

paragraphs 32 and 33, paragraphs 63 through and including paragraph 80, paragraphs 91 through and including paragraph 104; by striking from the conclusions paragraph 6; and by substituting therefor the findings and conclusions of the accompanying opinion.

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

Commissioner MacIntyre not concurring for the reason that he considers this to be a price discrimination case of a fundamental type where competitive opportunities of small business retailers are substantially adversely affected by a continuing 10% price discrimination in favor of the large chains with which they "keenly" compete and, consequently, believes that minimally this matter should be handled in the same manner as Federal Trade Commission Docket No. 8513, *In the Matter of Atlantic Products Corporation, et al* (December 13, 1963) [63 F.T.C. 2237]. Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

CONTINENTAL PRODUCTS, INC., ET AL.

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

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

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

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Continental Products, Inc., a corporation, and Garrison Grawoig, Allen Grawoig, Earl W. Grawoig, Richard N. Grawoig and Paul M. Mayer, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the

Complaint

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

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

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

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

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

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

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

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

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

26-89537-1356 * * * Retail 22.50

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

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

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

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

PAR. 8. The use by respondents of the aforementioned false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements were, and are, true, and into the purchase of substantial quantities of respondents' products because of said mistaken and erroneous belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

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

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

Initial Decision

65 F.T.C.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

JUNE 18, 1963

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

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

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

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

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

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

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

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

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

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

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

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

* * * * *

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

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

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

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

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

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

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

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

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

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

