of charge * * *."

"To help you receive these many free catalogs and take advantage of the many bargains available, we have established the 'NATIONWIDE WHOLESALERS BUYING GUIDE * * *.' The 'NATIONWIDE WHOLESALERS BUYING GUIDE' will show you how to get quickly and at the lowest possible price THOUSANDS and THOUSANDS of NATIONALLY ADVERTISED PRODUCTS!"

PARAGRAPH NINE: Through the use of the aforesaid statements, and others of like import not specifically set out herein, respondents represent that they are providing a wholesalers' service whereby they assist purchasers to buy at wholesale prices.

PARAGRAPH TEN: In truth and in fact, respondents are not providing a wholesalers' service and they do not in many instances assist purchasers to buy at wholesale prices. Therefore, respondents' aforesaid representations referred to in PARAGRAPHS EIGHT and NINE are false, misleading and deceptive.

In their answer the respondents deny the allegations in Paragraphs Five and Eight of the complaint but admit that certain of their catalogs, circulars, and letters contain the quoted statements.

Respondents deny the allegations in Paragraphs Six, Seven, Nine, and Ten of the complaint.

On March 31, 1965, complaint counsel filed a Motion To Take Official Notice. Pursuant thereto, at a prehearing conference on May 10, 1965, the hearing examiner took official notice that:

* * * the term "Wholesale" means "To sell merchandise, usually in quantity lots, to one who intends to resell it in one form or another, or to use it for business needs as supplies or equipment."

* * * the term "wholesaler" means "One who sells merchandise at wholesale." (Tr. 46.)

The hearing examiner further ruled (Tr. 46-47) that his taking of official notice meant only that a prima facie case as to such noticed facts had been established, and therefore counsel supporting the complaint would not need to introduce evidence as part of their case-in-chief regarding the meaning of those terms. It was pointed out that the taking of official notice did not prevent the respondents, if they chose, from offering evidence as to what respondents considered the correct meaning of the terms to be. (Tr. 47.) (See Commission's Rules of Practice for Adjudicative Proceedings § 3.14(d).)

Complaint counsel seeks an order enjoining respondents from:

1. Representing that they are wholesalers or that their business is a wholesale business;
2. Representing that they are providing a wholesalers' service;
3. Representing that they are offering articles of merchandise for sale at their wholesale prices unless such is the fact;
4. Misrepresenting the amount of savings to persons buying at respondents' alleged wholesale prices; and
5. Misrepresenting in any manner the amount of savings available to purchasers of respondents' merchandise.

The substance of respondents' defense is that they do, in fact, sell items of merchandise at wholesale prices and do provide a means by which their customers may subscribe to a wholesalers' service. Respondents assert, therefore, that their holding themselves out as wholesalers is not a misrepresentation. Respondents assert further that they do provide a wholesalers' service which assists prospective purchasers in buying at wholesale prices.

The Federal Trade Commission has adjudicated issues similar to those presented in this record in prior proceedings, including: Docket 8449, *Majestic Electric Supply Company, Inc.*, (opinion of February 28, 1964) [64 F.T.C. 1166, 1187]; Docket 8466, *Sans & Streiffe, Inc.*, (opinion of July 12, 1963) [63 F.T.C. 138]; Docket 8517, *Continental Products, Inc.*, (opinion of April 23, 1964) [65

F.T.C. 361, 405]; Docket 8561, *Silvo Hardware Co.*, (Commission's Order of January 24, 1964) [64 F.T.C. 409, 427]; Docket 7962, *Southern Indiana Wholesalers, Inc.*, (order of January 16, 1963) [62 F.T.C. 46, 57]; Docket 8428, *National-Porges Co.* (order of July 15, 1963) [63 F.T.C. 163, 204]; Docket 7655, *The Sessions Company* (decision of August 1, 1963) [63 F.T.C. 333, 349]; Docket 8533, *Name Brand Distributors*, (decision of April 24, 1964) [65 F.T.C. 497, 522].

Counsel supporting the complaint has the burden of proving his allegation that the prices at which respondents sell their products are not wholesale prices, but are "in excess of wholesale prices." Similarly, the burden is also upon complaint counsel to prove his allegation that, contrary to their representations, "* * * respondents are not providing a wholesalers' service and they do not in many instances assist purchasers to buy at wholesale prices." (§ 3.14(a) of the Commission's Rules of Practice for Adjudicative Proceedings; § 7(c) of the Administrative Procedure Act.)

The following witnesses testified in support of the complaint:

Joel Jacobs, president and one of the principal stockholders of the corporate respondents. (Tr. 116 *et seq.*)

Walter J. Rieger (Tr. 235 *et seq.*), president of John M. Maris Company, Inc., of 52 Walker Street, New York, New York, wholesale distributors of drug sundries (Tr. 236) ("everything except drugs and chemicals"), principally to drug stores.

John H. Foley (Tr. 268 *et seq.*), vice president in charge of sales of Gilman Brothers, Inc., 100 Shawmut Avenue, Boston, Massachusetts. Gilman Brothers, Inc., is a wholesale drug firm.

Ronald Reigle (Tr. 302 *et seq.*), field sales director of Regal Ware, Inc., of Kewaskum, Wisconsin. Regal Ware, Inc., manufactures cookware and related items out of aluminum and stainless steel.

Mrs. Judith Weinberger (Tr. 344 *et seq.*), Mastercraft Pipes, Inc., 25 West 32nd Street, New York, New York, importers and vendors of smoking pipes and smoking accessories.

James R. Cecil (Tr. 393 *et seq.*), merchandise manager and buyer for Goulds, Inc., 244 East Woodlawn, Louisville, Kentucky. Goulds, Inc., is a "wholesale drug service" (Tr. 393) selling drugs and sundries to approximately 400 drug stores in and around Louisville, Kentucky, and in other portions of Kentucky and in southern Indiana.

Frank W. Schattschneider (Tr. 414 *et seq.*), an attorney on the staff of Westinghouse Electric Corporation in Pittsburgh, Pennsylvania.

Randolph S. Harper (Tr. 436 *et seq.*), administrative service manager for Westinghouse Electric Supply Company of Newark, New Jersey.

Robert Kemelhor (Tr. 456 *et seq.*), salesman and sales representative for International Appliance Company, 918 Stanley Avenue, Brooklyn, New York, a manufacturer of electrical appliances—primarily broilers, bakers, and rotisseries.

Ralph Sigler (Tr. 478), district sales manager of Spalding Sales Corporation, the selling organization of A. G. Spalding & Bros., manufacturers of sporting goods and equipment, located at 75 Varick Street, New York, New York.

Milton Prizant (Tr. 519 *et seq.*), sales manager for Gazzolo Drug and Chemical Company, 123 South Green Street, Chicago, Illinois, a “full-line service wholesale drug distributor to retail drug stores and hospitals.” (Tr. 519.) The company sells up to the Wisconsin border on the north, to the Fox River Valley on the west, to Joliet, Illinois on the southwest, and Gary, Indiana on the southeast.

Annette Brodsky (Tr. 534 *et seq.*), a mailing list broker associated with Accredited Mailing List, Inc., 15 East 40th Street, New York, New York.

The only witness called by respondents was *Joel Jacobs*. (Tr. 562 *et seq.*)

The testimony of *Walter J. Rieger* of John M. Maris Company, Inc., *John H. Foley* of Gilman Brothers, Inc., *James R. Cecil* of Goulds, Inc., and *Milton Prizant* of Gazzolo Drug and Chemical Company was elicited for the purpose of establishing the prices at which these four wholesale drug firms purchased and resold Amity wallets, pocket books, and other Amity products, during the pertinent periods, in their respective sales areas.

Complaint counsel's witnesses (other than Joel Jacobs and Annette Brodsky) were offered to prove that the prices which respondents characterized in their mail-order catalog, of which Commission Exhibit 4 (CX 4) is a specimen, as “wholesale” prices were not, in fact, wholesale prices.

No direct evidence, oral or otherwise, was offered to prove that respondents are not providing a wholesalers' service and they do not in many instances assist purchasers to buy at wholesale prices.

Hearings were conducted in New York, New York, on July 19, 20, 21, 22, and 23, 1965. The record was closed for the receipt of evidence on August 11, 1965. Proposed findings, conclusions, and briefs have been filed, and they have been considered by the hear-

ing examiner. This proceeding is now before the hearing examiner for final consideration on the entire record, including the pleadings, testimony, and exhibits. All findings and conclusions which are not hereinafter specifically found and concluded in the precise form submitted or in substantially such form are hereby rejected. All motions heretofore made and presently undisposed, which are not otherwise specifically ruled upon in this decision, are hereby denied. After having carefully considered the entire record, the hearing examiner makes the following:

FINDINGS OF FACT

The corporate respondent, Federated Nationwide Wholesalers Service, Garydean Corp., a New York corporation, was originally incorporated in 1944 by Joel Jacobs' father under the name Textile Mart, Inc. (Tr. 118.) It also trades under the names Federated Wholesalers Service, Nationwide Wholesalers Service and Nationwide-Federated Wholesalers Service. Its principal office and place of business is located at 273 Merrick Road, Lynbrook, Long Island, New York. (Tr. 117.)

Corporate respondent, Jay Norris Corp., also a New York corporation, has its principal office and place of business also located in Lynbrook, New York, at the same address as Federated.

Individual respondents Joel Jacobs and Mortimer Williams are the chief executive officers and principal stockholders of each of the corporate respondents. They formulate, direct, and control the acts and practices of each of the said corporate respondents, including the acts and practices hereinafter set forth. Their business address is the same as that of the corporate respondents.

Respondents are now, and for some time last past have been, engaged in advertising, offering for sale, selling and distributing, in commerce, articles of general merchandise, including electric fry pans, electric broilers, clock-radios, electric can openers, pipes, wallets, purses, sporting goods, jewelry, clothing, dinnerware, and similar products to the purchasing public.

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

matter of this proceeding. This proceeding is in the public interest.

In the course and conduct of their business, as aforesaid, and for the purpose of inducing the purchase of their merchandise, respondents have advertised extensively by means of circulars and catalogs circulated and disseminated by and through the United States mails to prospective purchasers of their products located in various States of the United States other than in the State of New York.

In the course and conduct of their business and at all relevant times, respondents have been in substantial competition, in commerce, with other corporations, firms, and individuals in the sale of articles of general merchandise, including electric fry pans, electric broilers, clock-radios, electric can openers, pipes, wallets, purses, sporting goods, jewelry, clothing, dinnerware, and other articles of merchandise of the same general kind and nature as that sold by respondents.

The business conducted by respondents Jacobs and Williams was originally started as a wholesale business in 1944 by Joel Jacobs' father under the name of Textile Mart, Inc. (Tr. 193.) The nature of this business was "Selling [through salesmen] to small installment and small retail stores throughout the south. * * * all sorts of general merchandise." (Tr. 193.) Originally, Textile Mart, Inc., specialized in the sale of curtains, draperies, and assorted soft goods. (Tr. 194.) The business originally sold "to small door-to-door installment-type companies, small furniture stores. * * *" The bulk of sales were made in the South where representatives of Textile Mart, Inc., sold to persons who in turn resold door-to-door. (Tr. 194.)

Textile Mart, Inc., was established to service the small businessman at a wholesale level, and it continued its operation at the wholesale level from its formation in 1944 to 1960.

Respondents have spent large sums of money in promoting their public image and in being accepted in trade circles as wholesalers, since the business' formation in 1944. (Tr. 196.) The money has been spent in magazine advertising, classified advertising, and direct mail advertising.

Dun and Bradstreet has "carried" the respondents as wholesalers since 1944. (Tr. 197.) Various suppliers have recognized the respondents as wholesalers. Mr. Jacobs testified that their suppliers include, among others, "Kodak, Sony, Dormeyer, Pepperill, Waltham Watch Company, and Benrus Watch." (Tr. 197.) Also included are "Helbros Watch, Gruen Watch, Bradley Watch, Welby Clock, Sessions Clock, Arvin Radio, Eternalight Diamond

Company, Amity Leather, Bond Street Cuff Link Company, International Silver Company, Stradolin Corp. * * * Knickerbocker Manufacturing * * * Star Rubber * * * Atlas Manufacturing * * * Ram Tool Company * * * Mono Manufacturing Company * * * Shetland Manufacturing * * * Regal Ware * * * Stetson Manufacturing * * * Superior Manufacturing * * * Monarch Manufacturing * * * Maximilian * * * Ebonite Manufacturing * * * Norelco * * * I. Jacobs & Sons." (Tr. 198-99.)

Joel Jacobs testified (and is uncontradicted in this record) and the examiner finds that the manufacturers with whom the respondents do business have more than one "wholesale" price. Mr. Jacobs testified that in some instances, even R. H. Macy—"the largest retailer in the world"—cannot buy at the same low price that respondents can buy, because Macy will be given 50 percent off list price, whereas respondents will be given 50 percent plus an additional 10 percent in order to encourage respondents to resell the merchandise to retailers, thereby providing wider distribution for the product. (Tr. 202.)

Mr. Jacobs testified, without contradiction, that if respondents were not allowed to continue to represent themselves as wholesalers, they would have to go out of business, because they would not be able to buy at the prices at which they are presently able to buy, and would not be able to resell their merchandise at "wholesale" prices. (Tr. 203.)

Mr. Jacobs testified, and he is uncontradicted in the record, that respondents service every type of retail establishment "from a gasoline station to a beauty parlor to a mortician * * * to just about any type of retail establishment that exists in this country." (Tr. 203-04.)

Respondents sell to grocery stores, Army centers, 5 & 10-cent stores, variety stores, barber shops, gas stations, beauty parlors, door-to-door installment companies, and gift shops. (Tr. 204.) Respondent Jacobs testified that respondents' business permits them to sell to the small businessman and shopkeeper at the wholesale level and that respondents' business is the "middle man" between the manufacturer and the retailer. (Tr. 205.)

In 1961, respondents' sales of merchandise were between \$250,000 and \$300,000. By 1965, this had increased to \$2,000,000, of which amount approximately 40 percent will be sold to the small businessman.

Several years ago, respondents began to make sales to the consumer and ceased to confine their sales to the small businessman. (Tr. 206.)

At or about the same time respondents started selling a wholesalers' service which they have operated separately and apart from their direct mail catalog selling.

Pursuant to stipulation filed in this record, it is found that if the following individuals had been called as witnesses, they would have testified that they had purchased articles of merchandise from respondent Jay Norris Corp. for their own use and not for sale:

Virginia Cicalese	Albert R. Berube
250 Van Buren Street	5 Spruce Street
Newark, New Jersey	Plainville, Connecticut
Stanley Grosky	Mrs. Ruth Frost
44 Marne Street	Mr. Charles G. Chamberlin
Newark, New Jersey	433 Main Street
Irene T. Klecha	West Haven, Connecticut
61 Alden Street	Emily De Decius
Wallington, New Jersey	198 Abermarle Street
Mary Garaventa	Rahway, New Jersey
411 Westview Place	Mrs. Ann Marcheski
Fort Lee, New Jersey	246, B, Davey Street
Elizabeth Macioch	Bloomfield, New Jersey
21 Van Buren Avenue	Mr. Alfred J. Rasmussen
Carteret, New Jersey	14 Volkmar Place
Mrs. Janet Condit	Metuchen, New Jersey
139 Cooper Avenue	Mr. Edward Pizzella
Upper Montclair, New Jersey	80 Centennial Avenue
Glenna Gingerly	Cranford, New Jersey
21 Hampton Road	Mr. Clarence Yarotheski
Cranford, New Jersey	4 Sutton Place
Elmer Young	Trumbull, Connecticut
79 Butler Avenue	Mr. William Brown
Bridgeport, Connecticut	2985 Reservoir Avenue
Mrs. Viola Schovanec	Trumbull, Connecticut
137 Huntington Road	Miss Helen Velykis
Bridgeport, Connecticut	173 DeCicco Road
Stephen G. Beardsley	Waterbury, Connecticut
276 Levenworth Road	Mr. Andrew Bosch
Shelton, Connecticut	St. Mary's Hospital
Michael A. Iarrapino	56 Franklin Street
17 Howard Street	Waterbury, Connecticut
Waterbury, Connecticut	Mr. Lee D. Aspinall
Mrs. Nancy Rosa	20 Forest Street
55 Lockwood Drive	New Haven, Connecticut
Watertown, Connecticut	Mr. Joseph Casher, Jr.
Francis D. Owens	773 Quinipiac Avenue
55 South Elm Street	New Haven, Connecticut
Bristol, Connecticut	

Respondents developed their wholesalers' service to specialize in servicing the small businessman at the wholesale level (Tr. 208)

"to give the small business man [sic] an opportunity to get a tremendous array of products that he never knew about, * * * and find sources for just about any product that any of these people or companies wanted to buy." (Tr. 208.) An individual or businessman may subscribe to respondents' wholesalers' service for \$3 for one year, and this entitles such subscriber to obtain a wholesale source of merchandise for any items or articles in which he may be interested. Respondents started the wholesalers' service as an addition to the wholesale catalog selling, because respondents were convinced that their own wholesale mail-order catalog selling did not offer prospective customers "sufficient product mix"—"we did not offer enough." (Tr. 209.) Respondents' wholesalers' service enabled them to put persons who were interested in buying at "wholesale" prices through catalogs in touch with sellers who were interested in selling at "wholesale" prices through catalogs.

CX 3 in evidence is a catalog, originally prepared by Reliable Wholesale Distributor Company in Chicago, upon which there is imprinted the name of one of respondents' companies. This catalog, CX 3, is sent out by respondents to their prospective wholesale club members. After they join the club and receive the catalog (CX 3) the members send their orders in to respondents, who, in turn, forward the orders to Reliable in Chicago. (Tr. 212.) Respondents keep a record of the number of orders that are received. Reliable has in its catalog one price for a small number of units and a different price for a larger number of units. (Tr. 213.)

Respondents, Federated Nationwide Wholesalers Service, Garydean Corp., was organized for the purpose of conducting the wholesalers' service business described above. (Tr. 213.)

Prior thereto, there was a company called Jay Norris Company. As previously found, Textile Mart, Inc., was the name under which the business was originally incorporated and Jay Norris Company was merely a trade name under which Textile Mart, Inc., operated. (Tr. 214.) Jay Norris Corp. is a name used since by Textile Mart, Inc., for selling merchandise in interstate commerce. The name "Jay Norris" has been used by Textile Mart, Inc., since 1951. (Tr. 215.) Nationwide Wholesalers Service was promulgated in order to expand the sales of the Jay Norris Corp. (Tr. 218.)

