

5. Failing to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb".

6. Failing to set forth the term "Natural" as part of the information required to be disclosed on invoices under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

7. Failing to set forth separately information required under Section 5(b)(1) of the Fur Products Labeling Act and Rules and Regulations promulgated thereunder with respect to each section of fur products composed of two or more sections containing different animal furs.

*It is further ordered,* That respondents Murray Hoffman and Edward Jacobs, individually and as copartners trading as Hoffman & Jacobs or under any other trade name, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, sale, advertising or offering for sale, in commerce, or the processing for commerce, of fur products; or in connection with the selling, advertising, offering for sale, or processing of fur products which have been shipped and received in commerce, do forthwith cease and desist from misbranding fur products by substituting for the labels affixed to such fur products pursuant to Section 4 of the Fur Products Labeling Act labels which do not conform to the requirements of the aforesaid Act and the Rules and Regulations promulgated thereunder.

*It is further ordered,* That the respondents herein 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 this order.

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IN THE MATTER OF

J. WEINGARTEN, INC.

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

*Docket 7714. Complaint, Jan. 5, 1960—Decision, Aug. 13, 1963*

Order dismissing "solely for the purpose of complying with the \* \* \* order of the District Court" requiring the Commission to issue a final order disposing of the case by August 13—"without prejudice to the right of the

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Commission to reopen the matter \* \* \* if the \* \* \* order of the District Court becomes ineffective as a matter of law"—complaint charging a grocery supermarket chain with 45 outlets in Texas, Louisiana and Tennessee, with knowingly inducing or receiving discriminatory advertising allowances from suppliers.\*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, having reason to believe that J. Weingarten, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of Section 5 of said Act (15 U.S.C.A. Sec. 45), 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 as follows:

PARAGRAPH 1. Respondent J. Weingarten, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas with its principal office and place of business located at 600 Lockwood Drive, in the city of Houston, State of Texas.

PAR. 2. Respondent is now, and for many years has been, engaged in the operation of a large chain of retail grocery stores reselling all types of grocery, cosmetic, and other products to the consuming public. Respondent purchases all of said products, including all types of canned foods, fresh vegetables, all types of meats, canned and fresh, dairy products of all kinds and numerous other food items, household articles and clothing, which it resells, from a large number of manufacturers, processors and handlers of such products. The forty-five retail grocery stores presently composing respondent's chain are all located in the States of Texas, Louisiana and Tennessee. The total sales made by respondent from these stores are substantial and exceeded \$120,000,000 for the fiscal year ending June 28, 1959. Respondent advertises the products which it sells to create consumer demand and acceptance therefor throughout the states where its stores are located.

PAR. 3. Respondent, in the course and conduct of its business, has engaged and is now engaging in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent for many years has been purchasing the products which it sells in its various chain stores from a large number of suppliers located throughout the United States and respondent causes these products when purchased by it to be transported from the place of manufacture and purchase

\*The District Court's order was reversed by the Court of Appeals for the Fifth Circuit on Sept. 14, 1964 [7 S.&D. 1000].

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without the States of Texas, Louisiana and Tennessee to stores or warehouses located within the States of Texas, Louisiana and Tennessee for resale to the consuming public. There is now, and has been for many years, a constant current of trade in commerce in said products between and among the various states of the United States.

PAR. 4. In the course and conduct of its business, as herein described, respondent has been for many years in competition in the sale and distribution of food and grocery products in commerce between and among the States of Texas, Louisiana and Tennessee with other corporations, persons, firms and partnerships.

PAR. 5. In the course and conduct of its business in commerce, respondent has knowingly induced or received the payment or contracted for the payment of something of value to respondent or for respondent's benefit as compensation or in consideration for services and facilities furnished by or through respondent in connection with respondent's offering for sale or sale of products sold to respondent by many of its suppliers, and which payments were not made available by such suppliers on proportionally equal terms to all other customers of such suppliers competing with respondent in the sale and distribution of such suppliers' products.

PAR. 6. For example, the respondent addressed letters to a large number of its suppliers early in 1958 as follows:

Weingarten's is on the move! Your products are now getting greater distribution through more units, serving more people than at any time in our history.

We are highlighting this progress with our great annual event this year \* \* \* the 57TH ANNIVERSARY SALE. Thirty-nine great big units are taking part, and we are sure that you will want to avail yourself of the opportunity to participate.

We will use proven advertising, merchandising and promotional facilities to create maximum traffic during this mammoth sales concentration. There will be newspaper coverage, radio and television employed, plus personnel enthusiasm and carefully laid plans for presentation of all merchandise to insure success on an overall basis.

Many of our suppliers have asked us concerning this event, and we are, therefore, extending to you an opportunity to participate.

The attached sheet shows the prices of participation in the entire promotional program with the difference in prices being due to the different size ads in the various cities which will be included in a newspaper section.

Please mail the attached card indicating your intentions, and we would appreciate it if it would reach us no later than February 3rd, so we may formulate our plans accordingly.

Respondent enclosed a chart containing the following information and indicating that the amount of newspaper advertising which each supplier was purportedly to receive varied depending upon the amount paid by the supplier and the area chosen:

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	Section in Houston area with distribution in Houston, Freeport, Baytown, Texas City	Section in three Sabine area newspapers, including Beaumont, Orange, Port Arthur	Section in Bryan and Galveston	Section in Lake Charles American Press	Section in Shreveport Times-Journal	Total amount in all areas
1/8 page, including entire service.....	215.00	111.05	87.50	56.05	106.01	546.83
1/8 page, including entire service.....	352.35	170.00	141.00	91.15	173.02	881.14
1/4 page, including entire service.....	559.50	318.00	223.00	145.30	279.04	1,448.40
1/2 page, including entire service.....	870.95	608.50	344.00	226.60	438.08	2,343.72
Full page, including entire service.....	1,409.15	1,115.80	555.00	367.20	759.06	3,995.90

A 5% discount is included and already deducted for participation on all sections where our stores are located.

The payment in each case to be made by the supplier was set by the respondent and varied from \$56 to \$3,995. Ninety of respondent's suppliers entered into the arrangements above described with respondent, and as a result agreed to and did pay the respondent a total of \$23,538.

PAR. 7. Typical of the suppliers, the products which they supply and the amounts which they paid the respondent are the following:

Name of Supplier	Location	Product	Amount paid
Max Factor & Co.....	Hollywood, Calif.....	Cosmetics.....	\$881.14
Nestle-LeMur Co.....	New York, N.Y.....	do.....	881.14
Lanolin Plus, Inc.....	Newark, N.J.....	do.....	881.14
Yakima Fruit & Cold Storage Co.....	Yakima, Wash.....	Fruit.....	150.00
Shreveport Macaroni Manufacturing Co.....	Shreveport, La.....	Macaroni.....	108.00
Ipswich Hosiery Co.....	Manchester, N.H.....	Hosiery.....	285.00
Vanity Fair Paper Mills, Inc.....	New Orleans, La.....	Paper products.....	215.00

PAR. 8. Many of respondent's suppliers, including those listed above, did not offer or otherwise make available similar compensation or things of value or allowance for advertising or other service or facility on proportionally equal terms to those granted the respondent to all other of their customers which were competing with respondent in the sale and distribution of the same supplier's products. Respondent knew or should have known that it was inducing or receiving a payment or allowance for advertising or other service or facility from its suppliers which its suppliers were not offering or otherwise making available on proportionally equal terms to other of such supplier's customers who were competing with respondent in the sale and distribution of such supplier's products.

PAR. 9. The acts and practices of respondent, as hereinbefore alleged, of inducing and receiving special payments or allowances

from its suppliers which were not made available by such suppliers on proportionally equal terms to respondent's competitors are all to the prejudice and injury of competitors of respondent and of the public; have the tendency and effect of obstructing, hindering and preventing competition in the sale and distribution of food, grocery, cosmetic and clothing products and have the tendency to obstruct and restrain, and have obstructed and restrained, commerce in such merchandise and constitute unfair methods of competition in commerce and unfair practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

PAR. 10. The amounts of money solicited and received by the respondent from each of its suppliers were paid by such suppliers for advertising to be done by respondent in promoting each such supplier's products during respondent's anniversary sales and Texas Products and Louisiana Products sales in the year 1958 and the years prior thereto. However, it has been the regular and continuous practice of respondent not to use the entire amounts of money received from its suppliers to advertise such suppliers' products during such sales but to divert substantial amounts of such payments to its own use.

For example, during the year 1958, respondent solicited its suppliers and ninety of them paid respondent substantial amounts of money totalling \$23,538 for advertising which respondent was to do on such suppliers' products during its anniversary sale beginning February 24, 1958, and lasting one week. However, respondent did not expend the entire amount of money received from each of its suppliers as an advertising allowance in advertising each such supplier's products during such sale, but diverted substantial amounts of such payments from its suppliers to its own use.

PAR. 11. The aforesaid acts and practices of respondent as herein alleged of inducing and receiving advertising allowances from its suppliers and not expending the entire amount of money received from each such supplier as an advertising allowance in actual advertising of such suppliers' products and of diverting substantial amounts of such money to its own use are all to the prejudice and injury of such suppliers and of competitors of respondent and the public and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of and in violation of Section 5 of the Federal Trade Commission Act.

*Mr. Ernest Oakland* for the Commission.

*Fulbright, Crooker, Freeman, Bates & Jaworski*, by *Mr. Austin C. Wilson*, *Houston, Texas*;

*Howrey, Simon, Baker & Murchison*, *Washington, D.C.*, by *Mr. Edward F. Howrey*, *Mr. Harold F. Baker*, and *Mr. A. Duncan Whitaker* for respondent.

## INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

The Commission's complaint in this matter, issued on January 5, 1960, charges the respondent with violations of Section 5 of the Federal Trade Commission Act in two particulars, the gist of which are:

- (1) Knowingly induced or received promotional allowances from suppliers, and that it knew or should have known that such allowances were violative of Section 2(d) of the Clayton Act, as amended; and
- (2) Not expending the money received from its suppliers for advertising, but diverting substantial amounts thereof to its own use.

The respondent filed its answer, hearings were held at which evidence was received in support of and in opposition to the complaint, proposed findings were submitted and arguments heard. The proposed findings of fact and conclusions not hereinafter specifically found or concluded are herewith rejected. Upon consideration of the entire record herein, the Hearing Examiner makes the following findings of fact and conclusions:

The respondent challenges the jurisdiction of the Commission.

First, it asserts that it is a live poultry dealer within the meaning of Section 218b of Title 7, U.S.C., and, therefore, subject to the exclusive jurisdiction of the Secretary of Agriculture under the provisions of Section 227 of Title 7, U.S.C., as amended.

Second, it is the position of the respondent that the Commission does not have jurisdiction under Section 5 of the Federal Trade Commission Act to bring this action.

The jurisdictional questions were first raised by the respondent by its motions to dismiss the complaint, which motions were denied by the Hearing Examiner. The respondent filed an interlocutory appeal from such ruling which was denied by the Commission. It is found that the Federal Trade Commission has jurisdiction over the acts and practices of respondent as alleged in the complaint, and the complaint alleges a cause of action under Section 5 of the Federal Trade Commission Act.

Respondent, J. Weingarten, Inc., is a corporation organized under the laws of the State of Texas, and its principal office and place of business is located at 600 Lockwood Drive, Houston, Texas. Respondent is now and for many years has been engaged in the operation of a large chain of retail supermarkets purchasing and reselling all types of food products, drugs, cosmetics, household articles, and clothing.

The respondent's business can be traced back to the year 1901 when Harris Weingarten, a native of Poland, together with his 17-year-old son, opened a small grocery store in Houston, Texas, on \$300 capital. The senior's dry goods business had failed and the money came from

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Mama Weingarten's pinch money savings. Harris got up at 4:30 a.m. to make the rounds of the produce markets and Joe would have the store ready for opening at 6:00 a.m. During the slack hours of the day, Joe visited the homes in the area, going from door to door soliciting orders for the store. First, his brother, Sol, then later about 1914, his youngest brother, Abe, and his sister, Anne, joined their father and brother as partners. That was the start of a business that was to grow to one of the nation's most thriving and progressive supermarket enterprises. In 1914, the business was incorporated. In 1920, a second store and a bakery were opened and the company began advertising in local newspapers. From time to time other stores were added. In 1939, it had 13 stores, and during that year the sales totaled \$12,098,282. In 1942, it opened its first store outside of the city of Houston, and in 1954 its first store outside of Texas. As of July 2, 1960, the company operated sixty stores, forty-six in Texas, seven in Louisiana, and seven in Tennessee and employed approximately 5,000 persons. The sales for the fiscal year ended July 2, 1960 amounted to \$137,275,368.

Respondent, in the course and conduct of its business, has engaged and is now engaging in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent for many years has been purchasing the products which it sells in its various chainstores from a large number of suppliers located throughout the United States and respondent causes these products when purchased by it to be transported from the place of manufacture and purchase without the States of Texas, Louisiana and Tennessee to stores or warehouses located within the States of Texas, Louisiana and Tennessee for resale to the consuming public. There is now, and has been for many years, a constant current of trade in commerce in said products between and among the various States of the United States.

In the course and conduct of its business, as herein described, respondent has been for many years in competition in the sale and distribution of the named products in commerce between and among the States of Texas, Louisiana and Tennessee with other corporations, persons, firms and partnerships.

In the course and conduct of its business in commerce, respondent has knowingly induced or received the payment or contracted for the payment of something of value to respondent or for respondent's benefit as compensation or in consideration for services and facilities furnished by or through respondent in connection with respondent's offering for sale or sale of products sold to respondent by many of its suppliers, and which payments were not made available by such suppliers on proportionally equal terms to all other customers of such

suppliers competing with respondent in the sale and distribution of such suppliers' products.

The respondent has regularly been an extensive user of all forms of advertising media—newspapers, television, radio, circulars and others. In a speech delivered before the 1954 Annual Meeting of the National Association of Food Chains, an official of Weingarten's had this to say, in part:

According to statistics gained from a recent NAFC clinic, the advertising expenses of the average chain operation today run anywhere from one-half of one per cent to one per cent of sales, after deducting all types of creditable cooperative monies. Where the industry as a whole makes about one per cent to 1.3 per cent of sales after taxes, we can well realize the importance of attempting to hold down advertising costs, while still doing an outstanding job in telling the public about ourselves, our merchandise, and, of course, our prices.

In our organization, we manage to get approximately a little over half of all our advertising dollars expended returned to us in the form of charges to vendors. As you may well imagine, keeping up this rate of return and bettering it, if possible, is a prime responsibility of our advertising people. It is only through the cooperation of our many fine suppliers who show a willingness and desire to work with us and the others in the food industry in our area that we are able to continue our tremendous advertising outlay and still maintain an average net after taxes at the end of the year.

The respondent has in effect standard cooperative advertising agreements with many of its suppliers, which are offered by such suppliers, and such contracts usually contain statements that their benefits are available on proportionately equal terms to the suppliers' other customers. However, this case is concerned about payments made as the result of respondent's solicitation of its suppliers to participate in special promotions. For many years respondent has conducted so-called "Anniversary" and "Texas Products" sales. Since 1954 when respondent established stores in Louisiana, it has held "Louisiana Products" sales. Most all, if not all, of respondent's suppliers are solicited and requested to participate in such sales. Respondent also conducts special promotions in connection with particular divisions of its stores, such as the Drug, and Home Center Departments to which the suppliers of such departments are solicited to participate.

In addition, respondent sponsored radio and television programs to which suppliers were called upon and did make payments, but it would serve no purpose to go into the facts relating thereto. The Hearing Examiner in general will confine himself to the promotional sales during the years 1958 and 1959.

During 1958 respondent conducted its 57th Anniversary Sale (57th AS), 20th Texas & Louisiana Products Sale (20th TLPS), Twelfth Home Center Birthday Sale (12th HCBS), 9th Annual May Health & Beauty Carnival (9th AMHBC), Home Center—Million Dollar Sale

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(HCMDS) and in 1959 its 58th Anniversary Sale (58th AS), 21st Texas & Louisiana Products Sale (21st TLPS), 13th Home Center Birthday Sale (13th HCBS), 10th Annual May Health & Beauty Carnival (10th AMHBC), and Home Center—Million Dollar Sale (HCMDS).

The approximate number of suppliers who were solicited and the number who participated in the said promotions, together with the total amount contributed by them to respondent is summarized as follows:

Promotion	Approximate Number solicited	Participated	Amount
<i>1958</i>			
57th AS.....	350	90	\$23,538.37
20th TLPS.....	325	40	15,744.52
12th HCBS.....	170	71	7,955.10
9th AMHBC.....	37	21	17,939.88
HCMDS.....	( <sup>1</sup> )		(?)
<i>1959</i>			
58th AS.....	300	75	21,974.90
21st TLPS.....	275	45	12,271.93
13th HCBS.....	250	42	3,600.00
10th AMHBC.....	37	21	20,791.45
HCMDS.....	(?)	50	3,300.00

<sup>1</sup> Figures incomplete.

Respondent also solicited and received payments from suppliers in return for spot announcement of suppliers' products in the course of one or more of respondent's television and radio programs. In 1959, respondent received \$5,555.84 from 11 of its suppliers in connection with radio programs and \$75,916.45 from 51 of its suppliers in connection with television programs.

Starting the latter part of 1958 and abandoned at the end of 1959, respondent experimented with an in-store closed-circuit television advertising setup known as "Sell-A-Vision". Eighteen television receiving sets were placed throughout one of respondent's stores over which slides were shown and sales messages flashed. In 1959, respondent solicited and received \$4,415.05 from 33 suppliers for their participation in Sell-A-Vision.

The record shows that the respondent collected \$40,339.73 from 26 of its grocery suppliers, and \$20,313.57 from 17 drug suppliers in the year 1958; \$29,684.36 from 20 grocery suppliers, and \$28,935.74 from 17 drug suppliers in the year 1959 on regular advertising contracts.

To induce participation, it was the practice of the respondent to write letters to its supplier weeks prior to the date of the sale. There would be enclosed with the solicitation letter a reply card for the use of the supplier to indicate the extent of his participation. When a supplier was not heard from, the respondent would follow

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up with a reminder message in the form of a letter and telegram. In addition, respondent's buyer and officials would contact a supplier directly to invite participation. A typical solicitation letter used in connection with "Anniversary" and "Product" sales reads.

Weingarten's is on the move! Your products are now getting greater distribution through more units, serving more people than at any time in our history.

We are highlighting this progress with our great annual event this year \* \* \* the *57TH ANNIVERSARY SALE*. Thirty-nine great big units are taking part, and we are sure that you will want to avail yourself of the opportunity to participate.

We will use proven advertising, merchandising and promotional facilities to create maximum traffic during this mammoth sales concentration. There will be newspaper coverage, radio and television employed, plus personnel enthusiasm and carefully laid plans for presentation of all merchandise to insure success on an overall basis.

Many of our suppliers have asked us concerning this event, and we are, therefore, extending to you an opportunity to participate.

The attached sheet shows the prices of participation in the entire promotional program with the difference in prices being due to the different size ads in the various cities which will be included in a newspaper section.

Please mail the attached card indicating your intentions, and we would appreciate it if it would reach us no later than February 3rd, so we may formulate our plans accordingly.

Thanks very much in advance for your consideration.

Most sincerely,  
(Sgd.) Jesse Siegel,  
JESSE SIEGEL,  
*Director of Advertising.*

A reminder letter reads:

Gentlemen:

*JUST A REMINDER*

\* \* \* That we have not heard from you regarding your participation in our forthcoming *57TH ANNIVERSARY SALE*.

*TIME IS GROWING SHORT:*

\* \* \* Will you please contact our buyers or the writer not later than February 3rd, advising us of your commitment.

Sincerely,  
(Sgd.) Jesse Siegel,  
JESSE SIEGEL,  
*Director of Advertising.*

A reminder telegram reads:

(HOLD FOR DELIVERY UNTIL 2/9/59)

(29 BOOKS ATTACHED)

FEB. 8, 1959.

DEADLINE FOR *58TH ANNIVERSARY SALE* ONLY 48 HOURS AWAY. APPRECIATE HEARING FROM YOU IMMEDIATELY ABOUT YOUR PARTICIPATION.

E. L. JACKSON,  
J. WEINGARTEN INC.,  
HOUSTON, TEXAS.

Among the many suppliers who were solicited and who made payments to respondent are: Max Factor & Company, Yakima Fruit & Cold Storage Company, Shreveport Macaroni Manufacturing Company, Inc., Vanity Fair Paper Mills, Inc., Shulton, Inc., Ipswich Hosiery Company, The Nestle-Lemur Company, and Lanolin Plus, Inc.

Max Factor & Company of Hollywood, California, participated in the 57th Anniversary Sale with a payment of \$881.14, the 9th Annual May Health and Beauty Carnival with a payment of \$884.40, and 10th Annual May Health and Beauty Carnival in the amount of \$760.60. During 1958, respondent received additional payments of \$2,024.31 under the terms of a regular cooperative advertising contract with Max Factor. Yakima Fruit & Cold Storage Company of Yakima, Washington, participated in the 54th and 57th Anniversary Sales in the amount of \$192.50 and \$150, respectively. Shreveport Macaroni Manufacturing Company, Inc., of Shreveport, Louisiana, participated in the 57th and 58th Anniversary Sales and 20th and 21st Louisiana Products Sales, making payments of \$106.01, \$106.01, \$106.01, and \$107.51, respectively. Vanity Fair Paper Mills, Inc., with its principal office located at New York, N.Y., participated in the 57th and 58th Anniversary Sales at the 20th and 21st Texas/Louisiana Products Sales, making payments of \$215, \$227, \$215, and \$235.24, respectively. Further, respondent received \$541 in 1958 and \$509.76 in 1959 under its regular cooperative advertising contract with Vanity Fair. Shulton, Inc., of Clifton, New Jersey, participated in the 57th and 58th Anniversary Sales to the extent of \$881.14 and \$1,054, and in the 9th and 10th Beauty Carnivals with payments of \$1,761.30 and \$2,047, respectively. Shulton also paid respondent \$1,332.25 during 1958 and \$1,648.18 during 1959 pursuant to a regular cooperative advertising contract. Ipswich Hosiery Company of Manchester, New Hampshire, participated in the 57th Anniversary, the 12th and 13th Home Center Sales in the amounts of \$285, \$250, and \$300, respectively. The Nestle-Lemur Company of New York, N.Y., participated in the 57th and 58th Anniversary Sales in the amounts of \$881.14 and \$347.38, respectively. Nestle-Lemur also paid respondent \$151 in connection with the Sell-A-Vision promotion. Lanolin Plus, Inc., of Newark, N.J., participated in the 57th and 58th Anniversary, 21st Texas Products, and the 9th Beauty Carnival Sales, paying \$881.14, \$652.59, \$1,292.83, and \$1,093.50, respectively.

Ten witnesses from nine companies competing with the respondent testified with regard to the allowances, if any, received from the eight suppliers heretofore specifically named and their testimony established that the said suppliers did not offer or otherwise make available

payments or allowances for advertising or other services or facilities, on terms proportionately equal to those granted by them to respondent to all others of their customers who were competing with respondent in the sale and distribution of their products.<sup>1</sup>

The chief issue with reference to the first charge in the complaint in this case, is whether respondent knew or should have known that it was receiving unlawful allowances from some of its suppliers. A similar issue was involved in three recent cases before the Federal Trade Commission, which serve as a guiding post in disposing of the controversy here. The cases are *American News Company* (Docket 7396), *The Grand Union Company* (Docket 6973), and *Giant Food, Inc.* (Docket 6459) where the Commission rejected arguments similar to those advanced by respondent in this proceeding.

