The respondents' appeal is denied. The initial decision, modified as noted above, is adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon the appeal filed by the respondents from the initial decision of the hearing examiner; and

The Commission having denied the appeal for reasons stated in the accompanying opinion and having further determined that the order to cease and desist contained in the initial decision should be modified:

It is ordered, That the unnumbered paragraph in preamble to the three numbered paragraphs contained in said order be, and it hereby is, modified to read as follows:

"*It is ordered*, That respondent Witkower Press, Inc., a corporation, and its officers, and respondents Dan Dale Alexander and Bernard Witkower, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of a book entitled 'Arthritis and Common Sense,' or any other book or books of the same or of approximately the same content, material or methods, whether sold under the same name or any other name, in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or indirectly, that the regimen set out in said book provides:"

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

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

IN THE MATTER OF

THE CLINTON WATCH COMPANY ET AL.

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

Docket 7434. Complaint, Mar. 11, 1959—Decision, July 19, 1960

Order requiring Chicago distributors of watches to mail order and discount houses, wholesalers and retailers for resale, to cease representing "All Movement Parts GUARANTEED FOR LIFE Never To Break" in advertising their watches, when in fact the guarantee required payment of an undisclosed service charge for repairs or adjustments; and to cease preticketing their watches with exaggerated amounts and designating fictitious prices as "retail prices" in catalog inserts and other advertising, whereby retailers were enabled to mislead the public as to the usual retail prices.

Mr. William A. Somers for the Commission.
Mr. Paul G. Annes, of Chicago, Ill., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

In this proceeding respondent watch company and its officers are charged with having engaged in unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of the Federal Trade Commission Act. These alleged acts and practices, in substance, are that respondents have made deceptive so-called "lifetime guarantees" of their watches and have also used fictitious pricing by setting forth exaggerated and untrue retail prices of their watches on tickets attached to their watches, and by quoting certain exaggerated and untrue retail prices in their catalogues, brochures and other advertising media relating to such watches.

In this initial decision the charges of the complaint are found to be sustained by the evidence as to all respondents named in the complaint except respondents Bernard J. Cogan and Max Magnus in their individual capacities, as to whom the complaint is dismissed for reasons hereinafter set forth; but said two respondents are included in the findings and order as officers of the respondent corporation.

This proceeding was instituted by the issuance of the complaint on March 11, 1959. Thereafter due service of process was had upon all respondents, who jointly filed their answer on April 22, 1959. At a hearing held in Chicago, Ill., on June 18, 1959, the Commission's case was presented, and on September 28, 1959, the respondents presented their evidence at a further hearing in Chicago. The parties thereafter, on November 16, 1959, filed their respective proposed findings of fact, conclusions of law and order. Those proposals which have been adopted are included in the initial decision either in substance or verbatim, and all others have been rejected.

The record is quite brief, consisting of only 73 pages of testimony, stipulations of fact, remarks of counsel and rulings of the examiner, plus 13 documentary Commission's exhibits, all being advertisements and related papers of respondent. The record was materially shortened by counsel stipulating most of the evidence, by relatively brief testimony, and by a general absence of objection to evidence.

Respondents, during the hearing, petitioned the hearing examiner to accept a consent order agreeable to both parties, but acceptance thereof was conditioned by a claim that in order to avoid serious injury to respondents' business, issuance of any decision herein should be withheld until all the Commission's pending cases against various competitor watch companies were also ready for decision. Counsel supporting the complaint opposed this petition, although quite willing to agree to a consent order not so conditioned. The examiner denied this petition (R. 6–8) and also a later motion to the same effect (R. 59–69), primarily upon the ground that he had no authority to so act, since the matter is one of administrative policy and discretion vested solely in the Commission itself, to which body such a petition should be addressed (R. 6–8, 32). That this is the law is no longer open to question. See *Moog Industries, Inc.* v. *FTC* and *FTC* v. *C. E. Niehoff Co.* (1958), 355 U.S. 411, 413–414, rehearing denied 356 U.S. 905, holding that such power is not even vested in the Courts. No statute and no rule of the Commission delegates such authority or discretion to a hearing examiner. He can only pass upon the particular adjudicative proceeding before him, and "The taking of evidence and subsequent proceedings shall proceed with all reasonable expedition" (Commission's Rules of Adjudicative Proceedings, § 3.16(d).) Also by the Commission's Rules (§ 3.25 (d)), the hearing examiner must dispose of an agreement containing a consent order within 30 days of its receipt, either by accepting it and issuing an initial decision based thereon, or by rejecting it.