For purposes of this proceeding it is necessary to analyze the record evidence relating to two separate facets of respondents' business: first, the sale of merchandise; and second, the sale of a "wholesalers' service." Mr. Jacobs was a witness in support of the complaint as well as the only witness for respondents. His testimony is not contradicted by other evidence in the record, and

it constitutes the only evidence with reference to certain facts in the record.

Respondents sell exclusively as a mail-order catalog house. They do not own or operate any retail stores or outlets. They do not employ any salesmen. They do not control or have any special relationship with any of the manufacturers of the merchandise, which they offer for sale.

On the basis of Mr. Jacobs' testimony, the examiner finds that 60 percent of respondents' merchandise sales made through the Jay Norris Corp. are made to the ultimate consumer, and 40 percent of such sales are made to persons who buy from respondents for resale. (Tr. 172.) Annette Brodsky, complaint counsel's mailing list witness, estimated that respondents' mailings cost respondents about \$250,000 per annum. (Tr. 545.)

For the year 1965, respondents' income from the sale of merchandise through the Jay Norris Corp. should be approximately \$2,000,000, and respondents' income from their wholesalers' service should be approximately \$3,000,000. (Tr. 122.)

Counsel supporting the complaint has attempted to prove that respondents' alleged wholesale prices for six separate product lines were not wholesale prices. It was and is incumbent upon complaint counsel to prove by reliable, probative, and substantial evidence in this record, that respondents' alleged wholesale prices were not, in fact, wholesale prices for Regal Ware, Inc.,—kitchen utensils (Ronald Reigle—witness); Mastercraft Pipes, Inc. (Mrs. Judith Weinberger—witness); Westinghouse Electric Corporation products (Frank W. Schattschneider and Randolph S. Harper—witnesses); Amity Leather Products Co. (Walter J. Rieger, John H. Foley, James R. Cecil, and Milton Prizant—witnesses); Spalding Sales Corporation—the selling organization for A. G. Spalding & Bros. (Ralph Sigler—witness); and International Appliance Company (Robert Kemelhor—witness).

Complaint counsel's evidence was confined to the Regal Ware, Mastercraft, Westinghouse, Amity, Spalding, and International Appliance products offered for sale in CX 4. He must, therefore, have proven that the prices at which respondents offered these product lines for sale in CX 4 were not, in fact, wholesale prices in any of the trade areas in which respondents offered such product lines for sale—complaint counsel has failed to sustain this burden.

Respondents maintain an inventory in their warehouse located at Lynbrook, Long Island, New York from which they sell directly to their catalog purchasers. Occasionally, respondents fill orders

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from this inventory even though the orders are generated by their wholesalers' service rather than by their catalog sales. For the most part, however, the orders generated by the wholesalers' service are passed along to the outside business firms whose catalogs have been mailed out by respondents.

The Price Evidence as to Regal Ware, Inc.

Ronald Reigle (Tr. 302, *et seq.*), a witness in support of the complaint, testified that he has been the field sales director of Regal Ware, Inc., Kewaskum, Wisconsin, for two and one-half years, and he has been with the company for thirteen years. The company manufactures cookware out of aluminum and stainless steel. The cookware includes saucepans, chicken fryers, coffee makers (electric and nonelectric), fry pans (electric and nonelectric), and tea kettles. The company employs 50 salesmen.

Mr. Reigle classified respondents as wholesale catalog dealers (Tr. 305) and estimated that Regal had over 100 such wholesale catalog accounts. The company has a \$22 million a year business, 5 percent of which is done with the wholesale catalog houses. (Tr. 304, 317.) Regal has more than one "wholesale" price on its products. (Tr. 306, 307.)

Regal Ware is not fair traded, but the company fixes a suggested retail price for its merchandise. (Tr. 308.) Regal sells to catalog houses, chain stores, grocery stores, house-to-house installment sellers, mail-order houses, premium users, "promotional jobbers" (Tr. 309), and retailers such as retail tea and coffee operations, Jewel Tea, Grand Union, and "Great American Tea." (Tr. 311.)

On pages 66 and 67 of CX 4, the products manufactured by Regal Ware, Inc., are offered for resale by respondents. Regal Ware quoted six different prices (Tr. 313) on the Duncan Hines No. 1221 quart-size saucepan.

No. 1221 quart-size saucepan:

Categories for which prices are applicable

Wholesale Prices:

\$2.49	Wholesale trade, catalog houses, large premium users like General Mills.
\$2.49 less	
5 percent	People like Montgomery Ward where they put their own trade name on it; also Sears, Roebuck & Co.
\$2.62	Small premium users, grocery stores, smaller jobbers, etc.
\$2.99	Retailers such as Macy's.
\$3.15	Small, very small retailer.
\$5.75	Preticketed, retail price.

The saucepan, No. 1221, which is preticketed to sell at \$5.75 can be purchased from Regal Ware for \$2.49, or \$2.69, or \$2.99, or \$3.15. (Tr. 316.)

Exhibits were offered and were received in evidence as CX 22 to CX 26, inclusive. Each of these exhibits is a separate Regal Ware price list.

At Tr. 324, upon being referred to pages 66 and 67 of CX 4 of respondents' catalog, Mr. Reigle testified that the prices shown on those pages are "wholesale" prices.

Regal Ware price lists (CX 22-CX 26) show that different classes of Regal Ware customers pay different prices for the same item. Some of the items shown in CX 4, pages 66 and 67, were sold chiefly for resale through wholesale catalogs.

Mr. Reigle testified that the "wholesale" prices shown on pages 66 and 67 of respondents' catalog, CX 4, were represented by his firm to the respondents as wholesale prices (Tr. 336) and that, if the respondents sold their Regal Ware items at 40 percent off Regal's suggested retail price, respondents would be selling such products at a true wholesale price. (Tr. 337.)

Regal supplied pages 66 and 67 of CX 4 to respondents for use in their catalog, and they furnished similar pages to other catalog houses. (Tr. 339.) The catalog houses paid Regal Ware \$2.49 for a pan and resold it to retailers for \$3.50. (Tr. 339.)

Respondents have been classified by Regal Ware as jobbers and given the same price as jobbers.

Mr. Reigle testified as follows: (Tr. 324, 325, 335-339.)

Q. Mr. Reigle, are you familiar with the prices at which some of your customers throughout the United States resell these items to other companies or persons who, in turn, resell to consumers?

A. Yes.

Q. Would you look at Pages 66 and 67 of the catalog marked CX 4, which you have before you, and tell me whether the prices stated in each one of these is, in fact, a wholesale price?

MR. FENTON: I object to that question, your Honor. I don't think—

A. They have all my prices there, and these prices are quite old. I would say that they are, but I don't recall all the prices.

Q. Would you like to look at your exhibits to refresh your recollection?

A. Yes, please.

[Documents handed to the witness.]

A. Yes, they are.

Q. And you are referring to the prices noted on Pages 66 and 67 that include the phrase "You Pay," referring to Item 1221, where it says, "You Pay \$3.50," or whatever the item cost happens to be with respect to those items on that page; you say those are wholesale prices, and those are the prices you are referring to?

A. Yes.

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* * * * *

Q. I show you, Mr. Reigle, what has been marked as CX 27-A through D for identification, and I ask you if you can tell us what that is.

A. This is a price list that we gave to our jobbing trade as a guide.

Q. As a guide for the prices at which they, in turn, should sell your products at wholesale?

A. Yes.

* * * * *

Q. Do you know whether your products were, in fact, sold at wholesale at the prices referred to on the list?

A. I honestly don't. This list has since been discontinued.

Q. I mean at the time in question.

A. I could not answer that.

Q. At least, that is the wholesale price that you suggest?

A. This is a wholesale price that we suggest, yes.

Q. Would you take the example that the Hearing Examiner gave a while ago, saucepan No. 1221, and tell us what you suggest in that list as being a wholesale price?

A. \$3.50.

Q. And would you look at Respondents' catalog, CX 4, and tell us at what price that is sold for, that Item 1221?

A. \$3.50.

Q. And isn't it true, Mr. Reigle, that all of the prices that are contained on Pages 66 and 67 for the items are the wholesale prices that were given to us by your representatives?

A. All of these prices in here were given to you, yes.

HEARING EXAMINER GROSS: In where?

THE WITNESS: In Page 66 and Page 67 of this catalog, CX 4.

By Mr. Friend:

Q. They were given to us as wholesale prices, weren't they?

A. Yes.

Q. In fact, we were told they were the wholesale prices; is that correct?

A. That's right.

* * * * *

Q. Mr. Reigle, who prepares these inserts, Pages 66 and 67, that are found in the catalog, CX 4?

A. Regal Ware, Inc.

Q. Regal Ware prepares that?

A. Yes, we prepare these pages.

Q. And who places the amounts in? For example, "Retail, \$6.75," for item numbered 5751, who would put that in? Or, rather, on Item 1221, who supplies the suggested retail price in the insert?

A. Regal Ware.

Q. And who supplies the, "You pay \$3.50"?

A. Regal Ware does.

* * * * *

HEARING EXAMINER GROSS: Those sheets there, Pages 66 and 67 in CX 4, would it be accurate to state that you not only furnished those sheets to these respondents in this proceeding, but you furnished them for many other catalog houses, too?

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THE WITNESS: Yes, that would be correct.

HEARING EXAMINER GROSS: And you use the same prices for all catalog houses?

THE WITNESS: Yes, your Honor.

HEARING EXAMINER GROSS: In other words, you expect the catalog house to make what percentage of profit on its purchase from you?

THE WITNESS: 33 1/3 percent, I believe it is.

HEARING EXAMINER GROSS: In other words, the catalog house realizes 33 1/3 percent of their selling price or 33 1/3 percent of their cost?

THE WITNESS: Well, I am not that familiar with it. I cannot answer that specifically.

HEARING EXAMINER GROSS: Well, let us go back for a minute. You told me that pan we talked about sold for \$2.49 to the catalog house; right?

THE WITNESS: Right.

HEARING EXAMINER GROSS: And the catalog house sells it for how much?

THE WITNESS: They pay \$2.49, and they sell it for \$3.50.

On the basis of Mr. Reigle's testimony and the other evidence relating thereto, the hearing examiner finds that complaint counsel has failed to prove that the prices in respondents' catalog (CX 4) for Regal Ware products which are categorized as "wholesale" prices were not, in fact, "wholesale" prices. On the contrary, the evidence proves and the examiner finds that respondents were offering Regal Ware products for sale at wholesale prices during the relevant period.

The Price Evidence as to International Appliance Company

Robert Kemelhor, salesman and sales representative for International Appliance Company, 918 Stanley Avenue, Brooklyn, New York, was called as a witness in support of the complaint. (Tr. 456 *et seq.*) Mr. Kemelhor testified that his company manufactures electrical appliances. (Tr. 456.) He classified respondents as distributors. (Tr. 466.) Mr. Kemelhor testified that 60 percent of International's sales are made to distributors for resale, and about 40 percent are made to department stores which resell to the ultimate consumer. (Tr. 466.)

The witness testified that if a distributor purchased International item 860-DT at \$13 and marked it up to realize a profit of 20, 25, or 30 percent, he would be selling at a wholesale price to his dealers. (Tr. 468.)

Upon being shown respondents' catalog, CX 4, page 62, and the prices for International item 860-DT, priced therein at \$17.95 and 870-DT, priced at \$26.95, the witness testified that respondents' prices for the items "* * *" are under the retail prices and I

would say that in some cases they may be under wholesale prices." (Tr. 468.) Mr. Kemelhor testified that respondents' prices are wholesale prices, but they are not necessarily the lowest wholesale prices at which a distributor might sell the product. (Tr. 469.)

Q. But based upon the information you do have, and your familiarity with the industry and the sale of your products, you would say, would you not, that those prices are in fact wholesale prices?

A. Yes, I would say so.

Q. Would your answers be the same if I asked you those questions with respect to the two food slicers on page 61 of CX 4, taking first the Silver King electric food slicer and the non-electric food slicers, both of which are described in the upper right-hand corner of page 61? Would you say those prices at which respondents were selling and offering those two units for sale are wholesale prices?

A. Well, they are considerably under the retail price that those products are advertised at. I would say that, by and large, they are wholesale prices, yes.

Q. And the same answer, I assume you would give, if I would ask you whether they are necessarily the lowest wholesale price or necessarily the highest wholesale price?

A. That's right.

Q. Your answer would be that they are at least wholesale prices?

A. That's correct. (Tr. 469-70)

Upon examining respondents' catalog, CX 4, Mr. Kemelhor further testified that respondents sell International item 860-DT for \$17.95; that Macy's advertise and sell the item from \$22.95 to \$29.95; that Macy's price would be referred to as a discounted price off the suggested retail list; and that he would describe respondents' price of \$17.95 as a wholesale price. (Tr. 474.) The witness further testified that he would give the same answers to the same questions if they were asked of him concerning International item 870-DT (CX 4, page 62) and the two food slicers offered for sale by respondents in their catalog, CX 4. (Tr. 474.) International item 870-DT is offered for sale by respondents in their catalog at \$26.95. It has a suggested list of \$49.95. (Tr. 476.)

Complaint counsel has failed to prove that the prices at which respondents offered their International Appliance Company items for sale through their catalog were not wholesale prices. His own witness has testified that they were wholesale prices. It would be unfair and unjust to require respondents to cease and desist from holding themselves out as wholesalers on the basis of such slim evidence as has been offered with reference to the International Appliance Company items. The evidence fails to prove that respondents' prices were not wholesale prices.

The Price Evidence as to Westinghouse Electric Corporation

Frank W. Schattschneider (Tr. 414 *et seq.*), an attorney on the staff of the Westinghouse Electric Corporation in Pittsburgh, Pennsylvania, was subpoenaed as a witness in support of the complaint. Mr. Schattschneider had, at the request of complaint counsel, prepared CXs 29-39, all of which are in evidence. The witness testified that Westinghouse Electric Supply Company (WESCO) is a wholly owned subsidiary of Westinghouse Electric Corporation (Tr. 416); that WESCO is a "distribution outlet" for Westinghouse products to retail dealers (Tr. 417); and that CXs 29-39 are "prices for certain Westinghouse items." (Tr. 417.) Commission Exhibits 29-39 were prepared at complaint counsel's request by the witness, obtaining "from our Wesco people the price sheets used in the different areas, and extracted from them the prices on the twelve products about which you [complaint counsel] inquired." Each exhibit lists the prices for the same twelve items (Tr. 419) from September 24, 1962, until July 1, 1964. (Tr. 420.) That was the entire substance of Mr. Schattschneider's testimony. Commission Exhibits 29-39 are prices for eleven distribution areas in which Westinghouse products are distributed. (Tr. 422.) There are variations in the prices shown for a particular Westinghouse item from exhibit to exhibit or from zone to zone. (Tr. 424.) The Westinghouse items offered for sale and advertised by respondents are shown in respondents' catalog CX 4, at pages 52, 61, and 64. According to the Schattschneider exhibits, Westinghouse item 75AC1 was sold by respondents at a price which was very close to the price at which the item was sold by Westinghouse to its dealers in Salt Lake City and San Francisco. (Tr. 427-29.)

Mr. Schattschneider testified that \$39.90 (respondents' price) was not a retail price for Westinghouse item 75AC1 as far as he knew. (Tr. 431.)

Randolph S. Harper (Tr. 436 *et seq.*), also a witness for Westinghouse in support of the complaint, was administrative service manager for Westinghouse Electric Supply Company in Newark, New Jersey.

Harper testified that insofar as Schattschneider had stated that he had copied the prices on CX 29 from WESCO price sheets, Harper would confirm that the prices on CX 29 were the prices at which WESCO sold the products to its dealers. (Tr. 439.)

There are approximately 140 to 150 WESCO locations in the United States. (Tr. 440.) WESCO usually supplies its dealers

from the supply center in the area in which the dealer is located. (Tr. 440.)

On cross-examination, Harper testified that he could not state whether the information shown on CX 29-39, inclusive, would be applicable to all the 140 to 150 WESCO locations. (Tr. 441.) All that Harper could state with reference to CX 29-39, inclusive, was what Mr. Schattschneider testified to. (Tr. 441.) Although Harper knew Irving Pincus and Al Guidone of the WESCO Long Island operation, Harper was unable to state whether either Pincus, or Guidone, or both of them handled sales to respondents. (Tr. 442-43.) Harper was unable to state whether he had anything to do with the preparation of RX 10 A and B, but if he did, it would have been in a clerical capacity rather than in fixing the prices shown there. (Tr. 444-45.) WESCO's dealers' prices were subject to change without notice. (Tr. 446.)

In 1962 and 1963, WESCO distributed products other than those manufactured by Westinghouse Electric Corporation. (Tr. 449.) At one time, WESCO price sheets did have a "suggested dealer price." (Tr. 450.)

Mr. Harper was not able to state, upon redirect examination, whether the items listed on CX 29-39 were ever sold at prices lower than those set out in the exhibits. (Tr. 453.)

Respondents offered in evidence Exhibits RX 10 A and B, a price list which Westinghouse representative Al Guidone had supplied to them in 1961 and which respondents used to prepare their catalog. (Tr. 593-94.) Jacobs testified that he believed RX 10 was used as the price guide for setting the prices of the Westinghouse products (Tr. 595) and that respondent Williams had placed handwritten figures on RX 10 under the column "Our Price" as the result of a conversation with Al Guidone. (Tr. 597.)

The record showed that respondents' counsel had made diligent efforts to locate Guidone as a witness and that he and the Westinghouse attorneys were unable to obtain Guidone's last known address. (Tr. 601.)

Jacobs further testified that Guidone had given respondents a yellow sheet of paper which contained a list of all Westinghouse items that Mr. Guidone wanted respondents to handle. On that yellow sheet, Guidone marked down respondents' cost and the suggested list price. Some of the information on RX 10 A and B was also on the yellow sheet of paper. (Tr. 597-98.) In addition to this yellow sheet and RX 10 A and B, Guidone personally wrote the description of each of the Westinghouse items, supplied photographs, and supplied "all this price information." When asked

what he meant by "All this price information," Jacobs stated, "The suggested list prices, or known in this book as the retail prices, and also the prices at which [respondents] were to sell," or respondents "wholesale prices." (Tr. 599.)

