

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 WHOLESALING 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,

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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 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!*

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

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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 Yarocheski
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?

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