Several motions to dismiss for lack of proof were made after the close of the Commission's case-in-chief. They were denied, with leave to renew the same at the close of all evidence, or in the filed proposals, which latter method respondents have followed. The said motions of respondents Cogan and Magnus, made at the time the Commission's case was rested, were denied as being procedurally premature in any event. The motions as to all respondents were denied on the basis that a *prima facie* case had been made, under the now well-established doctrine of *Vulcanized Rubber and Plastics Co.*, Docket 6222 (1955), 52 FTC 533, decision (1956) 53 FTC 920, affirmed on review in *Vulcanized Rubber and Plastics Co.* v. *FTC* (C.A. of D.C. 1958), 528 F. 2d 684, followed in the Commission's order of May 27, 1959, in *Timken Roller Bearing Co.*, Docket 6504, and its order of January 5, 1959, in *Scott Paper Co.*, Docket 6559, and in several other decisions. The motions are renewed in respondents' proposals on the basis of the insufficiency of the evidence as to each and all respondents, but, except as to respondents Cogan and Magnus solely in their individual capacities, they are denied because the evidence fully sustains the allegations of the complaint, as hereinafter specifically found.

The two basic issues in contest herein are (1) whether the words "All Movement Parts Guaranteed For Life never to break" and similar expressions used in the advertising of respondents' watches are false, misleading and deceptive; and (2) whether the respondents have falsely represented the proper retail prices of their watches by pre-ticketing and otherwise advertising them at fictitious prices far above the actual retail prices at which such watches are sold to the public. Both of these issues are herein found to be sustained by the evidence, and such acts and practices are held to be violative of the Federal Trade Commission Act. A cease-and-desist order appropriate thereto is herewith issued.

In determining the facts in this proceeding upon the whole record as required by law, the hearing examiner has given full, careful and impartial consideration to all the evidence and to the fair and reasonable inferences arising therefrom. He has found those facts alleged in the complaint, which are admitted by the answer, to be true. Therefore, upon due consideration of the whole record, as well as from the personal observation of the conduct and demeanor of the witnesses, the hearing examiner makes the following findings of fact:

1. It is alleged in the complaint and admitted in the answer and upon the pleadings and evidence factually found that respondent, The Clinton Watch Company, 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 111 South Wacker Drive, Chicago, Ill.; that respondents Irving L. Wein, Bernard J. Cogan and Max Magnus are officers of the corporate respondent; and that respondent Wein formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. The address of respondent's officers is the same as that of the corporation.

It is undisputed that respondent Wein is the president of the respondent corporation. He alone formulates, directs and controls the corporate policies, acts and practices (R. 39, 40–41). While it is admitted in paragraph Two of the Answer that respondent Cogan is Vice-President and respondent Magnus is Secretary of the corporate respondent, the former functioning as sales manager and the latter as bookkeeper and accountant (R. 17–18), neither Cogan nor Magnus has anything to do with the corporation's advertising and pricing practices (R. 17–18, 37–39). Neither Cogan nor Magnus hold any stock in the corporation, and neither of them is a director thereof (R. 39–40). Under these circumstances there is no personal authority, interest or action shown on the part of either of them in the practices of respondent here under attack, to warrant an order against either in his personal capacity. See Opinion of the Commission, dated October 20, 1950, in Docket 7146, *Trans-Continental Clearing House*, *etc.*, *et al.*, and authorities cited. The complaint herein should therefore be dismissed as to respondents Cogan and Magnus, each in his individual capacity, but not in his capacity as an officer of the corporate respondent.