It may be noted that the prices on RX 10 are not described as "dealer cost," but rather as "suggested dealer cost," and that these prices were subject to change without notice. (Tr. 444-46.) The dealer cost was not shown to be a binding dealer price. Sales could be made by the salesman for a greater or lesser price without necessarily changing the character of the price as a wholesale price. (Tr. 450-52.)

The situation existing between respondents and Westinghouse was most unusual, and it was not typical of the manner in which respondents purchased or sold its merchandise. Respondent Jacobs testified that respondents ceased carrying the Westinghouse items shown on page 52 of CX 4 because respondents had become aware that they were not purchasing directly from Westinghouse but from a distributor known as Westinghouse Electric Supply Company. Respondents believed that they were not getting the lowest possible wholesale prices because they were not dealing with the manufacturing source. For this reason they discontinued the line. (Tr. 600.) This was done in keeping with respondents' policy of purchasing only from direct sources and not through distributors. (Tr. 603.)

This was all the evidence tendered to prove that respondents' prices for the Westinghouse Electric Corporation's products, offered for sale in respondents' catalog, CX 4, were not wholesale prices. Complaint counsel has failed to sustain his burden of proving that the prices of Westinghouse products, which respondents characterized as wholesale prices, were not, in fact, wholesale prices.

The Price Evidence as to Spalding Sporting Goods

Ralph Sigler, a witness in support of the complaint, testified that he was district sales manager for Spalding Sales Corporation—the selling organization for A. G. Spalding & Bros. Spalding Sales has nine district offices throughout the country. (Tr. 479-80.) Spalding price lists are in evidence as CX 40 and CX 41. (Tr. 481.) These price lists show that Spalding published several different categories of prices, including "confidential," "quantity," "special," and "list" prices. The confidential price was Spalding's selling price to its customers, such as respondents (Tr. 487); the quantity price was the price the Spalding dealer charged when

reselling in quantity to an institution (Tr. 487, 490); the special sale price was the suggested retail price to the ultimate consumer (Tr. 487, 492) which allowed the retailer a 40 percent markup over his cost. Although Mr. Sigler's testimony was not as precise as it might have been, it would appear and the examiner finds that the suggested retail price was the usual retail selling price of Spalding items. (Tr. 496-498.) In some of the retail establishments that did not engage in price cutting, Spalding's list price is the one which was charged. (Tr. 491.)

Insofar as the Spalding line is concerned, the evidence shows and the examiner finds that respondents' markup for Spalding items was less than the usual wholesale markup; and respondents' prices reflected on page 40 of CX 4 are substantially lower than the prices which Spalding suggests for sales to the ultimate consumer.

Mr. Sigler testified, and he is uncontradicted in this record, that Spalding does not sell directly to retailers. It sells only to dealers who, in turn, sell to retailers. Spalding sold its line directly to the respondents for resale to firms who resell to the consumer. (Tr. 482.)

The prices at which respondents offered Spalding products for sale, all were lower than every price listed in Spalding's catalog (CX 41), except the dealer's price to the dealer. (Tr. 506, 610 CX 4, p. 40; CX 41, p. 7.)

The uncontradicted evidence of the witness Jacobs was to the effect that Spalding drop ships from Chicopee, Massachusetts, any Spalding items which respondents sell through their catalog. (Tr. 607.) Spalding did not customarily render this service to its accounts.

Mr. Sigler testified that Spalding, during the relevant period, ordinarily sold its "pacesetter" line to wholesale catalog firms, such as respondents. Because the pacesetter line required a substantial inventory, the items that respondents offered for sale on page 40 of CX 4 were part of Spalding's regular line. (Tr. 508.) The exception in favor of respondents was made by Spalding's salesman, Frank Battaglia, who had sold respondents the regular Spalding catalog line instead of the pacesetter line so that respondents could act as distributors for resale. (Tr. 509, 606.)

At the time that Battaglia showed the Spalding line to respondent Jacobs, Battaglia represented to Jacobs that the prices shown on page 40 of CX 4 of respondents' catalog were wholesale prices. (Tr. 609.) Respondents' prices were fixed on a basis of a wholesale markup structure. (Tr. 611.)

Spalding approved respondents' pricing of its products as reflected in their catalog, and they furnished respondents with photographs and descriptions for use in their catalog. (Tr. 611.)

The testimony of Mr. Sigler, and the exhibits reflect the following prices for Spalding items advertised on page 40 of CX 4 of respondents' catalog.

Item	Spalding's cost to respondents	Quantity price	Special sale price	Suggested retail price	Respondents' resale price
3122-18	\$ 57.60	.....	.....	\$ 115.20	\$ 69.95
3128-18	57.60	.....	.....	115.20	69.95
15-102	34.45	.....	\$ 56.75	74.60	44.95
15-105	34.45	.....	56.75	74.60	44.95
2122-14	42.00	.....	.....	84.00	54.95
2122-13	31.50	.....	.....	63.00	41.50
2128-13	31.50	.....	.....	63.00	41.50
42-135 (Roger Maris)	6.00	\$ 9.25	9.95	12.45	7.95
42-267 (Al Dark)	3.00	.....	4.95	6.95	3.95
168 (Basketball)	6.00	.....	9.95	12.45	7.95
163 (Basketball)	4.80	.....	7.95	9.95	6.40

(CXs 40-41; CX 4, page 40; and Tr. 483 *et seq.*)

Complaint counsel has failed to prove by reliable, probative, and substantial evidence that the prices at which respondents offered the Spalding items for sale were not true wholesale prices. It was and is incumbent upon complaint counsel so to prove.

The fact that Spalding's products may have been sold at prices other than those set forth in respondents' catalog (CX 4, page 40) does not constitute proof that respondents' prices were not wholesale. Therefore, complaint counsel's assertions that respondents' prices for the Spalding items were not wholesale prices must be dismissed for failure of proof. Respondents' catalog (CX 4), the Spalding price lists, plus the testimony of Ralph Sigler and of Joel Jacobs, prove that respondents' prices for the Spalding line were wholesale prices—albeit not necessarily the lowest wholesale prices.

The Price Evidence as to Mastercraft Pipes, Inc.

Mrs. Judith Weinberger, manager of the catalog business of Mastercraft Pipes, Inc., 25 West 32nd Street, New York, New York, was called as a witness in support of the complaint. (Tr. 344.)

Mrs. Weinberger was shown page 42 of respondents' catalog

(CX 4). She identified the pipes and smoking accessories shown on that page as Mastercraft's pipes and accessories ordinarily "packaged" for catalog houses. She stated that these items had been sold to the Jay Norris Corp. and that they are sold to "Coop Electric; also, the Louis Watch Company, the Majestic Electric Company, Smith Distributors Company, among others." She further testified that Mastercraft sells 50 to 75 such catalog accounts. (Tr. 347-50.)

Mastercraft's price structure is set up so that it provides the "cost" price and a suggested retail price. The catalog houses pay the cost price; the dealer pays one-third off the suggested retail price; and the consumer pays the retail price. (Tr. 350-51.) When asked what price the catalog house would be expected to charge if its sales were made directly to the consumer, Mrs. Weinberger stated that Mastercraft would expect the catalog house to charge the retail price. (Tr. 351.) Mrs. Weinberger identified RX 8 A and B as two pages of Mastercraft's price list prepared by Sid Schreiber, a representative of Mastercraft, who handled catalog houses. (Tr. 353-55.) The evidence shows that these sheets (RX 8 A and B) were delivered to respondents for their use in preparing page 42 of their catalog (CX 4).

Respondents Exhibit 8 A and B and Mrs. Weinberger's testimony are to the effect that the dealer's price "is a third off the retail price." (Tr. 352.) But she was reluctant to categorize the "dealer's" price as a "wholesale" price. (Tr. 351-54.)

Excerpts from Mrs. Weinberger's testimony follow:

Q. Well, is the dealers price a wholesale price?

A. The dealers price would be the dealers price. I don't know what category I would put it into. As far as I am concerned, it is a third off the retail price.

Q. Well, is that wholesale?

A. "Wholesale price" is a very general term.

Q. What do you understand "wholesale price" to mean?

A. A wholesale price depends on the wholesale that it is. I mean, there is such a thing as a wholesaler who sells directly to the public, and he will have his own wholesale price. There will be a wholesaler that will further resell to dealers, and that will be a different wholesale price. And there is a dealer who sells to smaller distributors who will further resell; and therefore, "wholesale price" would be a very general term.

Q. Would you include within your general definition of "wholesale price" the price at which a company sells an item to a dealer who, in turn, has to resell it to a consumer? Would that price be a wholesale price?

A. It would be a dealer price. It would be the dealer price.

Q. But wouldn't it also be a wholesale price, since the dealer has to buy it at that price and then resell it? He is not buying it at retail, is he?

A. He is buying at a dealer price because he is not further wholesaling it.

So, therefore, it would be in the dealer price category. There would be no further—I mean, it wouldn't go any more at wholesale. It would go from that point to the consumer.

Q. Well, is the price to that dealer a list price?

A. No.

Q. Would that price to that dealer be a retail price?

A. It is less than the retail price.

Q. And in your case, you suggest a dealer's price which is one-third less than the retail price?

A. That's right.

Q. So if a dealer were to buy these pipes, he would pay a price which would allow him to sell at retail with a one-third mark-up; is that right?

A. That is correct.

The substance of her testimony was and the examiner finds that the dealer's price was, in fact, a wholesale price.

Sid Schreiber, the Mastercraft representative, handled respondents' catalog account. Mrs. Weinberger testified that he "might" have delivered the price lists (RX 8 A and B) to respondents at the time the prices were being compiled by Mastercraft for the line of pipes in respondents' catalog. (CX 4, page 42.)

The prices under the column entitled "Dealer," shown in RX 8 A and B, are the prices at which Mastercraft expected the items to be sold by respondents to dealers.

Mrs. Weinberger testified (Tr. 357) that respondents represented and advertised a price for each and every item which is "approximately" the same as the price set forth under the column headed "Dealer" and that Mastercraft knew through Sid Schreiber that respondents sold to dealers. (Tr. 357-59.) Mastercraft prepared RX 8 A and B, as a guide to be used by respondents in pricing the Mastercraft line. (Tr. 359.)

Mastercraft occupies one floor at 25 West 32nd Street, New York, New York, for shipping and packaging and another floor for offices and showroom, with a small warehouse in the rear. In addition to selling general merchandise for promotions and for pipe shops, Mastercraft prepares packaged merchandise for the catalog houses.

Mrs. Weinberger testified (Tr. 366) that the Mastercraft representative prepared page 42 of CX 4. She stated that they know what the representative is going to put into the catalog because he "consults" with them. He merchandises the page, putting together what he thinks will make a good set, and he makes a layout of the page. Mastercraft representatives sell pages with layouts to companies like Jay Norris, and also suggest the dealer prices and the retail prices. (Tr. 367.)

Mastercraft sells to wholesalers, such as respondents, and to

distributors. Mrs. Weinberger was reluctant to testify that Mastercraft sells directly to retailers. Mastercraft has several distribution systems for merchandising its pipes, including one system of distributing through catalog houses. (Tr. 373.) A small percentage of Mastercraft's business is transacted through catalog houses. (Tr. 374.) Mastercraft sells through salesmen, on its premises, through wholesalers, through distributors, and through jobbers. Mastercraft has no printed bound price list giving costs for a particular category of its products. (Tr. 378.)

Insofar as is evident in the record, the Mastercraft pipes sold by respondents through their catalogs were priced so as to permit the retailer a markup of at least one-third if he sold at Mastercraft's suggested retail prices. These suggested retail prices are fixed by Mastercraft. (Tr. 392.)

The evidence adduced by complaint counsel fails to prove that the prices at which respondents sold Mastercraft pipes were not wholesale prices. On the contrary, the evidence established that the prices at which respondents sold Mastercraft pipes were dealer prices and were represented by Mastercraft to respondents as the price at which respondents should sell to the retailer so as to permit the retailer to make the usual markup.

The Price Evidence as to Amity Leather Products Co.

In order to prove that respondents did not, and do not, sell Amity products (CX 4, page 25) at wholesale prices, complaint counsel introduced the testimony of Walter J. Rieger (Tr. 235), John H. Foley (Tr. 268), James R. Cecil (Tr. 393), and Milton Prizant (Tr. 519). These witnesses were associated with wholesale drug concerns and were subpoenaed by complaint counsel primarily for the purpose of placing exhibits in the record that allegedly reflected the prices at which their respective wholesale houses sold Amity wallets and other Amity items to their retail outlets. (Rieger—CX 18, CX 19; Foley—CX 20 A-B, CX 21; Cecil—CX 28; Prizant—RX 3.) (See also RX 5 A-C and RX 9.)

The evidence adduced by complaint counsel as to the Amity product line differed from the evidence adduced as to the other product lines: Spalding, Regal Ware, Mastercraft, Westinghouse, and International Appliance, where complaint counsel produced witnesses who were associated with the manufacturer.

The evidence offered by complaint counsel in support of his allegations as to respondents' prices for Amity products consists chiefly of tabulations of the four wholesale drug firms. These tabulations show the prices at which such drug firms sold Amity

items in four different trade areas: Louisville, Kentucky; Chicago, Illinois; Boston, Massachusetts; and New York, New York. The fact that in these trade areas the four wholesale drug firms sold Amity items at prices different from the prices at which respondents sold them does not prove that respondents' prices were not wholesale prices.

It is a fair inference from the evidence relating to Amity items that there were several wholesale prices for the particular Amity products here involved. Joel Jacobs in his testimony identified RX 6 A-D as "one of the price lists we were given by Amity for the 1962 catalog." (Tr. 578.)

Joel Jacobs' uncontradicted testimony (Tr. 578 *et seq.*) is and the examiner so finds that Amity furnished several different price lists to its customers and that such lists, among other things, suggested the prices at which Amity wholesalers should sell to retailers for resale to consumers.

Respondents were not aware that Amity had issued two almost identical-looking price lists or that one of these price lists, typified by RX 7, was structured out on a 50 percent plus 25 percent mark-up basis. (Tr. 222, 585.) Such lists were furnished to respondents and were followed by them in establishing the prices at which they resold Amity items. (See RX 3 A-D; RX 5 A-C; RX 9.) Amity supplied the prices quoted in respondents' catalog, page 25, CX 4. (Tr. 582.)

Respondents paid Amity a price that enabled respondents to make a one-third markup on their selling price (or 25 percent on their cost), and enabled their customers (retailers) to make a 40 percent markup on the suggested retail price. This was the normal price structure for wholesalers. (Tr. 583.)

Joel Jacobs testified that Amity Leather Products Co. prepared page 25 of respondents' catalog (CX 4) and suggested the prices shown on that page. (Tr. 220-22, 227, 579, 582-83.) Mr. Jacobs further testified that Amity representatives told respondents that these prices were legitimate and correct wholesale prices. The Amity salesman who verified and approved these prices was identified as Sidney Dick. (Tr. 221.) Mr. Dick, however, was not called as a witness by either side.

When a purchaser bought Amity wallets from respondent at the prices shown on page 25 of CX 4, he would be purchasing at wholesale prices. (Tr. 227.) Amity was aware of the type of catalog operation that respondents were conducting and was aware of the representations as to wholesale prices that respondents were making.

Complaint counsel has failed to prove by reliable, probative, and substantial evidence that the prices at which respondents offered Amity products for sale were not, in fact, wholesale prices within the pricing system and the pricing structure that Amity used for its catalog customers.

The representative of Gilman Brothers, Inc., of Boston, John H. Foley, testified that the Amity billfold, Style #0680, was purchased by Gilman from Amity for \$3.75, was sold by Gilman to the retail drugstore for \$5, and was resold by the retail drugstore to the consumer for \$10. (Tr. 275.) These prices permitted the retail drugstore to realize a 50 percent profit on the retail price and Gilman to realize a 33 $\frac{1}{3}$ percent profit on its cost. (Tr. 282; CX 19.) Testimony of the other witness connected with a wholesale drug firm confirmed this particular price structure.

Complaint counsel's witness, James R. Cecil of Goulds, Inc., testified that the usual markup at the retail level was 40 percent or 50 percent, depending on the item or type of store. Similar testimony was elicited from Milton Prizant of Gazzolo Drug and Chemical Company.

The prices charged by respondents for the Amity items were:

Amity's stock no.	Respondents' catalog price	Amity's suggested retail price
0680.....	\$ 5.37	\$ 8.95 (\$9.95)
0678.....	6.00	10.00
0223.....	2.97	4.95
0233.....	3.57	5.95
0237.....	6.00	10.00
0225.....	4.77	7.95
0236.....	6.00	10.00
0245.....	2.97	4.95
0247.....	4.77	7.95
0248.....	3.57	5.95
0235.....	3.57	5.95
0303.....	11.37	18.95
0513.....	2.97	4.95
0517.....	3.57	5.95
0518.....	4.77	7.95
0450.....	2.97	4.95
0660.....	4.77	7.95
0665.....	3.57	5.95
0677.....	4.77	7.95
0761.....	1.80	3.00
0825.....	2.10	3.50
0841.....	2.40	4.00
0835.....	1.50	2.50

Respondent Jacobs testified that RX 6 A-D was one of the price lists which Amity had given to respondents in 1962 (Tr. 578); that the prices under the column "Our Price" were placed there by respondent Williams in 1962 (Tr. 578-579); and that these prices were represented to respondents by Amity as being wholesale prices. Jacobs further testified that in 1962 Amity had given these prices to respondents on another price list, but it had been lost; however, the prices on RX 5 A-C were the same as those on the lost price list. (Tr. 580.)

Respondents Exhibit 5 A-C shows that Amity had suggested the resale prices that corresponded with the prices at which respondents sold the Amity products. (Tr. 582.) Mr. Jacobs testified that the suggested prices in respondents' catalog "are the same as supplied by Amity." (Tr. 582.) Amity products are also distributed through non-drugstore outlets, but these outlets may not use the same markup as the drugstores. (Tr. 586.)