In *Grand Union*, the Hearing Examiner in the initial decision said:

\* \* \* The facts must be interpreted in the light of the fact that respondent was not a mere passive recipient of normal advertising allowances, but was an instigator and co-originator of the sign project and, as such, must have been aware that it involved a specially "tailored", negotiated program which it would be very difficult to make generally available on a proportionally equal basis to its competitors. *Atalanta Training Corp.*, Docket No. 6464, December 20, 1956.

The Commission adopted the initial decision and said in part:

Respondent also argues that there is no evidence that it knew or should have known that such payments by its suppliers were not made available to its competitors on proportionally equal terms. The record shows, first of all, that payments made to respondent by certain of its suppliers had not been proportionalized. The record also shows that respondent was not a passive recipient of these discriminatory payments but that it had, in fact, solicited them. Respondent, and not the suppliers, originated the plan under which the payments were made and in most instances respondent approached the supplier with the plan \* \* \*.

<sup>1</sup> On January 5, 1960, the date the complaint was issued herein, the Commission initiated proceedings, charging violation of subsection (d) of Section 2 of the Clayton Act, as amended, against eight of the suppliers involved in this matter, to wit: *Max Factor & Company* (Docket 7717), *Yakima Fruit & Cold Storage Company* (Docket 7718), *Shreveport Macaroni Manufacturing Company, Inc.* (Docket 7719), *Vanity Fair Paper Mills, Inc.* (Docket 7720), *Shulton, Inc.* (Docket 7721), *Ipswich Hosiery Company* (Docket 7715), *The Nestle-Lemur Company* (Docket 7716), and *Lanolin Plus, Inc.* (Docket 7722). All of the mentioned cases were assigned to this Hearing Examiner. The first five named contested the charges after which the Hearing Examiner issued initial decisions finding violations of the complaint. With the exception of the *Yakima* case, where the Commission adopted the Hearing Examiner's initial decision, appeals have been taken to the Commission. In the *Shulton*, *Shreveport*, and *Vanity Fair* cases, the appeals have been denied and the Commission has adopted the initial decisions of the Hearing Examiner. In the *Shulton* case, a petition to review the order has been filed in the U.S. Court of Appeals (7th Cir.), where it remains pending. The *Max Factor* appeal has not been disposed of by the Commission. By a consent agreement, a cease and desist order has been issued against *Ipswich Hosiery Company*. The charges of the complaints in respect to *Nestle-Lemur* and *Lanolin Plus* remain pending.

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\* \* \* It also knew that certain of its suppliers had promotional allowance programs which were available to their customers. Respondent also knew that, in general, the arrangements for participation in the sign program were not negotiated as part of such announced advertising allowance programs. It also knew that, with one exception, the arrangement was a specially tailored or negotiated deal outside of the supplier's generally announced program. The record also shows that in some instances respondent received from the supplier an allowance under the supplier's generally announced advertising program in addition to the benefits which it received from the sign deal. We think that these circumstances should have at least "provoked inquiry in the mind of a prudent businessman," *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 66 (1952), and that respondent should have inquired whether the participating suppliers were proportionalizing the payments made under the sign arrangement.

On affirming the decision of the Commission, the U.S. Court of Appeals (2d Cir., February 7, 1962) said:

Of course there are unique problems in the application of § 5 of the Federal Trade Commission Act to the buyer who engages in a transaction outlawed by § 2(d) of the Clayton Act. Section 2(d) does not outlaw all payments by sellers for services or facilities rendered by their customers; it declares unlawful only those which are not offered on a proportional basis to all customers. Unlike the seller, the buyer has no control over those payments—he cannot insure that they are "proportionalized." It may be difficult even to find out whether the seller is making proportionally equal allowances available. The data are often in seller's files; and even if information is publicly available, it may be difficult to make the subtle assessments necessary to determine "proportionality." It would be a harsh burden to hold that any buyer who induces or receives a payment later found to be disproportionate has engaged thereby in unfair competition. The Commission in this case has correctly limited the complaint to "knowing receipt or inducement" of disproportionate payments; and the record supports its finding that Grand Union knew, or in the exercise of reasonable care should have known, that the payments received had not been made proportionally available to its customers. Cf. *Automatic Canteen Co. of America v. F.T.C.*, *supra*, 346 U.S. 61.

In *American News Company* in the opinion of the Commission, it is said:

A buyer who induces a seller to depart from his customary pattern of allowances and grant a promotional payment two or three times greater than previously paid does so at his peril unless possessed of particular knowledge that the seller has granted like concessions to others similarly situated.

In affirming the decision of the Commission, the U.S. Court of Appeals (2d Cir., February 7, 1962) had this to say:

The test of whether a buyer has knowledge that payments he induces and receives are illegal was laid down for cases brought under § 2(f) by the Supreme Court in *Automatic Canteen Co. of America v. F.T.C.*, 346 U.S. 61. By analogy this test is applicable in these § 5 proceedings. See *Grand Union Co. v. F.T.C.*, *supra*. Although knowledge must be proved, it need not be by direct evidence; circumstantial evidence, permitting the inference that peti-

tioners knew, or in the exercise of normal care would have known, of the disproportionality of the payments is sufficient.

The Court further said:

Petitioners contend that the order places undue burdens on them by forbidding inducement and receipt of payments when they know, or *should know*, that proportional payments are not "*affirmatively offered* or otherwise made available" to their competitors. They attack specifically the provisions we have italicized. There is nothing in the Supreme Court's opinion in *Automatic Canteen Co. of America v. F.T.C.*, *supra*, 346 U.S. 61, which precludes the imposition of a duty of reasonable inquiry upon a buyer. Indeed, that opinion stated that the Commission might find knowledge under § 2(f) that payments induced and received were not cost-justified (the issue there) if it showed two things: first, that the buyer knew of a price differential, and second, that one familiar with the trade should know that such a differential could not be cost-justified. *Automatic Canteen Co. of America v. F.T.C.*, *supra*, 346 U.S. 61, 81. Nor can there be any objection to including the term "*affirmatively offered*." Petitioners seem to feel that this provision makes the order more onerous and imposes a requirement on sellers not called for by § 2(d). Whatever may be the merits of petitioners' contention that § 2(d) imposes no duty of affirmative offering on sellers, inclusion of this provision cannot prejudice the buyer. As the order now reads, this clause does not change what sellers must do, but simply defines the obligation of the buyer to learn whether payments are "*proportionalized*." If he is apprised of sufficient information about payments which he induces and receives to create a duty of further inquiry, the buyer, under this order, must see first if the payments are affirmatively offered to his competitors on a proportionally equal basis; if not, the order indicates he may have a further duty to see whether they are "*otherwise made available*."

Many of respondent's suppliers offer to their customers regular cooperative advertising programs. Payments under such contracts are generally based upon and related to the quantities of purchases. Respondent was aware that the regular cooperative advertising contracts which it and its competitors maintained with suppliers were designed to be offered generally to the trade. For example, many of the suppliers' contracts with respondent, in an obvious effort to comply with the requirements of the Robinson-Patman Act, include passages such as these:

The allowance(s) provided in this contract is available on proportionally equal terms to all competing customers of the Company who purchased the product(s) listed.

This same precise agreement is offered to all customers of O-Cedar on a proportionally equal basis, in the same trading area \* \* \*

This agreement is available on proportionally equal terms to all competing customers of Lustre-Creme products.

The payments which respondent induced and received, the subject of this controversy, were outside of any regular advertising contract it had with its suppliers, and the requests for such payments were unrelated to any amount of merchandise purchased from a supplier.

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The situation was such that a supplier, even if he wanted to make similar payments to the competitors of respondent, would find it most difficult, if at all possible, to determine what payments would be proportionally equal to those made to the respondent. The situation is indicated by excerpts from letters received by the respondent from suppliers who were solicited and refused to make the payments requested:

We receive a great number of requests to participate in special events, and some years ago we decided upon a policy of nonparticipation in all special requests in order to make sure that we did not discriminate.

Since our company cannot accept each of the many offers to participate in customer promotions throughout the country, nor only some of the offers without showing discrimination, it has been our policy to decline participation in all of these promotions.

By letters received by respondent from participating suppliers, it was informed or put upon notice that the payments which it solicited were not being offered to competing customers on proportionally equal terms. For example:

Maybe you have heard us mention before that the cost of our Century cast iron cookware contains no cushion for cooperative advertising, special promotion discounts, etc. \* \* \*.

Nevertheless, Mr. Stabile, you people have done a wonderful job with our Century line of cast iron cookware to our mutual benefit, so a special request is being processed so that a credit memorandum for \$100 will be issued to your account.

The following year, respondent solicited the same supplier again, receiving this response:

Maybe old Walter Todd has told you before that our prices on Century cast iron cookware just do not include any cushion for advertising allowance, full freight allowance, special discounts, etc., which makes us helpless to offer any rebate for those things.

But, the very excellent job you have done for both of us tells me in no uncertain terms that this Million Dollar Sale you are planning for the Christmas season will be quite successful. So, we are glad to arrange for an exception so that we might participate with you folks.

A credit memo in the amount of \$100 will be issued right away.

Another supplier said:

We have your letter requesting that we might allow you \$100.00 for your Anniversary Sale and although we do not have a standard set-up for this sort of thing, we try to do it on a personal basis with our good accounts such as you, that have had such a good record with us.

We are happy to advise that we will allow this \$100.00 credit for this particular use.

Many of the suppliers advised respondent of the preferential nature of the payments being requested, but respondent persisted in soliciting the same suppliers. A typical situation is where Gold Seal Co. informed respondent in October 1958 that it had a "firm policy" preventing its participation in the 20th Texas Products Sale. Solicited shortly thereafter for the 58th Anniversary Sale, Gold Seal refused again, stating:

Our Company has a very firm policy of not tying in with any of these special sales because we receive so many requests each and every week for co-operation.

Undaunted, respondent made another effort in connection with its 21st Texas Products Sale.

In January of 1958, respondent was forwarded a letter written by National Oats Company's vice president to its broker, explaining its refusal to participate in the 57th Anniversary Sale:

Perhaps by next year the legal status of such activities will be settled, and then we can decide whether we should or should not participate. This type of activity is still under active investigation by the authorities in Washington, however, and so at least for the time being you will just have to give Nathan Finkelstein our regrets, at the same time explaining why.

Respondent nevertheless solicited National Oats a few months later for the 20th Texas Products Sale, and was once again forwarded a letter between the same parties. It stated in part:

In view of the Federal Trade Commission's investigation, which to our knowledge has not been dropped as yet, we still question the wisdom of going into any of the Weingarten promotions.

\* \* \* \* \*

With all this in mind we ask that you explain our position to Nathan Finkelstein. We would probably risk going into their next Anniversary Sale if you felt it absolutely necessary, though because of the Federal Trade Commission's attitude toward Weingarten's activities we would prefer not to.

Respondent apparently "felt it absolutely necessary": it solicited National Oats twice in the year following the receipt of the second letter.

The respondent seems to take the position that notwithstanding all the facts it knew, which suggested probable illegality, it should be permitted to ignore them and rely instead upon a presumption that its suppliers, in making the payments, were acting within the law. In support of its position, respondent relies heavily upon *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61 (1952). The decision therein does not support this contention. The Supreme Court, in discussing the point, stated that "trade experience in a particular situation can afford a sufficient degree of knowledge to provide a basis for prosecution." The respondent was apprised of suffi-

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cient information about payments which it induced and received to impose on it a duty of making reasonable inquiry if the payments were affirmatively offered or otherwise made available to its competitors on a proportionally equal basis. This it failed to do.

The acts and practices of respondent, as hereinbefore found, of inducing and receiving special payments or allowances from its suppliers which were not made available by such suppliers on proportionally equal terms to respondent's competitors are all to the prejudice and injury of competitors of respondent and of the public; have the tendency and effect of obstructing, hindering and preventing competition in the sale and distribution of food, grocery, cosmetic and clothing products and have the tendency to obstruct and restrain, and have obstructed and restrained, commerce in such merchandise and constitute unfair methods of competition in commerce and unfair practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

Consideration will now be given to the second charge of the complaint which reads:

PARAGRAPH TEN: The amounts of money solicited and received by the respondent from each of its suppliers were paid by such suppliers for advertising to be done by respondent in promoting each supplier's products during respondent's anniversary sales and Texas Products and Louisiana Products sales in the year 1958 and the years prior thereto. However, it has been the regular and continuous practice of respondent not to use the entire amounts of money received from its suppliers to advertise such supplier's products during such sales but to divert substantial amounts of such payments to its own use.

The respondent in its proposed findings takes the position that the allegations contained in paragraph 10 of the complaint should not be construed as stating a separate and distinct cause of action, but should be construed as merely supplementary to the major charge of the complaint contained in paragraph 9. There is no merit to the contention, and it is inconsistent with the position taken by the respondent all through the hearings. At a prehearing conference herein, counsel for respondent made this statement:

Let me say first, this proceeding is in many respects the same type of proceeding as I understand is presently at the Examiner's decision level in the Giant Food Stores matter.

Basically, the Commission has two complaints. One, they complain that we knowingly induced or received special allowances or payments or services from suppliers that the suppliers did not make proportionately available to other people in the business and, secondly, that we received monies over and above what we spent for the benefit of the particular suppliers. That is in substance the essence of the complaint.

In the Giant case (Docket 6459) referred to by counsel, the Hearing Examiner and the Commission construed the complaint, which is similar to the complaint herein, as stating two separate and distinct charges.

It seems to be the contention of counsel supporting the complaint that respondent was required to expend in newspaper advertising the entire amount received from a participating supplier in advertising such supplier's products. The record herein establishes that participation in respondent's sales was requested and received upon an express agreement that the services to be performed by respondent consisted of an entire promotional service including, but not limited to, newspaper advertising. A typical solicitation letter sent to a supplier, heretofore quoted, requested the payment for an entire promotional program. To repeat a portion of the letter:

We will use proven advertising, merchandising and promotional facilities to create maximum traffic during this mammoth sales concentration. There will be newspaper coverage, radio and television employed, plus personnel enthusiasm and carefully laid plans for presentation of all merchandise to insure success on an overall basis.

\* \* \* \* \*

The attached sheet shows the prices of participation in the entire promotional program \* \* \*.

The attached sheet referred to in the above letter shows the varying costs of participation in the sale depending upon the geographical area where newspaper advertising is to be given and the size of such advertisements. The sheet states that these costs are for the "Entire Service Which Includes" approximately so much of page of advertising.

Attached to such a letter was a reply card for the convenience of those suppliers desiring to participate, which reads in part:

We will be happy to participate in Weingarten's forthcoming ANNIVERSARY SALE. Please count on us for this overall promotion including \_\_\_\_\_ Page in \* \* \*

In view of the concise, direct and wholly unambiguous language contained in these solicitation materials, it must be concluded that each supplier was informed and did in fact understand that its payments were to be used to defray the costs of an entire promotional program, not merely the cost of the newspaper lineage, or the cost of any other single type of promotion.

Respondent's vice president in charge of sales described in detail the services and benefits received by a participating supplier:

A. Well, he receives the benefits of the entire sale which encompasses newspaper advertising, radio, display at store levels, supervision of the prod-

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ucts, in-store promotion that entail in making a sale, institutional advantage of being with the sale and the institutional copy we may use in connection with the sale, proper regard to his distribution of merchandise, and display of merchandise. That basically is it.

Q. Anything else?

A. Oh, there are probably other items, too.

Q. What are the other items?

A. All the different facets of the personnel of the company by-products of their job, the buyers and the supervisors might do in a store in connection with the sale, the working of the people, the training of the people and how to work on his particular product, working with warehouse functions to see that the product is well distributed; the by-products of the supervisory people.

In the opinion of the Commission in the Giant case, it is stated:

Although Section 2(d) of the amended Clayton Act does not authorize payments for services grossly in excess of their cost or value, neither does it prohibit a seller from compensating his buyers for any type of service provided its other standards are met, including a reasonable relationship between the payments and the services being rendered. Cf. *Lever Brothers Company*, 50 F.T.C. 491, 511-12 (1953).

The record herein does not establish that payments received by the respondent were in excess of the value of the services rendered by it. Evidence was submitted with reference to the 54th Anniversary, the 57th Anniversary, and 20th Texas Products Sales, and in each instance the respondent's direct newspaper, radio and television advertising costs, alone, were considerably more than the amounts paid by the participating suppliers. The total cost of newspaper advertising for the 54th Anniversary Sale was \$44,260, and for television and radio \$3,523, whereas total receipts from suppliers amounted to \$39,539.28. The cost of newspaper advertising for the 57th Anniversary Sale was \$40,391.42, and for television and radio \$3,978.80, whereas receipts from suppliers were \$23,538.37. The cost for newspaper advertising was \$33,736.12, and television and radio was \$9,720.32 for the 20th Texas Products Sale, whereas the receipts from suppliers were \$15,744.52. Respondent's special sales are programmed three months in advance and entail much work by various company personnel, including the advertising department, in advance of the actual period of the sale. The respondent offered tabulations based upon its records, which appear to be reliable and on the conservative side, showing the expenses of the advertising department attributable to the 54th Anniversary, 57th Anniversary, and 20th Texas Products Sales were, respectively, \$6,123, \$8,025 and \$8,055. There were other obvious expenses directly attributable to the conduct of the sales, but no attempt was made to determine the precise cost to respondent, since the total expenditures by respondent for the newspaper, radio and television advertising and for the services of its advertising depart-

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ment directly attributable to the sales greatly exceeded the payments from participating suppliers.

## ORDER

For the reasons hereinbefore stated,

*It is ordered*, That J. Weingarten, Inc., a corporation, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device, in or in connection with the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of products for resale by the respondent, or in connection with any other transactions between respondent and its various suppliers involving or pertaining to the regular business of the respondent in distributing and selling commodities and products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Inducing, receiving or contracting for the receipt of anything of value from any supplier as compensation or in consideration for services or facilities furnished by or through respondent in connection with the processing, handling, sale or offering for sale of products purchased from such supplier, when respondent knows or should know that such compensation or consideration is not affirmatively offered or otherwise made available by such supplier on proportionally equal terms to all of its other customers competing with respondent in the sale and distribution of such supplier's products.

*It is further ordered*, That the allegations contained in paragraphs 10 and 11 of the complaint be, and they hereby are, dismissed.

## ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

This proceeding was commenced by the issuance of a complaint on January 5, 1960, charging that the respondent retail grocery corporation had violated Section 5 of the Federal Trade Commission Act by knowingly inducing or receiving discriminatory promotional allowances from its suppliers. Adjudicative hearings were held before a hearing examiner who, on May 3, 1962, entered an initial decision finding the allegations of the complaint to have been substantially proven and ordering respondent to cease and desist from prescribed activities.

Respondent appealed to the Commission, pleading that the findings and conclusion of the examiner were not supported by reliable, probative and substantial evidence and that the initial decision does not comply with the requirements of Section 8(b) of the Administrative

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Procedure Act in that it fails to make factual findings to support its general conclusions. The matter was considered by the Commission on the briefs of the parties and on oral argument heard October 23, 1962. On March 25, 1963, the Commission issued an order vacating the initial decision and remanding the matter to the hearing examiner for the expeditious reception of additional evidence. Two of the four Commissioners participating in the decision of the appeal announced their reasons for the remand in an opinion accompanying the order [62 F.T.C. 1521].

On April 29, 1963, respondent filed a complaint against the Commission in the United States District Court for the Eastern District of Texas, Beaumont Division,\* seeking a declaratory judgement and injunctive relief barring the Commission from any further action in the instant proceeding other than dismissal and, on May 10, 1963, filed an amendment to the complaint seeking, after final hearing, an order in the nature of a writ of mandamus requiring dismissal of the administrative complaint. On July 11, 1963, the District Court entered an Order, together with Findings of Fact and Conclusions of Law, requiring *inter alia* as follows:

“a. Defendants, their agents, employees and attorneys and all persons in active concert and participation with them be and they hereby are restrained and enjoined from remanding the case of J. Weingarten, Inc., FTC Docket No. 7714, to said Hearing Examiner or other hearing officer or from holding any hearings or other proceedings or from taking any further action of any kind, directly or indirectly, under and by virtue of said order and opinion of remand.

“b. Within ninety (90) days from May 15, 1963, defendant Federal Trade Commission and defendants Dixon, Anderson, Elman, MacIntyre and Higginbotham make and issue a final order, disposing of said case before the Federal Trade Commission.”

On July 16, 1963, the District Court denied the Commission's motion for a stay pending appeal. On July 24, 1963, a notice of appeal was filed in the District Court. On or about July 26, 1963, motions for a stay of the District Court order pending appeal and for expedition of the appeal in the United States Court of Appeals for the Fifth Circuit were filed. The Court has not rendered a decision on these motions.

\**J. Weingarten, Inc. v. The Federal Trade Commission, et al.*, Civil Action No. 4754 [7 S.&D. 736].

## Complaint

Under the circumstances, and solely for the purpose of complying with the above-noted order of the District Court:

*It is ordered*, That the Commission's complaint in this proceeding be, and it hereby is, dismissed, without prejudice to the right of the Commission to reopen the matter and take such further action therein as the public interest may require if the aforesaid order of the District Court becomes ineffective as a matter of law.

## IN THE MATTER OF

## SAVOY WATCH CO., INCORPORATED, ET AL.

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

*Docket 8080. Complaint, Aug. 11, 1960—Decision, Aug. 14, 1963*

Order requiring New York City importers of watch movements from Switzerland which they assembled with watchcases either domestically manufactured or imported from Hong Kong, to cease furnishing display cards to dealer purchasers which stated falsely that the watches were fully guaranteed by the manufacturers and were water resistant, and represented falsely by the arrangement of the printing that they had been "nationally advertised in Life—Readers Digest"; and to cease selling the watches with the words "Swiss" or "Swiss Made" on the faces without disclosing that the cases came from Hong Kong.

## 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 Savoy Watch Co., Incorporated, a corporation, and Arthur Miller and Isadore S. Miller, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaints, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Savoy Watch Co., Incorporated, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its principal place of business located at 62-67 West 47th Street, New York, New York.

Individual respondents Arthur Miller and Isadore S. Miller are officers of the corporate respondent. They formulate, direct, and control the acts and practices of said corporate respondent, including the acts, policies and practices herein complained of. The place of

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business of said individual respondents is the same as that of respondent Savoy Watch Co., Incorporated.

PAR. 2. Respondents are now, and for some time last past have been, engaged in importing watch movements from Switzerland, and assembling said watch movements with watchcases either domestically manufactured or imported from Hong Kong. Respondents then distribute the assembled watches through retail and wholesale jewelers located throughout the United States.

PAR. 3. In the course and conduct of their business, respondents now cause, and for more than two years last past have caused, their watches, when sold, to be transported from their place of business in the State of New York to the purchasers thereof located in various other States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said watches in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents at all times mentioned herein have been, and now are, in substantial competition, in commerce, with individuals, firms and corporations engaged in the sale of watches.