2. The evidence also sustains the allegations of the complaint that respondents are now, and for some years last past have been, engaged in the advertising, offering for sale, sale and distribution of watches to mail order and discount houses and wholesalers, and also to retailers for resale to the public. See Record, pages 10–15, inclusive, stipulation of fact; pages 16–29 and 41–46; and also all of Commission's Exhibits 1–A through 13–D. The evidence clearly discloses a very substantial annual volume of business of about \$1,500,000 (R. 46). This business is done with about 4,000 distributors, but about \$100,000 of it is done mainly with about 100 retail distributors (R. 41, 45–46). These customers of respondent corporation are located throughout the United States, and the record clearly establishes that, as alleged in the complaint, respondents, in the course and conduct of their business, now cause, and for some time last past have caused, their said products, 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 now 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. Respondents admit this in their Answer, and the stipulation of record shows numerous actual, substantial purchases from respondent of its watches by a number of specifically named jewelry merchants, both wholesalers and retailers (R. 10–15), located in various places in the States of Indiana and Wisconsin.

3. The complaint further alleges, and the evidence establishes without dispute, that respondents used such words and expressions as "All Movement Parts GUARANTEED FOR LIFE Never To Break" in the advertising of some of their watches, thereby representing that the movements of said watches are fully guaranteed by them in every respect. See Commission's Exhibits 11–A through -D. Respondents contend that after such guarantee was adopted several years ago, they have made no charge whatever for repair parts or other service charges when defective watches are returned to them for correction of such defects under their guarantee. See Exhibit 12, Service Dept. price list, effective Aug. 12, 1957, as compared to their

earlier service price list, Exhibit 6–B. They have only charged reimbursement for packing, postage, insurance, and other expenses incurred in returning repaired or replaced watches to customers. It is also true that some of their cheaper brands of watches do not carry said guarantee (R. 27). But all such statements and representations of lifetime guarantee are false, misleading, and deceptive because the guarantee furnished by respondents actually require the payment of a service charge for repairs or adjustments, which fact was not disclosed in respondents' advertisements. That this reimbursement charge was small and the actual cost to respondents slightly exceeded it are immaterial. The guarantee itself says the watch is "unconditionally guaranteed" and the guarantee is "all-inclusive." Its limitations only except certain named breakages and the like. Reference on the back of the guarantee slip (Commission's Exhibit 11–D) to a $1 handling charge for servicing the watch does not relieve it of the capacity and tendency to deceive the public. The consumer does not actually see that precise guarantee on his watch until he actually purchases it (R. 26) and may miss it altogether because of its lack of prominence along with the guarantee. Moreover, in respondents' advertising, repeated emphasis is laid on an unlimited statement, in large, colored type, "Guaranteed for Life." See Exhibits 1–A through –D, 2–A and –B, 3, pages 8–A through –D, and 13–A through –D, advertising respondents' "Clinton" and "Wolbrook" brands of watches. Such limitations thereto as appear are in very inconspicuous small type. A number of consumers were actually misled by respondents' guarantee into believing there would be no service charge (R. 15–16). Counsel supporting the complaint cites *Parker Pen Co.* v. *FTC* (C.C.A. 7, 1946), 159 F. 2d 509, as authority for a cease-and-desist order on this particular charge. It is strong authority. In that case, as here, the evidence disclosed that the small service charge for repairing the Parker Company's "Lifetime guarantee pen" was so inconspicuously printed and placed in its advertisements as to pass unnoticed by the casual or negligent reader, whom it is the Commission's function to protect. The Court held that such "guarantee" advertisements might be permitted, but only if the less noticeable limitations within the apparently absolute guarantee were placed in close conjunction with and in the same sized type as the guarantee itself. The provisions of the order issued herewith, which appropriately relate to this phase of the case however, are broader and less specific than the precise, judicially modified order in the *Parker* case. The order herein issued follows current practice in this type of litigation, and lends better to the protection of the public interest.