Complaint counsel has failed to prove by reliable, probative, and substantial evidence in this record that respondents' prices for Amity products shown in their catalog, page 25, CX 4, and designated as wholesale prices, were not in fact wholesale prices. On page 8 of his proposed findings, complaint counsel requested a finding as to the Amity products, that "respondents' price is not the *lowest* wholesale price." (*Italic supplied.*) Respondents do not represent that they sell at the *lowest* wholesale price. Respondents represent only that they sell at a wholesale price—one which permits purchasers of Amity products from respondents' catalog to resell these products at Amity's suggested retail price and make a legitimate profit. On the basis of the evidence in this record, it is found that such representation by respondents is *not* deceptive or misleading.

CONCLUSIONS

Complaint counsel's price evidence offered with reference to the six product lines hereinbefore named proves that there *was* more than one wholesale price for such product lines. On page 7 of his proposed findings, complaint counsel asserts:

It should be clearly understood that counsel supporting the complaint did not allege nor did he attempt to establish that there is only one wholesale price for each item of merchandise. The number of wholesale prices depends upon the method of distribution.

If this is complaint counsel's position with reference to the suppliers' price structures of the items offered for sale by respondents in their catalogs (see CX 4), then complaint counsel should have

proven which one of the wholesale prices respondents must charge in order not to be deceptive.

The complaint does not articulate respondents' deception as being a misrepresentation that they sell at the *lowest* wholesale price, but that they misrepresent their catalog prices as wholesale prices. The witnesses from Regal Ware, Spalding, Mastercraft, Westinghouse, and International Appliance characterized respondents' prices for their respective lines as "wholesale" or "dealers' " prices—albeit not necessarily the *lowest* wholesale prices.

The evidence clearly establishes that respondents' prices for Amity products (page 24, CX 4) were substantially below Amity's suggested retail prices. (See page 35, *supra*; RX 3 A-D; RX 5 A-D; RX 9.) In most instances, respondents' prices for the Amity products were the prices that Amity suggested respondents use for resale to the retail outlets.

The evidence establishes and the examiner finds that a purchaser at respondents' prices could resell at the manufacturers' suggested retail prices and could make a profit equal to the usual and customary markup enjoyed by retailers of such product lines.

Complaint counsel asserts (see page 14, of his proposed findings) that, because respondents' wholesalers' service generates additional business for their catalog sales, respondents' representation that they sell a wholesalers' service is deceptive. This is a *non sequitur*. Joel Jacobs testified that respondents hoped the establishment of their wholesalers' service would increase their catalog sales. Jacobs' uncontradicted testimony is that respondents' wholesalers' service reached a substantial volume and this service substantially increased respondents' catalog sales. This fact alone, however, does not prove either of the separate deceptions charged against respondents in the complaint.

Although exhibits (CX 1, CX 2, CX 3, CX 7, CX 8, CX 9, CX 10, CX 11, CX 12 A-B, CX 13 A-B, CX 14 A-D, and CX 15 A-D), were offered by complaint counsel to prove false respondents' representation that they supply a wholesalers' service to their prospective customers, respondents contend, and respondent Joel Jacobs so testified, that they do conduct a wholesalers' service for their prospective customers and that the income from such service is substantial. But the real issue is whether subscribers to such wholesalers' service are able to purchase at wholesale prices. The record does not contain reliable, probative, and substantial evidence that subscribers to respondents' wholesalers' service are not able to buy at wholesale prices or that respondents' offer to sell a wholesalers' service is false, misleading, and deceptive.

Complaint counsel has failed to prove that the Commission exhibits enumerated above are in current usage by respondents. Respondent Jacobs testified to the contrary. (Tr. 130-33, 135, 139, 153-54.)

In presenting his case, complaint counsel has failed to differentiate between retail and wholesale catalog operations. Mr. Jacobs' uncontradicted testimony (Tr. 568-71), describing the differences between the wholesale and retail catalog operations, establishes that respondents, as a wholesale catalog operation, operate on a short markup; whereas, a retail catalog operation sells to the consumers on a much higher retail markup.

Aside from his price witnesses, complaint counsel has not offered reliable, probative, and substantial evidence to prove that the manner in which respondents advertise and conduct their wholesalers' service is false, misleading, or deceptive. Some of the statements respondents use to advertise their wholesalers' service are extreme, but they are not so patently deceptive as to constitute a *per se* violation of Section 5 of the Federal Trade Commission Act. Having asserted in the complaint that respondents do violate Section 5 of the Act, complaint counsel may not establish his case by pointing out, without proof, how completely unworthy of belief some of the statements may be. Commission Exhibits 13 A-B and 15 A-D contain some statements which are particularly difficult to believe. But, in the absence of any proof other than the exhibits themselves, the examiner cannot find that the statements are false, misleading, and deceptive. For example, there is no evidence in this record which proves false, misleading, or deceptive respondents' offer to show the subscribers to their wholesalers' service where and how to buy men's suits for \$2, ladies' dresses for 20¢, or men's overcoats for \$1.50 as advertised in CX 15 A. Inasmuch as Joel Jacobs was called as a witness in support of the complaint, he could have been interrogated sharply concerning some of the apparently extravagant claims made by respondents in advertising their wholesalers' service. But no such interrogation took place.

Even if complaint counsel had established that respondents' prices for Regal Ware, Mastercraft Pipes, Westinghouse Electric Corporation products, Spalding sporting goods, International Appliance and Amity products were not wholesale prices, the fact remains that there are many other product lines offered for sale in respondents' catalog (CX 4) concerning which the record is totally silent as to whether respondents' prices therefor were, in fact, wholesale prices.

Complaint counsel has failed to prove by reliable, probative, and substantial evidence the allegations in the complaint that:

PARAGRAPH SEVEN: In truth and in fact, respondents are not wholesalers, nor do they offer to sell, or sell, *many* of their articles of merchandise at wholesale prices but, to the contrary, *the prices of many of such items are in excess of wholesale prices*. Consequently, in *many* instances, the savings afforded is less than that amount which is realized by purchasers who buy at actual wholesale prices. (Italic supplied.)

* * * * *

PARAGRAPH TEN: In truth and in fact, respondents are not providing a wholesalers' service and they do not in many instances assist purchasers to buy at wholesale prices. Therefore, respondents' aforesaid representations referred to in PARAGRAPHS EIGHT and NINE are false, misleading and deceptive.

ORDER

It is therefore ordered, That the complaint be, and it hereby is, dismissed.

OPINION OF THE COMMISSION

JUNE 16, 1967

BY DIXON, *Commissioner*:

The complaint in this matter charged that respondents' representations that they are wholesalers, sell products at wholesale prices, and provide a wholesalers' service, are misleading and deceptive, and constitute unfair and deceptive acts and practices and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.¹ Complaint counsel has argued consistently that respondents' representations with respect to their prices are objectionable in two respects. First, he has argued that respondents have represented, contrary to fact, that their prices are the lowest wholesale prices, and that such representations have the capacity and tendency to mislead and deceive the purchasing public.² Secondly, he has taken the position that respondents' prices are higher than any bona fide wholesale prices for the products in question and, therefore, that representations of these prices as wholesale prices have a similar capacity and tendency to mislead and deceive.³

¹ 66 Stat. 631 (1952); 15 U.S.C. 45 (1964 ed.).

² Proposed Findings, Conclusions, and Order, p. 6. See Commission's Findings of Fact, p. 1129. In his Brief on Appeal, complaint counsel amplified his position as follows: Counsel supporting the complaint asserts that, in the light of the Commission's position in *Majestic Electric [Supply Co.] supra*, regarding the meaning of "wholesale prices" and respondents' representation in advertising that they sell, "[O]ver 1000 items at the lowest wholesale prices GUARANTEED," respondents must charge the *lowest* price in order not to be deceptive.

³ Proposed Findings, *supra*, n. 2, p. 7. See also complaint counsel's Brief on Appeal, p. 12.

The examiner, in dismissing the complaint, concluded that a purchaser paying the prices charged by respondents for the various products in question could, if he resold these products at the manufacturer's suggested retail prices, realize a profit equal to that usually enjoyed by retailers. Thus, he held that complaint counsel had failed to establish that respondents' prices for the products advertised in the Jay Norris catalog were higher than all bona fide wholesale prices. In so doing, he noted that complaint counsel had not taken the position that there was only one wholesale price for any particular line of products, and held that complaint counsel had failed to prove "* * * which one of the wholesale prices respondents must charge in order not to be deceptive."⁴ The examiner also dismissed complaint counsel's argument that respondents were representing their prices as the "lowest" wholesale prices or as low wholesale prices and that such representations were misleading and deceptive.

Proper disposition of this matter requires a review of the definitions of the terms "wholesaler" and "wholesale price" and a determination of the circumstances under which the use of these and related terms have the capacity and tendency to mislead and deceive the purchasing public. The courts have considered the definition of the term "wholesaler" on a number of different occasions in varying contexts. In *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46 (2d Cir. 1915), a case involving a refusal to deal, a United States Court of Appeals defined the term as follows:

* * * A "wholesaler" is one who buys in comparatively large quantities and who sells, usually in smaller quantities, but never to the ultimate consumer of an individual unit. He sells either to a "jobber" (a sort of middleman) or to a "retailer"; the latter being the one who sells to the consumer. The "large" quantities bought by the wholesaler may vary greatly—from a fraction of a car load to many car loads; the character, not of his buying, but of his selling, marks him as a wholesaler.⁵

This definition has been followed in subsequent cases. In *Mennen Co. v. Federal Trade Commission*, 228 Fed. 774 (2d Cir. 1923), *cert. denied*, 262 U.S. 759 (1923), a case involving the legality of different discounts to purchasers performing different functions in the distribution of products, the same court of appeals reiterated its earlier definition in the following language:

Whether a buyer is a wholesaler or not does not depend upon the quantity he buys. It is not the character of his buying, but the character of his selling,

⁴ Initial Decision, p. 1113.

⁵ 227 Fed. at 47-48.

which marks him as a wholesaler, as this court pointed out in *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, *supra*. A wholesaler does not sell to the ultimate consumer, but to a "jobber" or to a "retailer" * * *.⁶

Citing both of the above cases, this court affirmed a similar definition of the term "wholesaler" in *L. & C. Mayers Co. v. Federal Trade Commission*, 97 F. 2d 365 (2d Cir. 1938), a case similar to the present case. There, the court, quoting the Commission, stated:

As a description of what constitutes a wholesaler, the Commission says: "A wholesaler of jewelry is one who sells to the trade for resale and seldom, if ever, to the purchasing public, with the exception that sales to industrial concerns, public utilities, banks and other similar organizations, which purchase in quantity lots, i.e., simultaneous sales of more than one of a given item, not for resale, but for use by such organizations, are considered as wholesale transactions. It is the character of sales to the trade that makes and distinguishes a wholesaler."⁷

In numerous other cases, the courts have stated that the wholesaling function is characterized by the act of selling to one who intends to resell the merchandise or who intends to use it in the manufacturing process. See, e.g., *Roland Electric Co. v. Walling*, 326 U.S. 657 (1946); *Kerchner, Marshall & Co. v. City of Pittsburgh*, 176 A.2d 645 (S.C. Pa. 1962); *Ben Kanowsky, Inc. v. Arnold*, 250 F. 2d 47 (5th Cir. 1957); *Youngquist v. City of Chicago*, 90 N.E. 2d 205 (S.C. Ill. 1950); *Stolze Lumber Co. v. Stratton*, 54 N.E. 2d 554 (S.C. Ill. 1944); *White Motor Co. v. Littleton*, 124 F. 2d 92 (5th Cir. 1941); *Haynie v. Hogue Lumber & Supply Co. of Gulfport*, 96 F. Supp. 214 (D.C. Miss. 1951); *Harris v. Hammond*, 51 F. Supp. 91 (D.C. Ga. 1943); *Paper Products Co. v. City of Pittsburgh*, 130 A.2d 219 (Superior Ct. Pa. 1957).

In some instances, a merchant combines the functions of a wholesaler and a retailer, and sells both to resellers and to consumers. If a large proportion of such a merchant's sales are made to consumers on a regular basis, the use of the term "wholesaler" as above defined, may be misleading and deceptive. Such a merchant functions as a wholesaler when selling to resellers and acts as a retailer when selling to consumers. Under such circumstances, we recognize that the merchant is performing a dual role and is a hybrid of some sort. Thus, a representation that such a seller is a wholesaler is not entirely true. Although there is no legal rule forbidding use of the word "wholesale" per se, the law proscribes

⁶ 288 Fed. at 782.

⁷ 97 F. 2d at 366-367.

such use where it is unfair or deceptive. Whether a representation of this nature is likely to mislead and deceive the purchasing public depends upon a number of factors, including the proportion of customers who are consumers and the prices which are charged. These factors will be discussed, *infra*.

The term "wholesale price" is generally defined as the price which retailers pay when purchasing merchandise for resale to the ultimate consumer. See *Fawcner v. Lew Smith Wall Paper Co.*, 55 N.W. 200 (S.C. Iowa 1893); *Guess v. Montague*, 51 F. Supp. 61 (D.C. S.C. 1942). Even where the term is so defined, however, there may be more than one "wholesale price" for any particular product. This occurs where the manufacturer maintains multiple systems or channels of distribution and charges different prices in each channel. The result is that retailers will pay different prices for merchandise because their immediate sources of supply are not the same. For example, some manufacturers sell directly to retailers. In addition, the same manufacturer may sell to distributors, to wholesalers, and to jobbers, all of whom in turn sell to retailers. In such a situation, the jobber may be a small wholesaler who buys from the manufacturer in lesser quantities than distributors or ordinary wholesalers and who sells to smaller retailers. The jobber sometimes pays a higher price than distributors or wholesalers when purchasing from the manufacturer and thus may sell merchandise to retailers at prices which are higher than those charged retailers purchasing from wholesalers or from the manufacturer. Moreover, the prices which wholesalers charge retailers are sometimes higher than the prices charged by the manufacturer in direct sales to retailers. The situation is further complicated if distributors, instead of selling directly to retailers, sell to wholesalers or jobbers who in turn resell to retailers. It is apparent, therefore, that retailers will probably pay different prices for the same merchandise, depending upon their geographical location and the source from which they purchase. However, the prices which retailers pay when purchasing from the manufacturer, the prices which retailers pay wholesalers, and the prices which retailers pay jobbers are all, pursuant to the previously stated definition, "wholesale" prices.

A seller's representation that he is a wholesaler or that he sells merchandise at wholesale prices will constitute an unfair and deceptive act or practice or an unfair method of competition if such a representation has the capacity and tendency to mislead and deceive members of the purchasing public with respect to the amount of savings obtainable by patronizing the seller. See,

e.g., *L. & C. Mayers Co. v. Federal Trade Commission*, 97 F. 2d 365 (2d Cir. 1938); *Majestic Electric Supply Co., Inc.*, Docket No. 8449, 64 F.T.C. 1166 (February 28, 1964). The purchasing public will clearly be misled and deceived if the so-called "wholesaler" is in reality merely a "discounter" selling chiefly to consumers at low retail prices. See *L. & C. Mayers Co. v. Federal Trade Commission*, *supra*; *Continental Products, Inc.*, Docket No. 8517, 65 F.T.C. 361 (April 23, 1964); *Silvo Hardware Co.*, Docket No. 8561, 64 F.T.C. 409 (January 24, 1964); *Southern Indiana Wholesalers, Inc.*, Docket No. 7962, 62 F.T.C. 46 (January 16, 1963). In such a situation, the seller, when acquiring the products, is probably paying the same prices as other retailers⁸ and is reselling the products at prices which are higher than any bona fide wholesale prices. As a result, the representations that the prices are "wholesale" or that the seller is a "wholesaler" are false, misleading, and deceptive. It is apparent that retailer members of the purchasing public as well as consumers may be deceived by such advertising. Moreover, the use of such a representation amounts to an unfair method of competition, because customers of the seller's competitors will be attracted in the vain hope of realizing greater savings on products offered for sale.

Deception obviously flows from a representation that a seller's prices are "lowest wholesale," when in fact the prices are not the lowest wholesale prices available. The capacity and tendency of such a representation to mislead and deceive consumers and retailers alike is patent. Moreover, deception also occurs when the merchant sells both to consumers and to resellers at prices represented either directly or by implication to be low wholesale prices, when in fact such prices are higher than the prices usually and customarily paid by retailers.⁹ The representation that a price is a low wholesale price conveys the impression that the price is

⁸ The character of a merchant's selling rather than his source of supply is determinative in deciding whether the merchant is a wholesaler or a retailer. *Mennen Co. v. Federal Trade Commission*, 288 Fed. 774 (2d Cir. 1923), *cert. denied*, 262 U.S. 759 (1923); *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46 (2d Cir. 1915). However, evidence that the merchant buys from the same sources and pays the same prices as retailers can be considered as one of several factors in deciding whether or not the merchant's resale prices, after addition of the markup, are in excess of usual wholesale prices.

⁹ Where there are several wholesale prices for the same line of products, the prices usually and customarily paid by retailers will be the prices paid by the group of retailers whose purchases constitute the largest percentage of the manufacturer's total dollar volume of sales. If the manufacturer sells directly to retailers on an extensive basis and relies only secondarily on distributors and wholesalers for distribution, the prices usually and customarily paid by retailers will be the prices which the manufacturer charges retailers in such direct sales. However, if the manufacturer relies principally on distributors or wholesalers for the distribution function, the prices usually and customarily paid by retailers will be the prices which distributors or wholesalers charge retailers.

lower than the normal wholesale price or lower than the price usually paid by retailers. In addition, if the merchant who makes either of the above representations about his prices also characterizes himself as a wholesaler, it is our belief that he is representing that he sells predominantly to retailers. Moreover, the representation that such a merchant is a wholesaler, when coupled with the representation that the prices are low wholesale prices or lowest wholesale prices, also implies that the merchant's prices are not higher than the prices usually and customarily paid by retailers. If in fact the merchant sells primarily to consumers at prices which are higher than the prices usually paid by retailers, it is our opinion that both consumers and retailers will be misled by the dual representation that he is a wholesaler and that his prices are lowest wholesale prices or low wholesale prices. The capacity and tendency to mislead and deceive is present because each class of customers, no matter how sophisticated or knowledgeable in the ways of merchandising, has every reason to conclude that the merchant's resale prices, even though not the lowest wholesale prices, are certainly not in excess of the prices usually and customarily paid by retailers.