PAR. 5. Respondents in the course and conduct of their business, and for the purpose of inducing the sale of their watches, furnish display cards to dealers purchasing their watches, for use in displaying said watches for sale to the public, upon which, among other things, the following words, terms and expressions are printed.

Sold with a Factory Guarantee

Water Resistant. (These words are also stamped on the watches themselves.)

PAR. 6. By means of the aforesaid statements respondents represented, directly and by implication, that:

1. Their said watches are fully guaranteed by the manufacturers thereof.

2. Their watches are water resistant.

PAR. 7. Said statements and representations were false, misleading and deceptive. In truth and in fact:

1. Respondents' watches were not fully guaranteed as the guarantee furnished in connection therewith was a limited one.

2. Said watches were not water resistant.

PAR. 8. The following statement is also printed on the aforesaid display cards — " \* With the feature that is nationally advertised in Life — Readers Digest". The asterisk is carried to the center of the card, far removed from the aforesaid statement in the following fashion — "Jeweled \* Watch". While the jeweled lever used in  
Lever

respondents' watches may have been advertised in Life and Readers Digest, the arrangement of the printing on said card is such that the

public may be led to believe, contrary to the fact, that respondents' watches, in their entirety, had been advertised in said publications.

PAR. 9. Respondents import watchcases from Hong Kong, and after assembling said cases together with watch movements imported from Switzerland, sell and distribute the assembled watch without disclosing the country of origin of said watchcase except on the inside of the bezel which cannot be seen by prospective purchasers. The faces of said assembled watches bear the words "Swiss" or "Swiss made".

In the absence of a disclosure of the country of origin of said watchcases, the public understands and is led to believe that the said cases are either of domestic or Swiss origin.

There is a preference on the part of many persons in this country for watchcases of domestic and Swiss origin over watchcases manufactured in Hong Kong.

PAR. 10. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices and their failure to adequately disclose the country of origin of their watchcases have had, and now have, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public as to the country of origin of said watchcases and into the erroneous and mistaken belief that the statements and representations are true, and into the purchase of substantial quantities of said watches by reason of said erroneous and mistaken belief.

As a consequence thereof, substantial trade, in commerce, has been and is being unfairly diverted to respondents from their competitors and substantial injury has thereby been and is being done to competition in commerce.

PAR. 11. 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 and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

*Mr. David J. McKean* for the Commission.

*Noble & Moyle*, Washington, D.C., for respondents.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

FEBRUARY 26, 1962

Respondents are charged in the Commission's complaint, issued on August 11, 1960, with practices alleged to be misleading and deceptive

in violation of the Federal Trade Commission Act. Succinctly stated, the alleged deceptive practices are as follows:

1. The use of display and promotional material claiming that respondents' watches are guaranteed, without setting forth the terms and extent of the guarantee in full.

2. The use of display cards arranged and printed in such a manner as to mislead consumers into believing that respondents' watches had been advertised in certain well-known magazines of national circulation, when it was only a component which had been so advertised, and respondents' watches had not been so advertised.

3. The use of the representation, "water resistant" on display and promotional material, and on the backs and dials of respondents' watches, when in fact respondents' watches are not water resistant.

4. The sale of watches assembled from watchcases manufactured in Hong Kong, without disclosure of the fact of the foreign origin of the watchcases.

Three prehearing conferences were held in this matter on December 7, 1960, January 10, 1961, and January 24, 1961. Thereafter the Commission's case-in-chief was presented in three days of hearings during May and June of 1961, and at the close of the Commission's case-in-chief, respondents moved to dismiss the complaint in its entirety. The motion was denied by the hearing examiner and respondents' defense was presented in three days of hearings during September and December of 1961.

During the course of the hearings General Time Corporation made application to appear as an intervenor in this case. The application was opposed by respondents and by counsel supporting the complaint, and was denied; however, Cummings and Sellers, by David N. Barus, counsel for General Time Corporation were allowed to appear in a status comparable to that of an *amicus curiae* for the purpose of filing advisory briefs and memoranda. Hearings were concluded and the record on this case closed on December 12, 1961.

Proposed findings of fact and conclusions of law were filed by counsel for the parties. The hearing examiner has carefully reviewed and considered same. Proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

Upon the entire record in the case, the hearing examiner makes the following:

#### FINDINGS OF FACT

1. Respondent Savoy Watch Co., Incorporated, sometimes hereinafter referred to as Savoy, is a corporation organized, existing and

doing business under and by virtue of the laws of the State of New York with principal offices and place of business located at 62-67 West 47th Street, New York, New York.

2. Respondent Arthur Miller is the president of, and is a stockholder in, respondent Savoy.

3. Respondent Isadore S. Miller is an officer of, and is a stockholder in, respondent Savoy.

4. Respondents Arthur Miller and Isadore S. Miller are the sole stockholders of respondent Savoy, and they exercise sole control and direction over the policies of respondent Savoy.

5. Respondents are engaged in importing watch movements from Switzerland and assembling said watch movements with watchcases either domestically manufactured or imported from Hong Kong. Respondents then distribute such assembled watches to retail and wholesale jewelers located throughout the United States.

6. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in watches in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondents at all times mentioned herein have been, and are, in substantial competition in commerce with corporations, firms and individuals engaged in the sale of watches.

7. Respondent Savoy furnishes display cards to dealers for use in displaying respondents' watches for sale to the public. These display cards bear the representation "sold with a factory guarantee".

8. Guarantee certificates used by respondents in connection with the sale of their watches contain the following guarantee provisions: "This certifies that your MILOS watch is therefore fully guaranteed against any original mechanical defects".

9. Respondents collect service charges on watches returned for repairs, and sometimes impose a charge covering postage for such watches returned for repair. Thus, respondents' performance under their guarantee is at times limited and made conditional upon the payment of a fee.

10. The imposition of these service charges is nowhere set forth in the guarantee representations, and hence the nature and extent of the guarantee and the manner in which the guarantor would perform thereunder is not clearly disclosed. The guarantee representations made by respondents are misleading and deceptive.

11. Respondents use display cards which are arranged and printed in such a manner as to mislead consumers into believing that respondents' watches have been advertised in certain well-known magazines in national circulation, when only a component has been so advertised.

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12. Savoy's watches were never advertised in "Life" magazine, "Reader's Digest", "Saturday Evening Post", or in any of the other nationally circulated magazines mentioned on the face of the display cards.

13. Respondents represent to the public that their watches are "water resistant". This representation is made through the medium of display cards, and is also made in the case of individual watches, by having the legend "water resistant" stamped on the back of the watchcase.

14. A total of eight watches manufactured by respondent Savoy were purchased by the Commission's staff from various jewelry retailers in New York, New Jersey, and Massachusetts. All eight of these watches were subjected, by an independent testing agency to the test for "water resistance" as prescribed in the Trade Practice Rules for the Watch Industry. Only one of these eight watches successfully passed the test for water resistance. The remaining seven were not "water resistant" according to the meaning of that term as specified in the Trade Practice Rules of the Watch Industry.

15. Watches sold by respondents, bearing the representation "water resistant", are not tested with a reasonable degree of accuracy before the offering of the watches for sale to the general public. Mr. Irving Bloch, foreman and factory manager of the Savoy factory, testified that one-half of the watches which Savoy sells were not cased or assembled in their own factory, but were cased or assembled by a number of other outside watch assemblers doing work for Savoy. No one from Savoy supervises the actual assembly of Savoy's watches in these outside assembly shops, and, according to Mr. Bloch, the only quality control exercised is a visual inspection of the cased watches when they are returned to Savoy. However, defects which destroy a watch's "water resistance are not apparent on visual inspection.

16. Watches sold by respondents and claimed by respondents to be "water resistant" were not in fact "water resistant".

17. During 1958, 1959 and the first half of 1960, respondents imported watch movements from Switzerland. About two-thirds of the watchcases used by Savoy in casing these movements were purchased from the W. M. R. Watch Case Company, and from Conde Watch Case Company, and these watchcases, purchased by Savoy from W. M. R. and from Conde, were imported by those companies from Hong Kong.

18. None of the watchcases originating in Hong Kong and used by respondents in casing their watches bear markings on the outside showing the fact of their Hong Kong origin in such a way that it is disclosed to purchasers of the watches. The origin however is

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indicated on the inside of the casing and may be ascertained by removing the back of the case. This can be accomplished with facility.

19. In the absence of a reasonable disclosure that a product, including watchcases, is of foreign origin, the public believes and understands that it is of domestic origin.

20. There are, among members of the purchasing public, a substantial number who have a preference for products originating in the United States over products originating in foreign countries or in foreign places, including watchcases originating in Hong Kong. There are also, among the members of the purchasing public, substantial numbers of potential purchasers who are not concerned with the country of origin of watchcases if such watchcases are used by well-known brand watch manufacturers.

## CONCLUSIONS

1. Respondents' use of display and promotional material claiming that respondents' watches are guaranteed, without setting forth the terms and extent of the guarantee in full, is a deceptive practice within the purview of the Federal Trade Commission Act.

The testimony of respondent Arthur Miller, president of respondent Savoy, is that Savoy makes service charges on watches returned for repair, and that Savoy sometimes makes charges for postage on such watches returned for repair. The guarantee representation on respondents' display cards makes no mention of the fact, and the guarantee representation on the guarantee certificate supplied by respondents for sale in connection with their watches likewise makes no mention of this fact. The guarantees given by respondents appear on their face to be full and unqualified guarantees, although respondents' performance under these guarantees is limited and made conditional on the payment of a fee.

In *Clinton Watch Company* case, Docket No. 7434 [57 F.T.C. 222,231], involving similar facts, the Commission states:

Respondents contend that this ruling is in error since the repairing and replacing of parts is done without charge, the \$1.00 charge being made only to reimburse respondents, in part, for postage, insurance and other expenses incurred in returning the watch to the buyer. This argument is rejected on the authority of *Parker Pen Co. v. Federal Trade Commission*, 159 F. 2d 509 (7th Cir., 1946). In that case, the court in considering this same point with reference to the respondents' advertised "lifetime guarantee" on its pens, concluded that a guarantee *per se* negatives the idea of a further consideration on the part of a purchaser in his effort to obtain satisfactory performance with the article guaranteed.<sup>1</sup>

<sup>1</sup> See also *Hathaway Watch Co.*, Docket No. 6357, 52 F.T.C. 246; *Cimier Watch Corp.*, Docket No. 6703, 54 F.T.C. 542; *Roseman Enterprises Co.*, Docket No. 6358, 52 F.T.C. 467; *Maryland Distributors*, Docket No. 6065, 49 F.T.C. 1229.

2. Respondents' use of display cards arranged and printed in such a manner as may reasonably tend to mislead consumers into believing that respondents' watches had been advertised in certain well-known magazines of national circulation, when it was only a component which had been so advertised, and respondents' watches had not been so advertised, is a deceptive practice within the purview of the Federal Trade Commission Act.<sup>2</sup>

Paragraph 8 of the complaint charges that the display cards which respondents have used are arranged and printed in a misleading and deceptive manner. In the absence of scrutiny beyond that which might normally and reasonably be expected, a viewer of the cards would be led to believe that it was the "Surfside" or "Milos" watches<sup>3</sup> which had been advertised in the national magazines, when in fact only certain components or construction features of the movements had been so advertised.

Two examples of these display cards are in evidence. The testimony of Mr. Miller indicates these cards were distributed by Savoy to their customers to help sell watches. Savoy's watches were never advertised in "Life", "Reader's Digest", "Saturday Evening Post", or in any of the nationally circulated magazines mentioned on the face of the display cards.

3. Respondents' use of the representation "water resistant" on display and promotional material, and on the backs and dials of respondents' watches, when in fact respondents' watches are not water resistant, is a deceptive practice within the purview of the Federal Trade Commission Act.

The charge made by Paragraphs 5, 6 and 7 of the complaint, relating to water resistance, states that respondents held out their watches to the public as being "water resistant" and that this was false and deceptive because respondents' watches are not always water resistant. The evidence supporting this allegation is persuasive. It discloses that a number of respondents' watches bearing the water resistant legend on their dials, or on their backs, were purchased by the Commission's investigational staff from retail outlets located in various States, and the watches so purchased were tested for water resistance. All but one watchcase failed the test.

Two of the foregoing watches were purchased by Mr. T. Whitehead, a member of the Commission's investigational staff, from the regular stock of a retail jewelry store in New Bedford, Massachusetts, during August 1959. The third watch was purchased in the

<sup>2</sup> See the Commission's order in *Fry King Corporation*, Docket No. 7029.

<sup>3</sup> "Surfside" and "Milos" are trademarked trade names used by respondent Savoy Watch Co.

same way by Mr. Whitehead from the regular stock of a retail jeweler in Newark, New Jersey, in July 1959. All three watches are marked with respondents' trademarked trade names, "Surfside" or "Milos", on their dials. All three bear the legend "water resistant" on their backs, and two bear it on their dials.

Subsequent to their purchase these watches were in Mr. Whitehead's custody until they were turned over to a testing laboratory, Lucius Pitkin, Inc., for the water resistance test. The watches were then tested for water resistance according to the rules for test number 2 (the water resistance test), as set forth in the Trade Practice Rules for the watch industry (16 CFR, part 170.2(c)). These tests were performed by Mr. Frederick H. Wright, an official of Lucius Pitkin, Inc., on September 21, 1961. As Mr. Wright's testimony reflects, all three watches failed the test for water resistance.

After the issuance of the complaint, five more watches were purchased by Mr. Whitehead, during April 1961, from the regular stock of retail jewelers located in Roselle Park, New Jersey, Newark, New Jersey, and Hempstead, New York. All five of the watches bear respondents' trademarked trade names on their faces, and all bear the representation "water resistant" on their backs. After their purchase, the five watches were kept in Mr. Whitehead's custody and were delivered to him by Mr. Wright, of Lucius Pitkin, Inc., for testing.

Mr. Wright's testimony and his written report of the tests reflect that four of these five watches failed to pass the test, and that only one watch passed the test. There is no reliable evidence that these tests do not typically reflect the water resistant qualities of respondents' watches.

Furthermore, the evidence of respondents' testing procedures for water resistance are not demonstrative of their efficiency. A substantial number of respondents' watches are cased at the plants of two or three other watch manufacturers. Respondents therefore have no control over the quality of the work done at these other plants. It would seem from the testimony of Mr. Bloch, respondents' plant manager, that respondents perform only a cursory visual inspection of cased watches returned from these "outside" assembly plants. The adequacy of the testing, however, is not a primary issue. Of ultimate importance is the fact that a preponderant number purchased are not water resistant, although claimed to be.

Respondents' contention that the five watches purchased and tested after issuance of the complaint "are not material or relevant to the issues raised by the pleading" because they came into the Commission's possession after the complaint was issued is without merit since presumptively, in the absence of evidence to the contrary, they

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or other watches proved to have like defects, were on the market during the period contemplated by the complaint and their quality, which is in issue, involves a continuing deceptive practice before and after the filing of the complaint, concerning which relief is properly sought.

There also appears to be in issue the question as to whether or not the watches comprising the first group purchased are the products of Savoy Watch Co., Incorporated. The evidence, however, is abundantly clear in the affirmative. All three of these watches bear respondents' trademark. Commission's Exhibit 9 is marked "Surfside" on the dial. Commission's Exhibit 10 is also marked "Surfside" on the dial, and Commission's Exhibit 11 is marked "Milos" on the dial. As evidenced, "Surfside" and "Milos" are trademarked trade names, the property of, and used only by, respondent Savoy Watch Co., Incorporated.

Corroborative of the foregoing, the symbols are also a mode of identification. Nevertheless, Mr. Miller in examining Commission's Exhibit 9, found the symbol QZX not EXM, and expressed inability to identify the watch as a Savoy product for that reason. He also failed to identify Commission's Exhibit 10. Although his attention was invited to the fact that these watches had Savoy's trade name "Surfside" on their dials, and that the phrase "Surfside Watch Company" was stamped on the movement in both of these watches, Mr. Miller opined that perhaps certain parts of the watch movement (the "balance bridges") had been switched by some person or persons unknown. However, he was certain that the QZX symbol was not Savoy's. The official records of the U.S. Bureau of Customs, however, resolves this conjecture.<sup>4</sup> These records reflect that watch import symbol QZX was assigned to the "Surfside Watch Co.", of 62 West 47th Street, New York, New York, on the 22nd day of June 1957. "Surfside" was a trademarked trade name of Savoy Watch Co., Incorporated. Respondents began using the trade name "Surfside" in "1956 or 1957", which corresponds with the time that QZX was assigned to the "Surfside Watch Co." Significantly also, the address given for the "Surfside Watch Co." is the same as Savoy's address, 62 West 47th Street, New York, New York.

The aforesaid acts and practices of respondents, hereinabove identified as 1, 2 and 3, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

<sup>4</sup> See Commission's Exhibit 17, Tr. 328-329.

4. The sale of watches assembled from watchcases manufactured in Hong Kong without disclosure of the foreign origin of the watchcases is not deceptive *per se* or in the instant case violative of the Federal Trade Commission Act.

It is a well established principle of law, that in the case of most products imported in their entirety and sold in commerce, failure to disclose the country of origin constitutes an unfair or deceptive act or practice which the Commission is fully empowered to enjoin by cease and desist order. See, for example, *Rene D. Lyon Co., Inc., et al.*, 48 F.T.C. 313 (Docket No. 5859, 1951) (imported metal watchbands), and *Duo-Tint Bulb & Battery Co., Inc., et al.*, 36 F.T.C. 749 (Docket No. 4814, 1943) (imported electric light bulbs). There are exceptions, however, hereinafter discussed.

This principle has been authoritatively extended to apply similarly in many cases where, although the product in question was not imported in its entirety, the major component thereof was imported and its country of origin was not disclosed. The leading cases of this type are *L. Heller & Son, Inc., et al.*, 47 F.T.C. 34 (Docket No. 5358, 1950), *aff'd sub nom. Heller v. Federal Trade Commission*, 191 F. 2d 954 (C.A. 7, 1951) and *Lucian V. Segal, trading as Segal Optical Company*, 34 F.T.C. 218 (Docket No. 4181, 1941), *aff'd sub nom. Segal v. Federal Trade Commission*, 142 F. 2d 255 (C.A. 2, 1944).

In the *Heller* case, the Commission ordered disclosure of the foreign origin of imported imitation pearls, which respondents mounted on domestically produced ear clips and necklace strings. The reviewing court upheld this order, and quoted with approval the following language from the opinion of the Commission (47 F.T.C. 34, 45; 191 F. 2d 954, 956):

"When such imitation pearls are used in necklaces they represent the principal component and the part which makes the necklaces valuable to the consumer. The consumer purchases an imitation pearl necklace not because of the string which holds the pearls together or the clasp which joins its ends, but because of the imitation pearls which are thus assembled and made useful as ornaments \* \* \*. Failure to disclose foreign origin, under previous decisions of the Commission, constitutes misrepresentation and an unfair and deceptive practice."

In the foregoing case, the Commission treats and compares different types of imported products and product components. The country of origin of imported genuine pearls, it was held, need not be disclosed. This is an exception to the general rule stated above. Moreover, in considering certain imported alabaster or glass beads, used as the cores for imitation pearls manufactured in the United States, the Commission found that failure to disclose the foreign origin of these beads in the sale of the imitation pearls was not mis-

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leading to the public. Thus, in contrast with the finished imported imitation pearls domestically mounted, the imported cores were regarded, in effect, as product components having insufficient significance to justify a required disclosure of their origin to prevent public deception in any material respect.

The concept enunciated in the *Heller* case appears to be that the "particular circumstances" of each merchandising situation involving a product containing an imported component, must be considered to determine whether the public has a sufficient interest incident to purchase in the characteristics of the imported component, in its relationship to other components, or the product as a whole. It is quite apparent therefore that disclosure of the foreign origin of an imported component, is not a *per se* requirement. The Commission only recently adhered to this theory in *Swiss Watch Case Corp., et al.*, (Docket No. 7040, 1959) [56 F.T.C. 87], the only previous Commission decision involving imported watchcases. The hearing examiner had held that the public is entitled to disclosure of the foreign origin of an imported product as a matter of law, and accordingly proposed an order requiring the respondents to disclose the foreign origin of their watchcases. In reversing the initial decision of the hearing examiner and dismissing the complaint, the Commission held (p. 4) [56 F.T.C. 87, 90]:

\* \* \* [The] concept that failure to disclose foreign origin is unlawful in all merchandising situations similarly lacks sound legal basis.

However the Commission has ordered disclosure of the country of origin of major components of a product.<sup>5</sup>

The hearing examiner has taken official notice of a preference for American products over foreign products including watchcases. However, this is insufficient to establish a deception as to unmarked foreign component parts unless the component may be reasonably considered a material factor incident to the purchase of the assembled

<sup>5</sup> In *Swift & Anderson, Inc., et al.*, (FTC Docket No. 6818) the Commission ordered disclosure of the foreign origin of the imported movements (not the cases) of weather instruments, and the imported lenses (not the frames, holders or cases) of reading glasses, magnifiers and binoculars.

Other proceedings resulting in similar orders are many, but the following are typical of those in which a product component was imported and its foreign origin was not disclosed:

*Propper Manufacturing Company, Inc., et al.*, 53 F.T.C. 852 (Docket No. 6665, 1957): imported glass barrels and plungers for domestic hypodermic needles (consent order),

*Mercury Machine Importing Corp., et al.*, 51 F.T.C. 534 (Docket No. 6011, 1955) (consent order) and *Sewing Machine Sales Corporation, et al.*, (FTC Docket No. 6149): imported sewing machine heads (works) for domestic cabinets.

*William Adams, Inc., et al.*, 53 F.T.C. 1164 (Docket No. 6575, 1957) and *Lifetime Cutlery Corp., et al.*, (FTC Docket No. 7292, 1959): imported cutlery handles for domestic (or English) blades and tines.

*Windsor Pen Corporation, et al.*, 48 F.T.C. 811 (Docket No. 5829, 1952): imported automatic pencil mechanisms for domestic barrels.

product or is of a quality inferior to an American component a purchaser presumes he is getting the absence of disclosure. Regardless of the quality of product components, it is common knowledge that the public has fixed ideas about the overall better quality of American products generally as compared to foreign products. In this connection, with regard to many products, the public relies upon the American manufacturer in assembling a product (e.g., watches), to provide component parts, if foreign, that are not of quality inferior to those which can be obtained in the American domestic market.<sup>6</sup> It is inconceivable that a reasonably minded purchaser would be interested in knowing the origin of every component part of every type of machinery he might purchase unless the particular parts, concerning which he is knowledgeable, have a material relationship to the quality of the product as a whole after assembly (e.g., the operating unit of a watch as a part of the entire watch, a motor as a part of an automobile, a transistor as a part of a radio, etc.) or unless a foreign component is inferior to the American component, the purchaser presumes he is buying in the absence of foreign origin identification.

As emphasized by the Federal Trade Commission in the *Swiss Watch* case, *supra*, each merchandising situation must be considered on its own merits. It would appear to be a logical deduction from this concept that a disclosure of the national origin of a component part is mandatory only in those cases where a failure to disclose would be of sufficient materiality to induce a sale which otherwise might not have been consummated. It is difficult to believe that a reasonably minded purchaser would refuse to purchase a watch with which he was otherwise satisfied, because the watchcase was manufactured in a foreign country including Hong Kong, unless such component was of quality inferior to that usually manufactured in the domestic market in the United States for a comparable type watch. In the within case, there is no evidence of such inferiority. Furthermore, the evidence herein does not adequately establish in other respects the materiality of the disclosure of the national origin of respondents' watchcases or that such watchcases represent the principal component and the part which makes respondents' watches valuable to the consumer.<sup>7</sup>

Even if the national origin of a watchcase should be of some materiality to a purchaser under unusual circumstances, it would seem reasonable to expect that the purchaser's special interest would induce him to seek identification of its origin by removal of the back of the case in the absence of disclosure on the outside.