Deception may also result where the merchant sells to consumers and retailers alike at prices which are characterized merely as wholesale prices, instead of low or lowest wholesale prices. In *Majestic Electric Supply Co., Inc.*, Docket No. 8449, 64 F.T.C. 1166 (February 28, 1964), the evidence demonstrated that the seller sold extensively to consumers, that such sales were substantial, and that such sales constituted a significant portion of the sales made by Majestic through its catalog. Majestic represented itself as a wholesaler and described its prices as "wholesale," but its advertising was clearly consumer oriented. The evidence showed that the manufacturers of many of the products advertised in Majestic's catalog sold directly to retailers, and that even where the retailers purchased from wholesalers, they paid lower prices in the great majority of instances than did purchasers from Majestic. The examiner found that a substantial part of Majestic's sales were actually wholesale sales, because made to resellers, and that the prices charged in these sales were thus technically wholesale prices. However, he concluded that Majestic's representations had the capability of convincing consumers that the prices charged were the equivalent or substantially equivalent to the prices which local retailers paid for the same articles. Because Majestic's prices were higher than the prices usually and customarily paid by retailers in the various localities, the examiner held that the repre-

sentations were capable of misleading and deceiving the consuming public.

In affirming the examiner's conclusion on this point, the Commission noted that the principal type of reseller purchasing from Majestic was the merchant who resells from the catalog, maintaining no inventory or showroom. The Commission concluded that a person reading Majestic's advertising would not construe the term "wholesale prices" to mean only those prices at which articles of merchandise are sold to persons or firms who resell through Majestic's catalog or some similar catalog and stated:

* * * A prospective purchaser could reasonably interpret "wholesale prices" to mean the prices at which retailers normally purchase, or even the lowest prices at which any retailer purchases.¹⁰

Because Majestic's prices were not wholesale prices as that term was generally understood by the public, the Commission concluded that the representations were misleading and deceptive. The order issued by the Commission prohibited Majestic from representing directly or by implication in connection with the sale of merchandise to the ultimate consumer that such merchandise was being offered for sale at wholesale prices.

Even when the so-called wholesaler, in addition to his sales to consumers, sells to the usual type of retailer who maintains normal inventories and showrooms, the possibility of deception from representations that the seller is a wholesaler or that his prices are wholesale prices exists in certain circumstances. In our opinion, such circumstances are present when the merchant sells primarily to consumers and charges consumers and retailers alike prices which are higher than the prices usually paid by retailers. For example, if the greatest portion of the manufacturer's dollar volume of sales is composed of direct sales to retailers and the prices which the manufacturer charges such retailers are lower than the prices jobbers charge retailers in the manufacturer's secondary channel of distribution, the prices charged direct buying retailers by the manufacturer are the prices usually and customarily paid by retailers. The prices charged by jobbers are technically wholesale prices, because they are prices which are regularly paid by a small number or a limited class of bona fide retailers. However, if the jobber designs his advertising to appeal to consumers, disseminates it among consumers, and sells primarily to consumers, representations that he is a wholesaler and that his prices are wholesale prices, have the capacity and tendency to mislead and

¹⁰ Commission's Opinion, pp. 6-7 [64 F.T.C. 1166, 1191].

deceive this class of customers. The tendency to mislead and deceive exists because consumers are unlikely to realize that some wholesale prices are higher than others and, as was held in *Majestic Electric, supra*, tend to equate the term "wholesale price" with the prices usually and customarily paid by retailers. Moreover, the representation that the merchant is a wholesaler, under these circumstances, has the tendency to mislead consumers in the same manner.

Although the possibility of deception is greater when such representations are made to consumers, these representations also have the capacity and tendency to mislead and deceive retailers. In the absence of qualification of these representations, or of information to the contrary, retailers, and particularly small retailers, will probably assume that the so-called wholesaler's prices are not higher than the usual wholesale prices. If the retailer knew that the so-called wholesaler was selling predominantly to consumers, he would probably realize that the prices which are being represented as wholesale prices may be and in all likelihood are higher than the usual wholesale prices. Accordingly, the Commission concludes that the merchant who operates a consumer oriented business and who sells primarily to consumers at prices which are in excess of the prices usually and customarily paid by retailers is engaged in an unfair and deceptive act or practice and an unfair method of competition if he represents himself either to consumers or to retailers as a wholesaler or describes his prices as wholesale prices.

The Commission has applied the above-stated tests to the issues in this case. In connection with two lines of products advertised in respondents' Jay Norris catalog, we found that respondents' prices for these lines were in excess of all bona fide wholesale prices.¹¹ Thus, respondents' prices were in essence "discounted" or retail prices, and respondents were acting as retailers in selling these products. In such a situation, representations that respondents are wholesalers and that their prices are wholesale, low wholesale or lowest wholesale have the capacity and tendency to mislead and deceive not only consumer members of the purchasing public, but also resellers and retailers. As a result, such representations constitute unfair and deceptive acts and practices and unfair methods of competition.

¹¹ Respondents' resale prices for products manufactured by A. G. Spalding & Bros. and by Westinghouse Electric Corporation were, with minor exceptions, higher than any bona fide wholesale prices for these products throughout the United States. See Commission's Findings of Fact, pars. 25, 32.

Because of deficiencies in the evidence, the Commission was unable to determine whether respondents' prices for the remaining product lines were higher than all bona fide wholesale prices for these lines or whether, in the alternative, respondents' prices were technically wholesale prices. In several situations, however, the Commission has concluded that respondents' prices are higher than the prices usually and customarily paid by retailers for the products in question.¹² Respondents' representations that their prices are the lowest wholesale prices and low wholesale prices thus have the capacity and tendency to mislead and deceive members of the purchasing public. Again, we think that the capacity and tendency to mislead and deceive is present not only when the representations are made to consumers, but also when retailers, and particularly small retailers, are the target of respondents' advertising. As a result, such representations constitute unfair and deceptive acts and practices and unfair methods of competition.

The evidence not only demonstrated that respondents' prices were higher than any bona fide wholesale prices in some instances, and in other instances that their prices, even though technically wholesale, were higher than the prices usually and customarily paid by retailers. It also established that respondents operate a consumer oriented business and that they sell primarily to consumers.¹³ In this context, we think that respondents' representations of themselves as wholesalers, especially when coupled with their representations that their prices are "lowest" wholesale and "low" wholesale, imply that their prices are not higher than the prices usually and customarily paid by retailers, and thus have the capacity and tendency to mislead and deceive. Within the framework of the facts of this case, therefore, we conclude that respondents' representation of their business as a wholesale business constitutes the use of an unfair and deceptive act or practice and an unfair method of competition.¹⁴

The complaint also charged that respondents' representations that they provide a wholesalers service which aids individuals and small retailers in purchasing products at wholesale prices are false and have the capacity and tendency to mislead and deceive the purchasing public. The evidence demonstrated that respondents'

¹² Respondents' resale prices for products manufactured by Regal Ware, Inc., and by Amity Leather Products, Inc., were higher than the prices usually and customarily paid by retailers for these products throughout the United States. See Commission's Findings of Fact, pars. 38, 48. Their resale prices for the products manufactured by International Appliance Company were higher than the prices usually and customarily paid by retailers in New York City. See Commission's Findings of Fact, par. 53.

¹³ Commission's Findings of Fact, par. 13.

¹⁴ Commission's Findings of Fact, pars. 13, 14.

selling operation, Jay Norris, Inc., makes initial contact with prospective purchasers through Wholesalers Service. Recipients of the Service's advertising are informed that they will be assisted in purchasing numerous products at wholesale prices. Subscribers to the Service are sent three catalogs, at least one of which is a Jay Norris catalog, three coupons entitling the subscriber to discounts on articles purchased from Jay Norris, and a list showing a number of categories of products and companies which allegedly will sell such products at wholesale prices. Jay Norris is prominently listed as a wholesaler in connection with many of these categories.

Complaint counsel contends that Wholesalers Service is in essence a sham which provides little real service to subscribers and that it functions primarily as a disguised promotional gimmick designed to stimulate sales for Jay Norris. It is true that the Service suffers from a number of deficiencies. The name ascribed to the Service—Federated Nationwide Wholesalers Service—connotes a national service not connected with a particular seller, and nothing in the advertising material nor in the subsequent literature received by subscribers informs them that the service is the alter ego of Jay Norris. Thus, the subscriber could reasonably believe that he will receive objective information on the most advantageous places to purchase merchandise at wholesale prices. However, the literature received by subscribers—the list of sellers of various articles of merchandise with the Jay Norris name prominently displayed, the Jay Norris catalog, and three bonus certificates redeemable only on purchases made from Jay Norris—is obviously designed to encourage subscribers to purchase products from Jay Norris rather than from other companies listed.

Another deficiency is the total absence of information on manufacturers willing to sell directly to either small retailers or consumers, or even the suggestion of such a possibility. Moreover, the information which is provided about companies not affiliated with respondents is not complete. No information other than the name of the company and the category of products it sells is given. The subscriber is not told whether the company is a wholesaler, jobber, or distributor, or supplied any information on its prices. Further, to obtain information on prices from the listed companies, the subscriber must write each company and in many instances must purchase their catalogs. Thus, a subscriber must expend more than the \$3 initially charged by Wholesalers Service to accumulate the information which he could reasonably expect the Service to supply.

Although Wholesalers Service does not provide as complete a service as is desirable and appears to be operated primarily for the purpose of increasing Jay Norris sales, we do not think that the evidence justifies the remedy requested by complaint counsel—excision of the name “Wholesalers Service” from the corporate name of the company and a prohibition from continued representation that the company performs a service for wholesalers. The record is devoid of evidence showing the methods of operation and the prices charged by many of the companies not affiliated with respondents which Wholesalers Service lists as wholesalers. With the exception of respondent Jay Norris and two companies presently under Commission order to cease representing their prices as wholesale prices,¹⁵ the record is absolutely silent with respect to such information. In the absence of this information, the Commission is of the opinion that complaint counsel has not established that Wholesalers Service does not assist subscribers in purchasing products at wholesale prices. As a result, the allegations of the complaint concerning Wholesalers Service must be dismissed.

The order to be issued in this matter should, we think, not only prevent respondents from engaging in those practices specifically found to be in violation of the Federal Trade Commission Act, but also should prevent related practices which are likely, if pursued, to result in substantial circumvention of the order. *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *Federal Trade Commission v. Henry Broch & Co.*, 368 U.S. 360 (1962); *Federal Trade Commission v. Mandel Bros., Inc.*, 359 U.S. 385 (1959); *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470 (1952); *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F. 2d 337 (7th Cir. 1960), *cert. denied*, 364 U.S. 883 (1960). We have concluded that respondents violated the Federal Trade Commission Act by representing the prices which they charged for two lines of products as wholesale prices, low wholesale prices, and lowest wholesale prices, when in fact such prices were higher than any bona fide wholesale prices. In addition, we have concluded that respondents violated the Federal Trade Commission Act by representing their prices for three lines of products at lowest wholesale, when in fact the prices for these lines, even though technically wholesale, were higher than the prices usually and customarily paid by retailers. Because of these facts, and because respondents operate a consumer oriented business and sell primarily to consumers, the Commission held that respondents' representations of

¹⁵ *Cam Co.*, Docket No. C-323 (April 5, 1963) [62 F.T.C. 1086]; *Silvo Hardware Co.*, Docket No. 8561, 64 F.T.C. 409 (January 24, 1964).

themselves as wholesalers were, within the context of this case, violations of the Federal Trade Commission Act. Clearly, the order should, and will, prevent these particular practices. Because we have concluded that these misrepresentations are capable of deceiving consumers and retailers alike, the order will be applicable to respondents' representations to both classes of customers.

To prevent substantial circumvention of these terms, we think that the order should also prohibit a closely related practice which was not specifically questioned by the complaint or the pleadings. If respondents are permitted to continue representing their prices as "wholesale," as opposed to "lowest wholesale" in circumstances where the prices are technically wholesale prices but are higher than the prices usually and customarily paid by retailers, the possibility of deception is still present. This possibility exists because, as was previously pointed out, consumers do not realize that there may be several wholesale prices, and tend to equate the designation "wholesale" with the prices usually and customarily paid by retailers. In this instance, the possibility of deception is greater when the representations are made to consumers than when they are made to retailers. However, respondents have never attempted to separate prospective customers who are consumers from those who are retailers, and there is no indication that they are able to do so. As a result, the Commission concludes that the terms of the order should be applicable to respondents' representations to both classes of customers. Thus, the order will be designed to prevent respondents from representing their prices as wholesale prices in all instances where the prices are higher than the prices usually and customarily paid by retailers for such merchandise to any source of supply, when purchased in the quantity offered for sale by respondents.

It should be noted that the order will apply not only to any advertising which Jay Norris might undertake, but also applies to all companies affiliated with respondents' present organization and any successors to such corporations. Thus, the prohibition is applicable to any advertising disseminated by Wholesalers Service, including statements made in its preliminary advertising, in the lists of wholesalers supplied to subscribers, and to the catalogs distributed by the Service. As a result, neither Jay Norris, nor any other company affiliated with respondents may be listed as a wholesaler by Wholesalers Service or otherwise represented as a wholesaler or as selling merchandise at wholesale prices, unless the company in fact makes a substantial and significant number of sales to retailers in the ordinary course of business and the prices

it represents to be wholesale do not exceed the prices usually and customarily paid by retailers for such merchandise to any source of supply, when purchased in the quantity offered for sale by respondents.

For the aforementioned reasons, the findings of fact, conclusions, and order of the hearing examiner are set aside. The Commission's Findings of Fact and Conclusions, as supplemented by this opinion, are substituted for the examiner's findings and conclusions. An appropriate order will be issued.

Commissioner Elman concurred in the order and has filed a separate statement.

Commissioner Reilly concurred in the result.

SEPARATE STATEMENT

JUNE 16, 1967

BY ELMAN, *Commissioner*:

I concur in the order but not in the opinion, which goes much farther than the facts warrant. Respondents here sell to retailers and consumers, and are thus a hybrid of both wholesaler and retailer. There is nothing unlawful in a merchant's trading at both levels of distribution, so long as he does not utilize his dual role to mislead and deceive. Absent any evidence of unfairness or deception of the public, there is no legal basis upon which the Commission should outlaw a hybrid wholesaler-retailer's use of the words "wholesale" or "wholesale price" in his advertising. For example, if such a wholesaler-retailer advertises to the consuming public, "My price to you and to retailers who buy from me is \$1, so that you are paying the same as the wholesale price these retailers pay," there would be no deception.

The Commission should not lay down a flat and unqualified rule prohibiting a hybrid wholesaler-retailer, in all circumstances, from using the terms "wholesale" or "wholesale price" in his advertising, even where he does so truthfully and honestly.

FINDINGS OF FACT, CONCLUSIONS, AND ORDER

This matter is before the Commission on appeal of counsel supporting the complaint. In an initial decision dated November 3, 1965, the hearing examiner concluded that the charges of the complaint were not supported by the evidence of record and ordered the complaint dismissed. In essence, the complaint charges that respondents' representations of themselves as wholesalers and their prices as wholesale prices in the advertising, offering for sale,

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sale, and distribution of articles of general merchandise, have the capacity and tendency in many instances to mislead and deceive the purchasing public, and constitute unfair or deceptive acts or practices and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act (66 Stat. 631 (1952); 15 U.S.C. 45 (1964 ed.)). In addition, the complaint charges that respondents' representations that they provide a wholesaler's service which assists purchasers in buying items at wholesale prices also have a similar capacity and tendency to mislead and deceive the purchasing public, and constitute the use of unfair or deceptive acts or practices and an unfair method of competition. The complaint lists the following representations as being typical and illustrative:

Wholesale Catalog No. 908.

Over 1000 items at the lowest wholesale prices GUARANTEED.

Remember: you're getting not ONE, TWO, BUT THREE wholesale catalogs * * *.

BUY YOUR NEXT CAR WHOLESALE AND SAVE UP TO \$1,000.

Most people would gladly pay \$10 to \$20 for the privilege of buying wholesale.

Don't continue to pay high prices for the things you need and use everyday. There are many wholesalers in this country who will sell to *YOU! YOU* will be able to obtain MANY of the FINEST WHOLESALE CATALOGS free of charge * * *.

To help you receive these many free catalogs and take advantage of the many bargains available, we have established the "NATIONWIDE WHOLESALE BUYING GUIDE" * * *. The "NATIONWIDE WHOLESALE BUYING GUIDE" will show you how to get quickly and at the lowest possible price THOUSANDS and THOUSANDS of NATIONALLY ADVERTISED PRODUCTS!

Pursuant to the Commission's Rules of Practice, § 3.14(d), the hearing examiner took official notice at a pretrial conference held on May 10, 1965, of the meaning of "wholesale" and "wholesaler" as follows:

* * * the term "[W]holesale" means "To sell merchandise, usually in quantity lots, to one who intends to resell it in one form or another, or to use it for business needs as supplies or equipment."

* * * the term "wholesaler" means "One who sells merchandise at wholesale." (Tr. 46.)

The examiner instructed respondents that the taking of official notice did not prevent them from introducing evidence tending to establish that these terms should be accorded different meanings (tr. 46-47). Respondents have not taken exception to these definitions. Hearings in the matter were conducted in New York, New

York, on July 19, 20, 21, 22, and 23, 1965. The record was closed for the receipt of evidence on August 11, 1965.

Counsel supporting the complaint argued that respondents' representations were misleading and deceptive in at least two regards. First, he contended that respondents advertised that all of the products offered for sale in their Jay Norris catalog, their primary catalog, were, contrary to fact, being offered for sale at the "lowest wholesale" prices. In this respect, he made the following statement:

It is noteworthy that respondents represent to potential purchasers that they will be able to buy, "at the LOWEST POSSIBLE PRICES", (CX 15(a) of which 20,000,000 pieces were mailed in 1964). Also, "[O]ver 1000 items at the *lowest wholesale price* GUARANTEED" (emphasis added). Referenced here is Catalog No. 3 in CX 15(c) which has been identified by respondent Jacobs as being the Jay Norris Catalog 908-A (CX 4). (See R. p. 146). (Proposed Findings, Conclusions, and Order, p. 6.)