<sup>6</sup> This is particularly applicable to name brand manufacturers.

<sup>7</sup> See *Heller v. Federal Trade Commission*, 47 F.T.C. 34, 45; 191 F. 2d 954, 956.

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Accordingly, since the Federal Trade Commission has jurisdiction and this proceeding is in the public interest, the following order shall issue:

## ORDER

*It is ordered*, That respondent Savoy Watch Co., Incorporated, a corporation, through its officers, directors, agents, representatives and employees, and respondents Arthur Miller and Isadore S. Miller, individually and as officers of said corporation, directly or through any corporate device in connection with the offering for sale, sale, and distribution of watches or other similar products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing that watches are guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

2. Representing directly, indirectly, or by implication, that their merchandise has been advertised in Life Magazine, Reader's Digest, Saturday Evening Post Magazine, or in any other magazine or publication, unless such is the fact.

3. Representing through the use of deceptively arranged and printed advertising or promotional material, that their merchandise has been advertised in Life Magazine, Reader's Digest, Saturday Evening Post Magazine, or in any other magazine or publication, unless such is the fact.

4. Offering for sale or selling watches represented to be "water resistant" unless such watches are in fact water resistant.

5. Offering for sale or selling watches represented to be "water resistant" unless such watches are so constructed, and are of such a composition, as to provide protection against water or moisture to the extent of meeting the test designated test number 2 of the Trade Practice Conference Rules for the watch industry, as set forth in the Code of Federal Regulations, Title 16, Chapter 1, part 170.2(c); (16 CFR 170.2(c)).

6. Offering for sale or selling watches represented to be "water resistant" unless such watches are so constructed, and are of such composition as to be capable of immersion for at least three minutes in water at a pressure equivalent to a depth of 26 feet of water under normal atmospheric pressure of 15 pounds per square inch, without admitting or showing any evidence of capacity to admit any moisture or water, and it is

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*Further ordered*, That the charge relating to the offering for sale or selling watches containing watchcases manufactured in Hong Kong combined with other parts made in the United States and Switzerland, without clearly disclosing the Hong Kong origin of the watchcases, is herein and hereby dismissed.

ORDER MODIFYING AND ADOPTING INITIAL DECISION AND PROVIDING  
FOR THE FILING OF OBJECTIONS TO PROPOSED FINAL ORDER AND REPLY

JUNE 19, 1963

This matter having been heard by the Commission upon the exceptions to the hearing examiner's initial decision filed by counsel supporting the complaint, and upon briefs and oral argument in support thereof and in opposition thereto; and

It appearing that the only question raised concerns the examiner's dismissal of the charge of the failure to disclose the foreign country of origin of watchcases in violation of the Federal Trade Commission Act; and

The Commission having determined that the findings and conclusions in the initial decision are appropriate in all respects except as to certain findings and conclusions on the foreign origin issue; that the initial decision should be modified (a) in connection with the foreign origin issue and (b) in connection with various paragraphs of the order for clarification; and that the initial decision as so modified should be adopted as the decision of the Commission:

*It is ordered*, That the portion of the initial decision under the heading "Conclusions" numbered 4, beginning with the last paragraph on page 484 and ending with the second full paragraph on page 485, be, and it hereby is, stricken.

*It is further ordered*, That the following new findings be, and they hereby are, included in the initial decision following finding numbered 20:

21. The record shows that many people care where a watchcase is from and prefer a watch with an American-made case. A number of witnesses testified to this effect. The following are excerpts from pertinent testimony:

*Witness Robert Dolan*

Q. Now, in purchasing a wristwatch, would you prefer one with an American made watchcase, or perhaps a Swiss made watchcase over one of the watchcases made in Hong Kong?

A. I would prefer either one that's either made—a Swiss-made watch or an American-made watch.

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Q. One with a watchcase made in America?

A. Yes. (R. 60.)

*Witness Irving Gerber*

Q. Does knowledge of the national origins of the component parts of a watch affect your opinion of the watch's quality?

A. Yes.

Q. Do you prefer American made goods over those made in Hong Kong?

A. Yes. (R. 206.)

*Witness Ann Marie Girven*

Q. Would knowledge of the national origin of the components of the watch affect your opinion of its quality?

A. Yes. (R. 101.)

Mr. Arthur Nathanson, part owner of Conde Watch Case Company, a large importer and seller of Hong Kong watchcases, when asked why he did not stamp "Made in Hong Kong" on the outside of his cases, testified in part:

"In short, an importer of Swiss watches who has a Swiss movement which costs him seven or eight dollars and puts it into a Hong Kong case which costs him 25, 50 cents or even a dollar doesn't want the inference there that the entire product is manufactured in Hong Kong.

"So, were we to stamp it on the outside 'Made in Hong Kong' there would definitely be no sale of the item." (R. 189-190.)

In this there is the clear implication that many consumers are interested in the place of origin of watchcases and that they prefer American-made cases over watchcases made in Hong Kong.

*It is further ordered,* That the following be, and it hereby is, included in the initial decision in part 4 of the conclusions following the last full paragraph on page 484, as follows:

The watchcase is a component of the completed watch. It is, however, a substantial and important component. It protects the watch movement from moisture, dirt and other foreign substances. The watchcase is also identifiable. It serves not only a specific and important function of protecting the movement but, as it is the part the customer mainly sees, adds to the appeal of the product by its style and appearance. In the circumstances, the watchcase does not lose its identity in the manufacture of the watch, but retains its essential characteristics as a foreign-made product. See *L. Heller & Sons, Inc., et al. v. Federal Trade Commission*, 191 F. 2d 954, 956 (7th Cir. 1951). Moreover, many members of the purchasing public prefer United States-

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made watchcases over watchcases made in Hong Kong and, in the absence of a reasonable disclosure of foreign origin, would believe the watchcases to be of domestic origin.

It is concluded, therefore, that respondents' failure to mark the foreign place of origin on their watchcases has the capacity and tendency to mislead and deceive purchasers and prospective purchasers into the false and erroneous belief that such watchcases are of domestic origin. The aforesaid practice constitutes an unfair and deceptive act or practice in violation of the Federal Trade Commission Act.

*It is further ordered,* That respondents may, within twenty (20) days after service upon them of this order, file with the Commission their objections to the changes in the order to cease and desist contained in the initial decision, as shown by the following proposed order of the Commission, together with a statement of the reasons in support of their objections and a proposed alternative form of order appropriate to the Commission's decision:

## PROPOSED ORDER

*It is ordered,* That respondent Savoy Watch Co., Incorporated, a corporation, and its agents, representatives and employees, and respondents Arthur Miller and Isadore S. Miller, individually and as officers of said corporation, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of watches or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:
  - (a) That their products are guaranteed, unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.
  - (b) That their watches or other products are advertised in *Life*, *Reader's Digest*, *Saturday Evening Post*, or in any other national publication, when they are not in fact so advertised.
  - (c) That their watches are "water resistant," it being understood that respondents may successfully defend the use of such representation with respect to any watch, the case of which respondents can show will provide protection against water or moisture to the extent of meeting the test designated test No. 2 of the Trade Practice Conference Rules for the

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Federal Regulations, Title 16, Chapter 1, Part 170.2(c) (16 CFR 170.2(c)).

2. Offering for sale or selling watches, the cases of which are in whole or in part of foreign origin, without affirmatively disclosing the country or place of foreign origin thereof on the exterior of the cases of such watches on an exposed surface or on a label or tag affixed thereto of such degree of permanency as to remain thereon until consummation of consumer sale of the watches and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers.

*It is further ordered*, That counsel supporting the complaint may, within ten (10) days after service upon him of respondents' objections, file a statement in reply thereto.

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

By the Commission, Commissioner Higginbotham not participating by reason of the fact that this matter was argued before the Commission prior to the time he was sworn into office.

#### FINAL ORDER

Pursuant to §4.22(c) of the Commission's Rules of Practice, respondents were served with the Commission's decision and afforded the opportunity to file exceptions to the form of order which the Commission contemplates entering; and

Respondents having not availed themselves of the opportunity to except to the form of the proposed order to cease and desist, said order is hereby entered as the final order of the Commission:

*It is ordered*, that respondent Savoy Watch Co., Incorporated, a corporation, and its agents, representatives and employees, and respondents Arthur Miller and Isadore S. Miller, individually and as officers of said corporation, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of watches or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:
  - (a) That their products are guaranteed, unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.
  - (b) That their watches or other products are advertised in *Life*, *Reader's Digest*, *Saturday Evening Post*, or in any

other national publication, when they are not in fact so advertised.

(c) That their watches are "water resistant," it being understood that respondents may successfully defend the use of such representation with respect to any watch, the case of which respondents can show will provide protection against water or moisture to the extent of meeting the test designated test No. 2 of the Trade Practice Conference Rules for the Watch Industry, as set forth in the Code of Federal Regulations, Title 16, Chapter 1, Part 170.2(c) (16 CFR 170.2(c)).

2. Offering for sale or selling watches, the cases of which are in whole or in part of foreign origin, without affirmatively disclosing the country or place of foreign origin thereof on the exterior of the cases of such watches on an exposed surface or on a label or tag affixed thereto of such degree of permanency as to remain thereon until consummation of consumer sale of the watches and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers.

*It is further ordered,* That the initial decision as modified by the Commission's order of June 19, 1963, be, and it hereby is, adopted as the decision of the Commission.

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

By the Commission, Commissioner Higginbotham not participating by reason of the fact that this matter was argued before the Commission prior to the time he was sworn into office.

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IN THE MATTER OF

DELAWARE WATCH COMPANY, INC., ET AL.

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

*Docket 8411. Complaint, June 1, 1961—Decision, Aug. 15, 1963*

Order requiring New York City distributors of watches to wholesalers, retailers and premium users, to cease attaching price tickets to their products and disseminating price lists, catalogs, newspaper and magazine advertisements, etc., which showed excessive amounts as usual retail prices; falsely representing their watches as "fully guaranteed" and "water re-

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sistant"; failing to disclose that watch bezels finished in a color simulating silver, gold or stainless steel were actually composed of base metal; and failing to disclose that watches having the word "Swiss" on the dial were imported from Hong Kong.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that the Delaware Watch Company, Inc., a corporation, A. Schwarcz & Sons, Inc., a corporation, and Steven Vogel and Leslie Shaw, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of the 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. The corporate respondents Delaware Watch Company and A. Schwarcz & Sons, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their principal office and place of business located at 580-5th Avenue, in the city of New York, State of New York.

Steven Vogel and Leslie Shaw are officers of the corporate respondents. They formulate direct and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondents.

Respondents are now and for some time last past have been engaged in the advertising, offering for sale, and selling of watches to wholesalers, retailers and premium users, for distribution to the public.

PAR. 2. In the course and conduct of their business, respondents are now 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 New York to purchasers thereof located in various 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. 3. Respondents for the purpose of inducing the purchase of their products have engaged in the practice of attaching or causing to be attached price tickets to their said products upon which certain amounts are printed. Respondents have also disseminated or caused to be disseminated price lists, catalogs, brochures, leaflets, newspaper and magazine advertisements and other forms of advertising in which certain amounts are shown as retail prices of respondents' products.

Respondents thereby represent, directly or by implication, that said amounts are the usual and regular retail prices of said products. In truth and in fact, said amounts are fictitious and in excess of the usual and regular retail prices of said products.

PAR. 4. Respondents use such words and expressions as "guaranteed" and "fully guaranteed" in the advertising of their said products, thereby representing that said products are guaranteed by them in every respect.

PAR. 5. Said statements and representations were and are false, misleading and deceptive. In truth and in fact, the guarantee provided was limited as to time and extent, moreover a service charge is made for repairs or adjustments which fact is not disclosed in respondents' advertisements.

PAR. 6. Certain of the watches offered for sale and sold by respondents are in cases which consist of two parts, that is, a back and bezel. The back part has the appearance of stainless steel and is marked "stainless steel back". The bezel is composed of base metal other than stainless steel which has been treated or processed to simulate or have the appearance of precious metal or stainless steel. Some of the bezels are finished in a color which simulates silver or silver alloy or stainless steel. Some of the bezels are finished in a color simulating gold or gold alloy. Said watchcases are not marked to disclose that the bezels are composed of base metal or metal other than stainless steel.

The practice of respondents in offering for sale and selling watches, the cases of which incorporate bezels composed of base metal which have been treated or processed to simulate or have the appearance of precious metal or stainless steel as aforesaid, without disclosing the true metal composition of said bezels, is misleading and deceptive and has a substantial tendency and capacity to mislead members of the purchasing public to believe that said bezels are composed of precious metal or stainless steel.

PAR. 7. Respondents in the course and conduct of their business for the purpose of inducing the sale of their said watches have caused and now cause to have marked upon their watchcases the words "water resistant" and have advertised certain of their watches as "water resistant". In truth and in fact said watchcases are not water resistant.

PAR. 8. Certain of the watches offered for sale and sold by respondents are in cases imported from Hong Kong. When delivered to respondents' customers for resale said watches have the word "Swiss" on the dial. There is no disclosure of the fact that the watchcases are imported from Hong Kong.

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The practice of respondents in offering for sale and selling watches, the cases of which are imported from Hong Kong, as aforesaid without disclosing the country or place of origin of said watchcases is misleading and deceptive. In the absence of a disclosure of the country of origin of said watchcases, the public understands and is led to believe that the said cases are either of domestic or Swiss origin.

There is a preference on the part of many persons in this country for watchcases of domestic and Swiss origin over watchcases manufactured in Hong Kong.

PAR. 9. Through the use of the practices hereinabove set forth respondents place in the hands of watch dealers and retailers a means and instrumentality whereby such dealers and retailers may mislead and deceive the purchasing public as to the regular and usual retail prices of their watches; the source or origin of their watches, the metal composition and the capacity to resist moisture of watches sold by them.

PAR. 10. The use by respondents of the false, misleading and deceptive practices hereinabove set forth and the failure to disclose the true origin and metal composition of their watchcases had and now have the capacity and tendency to mislead and deceive members of the purchasing public in the manner aforesaid and thereby to induce them to purchase respondents' watches. As a consequence thereof trade in commerce has been unfairly diverted to respondents from their competitors and injury has thereby been done to competition in commerce.

PAR. 11. 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 and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

*Mr. Harry E. Middleton, Jr.*, supporting the complaint.

*Mr. Harvey M. Lewin*, of *New York, N.Y.*, for respondents.

INITIAL DECISION BY MAURICE S. BUSH, HEARING EXAMINER

APRIL 27, 1962

The complaint herein, issued on June 1, 1961, charges the above-named respondents, wholesalers of watches, with certain acts and practices in violation of Section 5 of Federal Trade Commission Act. More specifically, the complaint charges the respondents with the following illegal acts and practices: (1) Showing prices on both the price tags which respondents attach to their watches prior to sale

and on advertising material on such watches in excess of the usual and regular retail prices of said watches; (2) Representing in their advertisements through the use of such expressions as "guaranteed" and "fully guaranteed" that their watches are guaranteed in every respect, whereas the guarantee provided was limited as to time and extent and also made subject to a charge for repairs or adjustments not disclosed in respondents' advertisements; (3) Misleading the purchasing public into believing that the bezel [*i.e.*, fronts] of certain watchcases in which respondents' watches are incased are composed of precious metal or stainless steel whereas they are made of base metals which have been treated or processed to simulate precious metal or stainless steel; (4) Representing that certain of their watches are "water resistant", whereas they are not in fact water resistant; (5) Misleading and deceiving the purchasing public into believing that certain of the watchcases in which they enclose their watches are made in either Switzerland or the United States because the dial of the watch movement put in such cases carries the word "Swiss" and because the watchcase carries no disclosure of the country of origin of the watchcases.

Respondents in their joint answer take issue with the above-described charges.

Hearing was held in New York, New York, over a period of six days between October 31, 1961, and February 1, 1962. Thereafter proposed findings of fact and conclusions of law, together with reasons or brief in support of the proposed findings of fact and conclusions of law, were filed by the parties. These have been carefully reviewed and considered and such proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters. The facts hereinafter set forth are based on the entire record.

*General Background Facts and Special Facts  
Re Delaware Watch Company, Inc.*

Respondents, Delaware Watch Company, Inc., and A. Schwarcz & Sons, Inc., hereinafter sometimes called DWC and Schwarcz, respectively, are corporations, organized and doing business by virtue of the laws of the State of New York with their office and principal place of business located at 580 Fifth Avenue in the city of New York, State of New York. Respondents, Steven Vogel and Leslie Shaw, hereinafter sometimes called Vogel and Shaw, respectively, are officers of the corporate respondents. They formulate, direct, and control the acts and practices hereinafter set forth and their address

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is the same as that of the corporate respondents. Vogel and Shaw are responsible, individually and as officers, for the acts and practices of the corporate respondents.

Respondents are now and for some time last past have been offering for sale and selling watches to wholesalers and retailers for distribution to the public. In the course and conduct of their business, respondents are now, 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 New York to purchasers thereof located in various States of the United States 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.

Respondent A. Schwarcz & Sons, Inc., which as noted is sometimes herein referred to as Schwarcz, was organized as a New York corporation in or about the year 1948 as a successor to a partnership which had operated under the name of A. Schwarcz & Sons. Respondent Delaware Watch Company, Inc., which as noted is sometimes herein referred to as DWC, was organized as a New York corporation on November 30, 1960. It is not a successor to any prior firm. Not to be confused with respondent DWC, the Delaware Watch Company is a New York partnership organized in about the year 1948; it is not a respondent in this proceeding. Not to be confused with either the said partnership or DWC, the Delaware Watch Company of the Virgin Islands, Inc., hereinafter called Virgin Islands Company, is a corporation organized under the laws of the Virgin Islands in the early part of 1960. The Virgin Islands Company is also not a respondent in this proceeding. The Virgin Islands Company, like Schwarcz, DWC, and Delaware Watch Company (the partnership), is under the direction and control of Vogel and Shaw.

Schwarcz owns all of the outstanding shares of stock of DWC and the Virgin Islands Company. The partners in Delaware Watch Company are the aforementioned Steven Vogel and Leslie Shaw who as seen direct and control Schwarcz. The business address and place of business of DWC and the Delaware Watch Company (partnership) is the same as that of Schwarcz.

The Virgin Islands Company is engaged in the business of assembling and selling watch movements. No trade name is stamped or printed on the dials of the watch movements it assembles and the movements are sold without watchcases. It sells about one-half of its production to Schwarcz and the other half directly to other customers in the United States.

DWC, in the joint answer of the respondents herein, prepared by respondents' counsel of record who has had long familiarity with the

business affairs of respondents Steven Vogel and Leslie Shaw, admits that it is "now and for some time last past have [has] been engaged in the advertising, offering for sale, and selling of watches to wholesalers, retailers and premium users, for distribution to the public." Notwithstanding this admission, the uncontradicted testimony of Leslie Shaw, officer and principal stockholder of DWC, shows that the sole business function or operation of DWC since the date of its incorporation has been and is to clear such merchandise through customs as has been and is being shipped by the Virgin Islands Company to the United States and to forward such merchandise to their consignees in the United States as designated by the Virgin Islands Company and that DWC has not at any time engaged in the sale or offering for sale of watches. By virtue of the findings made in the paragraph next below, it is not necessary to resolve this conflict of evidentiary fact in the record.

No evidence has been presented by counsel supporting the complaint and no evidence otherwise appears of record to support the charges made in the complaint against DWC. It is accordingly found that there is a complete failure of proof with respect to the charges made against respondent DWC in the complaint in this proceeding. A motion by respondents' counsel to dismiss the complaint with respect to DWC will be disposed of below.

Schwarcz sells watches with various trade names imprinted on the dial of the watch, one of these being "Delaware". The only connection of the partnership Delaware Watch Company (as seen not a respondent herein) with the issues in this matter is that the written guarantees given by Schwarcz on its watches bearing the imprint "Delaware" are issued under the name of the said partnership. The reason for this is the desire on the part of respondents Vogel and Shaw, the individual respondents who control corporate Schwarcz, to have it appear for "aesthetic" reasons that watches marked "Delaware" are guaranteed by a company bearing the same name. Schwarcz commenced the use of the name "Delaware" on watch dials in about the year 1948.

*Dismissal As To DWC*

At the conclusion of the hearing herein, DWC moved for a dismissal of the complaint with respect to it on the ground that no evidence was presented to show that it was engaged in any of the illegal practices and acts charged in the complaint. A finding having been made above that there is a complete failure of proof with respect to the charges made against respondent DWC in the complaint, the motion

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is hereby granted and the dismissal of the complaint against DWC will be further reflected in the order below.

Hereinafter all collective references to "respondents" will mean all respondents except DWC.

*Preticketing Issue*

It is established by the stipulation of the parties that the respondents have for many years attached tags to watches sold by them to their dealer-customers, showing a printed retail price intended to be exhibited to the ultimate consumer-customer and to remain attached to the watch at the time of sale to said customers. More particularly, the evidence shows that the price tags are inserted by respondents in a conspicuous position in the decorative boxes in which the watches are sold by respondents. This practice of inserting price tags with respondents' merchandise will hereinafter be referenced to as "preticketing".

One of respondents' numerous customers of its preticketed watches is Alben Jewelers of Newark, New Jersey, a retail jewelry store located in the downtown or loop area of Newark. Newark with a population of about 400,000, together with adjacent or nearly adjacent suburban towns, constitutes an independent trade area.

Alben Jewelers under an invoice dated March 30, 1958, purchased 19 watches from Schwarcz. The invoice shows that the purchase included a watchbox for each of the watches invoiced on the invoice. The invoice also shows that the merchandise was delivered "Via P U" (Tr. 737) which is found to mean that the merchandise was picked up in person at Schwarcz' place of business in New York City by a representative of Alben Jewelers and that it was not sent by mail or by public or private conveyance by respondents to Alben's place of business in Newark. The fact of delivery in person of these watches by Schwarcz at its place of business in New York City to a representative of Alben Jewelers is also shown by oral evidence.

Included in the aforementioned 19 watches were a "Delaware" 17-jewel ladies' wristwatch and a "Delaware" 7-jewel wristwatch, billed to Alben Jewelry at a cost of \$10.50 and \$6.50, respectively. The two watches in the order named were received in evidence as CXs 1-A and 2-A. Alben sold both of these watches at its place of business in Newark to a representative of the Commission on September 5, 1958. At the time of the sale of the 17-jewel watch to the Commission's representative, it bore Schwarcz's preticketed price tag of \$39.95, including Federal tax; this watch was sold by Alben to the representative for a price of \$17, exclusive of Federal tax. At the time of

the sale of the 7-jewel watch to the Commission's representative, it bore Schwarcz's preticketed price tag of \$19.95, with no indication as to whether Federal tax was included; this watch was sold by Alben to the representative for a price of \$12.48, exclusive of Federal tax. No Federal tax was charged by Alben on the two wristwatches as the sale was to an agency of the Federal government. The oral evidence establishes that Alben's normal markup on watches above their cost is substantially less than the markup reflected on the two Schwarcz preticketed price tags described above.