In addition, complaint counsel argued that respondents' advertising and representations relative to their status as a wholesaler and their prices as wholesale prices were misleading and deceptive because their prices are higher than all bona fide wholesale prices for these products. In this regard, complaint counsel made the following statement:

Counsel supporting the complaint has not limited himself to proving that respondents' prices are not the lowest "wholesale" price. It is submitted that the testimony with regard to "wholesale" price, as will be hereinafter discussed, clearly establishes that, in many instances, respondents' prices are higher than even the highest bona fide wholesale prices. (Proposed Findings, Conclusions, and Order, p. 7.)

Respondents admit the representations which the complaint attributes to them, but take the position that they are in fact wholesalers and that they sell items of merchandise at wholesale prices. In addition, they argue that they offer their customers a genuine wholesaler's service which assists these customers in purchasing items of merchandise at wholesale prices. As a result, they assert that there is no possibility of deception and hence no violation of law, since there has been no misrepresentation of their status as wholesalers, of the prices at which they sell items of merchandise, or of the function of wholesalers' service offered their customers.

The Commission having concluded that the Findings of Fact, Conclusions, and Order of the hearing examiner dismissing the complaint should be set aside in their entirety, makes the following findings of fact and conclusions of law and substitutes its own order for that of the examiner.

FINDINGS OF FACT

1. Respondent Jay Norris Corporation, 273 Merrick Road, Lynbrook, Long Island, New York, was incorporated in New York on July 1, 1962, and is engaged in the offering for sale and sale of items of general merchandise in many States of the United States through mail order catalogs, and by the use of other circulars and advertisements disseminated by and through the United States mails. (Admitted by answer; see also tr. 213, 564.)

2. Respondent Federated Nationwide Wholesalers Service, Garydean Corporation, hereinafter referred to as Wholesalers Service, 273 Merrick Road, Lynbrook, Long Island, New York, was incorporated in New York on July 1, 1962, and operates a service which allegedly assists buyers in purchasing items of general items of merchandise at wholesale prices. Pursuant to this operation, it disseminates through the United States mails and otherwise circulars and advertisements. In addition, it offers for sale and sells in many States catalogs and lists of sellers of general merchandise. It also trades under the names Federated Wholesalers Service, Nationwide Wholesalers Service, and Nationwide-Federated Wholesalers Service. (Admitted by answer; see also tr. 166, 169, 213, 564.)

3. Individual respondents Joel Jacobs and Mortimer Williams are the chief executive officers and principal stockholders of each of the corporate respondents, and formulate, direct, and control the acts and practices of each of the said corporate respondents. (Admitted by answer; see also tr. 117, 563.)

4. Respondents are engaged exclusively in the sale of items of general merchandise through mail order and maintain no manufacturing or retail display facilities. The mail order business is conducted from a warehouse located on Long Island in the State of New York (tr. 118, 122-126). In the course and conduct of their business and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of articles of general merchandise of the same general kind and nature as that sold by respondents (tr. 208-209; CX 14; compare CX 4 and CX 3).

5. The instant corporate respondents are successor corporations to Textile Mart, Inc., a corporation which was organized by respondent Jacobs' father in 1944 and which no longer has a corporate existence. Textile Mart, which also engaged in business as Jay Norris, Inc., sold general merchandise by mail order to small retail stores and to door-to-door salesmen, primarily

in the southern portion of the United States (tr. 192-194). Respondent Jacobs testified that Textile Mart limited its advertising and sales promotion efforts prior to 1960 to trade publications catering to small retailers. In 1960, the company began soliciting prospective customers by direct mail rather than relying exclusively on advertisements in trade publications. Names and addresses of such prospective customers were obtained from companies engaged in the business of leasing lists of names (tr. 144, 534-537, 571). At this time, none of the company's customers were consumers (tr. 177-178), and its total dollar volume of sales did not exceed \$300,000 (tr. 205). Dun & Bradstreet recognized Textile Mart as a wholesaler at some times during its existence (tr. 194).

6. Textile Mart initiated what it termed a "wholesalers service" in 1961 (tr. 207-208). The evidence does not show precisely what benefits were provided by the service at this time. However, it is clear that subscribers to the service, who were charged \$3, received among other things, the privilege of requesting for a period of one year the names of wholesalers of products not sold by Textile Mart (tr. 207-211). With respect to the decision to form the wholesalers service, Jacobs testified as follows:

Then what happened was, the business situation had changed and, as a result of change—if one does not change with the times, one cannot exist—these lists that we were using, or the method, rather, that we were using was petering out.

So we had to start something new and, as I explained, we started this Nationwide [wholesalers' service] thing. We started out originally with these agency lists, which was the field we knew, and these small stores (tr. 179).

This testimony was reiterated later during the hearing in a slightly different form:

* * * We found that the advertising in Opportunity Magazine, Specialty Salesman Magazine, and other sales magazines which we had used up until that time, were no longer carrying their weight, and it was getting exceedingly difficult to get new customers.

* * * * *
So, aggressive thinking told me we had to try something different, so we started out with this little booklet I told you about yesterday. We started with a list of the small establishments whom we knew, and after that booklet no longer produced the desired results we started Nationwide Wholesalers Service through the same class of people (tr. 206).

7. Although Textile Mart's wholesalers service originally mailed its advertising only to small retailers, the company subsequently began leasing lists of names of persons who were consumers

rather than retailers or resellers, and extended its mailings to those persons (tr. 179-180, 206-207). Concerning the decision to include consumers, Jacobs testified:

When it became apparent to us that we had a success on our hands, we then were aware that there were other lists, too, that were not necessarily agency lists or small stores, but perhaps could bring us back a return on this investment of ours, and we tried these other lists.

* * * * *

Then, gradually, we tested other outlets. We tested agents, agent lists, and the agents are the people who would be reading these magazines. These are small individual sales people, in some cases small companies, and in some surprising cases rather large companies, who respond to these ads, and we started to advertise to lists of agents. *And then we tested other lists, which were not necessarily agents* (tr. 179-180; emphasis added).

8. Textile Mart was dissolved in 1962 and its warehousing and sales operation was incorporated as the Jay Norris Corporation. The wholesalers service operated by Textile Mart was separately incorporated as Federated Nationwide Wholesalers Service, Garydean Corporation (tr. 213-215, 563-564). Wholesalers Service continued the trend of mailing advertisements soliciting subscriptions to consumers. This practice increased on such a substantial scale that, according to Jacobs' estimate, sixty percent of Wholesalers Service's advertisements at the time of the hearing were being mailed to consumers (tr. 180, 205, 571).

9. The advertisements of Wholesalers Service contain statements obviously designed to appeal to consumers. The following statements, which appear in a letter mailed to one million prospective subscribers in 1962, five million in 1963, and twenty million in 1964, are examples (see CX 15; tr. 143-144):

* * * *YOU* can buy THOUSANDS OF NATIONALLY ADVERTISED Sporting Goods, Fishing Equipment, Clothing, Tools, Toys, Appliances, Furniture, Jewelry, Television Sets, Auto Accessories, Watches, or practically anything else at a fraction of the retail price. *YOU* can pocket *SAVINGS* of up to 60% * * *.

DON'T continue to pay high prices for things you need and use everyday! There are many wholesalers in this country who will sell to *YOU*!

* * * No longer will you have to search in the dark looking for discounts * * *.

Most people would gladly pay \$10 to \$20 for the privilege of buying wholesale. Yet all it costs you is \$3.00 * * *.

Over 1000 items at the lowest wholesale prices GUARANTEED!

Save 50% and more on everything * * *.

In addition, the blank forms to be completed by prospective subscribers contain the following statement:

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Yes, I want to save as much as 30% to 80% on everything I buy (CX 12, 13, 15).

Other circulars and advertising matter contained the following statements:

Factory To You Prices (CX 7).

BARGAINS! BUY WHOLESALE, SAVE MONEY (CX 8).

BUY YOUR NEXT CAR WHOLESALE AND SAVE UP TO \$1,000!! (CX 9).

* * * Late Model cars are available to you at *below WHOLESALE* prices * * *. (CX 10, emphasis in original).

10. Individuals desiring to become subscribers of the present Wholesalers Service are charged \$3. In return, they receive a Jay Norris catalog (CX 1 and 4) and two other catalogs. One of these catalogs bears the name "Federated Wholesalers Service (Nationwide Wholesalers Service)" (CX 2), while the other is entitled "Gary Dean Company" (CX 3). The latter catalog is that of a Chicago company which advertises some products not stocked by respondents. Orders from this catalog are forwarded to the Chicago company. Respondents, who are not affiliated with this company, receive a commission for printing and mailing the catalog (tr. 211-212, 231-232).

11. Individuals subscribing to Wholesalers Service also receive three bonus coupons, each of which is worth \$1 and is redeemable only on purchases made from the Jay Norris catalog. In addition, each subscriber receives a list of companies which allegedly will sell to him at wholesale prices (CX 14). The list contains a number of products and product classifications and names several companies which sell these products. Respondent Jay Norris is prominently named in connection with many of these classifications. The record does not reveal what prices the listed companies other than Jay Norris charge customers.

12. Wholesalers Service, by prominently listing Jay Norris as a wholesaler, and providing subscribers, including consumer subscribers, with a Jay Norris catalog and bonus coupons entitling purchasers to a discount on items ordered from this catalog, generates a substantial amount of business for Jay Norris, much of which is consumer business. Pursuant to written agreement signed by respondents' attorney on June 30, 1965, and by counsel supporting the complaint on July 1, 1965, the parties stipulated that if certain listed witnesses were called to testify, they would testify that they had purchased articles of merchandise from respondent Jay Norris Corporation for their own use and not for resale (tr. 111-112).

13. Respondent Jacobs testified that respondents' combined annual dollar volume of sales at the time of the hearings in 1965 would approximate five million dollars. He estimated that forty percent or two million dollars of this total constituted wholesale sales and sixty percent or three million dollars of this total constituted retail sales (tr. 122, 205-206, 572-573). Jacobs further testified that customers purchasing for resale included "Grocery stores, Army centers throughout the world, 5 & 10-cent stores, variety stores, barber shops, gas stations, beauty parlors, door-to-door installment companies, gift shops, morticians * * *" (tr. 204). However, respondents have no accurate records showing the amount of sales to resellers, and the estimate that 40 percent of sales are made to resellers is predicated upon the information that 40 percent of Wholesalers Service's preliminary advertisements are sent to small resellers (tr. 571). Although this estimate is thus clearly questionable, complaint counsel presented no countervailing evidence.

14. Even if it is assumed, however, that 40 percent of respondents' current dollar volume of sales consists of sales to resellers, it is apparent that the entire complexion of respondents' business changed after Wholesalers Service extended its membership solicitations to consumers. From a small wholesale company grossing not more than \$300,000 in 1960, respondents' business had expanded by 1963 into a predominantly consumer oriented company which was selling at least three million dollars worth of merchandise to the ultimate consumer. Although respondent Jacobs estimated that 40 percent of respondents' dollar volume of sales was composed of sales to small resellers, he also stated that the average sale of merchandise does not exceed \$25 (tr. 639). It is arguable that the small size of the average sale indicates that less than 40 percent of the total number of individual sales are made to resellers. In any event, it is clear and we conclude that the business has been transformed into one which now devotes its major efforts to consumer selling and which, while making some sales to resellers, now sells primarily and in the regular course of business to consumers. Respondents are thus not wholesalers as that term is generally understood, but are a hybrid enterprise—part retailer and part wholesaler. For the reasons stated in the accompanying opinion, therefore, the Commission concludes that respondents' representations of themselves as wholesalers, within the factual confines of this case, constitutes unfair and deceptive acts and practices and unfair methods of competition.

15. Respondents' resale prices for the products offered for sale in the Jay Norris catalog (CX 4), are advertised in a variety of ways. All of Wholesalers Service's preliminary advertising in soliciting subscribers carries statements indicating that such subscribers will be able to purchase products at "wholesale prices" (see CX 7, 8, 9, 10, 12, 15). In one circular extensively distributed on a nationwide basis, prospective subscribers were informed that they would receive a catalog which would offer them "[o]ver 1000 items at the lowest wholesale prices" (CX 15). Jacobs testified that the catalog referred to by the circular was the Jay Norris catalog (tr. 146). This same circular, when referring to this catalog, stated that subscribers could save "*** 50% and more on everything from shoes to diamond rings," while the application for membership contained the representation that subscribers could "*** save as much as 30% to 80% on everything ***." The list of so-called wholesalers supplied by Wholesalers Service to subscribers state that Jay Norris is a wholesaler of general merchandise, thus indicating that Jay Norris sells products at wholesale prices (see CX 14). The Jay Norris catalog supplied to subscribers is entitled "Wholesale Catalog No. 908 A" (see CX 4). Although respondents' resale prices are characterized inside the catalogs "your price," the title of the catalog and all the preliminary advertising clearly convey the impression that "your price" is a wholesale price. Moreover, the Jay Norris catalog contains the following statement on its cover:

We guarantee to meet any wholesale catalog competition *** anywhere! If, within 14 days after your purchase from us, the same article can be purchased for less in any other wholesale catalog, we guarantee to refund the difference.

16. We think it apparent, therefore, that respondents have not only advertised that their prices are wholesale prices, but have also represented that their prices are low wholesale and are perhaps the lowest wholesale prices available anywhere. The various statements referred to in Wholesalers Service's preliminary advertising, coupled with the guarantee on the face of the Jay Norris catalog clearly convey this impression. Thus, two broad issues with respect to respondents' statements about their prices are presented by the complaint, pleadings, and evidence for resolution. The first is whether respondents' representations that their prices are wholesale prices have the capacity and tendency to mislead and deceive the purchasing public because, contrary to respondents' representations, such prices are higher than the

bona fide wholesale prices. The second is whether respondents' representations that their prices are low wholesale prices or the lowest wholesale prices have a similar capacity to mislead and deceive because such prices are higher than the prices usually and customarily paid by retailers.

17. In seeking to establish that respondents' various representations are misleading and deceptive for the above reasons, complaint counsel offered evidence with respect to the pricing and distribution systems of six manufacturers. All of the products involved were advertised in the Jay Norris catalogs which Wholesalers Service mailed to its subscribers. In deciding whether respondents' prices are in excess of the prices usually and customarily paid by retailers, the Commission has compared the prices which respondents pay in acquiring the products and the prices charged upon subsequent sale with the prices which the manufacturers charge wholesalers and retailers and the prices at which these entities resell. The status of each line of products will be considered separately.

A. G. Spalding & Bros.

18. Ralph Sigler, District Sales manager of the New York district of Spalding Sales Corporation described the Spalding distribution system. Spalding Sales Corporation is the sales agent or "selling organization" for A. G. Spalding & Bros., the manufacturer, and has nine district offices located throughout the United States (tr. 480). Two lines of Spalding merchandise are marketed. The "regular" line is sold directly to retailers for resale both to consumers and to schools or institutions. The second line, termed "Pacesetter Line," is sold to jobbers, distributors or dealers for resale either to small retailers or to institutions (tr. 488, 508-509). Respondents do not carry the "Pacesetter Line," and no evidence concerning its prices was introduced (tr. 606).

19. Spalding Sales Corporation uses a single set of prices throughout the United States for its "regular" line (tr. 517-518; CX 40, 41). The "confidential" price is the price which Spalding charges its customers, which are retail sporting goods stores, department stores, and retail catalog outlets (tr. 486, 488, 508-509). Among its retail catalog outlets are Sears, Roebuck, Montgomery Ward, and Spiegel (tr. 513). The price paid by these customers is the only wholesale price which Spalding has for this line of products (tr. 486, 488). The "quantity" price is the price which Spalding suggests that its retail dealers charge

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schools or institutions (tr. 487-490). The "special sales price" is a suggested retail price to the ultimate consumer (tr. 487). A higher suggested retail price termed the "list" price is adhered to only by so-called quality stores, such as Abercrombie & Fitch, New York, New York (tr. 490). The following chart contains Spalding's prices for several items listed in respondents' Jay Norris catalog and shows respondents' resale price for each such item (see CX 4, 40, 41; tr. 483, *et. seq.*):

Item	Confidential price	Quantity price	Special sale price	Suggested list price	Respondents' resale price
3122-18.....	\$ 57.60			\$ 115.20	\$ 69.95
3128-18.....	57.60			115.20	69.95
15-102*.....	**34.45		\$ 56.75	74.60	44.95
15-105*.....	**34.45		56.75	74.60	44.95
2122-14.....	42.00			84.00	54.95
2122-13.....	31.50			63.00	41.50
2128-13.....	31.50			63.00	41.50
42-135.....	6.00	\$ 9.25	9.95	12.45	7.95
42-267.....	3.00		4.95	5.95	3.95
61-231.....	6.00		9.95	12.45	7.95
61-241.....	4.80		7.95	9.95	6.40

*1962 catalog.

**Tr. 485.

20. All purchasers acquiring the "regular" line directly from Spalding were charged the "confidential" prices. Moreover, there is no indication that retailers, other than those who may have purchased Spalding products from respondents, paid prices in excess of the "confidential" prices when acquiring this line. Even though the purchaser might make some sales to other retailers, he did not receive a lower price or an additional discount (tr. 510). It is thus apparent and we conclude that Spalding's normal method of distributing its "regular" line of products is through direct sales to retailers and that the prices usually and customarily paid by retailers are the "confidential" prices.

21. Respondents pay the "confidential" price, the price usually paid by retailers, when purchasing Spalding's "regular" line (tr. 609; CX 40, 41). Sigler testified that if respondents did sell this line to resellers, the practice " * * * would certainly be unauthorized" and " * * * would be a definite infraction against our policy of selling" (tr. 511). However, he stated that respondents could have sold to resellers and that he was not testi-

fyng that such sales did not occur (tr. 511). Respondents do not maintain an inventory of Spalding's "regular" line and have a special agreement with Spalding whereby one item or a number of items from this line are drop-shipped directly from the factory to respondents' customers under their trade name (tr. 606-607). In selling Spalding products, respondents charge their customers prices which are in excess of the "confidential" prices, Spalding's only wholesale prices, but which are less than any of Spalding's suggested retail prices. Sigler characterized respondents' price for one Spalding product as a "discounted price" (tr. 495).

22. Respondents present three arguments in support of their contention that their resale prices for Spalding's regular line of products, which are higher than the "confidential" prices but lower than any of Spalding's suggested retail prices, should be considered to be wholesale prices. First, they contend that their markup, which is twenty-five percent, is the customary wholesale markup, and, therefore, that the characterization of their resale prices as wholesale is not misleading or deceptive. Obviously, however, if the base to which the markup is applied is, as here, the price which retailers normally pay, any markup will result in a price which is higher than the normal wholesale price. Thus, the fact that respondents' markup may correspond to the average or usual wholesale markup is a *non sequitur*.

23. Secondly, respondents, relying upon *L. & C. Mayers Co. v. Federal Trade Commission*, 97 F. 2d 365 (2d Cir. 1938), advance the argument that quantity sales to industrial concerns, are considered to be wholesale sales and, on this basis, argue that Spalding's "quantity" price, the price retailers charged educational institutions, are wholesale prices. Since their price for the only Spalding item shown to have a "quantity" price was lower than Spalding's suggested "quantity" price, respondents argue that all of their prices are equal to wholesale prices. In the present case, however, the entity selling to the educational institution is usually a retailer rather than a wholesaler, and the "quantity" price is always higher than the retailer's purchase price. Thus, Spalding's suggested "quantity" price would appear to be a discounted or low retail price rather than a wholesale price.

24. Thirdly, respondents state that a Spalding representative informed them that their prices were "wholesale" prices and argue that their special agreement with Spalding, whereby merchandise was drop-shipped directly from the factory to respondents' customers, indicates that respondents were considered by

Spalding to be wholesalers. Contrary to respondents' assertion, the record does not reveal that Spalding classified respondents as wholesalers or their prices as wholesale prices (see tr. 606-612). Instead, it merely shows that a Spalding representative suggested the prices which respondents ultimately used in their catalogs. Nor does the fact that Spalding drop-shipped the merchandise directly to respondents' customers under a special agreement establish that Spalding considered these sales to be wholesale sales. It is equally logical to assume that Spalding would on occasion drop-ship a product not stocked by a retailer directly to the retailer's customer.

25. For the foregoing reasons, the Commission concludes that complaint counsel has established that respondents' prices for Spalding products are higher than any bona fide wholesale prices for these products and thus are not wholesale prices. Accordingly, respondents' characterizations of these prices as wholesale prices are false, misleading, and deceptive, and constitute unfair and deceptive acts and practices and unfair methods of competition.

Westinghouse Electric Corporation

26. Frank W. Schattschneider, an attorney in the law department of Westinghouse Electric Corporation, testified with respect to the distribution system of Westinghouse, Westinghouse Electric Supply Company (WESCO) is a division of Westinghouse Electric Corporation and serves as the distribution outlet (tr. 416-417). WESCO, which has branches throughout the United States, sells to retail dealers (tr. 417). The prices which each branch charges retail dealers vary (see CX 29-39). The following chart shows the prices which WESCO charged for twelve items at several distribution points on April 1, 1963, and respondents' selling prices for these items as advertised in their Jay Norris Catalog at the same time (CX 29-39; CX 4, pp. 52, 61, 64).

Findings

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Westinghouse stock No.	Long Island CX 29	Boston CX 30	Philadelphia CX 31	Baltimore CX 32	Atlanta CX 33	Charlotte CX 34	Pittsburgh CX 35	Chicago CX 36	Omaha CX 37	San Francisco CX 38	Salt Lake City CX 39	Respondents' resale prices as advertised in CX 4
1. 75 AC1	\$ 35.86	\$ 36.05	\$ 36.40	\$ 37.24	.....	\$ 37.60	\$ 37.60	\$ 37.60	\$ 37.60	\$ 39.70	\$ 39.57	\$ 39.90
2. 73 MP1	16.42	16.65	16.90	17.27	.....	16.90	16.90	16.90	16.90	18.75	18.57	19.95
3. 90 ACS-1	104.33	108.15	107.40	109.79	.....	111.80	111.80	111.80	111.80	127.50	115.41	119.50
4. 833L4	14.00	14.48	14.20	15.20	\$ 14.20	14.40	14.40	14.00	14.20	14.50	15.34	16.85
5. HLB-5	22.60	23.59	22.28	.....	25.17	25.06	25.06	23.59	23.59	25.69	.....	26.95
6. HC-15	16.20	16.84	16.48	.....	17.97	17.97	17.90	16.85	16.85	17.96	.....	17.95
7. HS-39	14.08	14.82	13.99	.....	15.80	15.80	15.36	14.83	14.83	15.80	.....	15.95
8. HS-29	11.50	12.12	11.44	.....	12.92	12.92	12.56	12.12	12.12	12.92	.....	12.95
9. 839N5	22.74	22.65	22.50	22.89	23.30	23.30	23.30	23.30	23.30	23.97	24.28	29.95
10. 830T5	13.98	13.94	14.28	14.47	14.50	14.50	14.20	14.50	14.50	15.65	15.64	17.95
11. 866P8	58.80	56.65	56.50	58.12	57.30	57.30	58.80	57.30	57.30	60.00	58.97	69.95
12. 837L5	23.27	23.04	23.49	23.24	23.79	23.79	23.60	23.79	23.79	24.70	24.65	29.95

27. The former administrative services manager for WESCO's Long Island outlet, Mr. Randolph S. Harper, testified that WESCO sometimes sold its products to dealers for less than the "dealer cost" in order to meet competition, but that, as a general rule, the dealer costs are used (tr. 453-454). Moreover, there is absolutely no indication that WESCO regularly or even on isolated occasions sold products to wholesalers, jobbers, or other middlemen. Thus, the normal method of distribution of Westinghouse products is through sales by WESCO directly to retailers and the prices usually and customarily paid by retailers are the WESCO "dealer" prices.

28. Respondents' account was handled by a Mr. Al Guidone, a salesman for WESCO's Long Island distribution outlet (tr. 442-443, 593-594). Respondent Jacobs, when testifying with respect to Westinghouse products, did not identify the prices at which he purchased. However, he said nothing which would indicate that he purchased from WESCO at prices which were less than the Long Island outlet's "dealer costs" as stated on CX 29 and RX 10 (tr. 593, 597-599). Since RX 10 is the price list used by respondents (tr. 593-599), we conclude that respondents purchased Westinghouse products for the same prices as those WESCO's Long Island outlet normally charged retailers in that jurisdiction.

29. As demonstrated by the above chart, respondents sold Westinghouse products at a price which exceeded the price charged dealers by WESCO's Long Island outlet. Moreover, with the exception of two products sold by WESCO's San Francisco outlet, respondents' advertised prices for the Westinghouse products were higher than the prices charged by WESCO outlets for these products. As a result, respondents' prices are, with but few exceptions, significantly higher than the prices usually paid by retailers purchasing directly from WESCO. In addition, respondents' advertised prices do not include the cost of shipping the products to the purchasers (tr. 631-632; CX 1, p. 3). WESCO delivered its products to dealers from the outlet closest to the dealers (tr. 440), and there is nothing to indicate that it added delivery costs to its regular dealer prices.

30. Respondents ultimately ceased selling Westinghouse products. Jacobs testified that the reason for the discontinuance was the belief that he was not " * * * getting the prices, the lowest possible wholesale prices" and that he was not " * * * dealing with a direct source * * *" (tr. 600). Jacobs also testified that a Westinghouse salesman had provided him with the retail or list prices

published in his catalog and that this salesman had aided him in determining the prices which were used in reselling these items to his customers (tr. 599). As a result, Jacobs termed the prices at which he resold as "wholesale" prices (tr. 599), but he did not state that the Westinghouse salesman with whom he dealt so characterized them (tr. 599).

31. Respondents argue that their arrangement with Westinghouse was "unusual" and "not typical," and that a Westinghouse employee had suggested their resale prices. However, there is no indication that respondents' arrangement with Westinghouse permitted them to purchase products at prices below those charged by WESCO's Long Island outlet. To the contrary, respondents ceased purchasing Westinghouse products because of dissatisfaction with the prices charged. Moreover, the fact that a Westinghouse employee may have suggested respondents' resale prices or termed them "wholesale" is not controlling in deciding whether these prices are actually wholesale prices. Instead, such a determination must be made by a comparison with the prices charged throughout WESCO's distribution system.

32. Respondents, in comparing their resale prices with those of WESCO, argue that their prices for Westinghouse products are wholesale prices and that they should be permitted so to represent them throughout the United States because their prices are only slightly higher than WESCO's San Francisco prices on most items and are lower on two items. The untenability of this argument is, we think, obvious. If respondents' prices for Westinghouse products were only a few cents higher than WESCO's prices in each geographical district, their argument might have more merit. However, in all other areas dealt with by the evidence, respondents' prices are significantly higher than WESCO's. If shipping costs are added to respondents' prices, the increment between their prices and those of WESCO, including WESCO's San Francisco prices, becomes even more pronounced. Moreover, respondents were purchasing from the same source and apparently in the same manner as retailers. Since there is no indication that WESCO made a practice of selling to wholesalers or other middlemen, we are of the opinion that all of the facts compel the conclusion that respondents' resale prices for Westinghouse products, as complaint counsel contended, were, with but two insignificant exceptions, higher than any bona fide wholesale prices in the various geographical areas encompassed by the evidence. Accordingly, the Commission concludes that respondents' characterization of their prices for Westinghouse products as wholesale prices had the

capacity and tendency to mislead and deceive members of the purchasing public and constituted the unfair and deceptive acts or practices and unfair methods of competition.

Regal Ware, Inc.

33. Ronald Reigle, field sales manager of Regal Ware, Inc., testified that the company is engaged in the business of manufacturing cooking utensils and other cooking ware from aluminum and stainless steel (tr. 302-303). The company's products include saucepans, chicken fryers, electric and nonelectric coffee makers, fry pans, and tea kettles (tr. 303-304). Regal Ware sells its products to wholesalers, including catalog wholesalers, and jobbers who redistribute to retailers. The company has "more than a hundred" catalog wholesale accounts and this category of trade accounts for not more than five percent of its total sales volume (tr. 305-306). In addition, the company sells directly to retailers and this category of trade comprises approximately eighty percent of its total sales volume (tr. 311-312, 329-330). Direct sales to retailers thus clearly comprise the manufacturer's primary channel of distribution.

34. Regal Ware's prices for its customers vary with the customer's size and trade category. For example, the Duncan Hines quart sized saucepan, Item No. 1221, is sold by Regal Ware to the wholesale trade, wholesale catalog houses, large national premium users such as General Mills, trading stamp companies, and retail tea and coffee houses for \$2.49 (tr. 314, 325, 326; CX 22, 23). Smaller regional premium users, small jobbers, and small rack jobbers who sell to grocery stores pay \$2.62 (tr. 315, 326-327; CX 24). Large retailers such as Gimbel's and Macy's pay Regal Ware \$2.99 (tr. 316, 327-328; CX 25). A small retailer is charged \$3.15 for this item (tr. 316-317, 329; CX 26). Because direct sales to retailers constitute Regal Ware's primary channel of distribution, the price which retailers usually and customarily pay for Item No. 1221 is a price which is not higher than the \$3.15 which the small retailer pays Regal Ware. The same conclusion follows with respect to the prices of other Regal Ware items (see par. 37, *infra*).

35. The above prices apply only to customers purchasing directly from Regal Ware. The record contains no information with respect to the prices actually charged by wholesalers and jobbers who sell the products to retailers. However, the "cost" column of CX 27 contains the prices which Regal Ware suggested at one time that its jobbers charge their customers. This list has been

discontinued and there is no evidence that any jobbers actually charged these prices (tr. 334-336).

36. Regal Ware classifies respondents as catalog wholesalers (tr. 305). CX 22 contains the prices charged the catalog wholesale trade (tr. 325-326). Respondents resell Regal Ware items to any purchaser for the prices stated on CX 27, the price list containing suggested resale prices for the jobbing and wholesale trade (tr. 334-336; CX 4, pp. 66-67; CX 27). Since respondents' resale prices are obtained from this list of suggested prices, Reigle characterized respondents' prices as "wholesale prices" (tr. 324).

37. The following chart contains Regal Ware's prices for each

CHART OF REGAL WARE PRICES

Item Number	CX 22 (Catalog wholesale trade)	CX 23 (Catalog wholesale, legitimate jobber, premium houses, rack jobber mail order, Tea & Coffee, chain stores)	CX 24 (Small rack jobbers, small jobbers)	CX 25 (Large retailers)	CX 26 (Small retailers)	CX 27 (Suggested jobber resale prices and Respondents' resale prices)
7480	\$ 6.15	\$ 6.15	\$ 6.47	\$ 7.38	\$ 7.77	\$ 8.63
7473	5.20	5.20	5.47	6.24	6.57	7.30
7000	18.98	18.98	19.97	22.77	23.97	26.63
7006	11.25	11.87	12.50	14.25	15.00	16.67
7517	10.43	10.43	19.97	12.51	13.17	14.63
7515	9.47	9.47	9.97	11.37	11.97	13.30
7518	11.85	11.85	12.47	14.22	14.97	16.63
5350	2.35	2.35	2.47	2.82	2.97	3.30
1282-1/2	2.35	2.35	2.47	2.82	2.97	3.30
1844	2.49	2.49	2.62	2.99	3.15	3.50
1846	1.88	1.88	1.97	2.25	2.37	2.63
34	9.95	.....	.....	.....	.....	.....
5749-1	2.35	2.73	2.87	3.28	3.45	3.83
5750-1	2.82	3.20	3.37	3.85	4.05	4.50
5751-1	2.98	3.20	3.37	3.85	4.05	4.50
1221	2.49	2.49	2.62	2.99	3.15	3.50
1222	3.78	3.78	3.97	4.53	4.77	5.30
1223	4.25	4.25	4.47	5.10	5.37	5.97
1290	4.25	4.25	4.47	5.10	5.37	5.97
1291	5.67	5.67	5.97	6.81	7.17	7.97
1292	6.63	6.63	6.97	7.95	8.37	9.30
1274	4.72	4.72	4.97	5.67	5.97	6.63
1276	5.67	5.67	5.97	6.81	7.17	7.97
1263	5.94	5.94	6.25	7.13	7.50	8.33
1288	4.25	4.25	4.47	5.10	5.37	5.97
311	22.75	.....	.....	.....	.....	.....
317	8.35	.....	.....	.....	.....	.....

category of trade which purchases directly from it, and the prices which were suggested as appropriate for jobbers to charge their customers. As previously found, respondents' resale prices for these items are equal to the suggested jobber resale prices.

38. Complaint counsel did not introduce evidence showing the usual jobber markup or jobber resale prices for Regal Ware products, and this failure prevents a comparison between normal jobber resale prices and respondents' prices. As a result, there is no basis for determining whether or not respondents' prices are higher than all bona fide wholesale prices. Even assuming, however, that respondents' prices were equal to those charged by some jobbers and are thus technically wholesale prices, it is clear that not more than twenty percent of Regal Ware's sales are made through the channels of distribution which include both wholesalers and jobbers, while not more than five percent of such sales are made through catalog wholesalers. Thus respondents' resale prices, which at best are equal to the prices paid by only a small number and limited class of retailers, are higher than the prices paid by retailers buying directly from Regal Ware. Since direct buying retailers constitute Regal Ware's primary method of distribution, respondents' prices are higher than the prices usually and customarily paid by retailers. Clearly, these prices are not low wholesale prices, nor are they the lowest wholesale prices, as represented by respondents' advertising. For this reason, therefore, respondents' representations with respect to these prices are misleading and deceptive and constitute unfair and deceptive acts and practices and unfair methods of competition.

Amity Leather Products Co.

39. Four witnesses associated with wholesalers reselling products manufactured by Amity Leather Products Co. testified with respect to Amity's distribution system. Walter J. Reiger, president of John M. Maris Co., testified that his company, located in New York City, is a wholesale distributor "* * * principally to drug stores" (tr. 236). The company distributes drug sundries, which the witness defined as "* * * practically everything except drugs and chemicals" (tr. 236). These products are sold in New York, New Jersey, Connecticut, Pennsylvania, Delaware, Maryland, and Virginia (tr. 238). The company purchases and resells Amity products (tr. 239).

40. John H. Foley, vice president in charge of sales of Gilman Brothers of Boston, testified that the company is a wholesale druggist (tr. 268-269). It sells products in Maine, Vermont, New

Hampshire, and parts of Rhode Island and Connecticut (tr. 269). The company purchases Amity products and resells them to retail drug stores in its territory (tr. 269). According to this witness, Amity products are sold in other stores besides drug stores (tr. 285).

41. James R. Cecil, merchandise manager of Gould's, Inc., Louisville, Kentucky, testified that the company is a wholesale drug service which sells drugs and sundries to approximately four hundred drug stores in and around Louisville, Kentucky, other parts of Kentucky, and in southern Indiana (tr. 393-394). The company sells Amity items to drug stores and dispensaries (tr. 394). This witness stated that so far as he knew, Amity products are sold primarily in drug stores, and that in his trade area such products were sold only in drug stores, dispensaries, and sundry stores (tr. 399).

42. Milton Prizant, sales manager of Gazzolo Drug and Chemical Company of Chicago, Illinois, testified that the company is a " * * * full-time service wholesale drug distributor to retail drug stores and hospitals" (tr. 519). The company sells its products, which include items manufactured by Amity, in Illinois, Wisconsin, and Indiana (tr. 520). In response to the inquiry as to whether the Amity wallets advertised in respondents' catalog are " * * * generally referred to as drug store wallets," this witness stated that " * * * wallets in drug stores would be Amity, generally speaking" (tr. 526). In addition to being sold in drug stores, he stated that Amity products are also sold in "general merchandising stores," which he further defined as "discount houses" (tr. 527).

43. Amity provided the above-mentioned wholesalers with price lists to be distributed to drug retailers purchasing from them. These price lists contained a "dealer cost" column which stated the prices which the drug retailers paid the wholesalers and a second column showing a suggested retail price. The prices which the drug retailers paid the wholesalers on Amity products are equal to approximately 50 percent of the suggested retail price (see CX 28, 42; RX 3, 7).