No evidence was presented by counsel supporting the complaint as to the "usual and regular retail prices" of the two watches under consideration, or watches of similar grade and quality, in Newark or elsewhere. The record is also otherwise barren of any evidence of the usual and regular retail prices on the watches in question or watches of similar grade and quality in the city of Newark. As part of its defense, respondents sought to show through dealers of its watches in the cities of Passaic, Paterson, and New Brunswick, New Jersey, the usual and regular prices of the described watches in those communities. This evidence, although showing in part that respondents' preticketed price tag of \$39.95 on the described 17-jewel watch reflects a price in excess of the usual and regular retail price on said watch in one of the above specified cities, is not deemed relevant on the issue under consideration because each of these cities are fairly large towns located considerable distances from Newark and each constitutes a trade area in itself. It is accordingly found that the cities of Passaic, Paterson, and New Brunswick are not part of the trade area of Newark.

#### *Discussion and Conclusions*

The issue here under consideration is the first count of the complaint charging respondents with preticketing its merchandise with fictitious retail prices. Counsel supporting the complaint has based his case on this issue on the sale of the two described preticketed Schwarcz watches to a Newark retail jewelry store at retail prices substantially less than the preticketed prices. Under Section 5 of the Act one of the required elements of proof is the establishment of the jurisdictional fact that the two watches in question were initially in "commerce" within the meaning of the Act.<sup>1</sup>

<sup>1</sup> Section 4 of the Act reads: "'Commerce' means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any States or foreign nation, or between the District of Columbia and any State or Territory or foreign nation."

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Respondents in their joint answer have admitted the following "commerce" allegation of the complaint:

In the course and conduct of their business, respondents are now 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 New York to purchasers thereof located in various 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.

Respondents are wholesalers, and wholesalers more often than not are engaged in both intrastate and interstate commerce. Respondents' general admission that they are engaged in interstate commerce (actually, as seen, the pleadings properly use the statutory term "commerce") does not relieve counsel supporting the complaint from the necessity of proving that the specific instances of the acts and practices he is relying on to establish his case are acts and practices in interstate commerce.

In the instant case the "commerce" evidence relating to the two wristwatches fails to show that "respondents have caused their said products [the two watches in question] when sold to be shipped from their place of business in the State of New York to purchasers [here Alben Jewelers] thereof located in various States of the United States" [in this instance the State of New Jersey].

On the contrary it has been found and the evidence shows that the two watches were picked up in person by a representative of the Newark dealer at respondents' place of business. This in our opinion constitutes intrastate commerce as distinguished from "commerce" as defined in the Act. Accordingly it is our conclusion that the two watches here under consideration were never in "commerce" within the meaning of the Act. It, therefore, follows that the complaint on the count here under consideration must be dismissed due to the fatal lack of proof of the jurisdictional requirement of "commerce".

Although the aforementioned jurisdictional defect disposes of the charge here under consideration, it is our opinion that the case-in-chief presented in support of the complaint suffers a second defect which in itself would also require a dismissal of the charge here involved. One of the essential elements of proof required under the complaint and applicable law is proof that respondents' preticketed prices on the two involved watches were not "the usual and regular retail prices of said products" but were, on the contrary, in the language of the complaint, "In truth and in fact \* \* \* fictitious and in excess of the usual and regular retail prices of said products." The phrase "usual and regular retail price" of a commodity has been in-

terpreted to mean the usual and regular retail price of the commodity *within the trade area or areas where the representation is made.* *The Baltimore Luggage Company v. Federal Trade Commission*, 296 F. 2d 608 (4th Cir. 1961) [7 S.&D. 251] *cert. denied* April 23, 1962. The Court in this opinion cites and indicates approval of Commission orders in other cases requiring certain named defendants therein to cease and desist from preticketing their merchandise with a retail price "in excess of the price at which such product is usually and customarily sold at retail *in the trade area or areas where the representation is made.*" (The emphasis here shown was supplied by the Court.)

In the instant case the record is completely barren of any evidence as to the "usual and regular retail prices" of the two watches in question or of watches of similar grade and quality in the trade area of Newark, New Jersey where the preticketed merchandise was being offered for sale. The only evidence of record with respect to the prices at which the watches were being sold in Newark were the prices at which they were sold by a single Newark dealer, Alben Jewelers. Since the city of Newark with a population of over 400,000 must have many retail jewelry stores selling watches similar, if not identical, to those involved here, it follows that the selling prices of only one retail store on the two involved watches is incompetent for the purpose of establishing the "usual and regular retail prices" of the said watches in the Newark trade area. Thus, if for no other reason, the charge of the complaint here under consideration must be dismissed for failure of proof of the "usual and regular retail prices" of the two involved preticketed watches or their equivalents in the Newark, New Jersey trading area.

Although the record suggests that respondents have been engaged in the prevalent practice of a substantial portion of the industry, of preticketing watches with fictitious retail prices (see statement as to the prevalence of this practice by petitioner-watch company in *The Clinton Watch Company v. Federal Trade Commission*, 291 F. 2d 838, (5th Cir. 1961) [7 S. & D. 184] *cert. denied* July 18, 1961, due process requires that this be proved by competent evidence.

#### *Guarantee Issue*

Since on this issue respondents in their proposed findings and brief in effect admit the charges of the complaint and since no defense on the issue was presented at the hearing the findings of fact thereon will follow the language of the complaint.

Respondents use such words and expressions as "guaranteed" and "fully guaranteed" in the advertising of their products, thereby rep-

representing that said products are guaranteed by them in every respect. Said statements and representations were and are false, misleading and deceptive. In truth and in fact, the guarantee provided was limited as to time and extent, moreover a service charge is made for repairs or adjustments which fact is not disclosed in respondents' advertisements.

The oral evidence also establishes, as heretofore noted, that the written guarantees issued by Schwarcz on the watches sold by it bearing the trade name "Delaware" are issued under the name of the partnership, Delaware Watch Company, a related company. Similarly watches sold by Schwarcz under the trade names of "Delgard" and "Genoveva" are also guaranteed under the name of Delaware Watch Company. The guarantees referred to in this paragraph are the "guarantees" described in the complaint and described in the paragraph next above. As mentioned earlier the Delaware Watch Company, the partnership, is not a respondent in this proceeding, but the partners thereof, Steven Vogel and Leslie Shaw, are respondents herein individually as well as in their capacities as officers of the two corporate respondents herein.

Respondents in their brief concede that an order may be entered on the guarantee issue as follows: "It is ordered that A. Schwarcz & Son, Inc., and Leslie Shaw and Stephen Vogel, as officers and directors, do forthwith cease and desist from representing, directly or indirectly, that the watches it offers for sale or sells are guaranteed unless and until the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed \* \* \*."

The only substantial difference between the foregoing proposed cease and desist order and the proposed order of counsel supporting the complaint on the issue here under discussion is that the former excludes DWC from its operation, whereas the latter is made to run against DWC as well as all other respondents named in the complaint.

The order to be entered herein on the guarantee issue will be issued against all respondents named in the complaint except DWC. DWC will be excluded from the order because, as heretofore noted, the complaint will be dismissed against DWC because of lack of proof that it was engaged in any of the illegal practices and acts charged in the complaint.

#### *Bezel Metal Content Issue*

Under this issue the complaint charges respondents with misleading and deceiving the purchasing public into believing that the bezels (i.e., the rim holding a watch crystal in its setting) of certain of their

watchcases are composed of precious metal or stainless steel, whereas they are in fact made of base metals which have been treated or processed to simulate precious metal or stainless steel.

The facts as admitted by respondents in their joint answer are as follows. Certain of the watches offered for sale and sold by respondents are in cases which consist of two parts, that is, a back and bezel. The back part has the appearance of stainless steel and is marked "stainless steel back". The bezel is composed of base metal other than stainless steel which has been treated or processed to simulate or have the appearance of precious metal or stainless steel. Some of the bezels are finished in a color which simulates silver or silver alloy or stainless steel. Some of the bezels are finished in a color simulating gold or gold alloy. Said watchcases are not marked to disclose that the bezels are composed of base metal or metal other than stainless steel.

"Commerce" with respect to the practice by respondents shown in the above paragraph is admitted by respondents in their joint answer.

Sample watches in evidence on the issue here under discussion are CXs 2-A, 8-A, and 9-A. CX 2-A has a base metal bezel which is finished in a color simulating gold or gold alloy. CXs 8-A and 9-A have base metal bezels which simulate silver or silver alloy or stainless steel. Although the issue of "commerce" with respect to each of these sample watches is not deemed particularly pertinent for the reasons set forth in the "Discussion and Conclusions" below, the facts with reference to the "commerce" of each of the said sample watches may have some value on review and as an aid in following the discussion and accordingly a finding with respect to the "commerce" of each of said watches are noted below. As seen, CX 2-A has heretofore been found to be not in "commerce". CX 8-A, being part of the same group of 19 watches purchased under a single invoice which were picked up in person by a Newark jeweler at respondents' place of business in New York City, is also found not to be in "commerce". CX 9-A, on the other hand, is found to be in "commerce". (Tr. 21-29, 736-737; CXs 11 and 13.)

Official notice was taken at the hearing herein of certain facts pertinent to the issue here under consideration. Pursuant to this official notice, it is found that an examination by an unskilled consumer of the watchcases described in the paragraph next above as having the appearance of gold or gold alloy, as typified by CX 2-A, would not disclose whether the watch case bezels are composed of rolled gold plate, gold filled, gold electroplate, 20 or 10 microns of gold, anodized aluminum, or polished brass. Similarly pursuant to the said official notice, it is found that an examination by an unskilled consumer of the watchcases described in the paragraph next above as having the

appearance of silver, silver alloy or stainless steel, as typified by CXs 8-A and 9-A, would not disclose whether they are composed of white gold, silver, stainless steel, chromium plated metal, polished aluminum, or any other metal. In accordance with the same mentioned official notice, it is also found with respect to the watches described in the sentence next above that a substantial portion of the purchasing public would be led to believe that such watchcases are white gold, silver or stainless steel.

In addition the evidence shows that an ordinary consumer, a journeyman painter in the employment of the State of New York, was misled and deceived from an examination of respondents' watches at the hearing herein into believing that the bezel of one of the watches, with the appearance of gold but actually without any gold content (CX 2-A), was made of rolled gold or gold plating, and that the bezels of two other watches, with the appearance of stainless steel but actually without any stainless steel content (CXs 8-A and 9-A), were made of stainless steel.

The only rebuttal offered by respondents with respect to the aforementioned official notice and consumer testimony was the testimony of a number of respondents' retail jeweler-dealers to the effect that in their experience consumers were not misled by the appearance of the described base metal bezels into believing that the said bezels were made of something other than their actual metal contents. This testimony, being largely self-serving, is rejected as not having substantial probative value.

Independently of the aforementioned consumer testimony in support of the complaint and the above-described official notice which under the Commission's Rules of Practice for Adjudicative Proceedings requires that opportunity be given the party adversely affected by the official notice to present rebuttal evidence, the examiner finds from his own examination of the bezels here under consideration that the bezels *per se* sufficiently demonstrate their capacity to deceive.

#### *Discussion and Conclusions*

On the basis of all the evidence of record, it is found that the practice of respondents in offering for sale and selling watches, the cases of which incorporate bezels composed of base metal which have been treated or processed to simulate or have the appearance of precious metal or stainless steel as aforesaid, without disclosing the true metal composition of said bezels, is misleading and deceptive and has a substantial tendency and capacity to mislead members of the purchasing public to believe that said bezels are composed of precious metal or stainless steel.

The above ultimate finding of fact and law is in accord with the decision and opinion of the Commission in the *Theodore Kagen Corp.*, No. 6893, F.T.C., Nov. 19, 1959, *aff'd per curiam*, 283 F. 2d 371 [6 S. & D. 837] (D.C. Cir. 1960), in a matter involving the same issue here under consideration and under a set of facts substantially similar to that involved in the instant case. The practice here involved was so comprehensively discussed by the Commission in the *Kagen* case as to require but little more than a reference to it here. The following quotation from the opinion of the Commission in the *Kagen* case is significant here:

\* \* \* Where the exhibits themselves sufficiently demonstrate their capacity to deceive, neither customers who have actually been misled nor experts need be called to testify. *Zenith Radio Corporation v. Federal Trade Commission*, 143 F. 2d 29 (7 Cir., 1944); *Royal Oil Corporation v. Federal Trade Commission*, 262 F. 2d 741 (4 Cir., 1959).

Representative samples of respondents' watch cases were received into the record. The bezel is a prominent component of the case and of the finished watch. Our own examination of those exhibits confirms that the bezels of many of respondents' watch cases are to all appearances composed of precious metal. We have no doubt that a substantial segment of the watch buying public would find it impossible to distinguish such bezels from those made of precious metals. In these circumstances, the fact that the backs are disclosed as being base metal or that no karat markings appear on the cases is immaterial.

Although our conclusion in the instant matter that the practice under consideration is misleading and deceptive is based on all of the evidence of record on the issue, the same conclusion could be reached solely on the basis of the facts as established by the pleadings which leave for decision only the conclusion to be drawn therefrom.

Notwithstanding the fact that the evidence under the metal content issue and the fictitious price preticketing issue (dealt with in an earlier section) involves two watch exhibits which have been found *not* to be in "commerce", the finding of "commerce" with respect to the metal content issue and the finding of *no* "commerce" with respect to the fictitious price issue, although seemingly inconsistent, are not in fact inconsistent. The two watches referred to are CXs 2-A and 8-A. Commission's CX 2-A is in evidence under both issues; CX 8-A is in evidence only under the metal content issue; but both of these watch-exhibits have been found to be not in "commerce". However, on the metal content issue, the evidence, in addition to CX 2-A, includes a watch received in evidence as CX 9-A. Since the latter was specifically found to be in "commerce", it sufficiently supplies the jurisdictional "commerce" element required under the metal content issue to sustain the cease and desist order rendered thereunder as set forth in the final portion of the instant initial decision.

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But it will be noted that our findings also contain another basis for the finding of "commerce" with respect to the practice involved in the metal content issue. This other basis consists of certain admissions by respondents in their pleadings heretofore stated but again indicated below for the convenience of the reader. While neither of the two bases are necessarily entitled to priority, our treatment of the findings of fact above gives priority of mention, and greater emphasis, to respondents' said admissions because they are in our opinion capable of disposing of the issue of "commerce" without any necessity for reliance on physical watch exhibits and transportation documents thereon for the establishment of "commerce". For this reason the one watch exhibit (CX 9-A) received in evidence under the metal content issue has been mentioned almost parenthetically on the issue of "commerce" in the findings of fact above.

The aforementioned admissions by respondents are two in number. The first is the general admission of "commerce" made in respondents' joint answer. The second is the admission of the practice involved under the metal content issue. The most significant sentences in the latter are the following: "The bezel is composed of base metal other than stainless steel which has been treated or processed to *simulate or have the appearance of precious metal or stainless steel*. Some of the bezels are finished in a color which *simulates silver or silver alloy* or stainless steel. Some of the bezels are finished in a color *simulating gold or gold alloy*. Said watchcases are not marked to disclose that the bezels are composed of base metal or metal other than stainless steel." (Emphasis supplied.) It is obvious that the general admission of "commerce" in the joint answer must necessarily relate to the "practices" admitted and set forth in the above sentences as there is nothing in the answer to indicate a contrary intention. Accordingly no physical exhibits (watches) are really required to prove "commerce" under the metal content issue. Moreover, the pleadings as revealed above set forth the facts so completely that the issue thereunder could have been submitted solely on the basis of the pleadings. Under the circumstances, the true function of the watches (physical exhibits) in evidence under the metal content issue is merely to serve as supplementary evidence of a visual character from which conclusions can be and were drawn by the examiner and the one consumer witness testifying in support of the complaint on the question of whether the involved practice is "misleading and deceptive and has a substantial tendency and capacity to mislead members of the purchasing public to believe that said bezels are composed of precious metal or stainless steel."

On the other hand the situation in the fictitious price preticketing issue with respect to the "commerce" element is quite different. The distinction between the situation in the metal content issue and that in the fictitious price preticketing issue is that in the latter we do not have admissions of the challenged practice as we do in the former. All we have under the fictitious price preticketing issue is a general admission of "commerce" plus an admission by stipulation that respondents have been engaged in the practice of preticketing their merchandise. It should be noted that there is a vast difference between mere preticketing and fictitious price preticketing. Preticketing in and of itself is not violative of the Act. To be so the preticketing must be of a particular kind, namely, preticketing with fictitious retail prices. The burden of the complaint is that respondents are charged with *fictitious* retail price preticketing, not mere preticketing. Respondents have nowhere in the record admitted the charge of fictitious price preticketing and "commerce" in connection with such practice. The most they have admitted is that they have preticketed their watches and placed them in "commerce"; these two elements, each being lawful, in combination are not violative of the Act. Consequently the double burden of proof on counsel supporting the complaint is to show (a) fictitious price preticketing and (b) "commerce" with respect to such practice. But on the metal content issue, as seen, both the challenged practice and the "commerce" were conceded by respondents in their pleadings.

#### *Water Resistant Issue*

On this issue, the complaint charges that respondents in the course and conduct of their business for the purpose of inducing the sale of their watches have caused and now cause to have marked upon their watchcases the words "water resistant" and have advertized certain of their watches as "water resistant", whereas in truth and in fact the watches so marked are not water resistant.

Respondents by their answer admit that they have sold and the record shows that they sell watches inscribed with the phrase "water resistant". The record also shows that respondents supply advertising mats in which many of their watches are described as "water resistant". The phrase "water resistant" will be shown in quotations hereinafter wherever necessary to indicate that our inquiry is as to the truth of the representation indicated by the phrase.

The evidence shows that on October 10, 1960, a representative of the Federal Trade Commission purchased a ladies' white metal wrist-watch from the aforementioned Albens Jewelers, of Newark, New

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Jersey, for a price of \$20, exclusive of Federal tax. This watch was received in evidence as CX 9-A. The back of the watchcase of the watch carries the inscription "Water-Resistant", among other inscriptions not here material. Albens had acquired this watch by purchase in "commerce" as heretofore indicated from Schwarcz.

After purchase from Albens, the same Commission representative, preparatory to taking the watch to a testing company for testing its "Water-Resistant" quality, took the watch to Jean Felber, a watch expert whose specific experience in watchmaking will hereinafter be set forth, for the purpose of having him inspect the watch, by opening and closing it, to make certain that the watch was properly put together "in the way and manner it would be closed and done in a factory", so that the watch could then be submitted for test of its water-resistant quality. Having made this inspection (in the presence of Commission's representative) to his satisfaction that the watch was in the condition it should ordinarily have been when it left the factory, Felber returned the watch to the Commission representative who immediately thereafter took the watch to an independent testing laboratory with instructions for testing pursuant to "Test No. 2—For Water Resistance or Water Repellancy" as set forth in the Commission's "Trade Practice Rules" as promulgated on April 24, 1947.

The test was made by the testing company and the watch, CX 9-A, failed to meet the test.

It is established from the testimony of watch expert Felber that it is very difficult to make a watchcase of the type of construction used in CX 9-A water-resistant. Felber testified in part as follows: "\* \* \* the crown tube [of CX 9-A] is made so [the construction of the crown tube of CX 9-A is described below] that it can hardly be \* \* \* water resistant. The lodging of the water resistant gasket is made so that it is very difficult for the case back to fit properly on it and make it water resistant." Felber's experience as a watch expert includes four years as a student at a watchmaking school in Switzerland, four years experience as assistant to the head technician at a large watch movement factory in Switzerland, four years as head watchmaker in New York City for the Vulcan Cricket Alarm Wristwatches of Switzerland after six months of preliminary training in the Vulcan factory in Switzerland, three years as a head watchmaker in New York City for the agency office of the Mido Watch Company of Switzerland and its successor, the Mido Watch Corporation of America, and approximately the past five years in the operation of his own watch service, primarily for various Swiss watch companies in connection with guarantees issued by them on their watches. His work for the Vulcan firm involved the casing of Vulcan movements in this country and repairs

of Vulcan watches under guarantees issued by Vulcan. In connection with his job for Mido, Felber spent two months in training at the Mido factory in Switzerland in which the emphasis was primarily on the waterproofing of cases. Mido features a waterproof watch. The general principles for the construction of a waterproof watchcase is the same as that for a water resistant watchcase, except that the former has a much higher standard of detail, accuracy and quality. (Tr. 541)

Schwarcz purchases about 40,000 "water resistant" watchcases annually for use in assembling watches which it sells at wholesale. From the record as a whole, it is found that the said 40,000 "water resistant" watchcases are manufactured in Hong Kong and purchased from importer-suppliers. (Tr. 678-679) Three of Schwarcz's importer-suppliers are Swiss Watch Case Company, Simon Spira, and WMR which stands for "Water and Moisture Resistant". Schwarcz regards WMR as its principal supplier of Hong Kong "water resistant" watchcases. Its actual purchases from WMR are between 8,000 and 12,000 such watchcases annually. The only Hong Kong watch importer called by respondents to testify in their behalf on the "water resistant" issue was Sheldon Parker, a partner of WMR. No other importer or manufacturer of "water resistant" watchcases was called upon to testify by either party.

The annual imports of Hong Kong watchcases into the United States totals about one million cases. The largest single importer of such watchcases is WMR which alone is responsible for more than one-half of the total imports. About 80 percent of WMR's Hong Kong imports consist of watchcases inscribed "Water-Resistant". The watchcases imported by WMR are manufactured in Hong Kong by Danemann Watch Case Factory, Limited. Although there are a number of such watchcase manufacturers in Hong Kong, Danemann is the largest. WMR has an exclusive contract with Danemann for the importation of its watchcases into the United States.

The watchcase of the aforementioned CX9-A (which as above indicated failed to meet Test No. 2 of the Commission's Trade Practice Rules) was manufactured in Hong Kong by Rays Metal Manufactory, a competitor of Danemann and sold to Schwarcz by one of the aforementioned suppliers, Swiss Watch Case Company or Simon Spira, competitors of WMR. Although the testimony of respondent Leslie Shaw establishes that the watchcase in CX 9-A was purchased from one or the other of the two mentioned watchcase importer-suppliers, Shaw was unable to pinpoint the supplier as between the two.

There are two methods of construction of "water resistant" watchcases, hereinafter described and designated as Type A and Type B, respectively. Type A is a watchcase in which a separate friction fitting tube is pressed by machinery into a previously drilled hole in the bezel part of the case, very much like a cork is pressed into a wine bottle. This is referred to in the trade as a "friction fit" water resistant case. Type B is a watchcase in which the tube is an integral part of the bezel and not a separate tube manufactured independently of the bezel and then inserted in a hole in the bezel as in Type B. Type B is known in the trade as a "one piece bezel".

The described tubes in both Types A and B are designed to receive the watch stem (which is part of the watch movement) and the watch crown when the case is assembled with a movement. These tubes will hereinafter be generally described as "crown tubes".

The water resistant quality of the Type B case is substantially superior to that of the Type A case. The Type A watchcase, due to the two-piece construction of its bezel, is vulnerable to water seepage at the site of its friction fitting crown tube because of the possibility that the crown tube was not inserted in the bezel hole with sufficient tightness at the factory to make for "water resistance". This source of vulnerability to water seepage is avoided in the Type B watchcase because the crown tube in that construction is an integral part of the bezel. WMR's representative, Sheldon Parker, concedes that the one-piece construction of the bezel in the Type B watchcase "helps quite a bit" to give it water-resistant superiority over the Type A case. The Hong Kong watch manufacturers disfavor the manufacture of the Type B watchcase because such production involves a large proportion of factory rejects due to service imperfections in the completed one-piece bezel. The predominant production in Hong Kong is of the Type A construction.

CX 18<sup>1</sup> and CX 25 are Hong Kong empty watchcases sold by WMR to Schwarcz. CX 18 bears the inscription "WATER RESISTANT" and CX 25 is inscribed "DUSTPROTECTED". The evidence establishes that CX 25, although marked "dust protected"

<sup>1</sup> Although the index of the official transcript of the proceedings in this matter does not show the identification of CX 18 as a physical exhibit or its receipt in evidence, the said CX 18 is deemed to be a part of the record herein by virtue of the following colloquy between the Hearing Examiner and witness Sheldon Parker, partner in WMR:

Hearing Examiner BUSH. Let the record show here again that this watchcase, as I understand it, as represented by Exhibit 18 was one sold by your firm. Isn't that so, Mr. Parker?

The WITNESS. That is correct.

Hearing Examiner BUSH: To the respondent Schwarcz & Son?

The WITNESS. It was picked up at Schwarcz, yes.

Hearing Examiner BUSH: Very well. In any event, it is your case,

The WITNESS. Yes, yes. (Tr. 598-599)

and not "water resistant", has the same "water resistant" construction as CX 18 and that for business reasons, in order to meet the various demands of the trade, watchcases which have the construction of CX 25 are sometimes inscribed "water resistant" and sometimes "dust protected". CXs 18 and 25 have the same kind of "friction fit" construction described above as Type A.

CX 9-A (the watch which failed to pass the Commission's Test No. 2 for water resistance) is also cased in a Type A "water resistant" watchcase. (Tr. 424 at lines 10 through 12, and Tr. 678-679 and compare with Tr. 598 at lines 12 through 19 and Tr. 603 at lines 4 through 10). Thus the watchcase of CX 9-A, of which the supplier was either the Swiss Watch Case Company or Simon Spira, and CXs 18 and 25, of which the supplier was WMR, are all Type A "water resistant" friction fit watchcases.

WMR sells its Hong Kong Type A watchcases at prices ranging from 20¢ to 25¢ each. It also sells Hong Kong Type B watchcases; these are sold at 10¢ more than the Type A case. The Type A case is also manufactured in the United States but Type B is not. Comparable Type A watchcases manufactured domestically from the same metals as the Hong Kong case sell at 60¢ to 75¢ each. Except for purchase of some 200 Type B cases annually, the evidence shows that Schwarcz buys its Type A cases at 20¢ each. From this and the record generally it is concluded that substantially all of Schwarcz's overall annual purchases of 40,000 "water resistant" watchcases are of Type A.

The relationship of the cost of the Type A metal watchcase in Schwarcz's assembled watch, CX 9-A, to Schwarcz's total cost of the assembled watch, is as follows: watchcase, 20¢; total watch cost, \$8.58. Included in the latter is a cost of 31¢ for a decorative hinged display box in which the watch is sold to the retailer.

The Type A watchcases handled by respondents are subjected to a certain amount of testing for compliance with the aforementioned Commission's Test No. 2 for watch resistance. As to the testing procedures of the many Hong Kong watchcase factories which manufacture Type A cases, the record contains evidence only as to the procedures of Danemann and this was supplied, not by a representative of Danemann, but by WMR, its sole customer in the United States, through the testimony of WMR's aforementioned part owner, Sheldon Parker. Danemann spot checks about 10 percent of its total production for WMR of Type A watchcases for compliance with the said Test No. 2 before releasing the production for shipment. Upon receipt of the watchcases in this country, WMR also random test checks about 10 percent of the empty watchcases for compliance

with Test No. 2 before releasing shipments thereof to customers. For purposes of these tests, both Danemann and WMR plug the crown tubes in the bezels with plastic stoppers; in the completely assembled watch the crown tube is filled with the stem of the movement and covered with the watch crown. Schwarcz upon receipt of shipments of the watchcases spot checks about 10 percent of the cases both before and after they are assembled into watches for compliance with Test No. 2 before releasing or selling the watches to its customers.

One of the respondents' defenses to the charge here under consideration is that all of the watches they sell as "water resistant" should be deemed to have passed Test No. 2 because of the aforementioned spot testing procedure for compliance with Test No. 2. The validity of this defense will be discussed below.

#### *Discussion and Conclusion*

From the foregoing evidentiary findings of fact it is concluded that the watches sold by respondent Schwarcz which are marked "water resistant" are not always in fact water resistant. This conclusion is based on a number of factors. It is based in part on the fact that a random selected Schwarcz wristwatch, CX 9-A, marked "WATERRESISTANT", with a construction identical with that of thousands so marked and handled by Schwarcz, failed to pass the Commission's Test No. 2 for water resistance. More fundamentally the conclusion is based on the inherent imprecision, for purposes of water resistance, of the construction of the type of the watchcase in question as typified by CX 9-A. This imprecision is at points particularly vulnerable to water leakage, namely, the crown tube and the lodging of the water resistant gasket in the case back. Thirdly, the conclusion is based on the expert opinion of an expert watchmaker that the watchcase under consideration, due to its construction as described in the findings, is very difficult to make water resistant.

Fourthly, the conclusion is based on the disbelief that any of the persons involved in the manufacturing, importing, or assembling of the involved Hong Kong "water resistant" watchcases would or could afford to exert the required effort to make such watchcases truly water resistant where the completed unit as here has so little economic value that it can be sold to assemblers in the United States after transoceanic carriage at the delivered price of 20¢ each.

The final basis for our conclusion is related to respondents' defense that their "water resistant" watches are spot checked for compliance with the Commission's "Test No. 2" for water resistance before they are released for sale. This test, it will be recalled, is set forth in the Commission's Trade Practice Rules as promulgated April 24, 1947,

respecting the term "waterproof" and related designations, as applied to watches, watchcases and watch movements.

"Test No. 2" is a part of Rule 2 of said Trade Practice Rules. Rule 2 is made up of parts (a), (b), and (c), the full text of which is set forth in the appendix hereto [p. 519 herein]. Part (a) is a general proscription against the improper use of the term "Water Resistant". This portion of the Rule states in effect that it shall be improper to apply the term "water resistant" to a watch or watchcase where the watch or watchcase is not in fact water resistant. Part (b) sets forth certain conditions under which watches and watchcases may be sold as "water resistant" without danger of being construed as coming within the prohibited use of the term "water resistant". The provisions of part (b) of this Rule are elective, not mandatory, but those who seek its protective coverage must meet its qualifying conditions. Among these conditions is the requirement that *each* watch and watchcase must pass "Test No. 2" pursuant to the following requirement of part (b) of Rule 2: "\* \* \* when [the watch and case], before being placed upon the market by manufacturers, assemblers, importers, or other marketers, *the watch* and *the case* have undergone such test ; \* \* \* ". (Emphasis supplied.) The provisions of Test No. 2 are set forth under part (c) of Rule 2 and are designed to give the watch trade an easy, practical, inexpensive, and acceptable method of testing for "water resistance". But our immediate concern here is not the detail of Test No. 2 but the requirement under part (b) of Rule 2 that each and every watch and case must undergo and pass Test No. 2 before it may be sold as "water resistant".

In the instant case, the evidence shows that respondents subjected only 10 percent of their watches inscribed "water resistant" to Test No. 2 for water resistance prior to marketing and not each and every such watch to the test as required by part (b) of Rule 2. Failing in this latter requirement, the protective coverage provisions of Rule 2(b) are not available to respondents.

The conclusion stated above that Schwarcz' "water resistant" watches are not in fact water resistant is based upon the entire record of this proceeding.

#### *Country of Origin on Issue Watch Cases*

The final charge of the complaint is that respondents are misleading and deceiving the purchasing public into believing that certain of the watchcases housing the watches they sell are made in either Switzerland or the United States due to the fact that the watch movement in such watches is inscribed with the word "Swiss" and to the further fact that the watch does not otherwise carry a disclosure

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of the country of origin of the watchcase. The complaint further alleges that there is a preference on the part of many persons in this country for watchcases of domestic and Swiss origin over watchcases manufactured in Hong Kong.

The complaint does not specify whether the charge of failure of disclosure of country of origin relates to the interior or exterior of the involved watch cases or both.

The answer admits that respondents have sold and the record shows that they are selling watches encased in watchcases imported from Hong Kong and that the dials of the watch movements of such watches bear the inscription "Swiss". The word "Swiss" on the dial indicates that the watch movement was imported from Switzerland. By stipulation of the parties, it is established that under appropriate law or regulation all watch movements imported from Switzerland must be inscribed with the word "Swiss" on their dials. The watches in evidence in this proceeding exhibit the word "Swiss" on the outer circumference of the dial in quite small print beneath the hour figure "6" which is the usual position and size of the word "Swiss" on most Swiss watches. The size and the position of the word "Swiss" occupied on the dial of the watches in evidence are inconspicuous in comparison with the size of the trademark name and other printed matter shown on more central and visible locations on the dials of respondents' watches.

As heretofore noted, respondents buy at least 40,000 Hong Kong watchcases annually through importers. These are purchased as indicated at a price of 20¢ each, which bears a nominal relationship to respondents' average selling price of \$10 for the fully assembled watch to their dealer-customers. The Hong Kong watchcases here under consideration if manufactured domestically would sell at a price between 60¢ and 75¢ each.

WMR, it will be recalled, is the principal importer in the United States of Hong Kong watchcases, imports the backs and bezels of such watches separately, although both are made by the same Hong Kong manufacturer and the two parts are designed in various sizes to be assembled together in one unit. The reason for this practice is that the charges imposed by law in connection with the importation of such commodities is less when the backs and bezels are brought into this country separately than when they are imported as assembled units.

CXs 18 and 25, as heretofore shown, are empty wristwatch cases purchased by respondent Schwarcz from WMR. The bezels of these watchcases bear the engraving "WMR Hong Kong" which reflects the name of the importer and the place of origin. The engraving

is on the inside rim surface of the bezel which will be completely obscured when a watch movement is inserted in the case. The bezel of a man's wristwatch could be inscribed with the country of origin on the outside portion of the bezel between the lugs (*i.e.*, the projections of the bezel which hold the pins designed to take the watch-band) without defacing the outward appearance of the bezel that meets the eye, but on some small ladies' wristwatches, as in CX 1-A, the bezel could not be marked anywhere on its outer surface without defacement of the outward appearance of the bezel. Neither the interiors or exteriors of the back covers of the two wristwatches here under consideration show the country of origin.

It is found pursuant to stipulation of the parties that some consumers would have a prejudice against watches housed in watchcases manufactured in Hong Kong and that some would not.

Under the Tariff Act of 1930, Title 1, Par. 367 (f) and (g), all watchcases imported *as fully assembled units* from a foreign country into the United States are required to "have cut, engraved, or die sunk, conspicuously and indelibly on the inside of the back cover, the name in full of the manufacturer or purchaser and the name of the country of manufacture."

Until recently the Bureau of Customs, by a process of exemption or waiver, did not require bezels or back covers *when imported separately by importers* to be individually inscribed with the name of the country of origin.

Effective as of January 18, 1962, the Bureau of Customs abolished the exemptions from country of origin markings formerly applicable to bezels and covers when imported separately and from and after the said date required all bezels and covers when imported separately to be marked with the name of country of origin. The marking on the cover must now show on its inside not only the country of origin but also the phrase "Case made in", followed by the country of origin. (Tr. 627-630.)

Testimony was received from WMR's Sheldon Parker on the economic consequences he believes would result from the order sought in this matter requiring in effect that all watchcases manufactured in Hong Kong be marked "Hong Kong" on the exterior of their backs. From this testimony, it is found that such an order would place the respondents as users of Hong Kong watchcases and their suppliers at a competitive disadvantage with competitors and their suppliers handling watchcases manufactured in France, Germany, and Switzerland because the latter are not currently under similar obligations to impress their watchcases with their respective countries of origin. It is also found from Mr. Parker's testimony that an order requiring

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disclosure of the country of origin on the exterior of back covers would have a tendency to adversely affect sales on the consumer level. This is because people generally prefer to buy watches with Swiss movements but there will be some persons who will be misled into believing that a watch containing a genuine Swiss movement but enclosed in a case conspicuously marked Hong Kong on its exterior was made entirely in Hong Kong and therefore reject the watch.

*Discussion and Conclusions*

Based on the foregoing facts, it is our conclusion that a substantial number of consumers would be misled and deceived into believing that the watchcases of certain of respondents' watches assembled with Swiss watch movements and Hong Kong cases were either of domestic or Swiss origin because of the absence of any disclosure on the watchcase as to its country of origin. From this, it is our further conclusion that an appropriate cease and desist order should be issued on the count of the complaint here under consideration.

As to what would constitute an appropriate order, the first difficulty encountered on the "country of origin" issue is that although the complaint alleges that the practice of selling Swiss movements in Hong Kong cases "is misleading and deceptive", the complaint does not state whether the relief sought is an order requiring the disclosure of the country of origin on the inside or outside of the watchcase. Under these circumstances, the complaint is construed to mean that it would be satisfied with having the inscription of the country of origin placed on any part of the case which could be deemed to give the public reasonably adequate notice of the place of origin under all the facts and circumstances of record in this proceeding.

It is our conclusion that a marking on the inside of a watchcase back which shows the country of origin preceded by the words "Case made in" would be reasonably adequate notice and disclosure to the public of the origin of the two involved parts of a watchcase, the bezel and back. We refrain from requiring that the bezels be individually marked with their country of origin, not only because the aforementioned marking on the back of the case would put the consumer on notice as to the country of origin of the bezel as well as the back but also because a marking of the country of origin on some small ladies' wristwatch cases could not be accomplished without defacing the outward appearance of the case.

There are a number of reasons for the above conclusion. One is that it is in line with long established custom, as the Tariff Act of 1930 has for many years required the back of imported cases, when they are imported as a unit, to be marked on their inside surface with the

country of origin. Our conclusion is also in line with the Bureau of Custom's recent extension of the requirements of the Tariff Act of 1930 as to the marking of watchcases imported as a unit to bezels and backs when imported separately. In view of this history of country of origins markings as required by the Bureau of Customs, it is a fair assumption that prospective watch consumer-purchasers who are interested in the country of origin of the watchcase would look for such markings on the inside of the case back. Another consideration for our conclusion is that a contrary order requiring that the exterior of the case be made to show the country of origin might well lead many prospective consumers to believe that watches displayed to them having Swiss movements and Hong Kong cases were made in their entirety in Hong Kong and lead to the rejection of the watch because Switzerland is associated in the public mind with the manufacturing of watches and Hong Kong is not. Consequently, such exterior markings of the country of origin could have a more mischievous and misleading effect on the consumer than a total nondisclosure of the country of origin on the Hong Kong made watchcases.

There are also other reasons for our conclusion that the public would be given adequate notice of the country of origin of respondents' imported watchcases if they carried the marking of the country of origin on the inside of the watchcase back. One of these factors is that the watchcases here involved sell at only 20¢ each and accordingly represent an insignificant component part of the assembled watch from a cost point of view. This notation of the low cost of the watchcase unit is not intended to be a denigration of the watchcases under consideration. They perform the function they are designed for and watchcases of similar construction and metal content, if made domestically, even though they sell at about 60¢ each, would have no greater functional utility than the 20¢ Hong Kong watchcase.

The President of the United States in his message on January 25, 1962, to the Congress on the subject of the "Reciprocal Trade Agreements Program" stated: "American imports, in short, have generally strengthened rather than weakened our economy." The public interest under Section 5 of the Act does not, in our opinion, require more than a marking of the country of origin on the inside of the watchcase back. A requirement for the marking of the country of origin on the exteriors of the watchcase back for the purpose of pandering to the stipulated prejudice of some consumers against watchcases made in Hong Kong would be inconsistent with the larger interests of the consuming public in having our economy strengthened by American imports.

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Although it is realized that the order to be entered in this proceeding will in effect be a duplication of the current requirements on respondents' importer-suppliers by the Bureau of Customs that they mark or cause to be marked watchcase backs (even when imported separately) with the name of the country of origin, the order will nevertheless be issued since the Federal Trade Commission operates under its own statutes and also because there is a possibility that the said new requirements of the Bureau of Customs may be challenged in the courts. A further reason for issuing a cease and desist order in this matter is that respondents in all probability still have on hand substantial quantities of unmarked (as to country of origin) Hong Kong watchcases which were imported prior to January 18, 1962, when the new requirements of the Bureau of Customs with respect to markings of country of origin became effective.

*Overall Findings of Ultimate Fact*

Through the use of the practices hereinabove set forth, the respondents, except DWC, place in the hands of watch dealers and retailers a means and instrumentality whereby such dealers and retailers may mislead and deceive the purchasing public (1) as to the guaranties they issue on their watches, (2) as to the metal composition of their watchcase bezels, (3) as to the ability of their watches marked "water resistant" to actually resist moisture, and (4) as to the country of origin of their imported watchcases.

The use by the respondents, except DWC, of the false, misleading and deceptive practices hereinabove set forth and the failure to disclose the true origin and metal composition of their watchcases had, and now have, the capacity and tendency to mislead and deceive members of the purchasing public in the manner aforesaid and thereby to induce them to purchase said respondents' watches. As a consequence thereof, trade in commerce has been unfairly diverted to said respondents from their competitors and injury has thereby been done to competition in commerce.

The aforesaid acts and practices of the respondents, except DWC, as set forth above, were and are all to the prejudice and injury of the public and of said respondents' competitors and constitute and now constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

*It is ordered,* That respondents A. Schwarcz & Sons, Inc., a corporation, and its officers and Steven Vogel and Leslie Shaw, individually

and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with the sale and distribution of watches or any other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that their watches are guaranteed, unless the nature, and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

2. Offering for sale or selling watches, the cases of which are in whole or in part composed of base metal which has been treated to simulate precious metal, without clearly and conspicuously disclosing the true metal composition of such treated cases or parts.

3. Representing that their watches are water resistant or water protected.

4. Offering for sale, or selling watches, the cases of which are of foreign origin without clearly and conspicuously disclosing on the interior of the watchcase back the name of the foreign country of origin, preceded by the words "Case made in."

5. Placing in the hands of dealers and retailers a means or instrumentality whereby they may mislead and deceive the purchasing public as to the character and quality of their products.

*It is further ordered*, That the charge of the complaint relating to fictitious price preticketing as contained in Paragraph 3 of the complaint be, and the same hereby is, dismissed.

*It is further ordered*, That the complaint be, and the same hereby is, dismissed as to the Delaware Watch Company, Inc., a corporation.

#### APPENDIX

#### Trade Practice Rules of Federal Trade Commission

Re: Terms "Waterproof and Related Designations, as Applied to Watches, Watchcases, and Watch-movements

#### RULE 2.

(a) *Improper Use of the Terms "Water Resistant," "Water Repellent," Etc.* It is an unfair trade practice to use the term "water resistant" or "water repellent," or any word, expression, depiction, or representation of like import, as descriptive of a watch or watchcase under any false, misleading, or deceptive circumstances or conditions, or in any manner which has the capacity and tendency, or effect of misleading or deceiving the purchasing or consuming public, or of

aiding, abetting, or causing salesmen, dealers, or other marketers to mislead, deceive, or confuse the purchasing or consuming public.

(b) *Use of Term "Water Resistant" or "Water Repellent" in Relation to Test, Etc.* Nothing in this rule shall be construed as prohibiting use of the terms "water resistant" or "water repellent" as descriptive of a watchcase or watch under the following conditions and limitations, namely, when the watchcase or watch has been so constructed and is of such composition as to provide protection against water or moisture to the extent of meeting the following test, designated as "Test No. 2," or a more severe test, and when, before being placed upon the market by manufacturers, assemblers, importers, or other marketers, the watch and the case have undergone such test: *Provided, however,* That subsequent to undergoing such test and before sale of the product to the purchasing public as and for a water resistant or water repellent watchcase, the water resistant condition thereof has not been impaired or destroyed by opening the case, or otherwise: *And provided further,* That no representation is made which is deceptive in implication, or otherwise, by reason of concealment of material fact or by way of guarantee, warranty, advertisement, label, or other means indicating or tending to indicate that the water resistant condition of the watch or watchcase will remain unaffected throughout the life thereof, or that it will not be affected by opening of the case for repairs or adjustment, or will not be affected by wear or other condition when such is not the fact.

*NOTE.* In the interest of avoiding possibilities of misunderstanding and deception of purchasers, members of the industry or marketers of watches or watchcases offered for sale or sold as and for "water repellent" or "water resistant" products should disclose to and inform the purchasing public, when such is the fact, that the water repellent and water resistant condition of the watch or case will be or may be destroyed or impaired by, or will not or may not continue after, having been opened for repairs, adjustment, or for other purpose, or because of other contingency encountered in the customary use or wear of the watch, unless the case is again serviced or treated by competent experts or by other methods adequate to renew or restore its condition of water resistance or water repellency.

(c) *Test No. 2—For Water Resistance or Water Repellency.* For purposes of this Rule 2, the following is deemed an acceptable test for water resistance or water repellency of a watch or watchcase, namely, complete immersion of the case or watch for at least 3 minutes in water at a pressure equivalent to a depth of 26 feet of water under normal atmospheric pressure of 15 pounds per square inch, without admitting, or showing any evidence of capacity to admit, any moisture or water. The so-called vacuum test of complete immersion in water under a vacuum sufficient to be productive of conditions of equivalent or great-

er severity may be used as an alternate or additional test for purposes of this Rule 2. (Neither test is to be accepted, however, as showing or indicating the durability of such water resistant or water repellent condition or any time or period during which such condition may continue.)

## OPINION OF THE COMMISSION

JUNE 19, 1963

By DIXON, *Commissioner*:

The complaint in this matter charges respondents with violation of Section 5 of the Federal Trade Commission Act through alleged misrepresentations concerning regular retail prices, guarantees, metal composition, place of origin and water resistant qualities of certain of their watches and watchcases. The case is before the Commission upon the cross-appeals of the parties from the hearing examiner's initial decision.

Complaint counsel takes exception to the hearing examiner's dismissal of the charge of preticketing and also to the form of the order as to disclosing foreign origin. He also appears to take exception to the examiner's dismissal of the charges as to respondent Delaware Watch Company, Inc. Respondents except to the examiner's holdings with respect to the charges on the metal content of watchcases and the use of the term "water resistant."

*Dismissal As To Delaware Watch Company, Inc.*

Respondents, Delaware Watch Company, Inc., and A. Schwarcz & Sons, Inc. (sometimes referred to hereafter as Delaware and Schwarcz, respectively), are New York corporations with their office and principal place of business at 580 Fifth Avenue, New York City. Respondents Steven Vogel and Leslie Shaw are officers of the corporations and they formulate, direct and control the acts and practices involved in this proceeding. The sole management of the corporate respondents rests in the individual respondents Shaw and Vogel. The individual respondents have also formed a partnership which is known as the Delaware Watch Company.