44. Respondents purchased directly from Amity and received for their own use a price list identical in appearance to the list provided drug retailers (see RX 6). The prices which respondents paid Amity are set forth in the "dealer cost" column in the same manner as the prices paid by retail druggists, and the suggested retail price appears in the second column. The prices which Amity charges respondents are computed by reference to a formula which permits them to realize upon resale a profit approximately

equal to one-third of their selling price or twenty-five percent of their cost (tr. 582-583). These prices are higher than the prices which Amity charges wholesalers who resell to retail druggists. (Compare CX 42 and RX 6.) The prices which respondents charge all customers for Amity products are equal to approximately 60 percent of Amity's suggested retail price (see tr. 583; CX 4, p. 25). Jacobs indicated that these resale prices had been suggested by an Amity representative (tr. 578-580), and that Amity had been informed that respondents sold such products to consumers (tr. 573-574).

45. The prices which each of the four above-mentioned wholesalers are charged for twenty-three Amity items when purchasing from the manufacturer, the prices at which they resell those items to retailers, respondents' purchase and resale prices, and Amity's suggested retail prices are as follows (CX 4, 18, 19, 28, 42; RX 3, 5, 6, 7):

Item Number	Wholesalers' purchase price	Drug retailers' purchase price	Respondents' purchase price	Respondents' resale price	Suggested retail price
0680	\$3.37	\$4.49	\$3.58	\$ 5.37	\$ 8.95
0678	3.75	5.00	4.00	6.00	10.00
0223	1.86	2.48	1.98	2.97	4.95
0237	3.75	5.00	4.00	6.00	10.00
0233	2.23	2.98	2.38	3.57	5.95
0225	2.98	3.98	3.18	4.77	7.95
0236	3.75	5.00	4.00	6.00	10.00
0245	1.86	2.48	1.98	2.97	4.95
0247	2.98	3.98	3.18	4.77	7.95
0248	2.23	2.98	2.38	3.57	5.95
0235	2.23	2.98	2.38	3.57	5.95
0303	7.11	9.48	7.58	11.37	18.95
0513	1.86	2.48	1.98	2.97	4.95
0517	2.23	2.98	2.38	3.57	5.95
0518	2.98	3.98	3.18	4.77	7.95
0450	1.86	2.48	1.98	2.97	4.95
0660	2.98	3.98	3.18	4.77	7.95
0665	2.23	2.98	2.38	3.57	5.95
0677	2.98	3.98	3.18	4.77	7.95
0761	1.13	1.50	1.20	1.80	3.00
0825	1.32	1.75	1.40	2.10	3.50
0841	1.50	2.00	1.60	2.40	4.00
0835	.94	1.25	1.00	1.50	2.50

46. Respondents, in arguing that no deception is likely to occur from representations that their prices are wholesale prices even though such prices exceed those charged by the above-

mentioned wholesalers, take the position that there are differences between drug retailers and other retailers. They contend that while drug retailers realize a 50 percent profit on all products as a matter of course, other retailers realize a profit of only 40 percent of the suggested retail price. Assuming this to be true, they then argue that a retailer can pay the prices charged in their catalog, *i.e.*, 60 percent of the suggested retail price, and, if the retailer resells the Amity products at the suggested retail price, can realize a profit equal to 40 percent of this retail price. As a result, it is their position that the price which the above wholesalers charge drug retailers, *i.e.*, 50 percent of the suggested retail price, and the price which they charge, *i.e.*, 60 percent of the suggested retail price, are both wholesale prices.

47. The evidence of record is inconclusive with respect to respondents' contention that a price equal to 60 percent of Amity's suggested retail price is a wholesale price. It is clear that many manufacturers consider the 40 percent markup to be the normal retailer's profit. Thus, a price equal to 60 percent of the suggested retail price would be in some instances a wholesale price. On the other hand, there is some indication that such a price may be the one used by discounters when reselling Amity products to consumers. As previously noted, the record established that Amity products were sold both by drug retailers who purchased from drug wholesalers and by discounters. Price lists which were supplied by Amity to these wholesalers to be distributed to their retail customers described the retailers' purchase price as the "dealer cost" (see RX 3, 7). This price list, entitled "Amity Open Stock Price List," also contained a column showing the suggested retail price. The obvious purpose of this price list is to provide the retailer, the "dealer," with a record of his purchase price and a suggested retail price. A list identical in appearance and also entitled "Amity Open Stock Price List" was supplied to respondents (see RX 6). This document listed respondents' purchase price under the "dealer cost" column and, in addition, contained the same suggested retail price as that supplied the drug retailers. Since Amity was aware that respondents sold to consumers and since it characterized the price which respondents paid in acquiring Amity products as a "dealer cost" in the same way that the drug retailers' cost was described, it is not illogical to assume that Amity regarded respondents as dealers or discounters rather than wholesalers. Moreover, since Amity products are sold through "discount" outlets, the fact that an Amity representative suggested that respondents sell their prod-

ucts at a price equal to 60 percent of the suggested retail price does not, as respondents argue, establish that this is a wholesale rather than a "discounted" or retail price.

48. Although the above evidence lends some support to complaint counsel's contention that respondents' prices for Amity products are retail prices, any finding that Amity does not have a chain of distribution in which it regularly sells to wholesalers for resale to retailers at 60 percent of the suggested retail price would be based essentially on supposition. As a result, the Commission makes no determination on this issue. However, we think that complaint counsel's evidence sufficiently establishes that Amity products are generally considered to be "drug store" items and are sold throughout many states by wholesalers who resell to drug retailers at 50 percent of the suggested retail price. There is absolutely no indication that sales to wholesalers for resale to nondrug retailers at the same prices charged by respondents constitute the major outlet of distribution for these products. Thus, we think the evidence is sufficient to support a finding that Amity's primary channel of distribution is through wholesalers to drug retailers. Even if respondents' prices—60 percent of the suggested retail prices—are technically wholesale prices, therefore, they are higher than the prices usually and customarily paid by retailers of these products. As a result, they are not the lowest wholesale prices, nor are they low wholesale prices, as respondents have represented. Accordingly, we hold that respondents' representations of their prices for Amity products have the capacity and tendency to mislead and deceive the purchasing public and constitute unfair and deceptive acts and practices and unfair methods of competition.

International Appliance Company

49. Robert Kemelhor, a sales representative for International Appliance Company, testified that the company manufactures electrical appliances, such as broilers, bakers, and rotisseries (tr. 456-457). The company sells these products to distributors, stamp companies, premium purchasers, and directly to large department stores (tr. 458). Approximately 60 percent of the company's sales are made on the East Coast and 35 to 40 percent are made in the area surrounding New York City (tr. 457, 475-476). In addition, the witness estimated that 60 percent of the company's sales are made to distributors whose customers purchase for resale, while 40 percent of its sales are made to large department stores

(tr. 466). The company does not sell directly to small retailers (tr. 466).

50. The prices which International charges distributors and direct buying retailers on the East Coast for four products advertised in respondents' catalog are as follows (tr. 462-466, 468):

Item	Distributors' cost	Retailers' cost
Broiler (# H4-14-860)	\$13.00	\$16.00
Rotisserie (# H4-15-870)	18.00	20.00
Electric Slicer (# H5-8-85)	15.00	17.00
Nonelectric Slicer (# H5-9-606)	6.50	7.50

51. International Appliance Company classifies respondents as distributors and sells its products to them at its regular distributor's prices (tr. 466-467). The record does not contain precise evidence with respect to the prices which distributors usually charge customers who purchase for resale. However, Kemelhor testified that one distributor in New York City sells the rotisserie, Item 870, for \$21.75 (tr. 464). He also stated that distributors usually sell International Appliance Company products to resellers in New York City at a price which is "* * * somewhere between 20 and 25 percent above their cost" (tr. 464), and "[t]wenty to 25 percent or a few percentages higher in some cases" (tr. 467). The prices which a hypothetical distributor in New York City who sells the above products at "25 percent above [his] costs" would charge, and respondents' resale prices are as follows (see Appeal Brief of Counsel Supporting the Complaint, p. 32; CX 4, pp. 61-62):

Item	Distributor's resale price	Respondents' resale price
Broiler	\$16.25	\$17.95
Rotisserie	22.50	26.95
Electric Slicer	18.75	19.95
Nonelectric Slicer	8.12	8.95

52. Kemelhor testified that International charged West Coast distributors higher prices than those located on the East Coast and that the prices which distributors located in areas outside New York City might charge their customers would vary (tr. 468). Kemelhor also indicated that the prices which International sug-

gested that retailers charge consumers were not usually followed and that small department stores did not charge the same prices as large stores (see tr. 470-476).

53. Because International classifies respondents as distributors, and charges them the prices usually charged such customers, respondents are clearly capable of reselling such products at the same prices as those which distributors usually charge retailers. Turning first to the New York City area,¹ however, it is clear that respondents' prices are higher than the prices which the great majority of distributors generally charge retailers in that area. Moreover, respondents' prices are higher than the prices which direct buying retailers in New York pay International. Even if it is assumed, therefore, that respondents' prices are not higher than the prices which some few distributors charge their customers and that their prices are thus technically wholesale prices, it is clear that respondents' prices are higher than the prices usually and customarily paid by most retailers located in the New York City area. Thus, it is obvious that respondents' prices for this area are not the lowest wholesale prices, nor are they low wholesale prices, as represented by their advertising. As a result, respondents' representations with respect to their prices in the New York City area are misleading and deceptive and constitute unfair and deceptive acts and practices and unfair methods of competition.

54. The evidence also established that respondents' prices are higher than those charged all direct buying retailers located on the East Coast. However, as previously noted, the record is silent with respect to the prices which distributors on the East Coast, other than those located in New York City, charge their customers. Because sales to distributors constitute sixty percent of International's total sales volume, it must be assumed, in the absence of evidence to the contrary, that this same percentage is applicable to International's sales on the East Coast. If such is the case, sales to such distributors would constitute International's primary method of distribution in this area. In the absence of evidence with respect to the resale prices of these distributors, therefore, no findings can be made concerning the prices usually and customarily paid by retailers located on the East Coast. Thus, the Commission can draw no conclusions with respect to the question of whether respondents' advertising is misleading and deceptive when distributed to consumers in this geographical area, and complaint counsel's allegations concerning respondents' various

¹ Respondents' circulars are sent to prospective customers living in New York City (see CX 8). Respondents also make sales to persons located in the New York City area (tr. 181).

representations of their prices for International products must, with the exception of the New York City area, be rejected.

Mastercraft Pipes, Inc.

55. Judith Weinberger, manager of the catalog-house business of Mastercraft Pipes, Inc., described that company's operations (tr. 344-345). The company has no manufacturing facilities and is engaged in the business of importing and selling smoking pipes and other smoking accessories. Its products are distributed nationwide through wholesalers, jobbers, and catalog houses (tr. 344-346, 365). The line of Mastercraft products distributed by respondents is prepared especially for and is sold exclusively by catalog houses. This line is not of the same quality as the company's other lines (tr. 346-347, 357-358, 369). Some of the catalog houses which purchase Mastercraft's catalog line are Co-Op Electric Supply Company, Louis Watch Company, and Majestic Electric Supply Company (tr. 347). These catalog houses sell Mastercraft products to dealers and directly to consumers (tr. 350-351, 359). Respondent Jacobs admitted that Majestic Electric and Co-Op Electric, two of the catalog houses which purchase the catalog line from Mastercraft, are retail operations (tr. 569-570).

56. In determining the prices which will be charged catalog houses purchasing its products, Mastercraft makes no distinction between sales by catalog accounts to dealers and sales by these accounts directly to consumers. As a result, all catalog accounts pay Mastercraft the same prices irrespective of whether they ultimately resell the products to dealers or directly to consumers (tr. 355, 357; see RX 8). Respondents are classified as catalog accounts (tr. 347, 355). Mastercraft supplies such accounts with price lists containing "dealer" prices and "suggested retail" prices (see RX 8). The following chart shows the prices charged catalog accounts, the suggested dealer prices, respondents' resale prices, and the suggested retail prices for fourteen items advertised in respondents' catalog (RX 8; CX 4, p. 42; tr. 347-350). [Page 1153.]

57. The following chart demonstrates that respondents, in reselling Mastercraft's catalog line of products, charge all customers, irrespective of whether they are dealers or consumers, a price which is a few cents higher than the suggested dealer price. Respondents contend that such prices are true wholesale prices. Complaint counsel argues that because respondents sell primarily to consumers at the dealer prices and because several of Mastercraft's catalog accounts are, by respondents' admission, retail businesses, the so-called "dealer" price has in fact become the

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Conclusions

prevalent "retail" price. Respondents, however, reply that there is no evidence that any of these catalog accounts utilize the "dealer" rather than the suggested retail price when selling to consumers.

Catalog item number	Cost to catalog accounts	Suggested dealer price	Respondents' resale price	Suggested retail price
H 2A	\$10.00	\$13.30	\$13.35	\$19.95
H 1A	5.00	6.63	6.65	9.95
H 1665	12.50	16.63	16.65	24.95
H 2335	17.50	23.30	23.35	34.95
H 1197	9.00	11.97	11.97	17.95
H 2869	5.00	6.63	6.65	9.95
H 2855	1.75	2.33	2.35	3.50
H 2852	1.75	2.33	2.35	3.50
H 2853	1.75	2.33	2.35	3.50
H 2866	4.00	5.30	5.35	7.95
H 2825	2.50	3.30	3.35	4.95
H 997	7.50	9.97	9.97	14.95
H 665L	5.00	6.63	6.65	9.95
H 335	2.50	3.30	3.35	4.95

58. If the record demonstrated that other catalog accounts sold Mastercraft's "catalog" line to consumers at the "dealer" prices, complaint counsel's argument that such prices have become the usual consumer prices would have merit. However, the record is totally lacking with respect to information on the prices which other catalog accounts use when and if they sell to consumers. Thus, although other catalog accounts could, as respondents do, sell Mastercraft items to consumers at prices approximating the suggested "dealer" prices, there is no evidence that other such accounts actually or even probably did so. In the absence of such evidence, there is no basis for a conclusion that respondents' prices for Mastercraft items are retail rather than wholesale prices, or that their representations of these prices as low wholesale prices or merely as wholesale prices have the capacity and tendency to mislead or deceive the purchasing public. Accordingly, complaint counsel's arguments with respect to this line of products are rejected.

CONCLUSIONS OF LAW

1. Respondents are engaged in the advertising and sale of articles of general merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, and have been and are in competition with corporations, firms, and individuals in the sale of

articles of the same general kind and nature as sold by respondents.

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

3. Respondents' representations with respect to their status as wholesalers, and their prices as wholesale, lowest wholesale, and low wholesale prices, are, for the reasons stated in the accompanying opinion, misleading and deceiving, and have the capacity and tendency to mislead and deceive the purchasing public into the erroneous and mistaken belief that said statements were and are true, and into the purchase of substantial quantities of respondents' products by virtue of said erroneous and mistaken beliefs.

4. The aforesaid acts and practices of the respondents, for the reasons stated in the accompanying opinion, were and are to the injury of the public and constitute unfair and deceptive acts and practices in commerce, and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

5. This proceeding is in the public interest.

ORDER

This matter having come before the Commission upon the appeal of counsel supporting the complaint from the initial decision of the examiner dismissing the complaint, and having been heard by the Commission upon briefs and argument in support thereof and in opposition thereto, and,

The Commission, having determined that the appeal of counsel supporting the complaint should be granted for the reasons and to the extent stated in the accompanying opinion, and that the examiner's initial decision and order should be set aside in their entirety:

It is ordered, That the Findings of Fact, Conclusions of Law, and Order of the hearing examiner be, and they hereby are, set aside.

It is further ordered, That the Findings of Fact and Conclusions of Law of the Commission be, and they hereby are, substituted for those of the examiner.

It is further ordered, That Federated Nationwide Wholesalers Service, Garydean Corp., a corporation, trading under the names Federated Wholesalers Service, Nationwide Wholesalers Service and Nationwide-Federated Wholesalers Service or under any other name or names, Jay Norris Corp., a corporation, and their officers, and Joel Jacobs and Mortimer Williams, individually and as officers of each of said corporations, and respondents' agents, repre-

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Order

sentatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of electric fry pans, electric broilers, clock-radios, electric can openers, jewelry, clothing, dinnerware, or any other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication in any advertising, including all advertising circulars, lists of wholesalers, or catalogs distributed by Federated Nationwide Wholesalers Service, Garydean Corp., or otherwise representing directly or by implication that an article of merchandise is being offered for sale at the lowest wholesale price unless the article is being offered for sale at the lowest price paid by retailers for such merchandise to any source of supply.

2. Representing, directly or by implication, in any advertising, including all advertising circulars, lists of wholesalers, or catalogs distributed by Federated Nationwide Wholesalers Service, Garydean Corp., or otherwise representing, directly or by implication, that respondents are wholesalers, or that they sell articles of merchandise at wholesale prices or at low wholesale prices: *Provided, however,* That it shall be a defense in any enforcement proceeding under this order for respondents to show:

(a) That they make a substantial and significant number of sales to retailers in the ordinary course of business, and

(b) That the prices represented to be wholesale, or low wholesale, prices do not exceed the prices usually and customarily paid by retailers for such merchandise to any source of supply, when purchased in the quantity offered for sale by respondents.

3. Misrepresenting in any manner the amount of savings available to purchasers of respondents' merchandise.

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 set forth herein.

Commissioner Elman concurred in the order and has filed a separate statement. Commissioner Reilly concurred in the result.

Complaint

71 F.T.C.

IN THE MATTER OF
THE CARL MFG. CO. ET AL.

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

Docket 8689. Complaint, June 27, 1966—Decision, June 16, 1967*

Order terminating a proceeding against a Lisbon, Ohio, catalog merchandiser which had been charged with misrepresenting its business status, prices and savings, based upon an Assurance of Voluntary Compliance dated June 14, 1967.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Carl Mfg. Co., a corporation, and Joyce Tuseck and Frank J. Tuseck, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The Carl Mfg. Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio with its principal office and place of business located at 110 West Washington Street, Lisbon, Ohio.

Respondents Joyce Tuseck and Frank J. Tuseck are individuals and officers of said corporate respondent. They formulate, direct and control the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. Their principal office and place of business 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 office, factory and store supplies and equipment and other articles of general merchandise to the purchasing public.

The individual respondents are also officers and principal stockholders of Pioneer Co., an Ohio corporation, which is engaged in the business of manufacturing, offering for sale, sale and distribution of hospital equipment and convalescent needs. The principal office and place of business of said Pioneer Co., is located at the

* Reported as amended by order of hearing examiner, dated Nov. 1, 1966, by amending Paragraph Six so as to conform with the evidence.