The president and majority stockholder of Schwarcz is respondent Leslie Shaw. The stock of Delaware Watch Company, Inc., is wholly owned by A. Schwarcz & Sons, Inc. Schwarcz also wholly owns the stock of a third corporation, Delaware Watch Company of the Virgin Islands, Inc., a corporation organized under the laws of the Virgin Islands.

The hearing examiner dismissed the complaint as to respondent Delaware Watch Company, Inc., on the ground that no evidence

was presented to show that it was engaged in any of the illegal practices and acts charged. According to the testimony, the Delaware Watch Company of the Virgin Islands, Inc., ships merchandise to respondent Delaware Watch Company, Inc., and the latter corporation then clears this merchandise through Customs and sees that it gets to the destination to which it was originally shipped. This assertedly is its sole function. Respondent Shaw testified that the New York corporation (Delaware) does not buy or sell any merchandise. It is noted, however, that respondents in their joint answer herein, including respondent Delaware, admitted that they now and for some time have engaged in the advertising, offering for sale, and selling of watches to wholesalers, retailers and premium users, for distribution to the public. As the examiner noted, this answer was prepared by respondents' counsel of record who has had long familiarity with the business affairs of respondents Steven Vogel and Leslie Shaw. In view of such admission, it is not readily apparent why the hearing examiner dismissed the complaint as to respondent Delaware Watch Company, Inc. He was clearly in error in so doing.

Furthermore, even without the admission, there is a sufficient showing to hold Delaware along with the other respondents responsible for the acts and practices charged. The individual respondents, Vogel and Shaw, were the sole managers of both corporations. The businesses of the two corporations were operated out of the same premises, and each corporation apparently was assigned different complementary functions in connection with the overall business. The business was essentially an individually owned and operated affair. This is emphasized by the fact that some of the business was conducted through a partnership composed of the individual respondents. In all the circumstances, we believe that the business affairs of the two corporations were so conducted and so interwoven as to make both responsible for the acts and practices herein charged and proved. See *Lifetime, Inc., et al.*, Docket No. 7616 (Decision of the Commission, December 1, 1961) [59 F.T.C. 1231].

#### *Preticketing*

The complaint charges that respondents for the purpose of inducing the purchase of their products have engaged in the practice of attaching or causing to be attached price tickets to their products upon which certain amounts are printed and that they have also disseminated advertising literature upon which certain amounts are shown as retail prices of their products. Respondents thereby represent, according to the complaint, that said amounts are the usual and regular retail prices of the products, whereas, in truth, the amounts

shown are not the usual and regular prices of the products but are in excess thereof. It is also charged that through the use of such practices, as well as others, respondents have supplied to dealers and retailers a means and instrumentality whereby they may mislead and deceive the purchasing public.

The hearing examiner dismissed this preticketing charge and we concur in his action. The record lacks substantial evidence as to the usual and regular retail prices of respondents' watches in any market area.

Counsel supporting the complaint adduced evidence of preticketing for only one market, namely, Newark, New Jersey. It appears that there is but one dealer (in this market) who distributes respondents' watches of the type involved. The dealer referred to is the Alben Jewelry Company, also known as Alben Jewelers, 206 Washington Street, Newark, New Jersey. The theory of complaint counsel appears to be that the prices charged by this single dealer are the usual and regular prices at which respondents' watches are sold at retail in that market. The further contention is that these prices are substantially less than the alleged preticketed prices.

The evidence as to the regular prices at which Alben Jewelers sold watches obtained from respondents included some testimony as to this dealer's usual markup over its costs. This evidence, however, is very inconclusive. Marvin Silverstein, associated with Alben Jewelers, testified that the markup on respondents' watches varied and would be "Any place, I imagine, from 25 percent over cost to two and a half times cost or two times cost." However, even if it were certain that Alben Jewelers' markup was a fixed percentage over its costs, such a fact would prove very little. On this record it could be related at most only to two watch exhibits allegedly falsely preticketed.

These two watches were purchased from Alben Jewelers by a Government investigator. One of the watches was a 17-jewel ladies' wrist watch sold by A. Schwarcz & Sons, Inc., to Alben Jewelers for \$9.95. When purchased by the investigator, it had attached to it a ticket which read: "39.95 fed. tax inc., Delaware." The other was a 7-jewel ladies' wristwatch sold to Alben Jewelers by A. Schwarcz & Sons, Inc., for \$6.50. The latter watch had the word "Delgard" printed on its face. In the box in which it was enclosed was a price tag or ticket with the printed figures "\$19.95." These watches were purchased by the Government investigator for the amounts of \$17.00 and \$12.48 respectively. The contention is that such prices were the usual and regular prices of these watches in the Newark market. This is not necessarily so. Evidence of one or two isolated sales at less than the

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preticketed price is as equally probative of a valid "sale" on the part of the dealer involved as it is of a deceptive practice. *Rayex Corp. v. Federal Trade Commission*, 317 F. 2d 290 (2d Cir. 1963) [7 S.&D. 696]. In the circumstances, the evidence is insufficient to prove the usual and regular retail prices of respondents' watches in this market. For this reason, the charge in the complaint that respondents have preticketed their watches at fictitious retail prices was properly dismissed, and the exceptions to this part of the initial decision will be denied.

*Country of Origin*

Another charge in the complaint is that respondents have misled the public as to the origin of certain of the watchcases housing their watches by failing to mark such cases to show that they were made in Hong Kong. In connection with this charge, the examiner found and concluded that in the absence of any disclosure on the watchcases as to the country of their origin a substantial number of consumers would be misled and deceived into believing that the watchcases of certain of respondents' watches assembled with Swiss watch movements, with the word "Swiss" inscribed on the dials, and Hong Kong cases, were made either in the United States or in Switzerland. On this finding, he entered an order which would prohibit the offering for sale or the selling of watches, the cases of which are of foreign origin, without clearly and conspicuously disclosing on the *interior of the watchcase back* the name of the foreign country of origin, preceded by the words "Case made in."

The record shows that respondents receive substantial quantities of Hong Kong watchcases through importers. The backs and bezels (or fronts) are imported separately, but they are made by the same manufacturer and are designed to be assembled together into one unit in the United States. Separate shipments of these parts are made only because of a savings in import duty. Thus, the backs and bezels are, in reality, a watchcase unit. The significance of these case parts and the unit into which they are assembled in the composition of a watch is clearly apparent. As a unit they will play the entire role in providing protection to the watch movement. If the watch is a "water resistant" type, for instance, the watchcase parts will provide this form of protection. While the case becomes a component of the assembled watch, it is a principal and observable component. Its appearance and quality are factors of prime importance in the salability of the watch. The watch case does not lose its identity in the manufacture of the watch, but retains its essential characteristics as a foreign made product. Moreover, the record supports the

conclusion that many consumers are interested in the place of origin of watchcases and that they prefer American-made cases over watchcases made in Hong Kong. In these circumstances, a requirement in the order for appropriate disclosure of the country of origin is clearly justified. The only question before us is the form the order should take. See *L. Heller & Son, Inc. v. Federal Trade Commission*, 191 F.2d 954, 956 (7th Cir. 1951); *Segal v. Federal Trade Commission*, 142 F.2d 255 (2d Cir. 1944); *Manco Watch Strap Co., Inc.*, Docket No. 7785 (March 13, 1962) [60 F.T.C. 495]; *Baldwin Bracelet Corp.*, Docket No. 8316 [61 F.T.C. 1345]; *Hilton Watch & Clock Co., Inc.*, Docket No. 8402 [61 F.T.C. 742]; *William Adams, Inc.*, 53 F.T.C. 1164.

It seems obvious to us that the order entered by the examiner would be singularly ineffective in preventing the deception which he found. Prospective purchasers rarely have an opportunity to see inside the back of a watch before purchase; hence, a marking on the interior of the case would be little better than no marking at all.

The argument has been made that the marking of the country of origin on some small watches cannot be accomplished without defacement. The solution is to provide that the information may be placed on a tag securely attached to the watch. Another argument advanced is that the use of Hong Kong on the part may mislead consumers to believe that the whole watch is made in Hong Kong. There should be no great difficulty, however, in marking so as to make clear that only the part is of Hong Kong origin. This might be accomplished by use of the phrase "Case made in."

We therefore conclude that the order in the initial decision should be modified to require proper disclosure of the country of origin on the exterior of watchcases or parts with the provision that the disclosure may be made by means of a label or a tag affixed to the watch with a degree of permanency sufficient to assure that it will remain there until the watch is sold to a consumer.

#### *Composition of Bezels (watchcase fronts)*

The complaint charges respondents with misleading and deceiving the purchasing public into believing that the bezels of certain of their watchcases are composed of precious metals or stainless steel whereas they are in fact made of base metals which have been treated or processed to simulate precious metal or stainless steel. The hearing examiner found this allegation to have been sustained and entered an order requiring disclosure of the true metal composition of base metal parts which have been so treated or processed. Respondents have taken exception to his findings and order on this issue. Their

main contention appears to be that the finding as to metal content of the bezels was unsupported by reliable, substantial and competent evidence.

Respondents are not now in a position to make this contention. In their answer to the complaint, they expressly admitted the first paragraph of Paragraph 6 thereof, which reads as follows:

Certain of the watches offered for sale and sold by respondents are in cases which consist of two parts, that is, a back and bezel. The back part has the appearance of stainless steel and is marked "stainless steel back". The bezel is composed of base metal other than stainless steel which has been treated or processed to simulate or have the appearance of precious metal or stainless steel. Some of the bezels are finished in a color which simulates silver or silver alloy or stainless steel. Some of the bezels are finished in a color simulating gold or gold alloy. Said watchcases are not marked to disclose that the bezels are composed of base metal or metal other than stainless steel.

Thus, the practice of simulating precious metal or stainless steel and the failure to mark so as to disclose that the parts are composed of metal other than that mentioned is admitted. Moreover, there is evidence in the record, and the examiner found, that purchasers would be deceived by the appearance of the bezels. This evidence includes the testimony of a consumer witness and the exhibits themselves. In the circumstances, the record clearly supports the finding that respondents' failure to properly mark the bezels has the tendency and capacity to mislead and deceive the purchasing public as to the metal content of such bezels. See *Theodore Kagen Corp. v. Federal Trade Commission*, 283 F. 2d 371 (D.C. Cir. 1960) [6 S.&D. 837], *cert. denied*, 365 U.S. 843.

#### *Water Resistance*

Respondents concede that they have marked and advertised their watches as "water resistant," but contend that the record fails to prove the falsity of this claim.

First, one of respondents' watches failed to pass the "water resistance" test described in Rule 2 of this Commission's Trade Practice Rules for the watch industry, April 24, 1947, 16 CFR 170.2 (text at CX 20, and appendix, initial decision [p. 519 herein]). The substance of that Rule is that a claim of water resistance shall not be deemed false and deceptive, and hence not violative of Section 5 of the Federal Trade Commission Act, *Helbros Watch Co.*, Docket No. 6807 (December 26, 1961), *aff'd*, 310 F. 2d 868 (D.C. Cir. 1962) [7 S.&D. 596], if, after "complete immersion of the case or watch for at least 3 minutes in water at a pressure equivalent to a depth of 26 feet of water under normal atmospheric pressure of 15 pounds per square inch," the watch is not then "admitting, or showing any

evidence of capacity to admit, any moisture or water." Rule 2(c), Test No. 2. (A watch represented as "waterproof," as contrasted with merely "water resistant," is tested by severer standards. See Rule 1(d), Test No. 1.)

Respondents' watch, which bore on the back of its case the engraved term "WATERRESISTANT" (CX 9-A), was tested by an independent testing company, Lucius Pitkin, Inc., of New York City. The technician who administered the test, Mr. F. H. Wright, an official of the company, testified that he conducted the test as follows: "The watch was immersed in one inch of distilled water in a strong glass flask, and pressure applied for three minutes, then released. The pressure was measured as 22.95 inches on a Mercury Manometer, and was equivalent to a depth of 26 feet of water under normal atmospheric pressure." He stated that "water entered the watch, and when the required pressure was released at the end of the test, bubbles of air were seen to escape from the watch into the water above." His written report (CX 21-A) corroborated his oral testimony: "Moisture condensed on inside of crystal. Air bubbles came from stem when pressure was released. Watch had been running, but stopped during pressure test."

Respondents have not challenged the reasonableness of the testing standards described in the Rules. *Helbros Watch Co., supra*, opinion of the Commission. Nor do we understand that they challenge the technical skill and competence with which the test was administered. Their objections are (1) that the watch had been damaged, and its water-resisting properties thus impaired, prior to its delivery to the testing laboratory, (2) that more than one watch (respondents suggest at least four) should have been tested, and (3) that there is no proof the watch tested had been sold in interstate commerce.

We see no merit in any of these contentions. In support of the first, respondents point to the fact that they found the back of the tested watch "loose" at the hearing, and found microscopic scratch marks on it. As to the latter, there was no showing that this so-called "damage" to the watch was the proximate cause of the leakage disclosed by the test. Expert testimony indicated that the watch leaked because of its particular type of construction, *i.e.*, that it would have been "very difficult to make this case water resistant." And as to the "looseness" of the case at the time of the hearing, a highly qualified watch expert, a man with special training and experience with water resistant watches, testified that he had examined and "tightened" the watch immediately before it was tested. The custody of the exhibit (CX 9-A) was fully accounted for from the time of its purchase by a Commission attorney until the test was completed.

Immediately after purchase it was hand carried to the watch expert, Mr. Jean Felber, who made a routine opening and closing of the case to be sure it *was* in a proper condition for taking a water resistance test. He testified that he opened and closed the case "the way any watch-maker would do this in servicing" it, that he had used the proper tool, that he had performed the opening and closing carefully, and that he had returned it to the Commission's attorney "in the same condition" as he had received it. The Commission's attorney then hand carried the watch to the testing laboratory, where the test was performed in the attorney's presence. The technician that administered the test stated that he had "handled the watch very gently throughout the testing, without doing anything mechanical to it." Since the condition of the watch at the time it was tested (November 1960) has thus been thoroughly established, the unexplained "looseness" of the case found at the hearing more than a year later does not affect the validity of the test. If respondents are arguing that the "water resistant" properties possessed by their watches are so delicate that they cannot survive a routine opening and closing of the case by a specially trained expert using an ordinary jeweler's tool, then respondents should qualify their "water resistant" claim so as to inform purchasing customers that the claim is valid only until the watch's first trip to the jeweler for a routine cleaning or repairing. See "Note," Rule 2(b) (CX 20).

As to respondents' contention that several watches should have been tested in order to present some kind of statistical sample, it should be noted first that, since the watch tested had been purchased at random from the shelf of a retail store, it can hardly be considered a hand-picked specimen. More importantly, however, respondents' own testimony confirmed the fact that a substantial percentage of their watches cannot pass the water resistant test. According to this testimony, the watchcases they buy are merely "spot-checked." First, 10% of them, selected at random, are given the test described in Rule 2(c) in Hong Kong, by the manufacturer. Then, upon their arrival in this country, the importer selects another random 10% for testing. Finally, respondents themselves, after purchase from the importer, "spot check" 20 out of each 100 watches received. Delaware's president described the results of these tests: "Usually, what happens is that out of 20, two or three are dissatisfactory, which then will be adjusted by either changing the rubber gasket or changing the crystal or making any necessary repairs or adjustments that may be required." It is a fair inference that, of the 80 *untested* watches, the same percentage would be found "dissatisfactory," *i.e.*, 8 to 12 of those 80 watches (or about 10%) are leakers. As to each of these,

respondents' "water resistant" claim was false and misleading, and in violation of Section 5 of the Federal Trade Commission Act. (Respondents cannot claim for this "spot checking" procedure the protection of Rule 2(c); its benefits can only be claimed where there has been a "complete immersion of *the* case or watch," *i.e.*, a testing of each and every watch represented as "water resistant.")

It need not be shown that *all* of respondents' watches would fail to meet a reasonable test of "water resistance." As we said in *Helbros Watch Co., supra*, "the showing that several watches selected at random were not water resistant was sufficient to sustain the charge even though another group of watches might be found to be water resistant. We [agree] that since respondents have undertaken to make an affirmative representation concerning their watches, they must bear the responsibility if this representation is not true with respect to a portion of the watches." Here, respondents' own testimony establishes that some 10% of the approximately 40,000 "water resistant" watches they sell annually (or some 4,000 watches sold per year) would not pass the water resistance test. Therefore, we do not see how respondents would have benefited in this case by our testing 3 more watches. Even if the other 3 had successfully passed the test—indeed, if we had tested another 9 and all 9 of them had passed the test—we would still be constrained to find, on the basis of the fact that 1 out of a total of 10 had failed, and on the basis of respondents' own testimony that 1 out of 10 fails to pass the test they administer themselves, that respondents had misrepresented the "water resistant" properties of a substantial portion of their watches.

As to respondents' further contention on the matter of interstate commerce, the hearing examiner expressly found that Commission Exhibit 9-A, the watch tested for water resistance, was sold in interstate commerce. This exhibit is a watch identified by the respondents with the number W-865. A watch of this type was sold to Alben Jewelers on an invoice dated January 5, 1960, identified on Commission Exhibit 11. The watches specified on this invoice were mailed to Alben Jewelers in Newark and, therefore, were transported in interstate commerce. It appears likely that the watch identified on Commission Exhibit 11 and the physical exhibit (CX 9-A) are one and the same, and the examiner in effect so found. Thus, at least one of respondents' watches marked with the term "water resistant," a representation found to be false, was sold in interstate commerce.

However, apart from this specific exhibit, the charge of misrepresentation in connection with the use of the term "water resistant" is proved. Respondents have admitted a substantial course of trade in their products in interstate commerce and the examiner found, as

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the evidence shows, that substantially all of respondents' purchases of water resistant watchcases were of a type so constructed as to make them vulnerable to water leakage. Also, as pointed out above, a large number of respondents' watches failed to be water resistant under the minimum standard set out in Rule 2(c) of the Trade Practice Rules promulgated April 24, 1947.

We hold that charges on use of the term "water resistant" are sustained. The hearing examiner's order will be modified so as to permit the use of the term "water resistant" where respondents' watches in fact meet the standards for a water resistant watch.

The exceptions of complaint counsel and the exceptions of the respondents are, respectively, sustained to the extent above indicated and otherwise rejected. It is ordered that the initial decision be modified in accordance with the views expressed in this opinion and that as modified adopted as the decision of the Commission. An appropriate order will be entered.

ORDER MODIFYING AND ADOPTING INITIAL DECISION AND PROVIDING  
FOR THE FILING OF OBJECTIONS TO PROPOSED FINAL ORDER AND REPLY

JUNE 19, 1963

This matter having been heard by the Commission upon the exceptions of counsel supporting the complaint and the respondents to the hearing examiner's initial decision and upon briefs and oral argument in support of and in opposition to the exceptions respectively taken; and

The Commission, for the reasons stated in the accompanying opinion, having sustained in part and rejected in part the exceptions of complaint counsel and of respondents, and having further ordered that the initial decision be modified in accordance with the views therein expressed and as so modified adopted as the decision of the Commission:

*It is ordered,* That all of the words beginning with the last sentence in the continued paragraph, line 6, on page 499 and ending with the second full paragraph on page 501 of the initial decision be, and they hereby are, stricken, and that the following be substituted therefor:

The record contains no substantial probative evidence as to the usual and regular retail prices for respondents' watches in the Newark, New Jersey, market or in any other market. The record is further deficient on this issue in that it is not clear that the respondents were responsible for placing the price tickets on the watches which were put in evidence to show the practice of

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preticketing. It is therefore concluded that complaint counsel has not sustained the burden of proof on the preticketing issue and that the complaint on such issue should be dismissed.

*It is further ordered,* That the paragraphs beginning with the third full paragraph on page 512 and ending with the second full paragraph on page 513 of the initial decision be, and they hereby are, stricken and that the following be substituted therefor:

Finally, the conclusion is based upon the showing that a substantial number of respondents' watches fail the tests provided for in Rule 2(c) of the Commission's Trade Practice Rules for the watch industry promulgated April 24, 1947. Respondent Shaw testified that out of every test group (20 watches selected from each 100 assembled watches), there would be 2 or 3 watch-cases which would not meet the tests. While these would be repaired before sale, it is apparent that statistically, at least, a substantial number of watches in the untested group would fail the tests, *i.e.*, 10% or more. The watch tested (Commission Exhibit 9-A) was a random selection in that it was purchased off a dealer's shelf, and the failure of this watch to pass a test provided in Rule 2(c) confirms the showing that a large number of respondents' watches would fail such tests.

The tests set forth in the aforementioned Rules for the watch industry were worked out in close cooperation with the watch industry and, in the circumstances, may be accepted as establishing a reasonable minimum standard. It is significant that respondents themselves by using a test prescribed in the Rules in their own testing procedures seem to accept such test as a reasonable standard for determining "water resistant" qualities. The tests in Rule 2(c), it should be pointed out, are not the only tests, which would be acceptable to show "water resistant" capability. A more severe test might be used. These tests, however, establish a minimum performance standard. Since large numbers of respondents' watches failed or would fail such tests, it is found that such watches are not "water resistant".

*It is further ordered,* That on page 498 of the initial decision in the last paragraph thereof the price of \$9.95 be, and it hereby is, substituted for the price of \$10.50.

*It is further ordered,* That on page 503 of the initial decision in the third full paragraph the portion beginning with the words "Although the issue" to the end of the paragraph be stricken and the following substituted therefor: "CX 9-A is found to be in 'commerce'".

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*It is further ordered,* That the following paragraphs or portions thereof contained in the initial decision be, and they hereby are, stricken:

1. Page 497, the words in the continued paragraph, line 5, beginning with the line "Notwithstanding this admission, the uncontradicted" to the end of that paragraph and all of the first full paragraph.
2. Page 497, the heading "Dismissal as to DWC" and the two paragraphs under this heading.
3. Page 502, the third and fourth full paragraphs.
4. Page 505, the last paragraph.
5. Page 507, the first paragraph.
6. Pages 515 through 518, all paragraphs beginning with the last paragraph at the bottom of page 515 and ending with the first paragraph on page 518, inclusive, except for the first full paragraph on page 516.

*It is further ordered,* That the phrase "except DWC" be, and it hereby is, stricken in each of the three paragraphs in which it appears under the heading "Overall Findings of Ultimate Fact" in the initial decision.

*It is further ordered,* That respondents may, within twenty (20) days after service upon them of this order, file with the Commission their objections to the changes in the order to cease and desist contained in the initial decision, as shown by the following proposed order\* of the Commission, together with a statement of the reasons in support of their objections and a proposed alternative form of order appropriate to the Commission's decision.

## FINAL ORDER

AUGUST 15, 1963

Pursuant to § 4.22(c) of the Commission's Rules of Practice, respondents were served with the Commission's decision on appeal and afforded the opportunity to file exceptions to the form of order which the Commission contemplates entering; and

Respondents having made timely filing of their exceptions to the order proposed which were opposed by counsel supporting the complaint, and the Commission, upon review of these pleadings, having determined that respondents' exceptions constitute reargument of

\*The proposed order to cease and desist is omitted, entered as the final order of the Commission.

matters thoroughly considered by the Commission upon its review of the initial decision and do not constitute a showing that the proposed order to cease and desist is inappropriate in any way; and

The Commission having concluded, therefore, that respondents' exceptions should be disallowed and that the order as proposed should be entered as the final order of the Commission:

*It is ordered,* That respondents Delaware Watch Company, Inc., a corporation, A. Schwarcz & Sons, Inc., a corporation, and their officers, Steven Vogel and Leslie Shaw, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of watches or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) That their products are guaranteed, unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

(b) That their watches are "water resistant," it being understood that respondents may successfully defend the use of such representation with respect to any watch, the case of which respondents can show will provide protection against water or moisture to the extent of meeting the test designated test No. 2 of the Trade Practice Conference Rules for the Watch Industry, as set forth in the Code of Federal Regulations, Title 16, Chapter 1, Part 170.2(c) (16 CFR 170.2(c)).

2. Offering for sale or selling watches, the cases of which are in whole or in part composed of base metal which has been treated to simulate precious metal or stainless steel, without clearly and conspicuously disclosing on such cases the true metal composition of such treated cases or parts.

3. Offering for sale or selling watches, the cases of which are in whole or in part of foreign origin, without affirmatively disclosing the country or place of foreign origin thereof on the exterior of the cases of such watches on an exposed surface or on a label or tag affixed thereto of such degree of permanency as to remain thereon until consummation of consumer sale of the watches and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers.

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4. Supplying to, or placing in the hands of, any dealer or other purchaser, means or instrumentalities by and through which they may deceive and mislead the purchasing public as to the national origin of their watchcases, the metal composition of their watchcases and the moisture resistant capacity of their watches.

*It is further ordered,* That the initial decision as modified by the Commission's order of June 19, 1963, be, and it hereby is, adopted as the decision of the Commission.

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

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IN THE MATTER OF

MAX M. BARTH TRADING AS CHARLES BARTH & SON

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE  
FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

*Docket C-568. Complaint, Aug. 16, 1963—Decision, Aug. 16, 1963*

Consent order requiring a Chicago manufacturing furrier to cease violating the Fur Products Labeling Act by labeling spotted cat fur as "Leopard Cat" and labeling and invoicing other fur products improperly as "Broadtail"; failing on labels and invoices, to show the true animal name of furs, to disclose when fur was artificially colored, and to use the term "Dyed Broadtail-processed Lamb" as required; failing to use the word "natural" on labels where applicable, and to show the country of origin of imported furs on invoices; substituting nonconforming labels for those originally affixed to fur products; and failing in other respects to comply with labeling and invoicing requirements.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Max M. Barth, an individual trading as Charles Barth & Son, hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling 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 Max M. Barth is an individual trading as Charles Barth & Son.

Respondent is a manufacturer, wholesaler and retailer of fur products with his office and principal place of business located at 190 North State Street, Chicago, Illinois.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent has been and is now engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and has manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were falsely and deceptively labeled or otherwise falsely or deceptively identified with respect to the name or designation of the animal or animals that produced the fur from which the said fur products have been manufactured, in violation of Section 4(1) of the Fur Products Labeling Act.

Among such misbranded fur products, but not limited thereto, were fur products which were labeled as Leopard Cat when the fur contained in such products was, in fact, Spotted Cat.

Also among such misbranded fur products, but not limited thereto, were fur products labeled as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designation.

PAR. 4. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed:

1. To show the true animal name of the fur used in the fur product.
2. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.

PAR. 5. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in

accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "Dyed Broadtail-processed Lamb" was not set forth on labels in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

(b) The term "natural" was not used on labels to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(c) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in handwriting on labels, in violation of Rule 29(b) of said Rules and Regulations.

(d) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth in the required sequence, in violation of Rule 30 of said Rules and Regulations.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced by the respondent in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed:

1. To show the true animal name of the fur used in the fur product.
2. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.
3. To show the country of origin of imported furs used in fur products.

PAR. 7. Certain of said fur products were falsely and deceptively invoiced with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products which were invoiced as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designation.

PAR. 8. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they

were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "Dyed Broadtail-processed Lamb" was not set forth on invoices in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

(b) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 9. Respondent in introducing, selling, advertising, and offering for sale, in commerce, and in processing for commerce, fur products; and in selling, advertising, offering for sale and processing fur products which have been shipped and received in commerce, has misbranded such fur products by substituting thereon, labels which did not conform to the requirements of Section 4 of the Fur Products Labeling Act, for the labels affixed to said fur products by the manufacturer or distributor pursuant to Section 4 of said Act, in violation of Section 3(e) of said Act.

PAR. 10. The aforesaid acts and practices of respondent, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

#### DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Max M. Barth is an individual trading as Charles Barth & Son with his office and principal place of business located at 190 North State Street, Chicago, Illinois.

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2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

*It is ordered*, That respondent Max M. Barth, an individual trading as Charles Barth & Son, or under any other trade name and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped or received in commerce, as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

## A. Misbranding fur products by:

1. Falsely or deceptively labeling or otherwise identifying any such fur product as to the name or designation of the animal or animals that produced the fur contained in the fur product.
2. Failing to affix labels to fur products showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.
3. Failing to set forth the term "Dyed Broadtail-processed Lamb" on labels in the manner required where an election is made to use that term in lieu of the term "Dyed Lamb".
4. Failing to set forth the term "Natural" as part of the information required to be disclosed on labels under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.
5. Setting forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in handwriting on labels affixed to fur products.
6. Failing to set forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder on labels in the sequence required by Rule 30 of the aforesaid Rules and Regulations.

## B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed in each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.
2. Setting forth on invoices pertaining to fur products any false or deceptive information with respect to the name or designation of the animal or animals that produced the fur contained in such fur product.
3. Failing to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb".
4. Failing to set forth on invoices the item number or mark assigned to fur products.

*It is further ordered,* That respondent Max M. Barth, an individual trading as Charles Barth & Son, or under any other trade name and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, sale, advertising or offering for sale, in commerce, or the processing for commerce, of fur products; or in connection with the selling, advertising, offering for sale, or processing of fur products which have been shipped and received in commerce, do forthwith cease and desist from misbranding fur products by substituting for the labels affixed to such fur products pursuant to Section 4 of the Fur Products Labeling Act labels which do not conform to the requirements of the aforesaid Act and the Rules and Regulations promulgated thereunder.

*It is further ordered,* That the respondent herein shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order.

By the Commission, Commissioner Elman not participating.

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IN THE MATTER OF

STANLEY NEWCOMB TRADING AS  
STAN NEWCOMB FIFTH AVENUE

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE  
FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

*Docket C-569. Complaint, Aug. 16, 1963—Decision, Aug. 16, 1963*

Consent order requiring a San Diego, Calif., retail furrier to cease violating the Fur Products Labeling Act by representing falsely, on labels and in

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newspaper advertising, that prices of fur products had been reduced from regular prices which were, in fact, fictitious; failing to use the term "natural" in labeling, invoicing and advertising for furs which were not artificially colored; failing to show the true animal name of fur on labels and invoices and in advertising; failing to keep adequate records disclosing the basis for pricing claims; and failing in other respects to comply with requirements of the Act.

#### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Stanley Newcomb, an individual trading as Stan Newcomb Fifth Avenue, hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling 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 Stanley Newcomb is an individual trading as Stan Newcomb Fifth Avenue.

Respondent is a retailer of fur products with his office and principal place of business located at 2706 Fifth Avenue, San Diego, California.

**PAR. 2.** Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent has been and is now engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and has sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

**PAR. 3.** Certain of said fur products were misbranded in that labels affixed thereto represented that the prices of such fur products had been reduced from regular or usual prices of said fur products and that the amount of such reductions constituted savings to purchasers when the so-called regular or usual prices were in fact fictitious in that they were not the prices at which said merchandise was usually sold by respondent in the recent regular course of business and the represented savings were not thereby afforded to purchasers, in violation of Section 4(1) of the Fur Products Labeling Act.

**PAR. 4.** Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of

the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed to show the true animal name of the fur used in the fur product.

PAR. 5. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "natural" was not used on labels to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(b) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in handwriting on labels, in violation of Rule 29(b) of said Rules and Regulations.

(c) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth in the required sequence, in violation of Rule 30 of said Rules and Regulations.

(d) Required item numbers were not set forth on labels, in violation of Rule 40 of said Rules and Regulations.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced by the respondent in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed to show the true animal name of the fur used in the fur product.

PAR. 7. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(b) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 8. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that cer-

tain advertisements intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements but not limited thereto, were advertisements of respondent which appeared in issues of the San Diego Union, a newspaper published in the city of San Diego, State of California.

Among such false and deceptive advertisements, but not limited thereto, were advertisements which failed to show the country of origin of imported furs contained in fur products.

PAR. 9. By means of the aforesaid advertisements and other advertisements of similar import and meaning not specifically referred to herein, respondent falsely and deceptively advertised fur products in that said advertisements represented that the prices of fur products were reduced from regular or usual prices and that the amount of such reductions afforded savings to the purchasers of respondent's products, when the so-called regular or usual prices were in fact fictitious in that they were not the prices at which said merchandise was usually sold by respondent in the recent regular course of business and the represented savings were not thereby afforded to the purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations promulgated under the said Act.

PAR. 10. Respondent falsely and deceptively advertised fur products by affixing labels thereto which represented that prices of such fur products had been reduced from regular or usual prices of such products and that the amount of such reductions constituted savings to purchasers when the so-called regular or usual prices were in fact fictitious in that they were not the prices at which said merchandise was usually sold by respondent in the recent regular course of business and the represented savings were not thereby afforded to purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations.

PAR. 11. In advertising fur products for sale as aforesaid respondent represented through such statements as "20-50% off" that prices of fur products were reduced in direct proportion to the percentages stated and that the amount of said reduction afforded savings to the purchasers of respondent's products when in fact such prices were not reduced in direct proportion to the percentages stated and the represented savings were not thereby afforded to the said purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 12. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondent falsely and deceptively advertised fur products in violation of the Fur Products Labeling Act in that the said fur products were not advertised in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "natural" was not used to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of the said Rules and Regulations.

(b) All parts of the information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder were not set forth in type of equal size and conspicuousness in close proximity with each other, in violation of Rule 38(a) of the aforesaid Rules and Regulations.

PAR. 13. In advertising fur products for sale, as aforesaid, respondent made pricing claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Regulations under the Fur Products Labeling Act. Respondent in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such pricing claims and representations were based, in violation of Rule 44(e) of the said Rules and Regulations.

PAR. 14. The aforesaid acts and practices of respondent, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

#### DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by re-

spondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Stanley Newcomb is an individual trading as Stan Newcomb Fifth Avenue, with his office and principal place of business located at 2706 Fifth Avenue, San Diego, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

*It is ordered*, That Stanley Newcomb, an individual trading as Stan Newcomb Fifth Avenue, or under any other trade name, and respondent's representatives, agents and employees directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce of any fur product; or in connection with the sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce; as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Falsely or deceptively labeling or otherwise identifying such products by any representation that any price, when accompanied or unaccompanied by any descriptive language, was the price at which the merchandise was in fact usually and customarily sold by respondent at such price in the recent past.

2. Misrepresenting in any manner on labels or other means of identification the savings available to purchasers of respondent's products.

3. Falsely or deceptively representing in any manner, directly or by implication, on labels or other means of identification that prices of respondent's fur products are reduced.

4. Failing to affix labels to fur products showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

5. Failing to set forth the term "Natural" as part of the information required to be disclosed on labels under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

6. Setting forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in handwriting on labels affixed to fur products.

7. Failing to set forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder on labels in the sequence required by Rule 30 of the aforesaid Rules and Regulations.

8. Failing to set forth on labels the item number or mark assigned to a fur product.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed in each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Failing to set forth the term "Natural" as part of the information required to be disclosed on invoices under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

3. Failing to set forth on invoices the item number or mark assigned to fur products.

C. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement or notice which is intended to aid, promote or assist, directly or indirectly, in the sale, or offering for sale of any fur product and which:

1. Fails to set forth in words and figures plainly legible all the information required to be disclosed by each of the

subsections of Section 5(a) of the Fur Products Labeling Act.

2. Fails to set forth the term "Natural" as part of the information required to be disclosed in advertisements under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

3. Fails to set forth all parts of the information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in type of equal size and conspicuousness and in close proximity with each other.

4. Represents, directly or by implication, that any price when accompanied or unaccompanied by any descriptive language, was the price at which the merchandise advertised was usually and customarily sold at retail by the respondent unless such advertised merchandise was in fact usually and customarily sold at retail at such price by respondent in the recent past.

5. Misrepresents in any manner the savings available to purchasers of respondent's fur products.

6. Falsely or deceptively represents in any manner that prices of respondent's fur products are reduced.

7. Represents directly or by implication through percentage savings claims that prices of fur products are reduced to afford purchasers of respondent's fur products the percentage of savings stated when the prices of such fur products are not reduced to afford to purchasers the percentage of savings stated.

D. Making claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act unless there are maintained by respondent full and adequate records disclosing the facts upon which such claims and representations are based.

*It is further ordered,* That the respondent herein shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order.

By the Commission, Commissioner Elman not participating.

## Complaint

IN THE MATTER OF  
TROY YARN & TEXTILE CO. ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE  
FEDERAL TRADE COMMISSION AND THE TEXTILE FIBER PRODUCTS IDENTI-  
FICATION ACTS

*Docket C-570. Complaint, Aug. 23, 1963—Decision, Aug. 23, 1963*

Consent order requiring manufacturers of textile fiber products in Pawtucket, R. I., to cease their practice of failing to maintain proper records of the fiber content of the textile fiber products they sold and distributed in commerce.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Troy Yarn & Textile Co., a corporation, and Jacob Percelay, Morris Percelay, and Merrill Percelay, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations under the Textile Fiber Products Identification 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 Troy Yarn & Textile Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island.

Individual respondents Jacob Percelay, Morris Percelay, and Merrill Percelay are officers of the corporate respondent. They formulate, direct and control the acts, practices and policies of the corporate respondent, including those hereinafter set forth. Respondents are manufacturers of textile fiber products with their principal office and place of business located at 603 Mineral Spring Avenue, in the city of Pawtucket, State of Rhode Island.

PAR. 2. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondents have been and are now engaged in the introduction, delivery for introduction, manufacture for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported, and caused to be transported, textile fiber products, which

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have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, transported, and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Respondents have failed to maintain proper records showing the fiber content of the textile fiber products manufactured by them, in violation of Section 6(a) of the Textile Fiber Products Identification Act and Rule 39 of the Regulations promulgated thereunder.

PAR. 4. The acts and practices of respondents, as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

## DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Troy Yarn & Textile Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island with its office and principal place of business located at 603 Mineral Spring Avenue, in the city of Pawtucket, State of Rhode Island.

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Respondents Jacob Percelay, Morris Percelay, and Merrill Percelay are officers of said corporation, and their address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

*It is ordered,* That respondents Troy Yarn & Textile Co., a corporation and its officers and Jacob Percelay, Morris Percelay, and Merrill Percelay, 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 introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States of textile fiber products; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, textile fiber products, which have been advertised or offered for sale in commerce; or in the connection with the sale, offering for sale, advertising, delivery transportation, or causing to be transported, after shipment in commerce, of textile fiber products, whether in their original state or contained in other textile fiber products as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from failing to maintain records of fiber content of textile fiber products manufactured by them, as required by Section 6(a) of the Textile Fiber Products Identification Act and Rule 39 of the Regulations promulgated thereunder.

*It is further ordered,* That the respondents herein 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 this order.

## IN THE MATTER OF

## QUALITONE INDUSTRIES, INC., ET AL.

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

*Docket C-571. Complaint, Sept. 4, 1963—Decision, Sept. 4, 1963*

Consent order requiring New York City distributors of phonograph needles, record brushes and phonograph accessories to wholesalers and jobbers, to cease selling phonograph needles with Japanese and Swiss components

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with no disclosure of such foreign origin and with the words "Printed in U.S.A.", etc., on the individual packages and on counter display cards; packaging imported clip-on record brushes in such manner that the word "Japan" stamped into the metal was hidden until the brush was removed and attaching them for sale to counter display cards bearing the words "Printed and Made in U.S.A."; and using such false statements as "Karns 'Eternal' Diamond Stylus", guaranteed forever", etc., on containers of styli and in advertising, and the words "sapphire" or "jewel" to describe synthetic tips of phonograph needles on containers and on counter display cards.

## 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 Qualitone Industries, Inc., a corporation, and Saul J. Karns, Samuel Karns and Dorothy Karns, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Qualitone Industries, Inc., 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 at 102 Columbus Avenue in the city of Tuckahoe, State of New York.

Respondents Saul J. Karns, Samuel Karns and Dorothy Karns are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address 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 offering for sale, sale and distribution of phonograph needles, record brushes and phonograph accessories to wholesalers, distributors and jobbers for ultimate resale 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 products, 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 in 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, respondents sell to said wholesalers, distributors and jobbers phonograph needles which consist in whole or in substantial part, of components which were manufactured in and imported from Japan or Switzerland. When offered for sale or sold by respondents, said phonograph needles do not bear disclosure showing they are in whole or in substantial part of foreign origin. Respondents individually package the said phonograph needles and on said packages there appear the words "Qualitone Industries Inc., Tuckahoe, N. Y." and "Printed in the U.S.A." In addition to the packages enclosing said needles, respondents furnish counter display cards on which appear the words "Printed and Made in U.S.A." or "Printed in U.S.A."

PAR. 5. In the course and conduct of their business respondents sell to wholesalers, distributors and jobbers clip-on record brushes which are manufactured in and imported from Japan. Each said brush has the word "Japan" stamped into the metal on the back of the brush arm, but respondents individually package said brushes and mount them on a counter display card in such a manner that the word "Japan" is hidden and is not readily apparent unless the brush is removed from its package or unless the package is disassembled by the purchaser. The counter display cards to which the clip-on record brush packages are attached have the words "Printed and Made in U.S.A." imprinted thereon.

PAR. 6. The use of the aforesaid quoted words, statements and representations of origin appearing on respondents' packaging and counter display cards, hereinabove described in Paragraphs 4 and 5, tends to lead the public to believe that the said merchandise is of domestic origin.

PAR. 7. In the absence of an adequate disclosure that a product, including phonograph needles and clip-on record brushes, is of foreign origin, the public believes and understands that it is of domestic origin, a fact of which the Commission takes official notice.

As to the aforesaid articles of merchandise, a substantial portion of the purchasing public has a preference for said articles which are of domestic origin, of which fact the Commission also takes official notice. Respondents' failure clearly and conspicuously to disclose the country of origin of said articles of merchandise is, therefore, to the prejudice of the purchasing public.

PAR. 8. Through the use of such statements as "Karns 'Eternal' Diamond Stylus", "guaranteed forever" and "Guaranteed FOREVER Even Against Wear" in or on the containers in which said styli are offered for sale to the purchasing public and in advertising,

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respondents have represented that the said diamond styli are of such superior quality and durability that they will last and continue to reproduce with the same degree of fidelity and brilliance forever, without the necessity of repair, adjustment or replacement.

PAR. 9. In truth and in fact, respondents' said diamond styli are not of such superior quality and durability that they will last or continue to reproduce with the same degree of fidelity and brilliance forever, without the necessity of repair, adjustment or replacement. Therefore, the statements and representations referred to in Paragraph 8 are false, misleading and deceptive.

PAR. 10. In the course and conduct of their business as aforesaid, respondents have used the words "sapphire" or "jewel" to describe the points or tips of certain of their phonograph needles. These representations were made in catalogs, on counter display cards, on the packages and containers in which said needles are offered for sale to the public, and used in connection with the sale of respondents' products. Respondents have thereby represented that said phonograph needles have tips or points made of natural sapphires or jewels.

PAR. 11. In truth and in fact, the said needles do not have points or tips made of natural sapphires or jewels; but said needles have points or tips made of synthetic materials. Therefore, the statements and representations referred to in Paragraph 10 are false, misleading and deceptive.

PAR. 12. By the aforesaid acts and practices, respondents place in the hands of jobbers, retailers and dealers, the means and instrumentalities by and through which they may mislead the public as to the country of origin of the said products and as to the composition, durability and other qualities of their phonograph needles.

PAR. 13. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of phonograph needles, record brushes and other phonograph accessories of the same kind and nature as those sold by respondents.

PAR. 14. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said products are of domestic origin and that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 15. 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 of the Federal Trade Commission Act.

#### DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Qualitone Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 102 Columbus Avenue, in the city of Tuckahoe, State of New York.

Respondents Saul J. Karns, Samuel Karns and Dorothy Karns are officers of said corporation and their address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

#### ORDER

##### I.

*It is ordered,* That respondents Qualitone Industries, Inc., a corporation, and its officers, and Saul J. Karns, Samuel Karns and Dor-

Decision and Order

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othy Karns, 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 phonograph needles, record brushes, phonograph accessories or other related products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or indirectly, in advertising, or in labeling or by any other means that products manufactured in Japan, Switzerland or any other foreign country are manufactured in the United States.

2. Offering for sale or selling the aforesaid products which are substantially, or which contain a substantial part or parts, of foreign origin or fabrication without affirmatively disclosing the country of origin or fabrication thereof on the products themselves, by marking or stamping on an exposed surface, or on a label or tag affixed thereto, of such degree of permanency as to remain thereon until consummation of consumer sales of the products, and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers making casual inspection of the products.

3. Offering for sale, selling or distributing any such product packaged, or mounted in a container, or on a display card, without disclosing the country or place of foreign origin of the product, or substantial part or parts thereof, on the front or face of such packaging, container, or display card, so positioned as to clearly have application to the product so packaged or mounted, and of such degree of permanency as to remain thereon until consummation of consumer sale of the product, and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers making casual inspection of the product as so packaged or mounted.

4. Using the words "Eternal" or "guaranteed forever" or "guaranteed forever even against wear", or any other word or words of similar import, alone or in conjunction with any other word or words to designate, describe or refer to respondents' diamond stylus; or misrepresenting in any manner the useful life of said product.

5. Placing in the hands of jobbers, retailers, dealers, and others, means and instrumentalities by and through which they may deceive and mislead the purchasing public concerning any merchandise in the respects set out in Section I herein.

## II.

*It is further ordered,* That respondents Qualitone Industries, Inc., a corporation, and its officers, and Samuel Karns and Dorothy Karns, 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 phonograph needles, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "sapphire" or "jewel" or any other word or words denoting precious stones, in designating or describing the points or tips of phonograph needles made of synthetic material of the kind so designated, without clearly stating in immediate connection with such word or words, that such points or tips are synthetic.

2. Placing in the hands of jobbers, retailers, dealers, and others, means and instrumentalities by and through which they may deceive and mislead the purchasing public concerning any merchandise in the respects set out in Section II herein.

*It is further ordered,* That the respondents herein 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 this order.

By the Commission, Commissioner Elman not participating.

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 IN THE MATTER OF

## COVE VITAMIN AND PHARMACEUTICAL, INC., ET AL.

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

*Docket C-572. Complaint, Sept. 6, 1963—Decision, Sept. 6, 1963*

Consent order requiring two associated corporate distributors of safflower oil capsules in Glen Cove, N. Y., to cease making a variety of false representations in a book "Calories Don't Count", which they promoted jointly with the publishers, and in newspaper and magazine advertising, with regard to the importance of polyunsaturated fats in the diet and their effectiveness in reducing etc., as in the order below in detail set forth.

## 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