It is further ordered, That the hearing examiner's initial decision, as modified and supplemented by the Commission's opinion, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents, National Trade Publications Service, Inc., and Melvin R. Lindsey, 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 contained herein.

Commissioner Elman not participating.

IN THE MATTER OF

ART NATIONAL MANUFACTURERS DISTRIBUTING CO., INC., ET AL.

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

Docket 7286. Complaint, Oct. 24, 1958—Decision, May 10, 1961

Order requiring two associated concerns with common officers—a catalog mail order house and a watch manufacturer which made a substantial part of its sales through the former's catalog—to cease misrepresenting the size and extent of their business quarters, or the length of time in business; representing falsely that their "Louis" watches were shockproof, had been awarded a Gold Medal, were jeweled with rubies, and were guaranteed; and to cease preticketing their watches with excessive prices represented thereby as the usual retail prices.

Mr. Harry E. Middleton, Jr., for the Commission.

Mr. B. Paul Noble, of Washington, D. C., for respondents.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

This proceeding is based upon a complaint brought under §5 of the Federal Trade Commission Act, charging respondents with the use of unfair and deceptive acts and practices and unfair methods of competition in commerce in connection with the sale and distribution of various items of merchandise, including watches.

This proceeding is now before the Hearing Examiner for final consideration upon the complaint, answers thereto, testimony and other evidence, proposed findings of fact and conclusions of law filed by all parties. The Hearing Examiner has given consideration to the proposed findings of fact and conclusions submitted, and all find-

ings of fact and conclusions proposed by the parties, not hereinafter specifically found or concluded, are herewith rejected. The motion to dismiss the complaint filed by the respondents is denied.

The Hearing Examiner, having considered the entire record herein, makes the following findings as to the facts and conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

1. Respondents Art National Manufacturers Distributing Co., Inc., hereinafter referred to as "Art National", and Louis Watch Company, Inc., hereinafter referred to as "Louis Watch", are corporations organized, existing and doing business under and by virtue of the laws of the State of New York. Their offices and principal places of business are, respectively, 58–40 Borden Avenue, Maspeth, New York, and 580 Fifth Avenue, New York, New York.

2. Respondents Louis Friedman, Martin Friedman and Albert Friedman are officers of said corporations. The individual respondents have participated in the formulation, direction and control of the policies, acts and practices of the corporate respondents, and have cooperated in carrying on the practices hereinafter found, except that respondent Martin Friedman has not been shown to have participated in the conduct of the affairs of Louis Watch, although he was nominally an officer of that corporation.

3. The respondents are engaged in interstate commerce.

4. Respondents are in competition with other catalog merchandisers and watch importers.

5. Art National publishes catalogs, circulars and other printed material, and such material is disseminated in commerce.

6. Art National represented that it has been in business for thirty-two years. Art National, however, was organized and incorporated in 1951.

7. Louis Watch represented that it was established in 1904, but this firm was not organized and incorporated until 1932.

8. The corporate respondents impliedly represented that the buildings depicted in their advertising were entirely occupied by them, when in fact each of them occupied only a small portion of the buildings depicted in their advertising.

9. Art National represented that it sold its merchandise at America's lowest prices. However, competitors of Art National sold many of the same items of merchandise at prices as low as those of this respondent, and respondent, in many instances, did not sell at wholesale prices.

10. Louis Watch represented that its watches were Gold Medal Award winners, but its watches have never been awarded a gold medal or any other kind of medal.

11. Louis Watch represented that the jewels in its watches were rubies. The jewels in Louis watches were not rubies, but were made of synthetic material.

12. Louis Watch represented that certain of its watches were shockproof, but they were not shockproof.

13. Louis Watch represented that its watches carried a "full year's written guarantee", but the written guarantee furnished Louis Watch purchasers, against "any original defects or workmanship", did not set out the manner in which the guarantor would perform, nor was such disclosure made in the Louis Watch advertisements.

14. The evidence does not establish whether or not the suggested resale prices with which respondent Louis Watch preticketed its watches were the prices at which such watches were usually and customarily sold at retail. Those sold by Art National through its catalog were sold for substantially less than Louis Watch's preticketed prices, and a number of peddlers, discount dealers and wholesalers sold them at retail for less than the preticketed prices; but all of the retailers who operated retail jewelry stores, who were called as witnesses, sold them at the suggested resale or preticketed prices. The evidence does not permit a determination that the usual or customary resale prices were less than the preticketed prices, nor does it permit a determination that the preticketed prices were fictitious.

CONCLUSIONS

The allegations of the complaint relating to the preticketing of watches with fictitious retail prices have not been sustained by the evidence.

The other acts and practices of respondents, as hereinabove found, were all to the prejudice and injury of the public and of respondents' competitors, and constituted 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 respondent Art National Manufacturers Distributing Co., Inc., a corporation; its officers; respondents Louis Friedman, Martin Friedman and Albert Friedman, individually and as officers of said corporation; and their agents, representatives and

employees, directly or through any corporate or other device, in connection with the sale or distribution of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or indirectly:

1. That said corporation has been in existence, or that said corporation or individuals have been in business for any period or length of time that is not in accordance with the facts;

2. That respondents occupy any portion of buildings depicted that is not in accordance with the facts, or misrepresenting, in any manner, the size or extent of the buildings in which they carry on their business;

3. That respondent Art National Manufacturers Distributing Co., Inc. sells its merchandise at America's lowest prices, or misrepresenting in any other manner its prices as compared to those of its competitors;

4. That Louis watches are shockproof.

It is further ordered, That respondent Louis Watch Company, Inc., a corporation; its officers; respondents Louis Friedman and Albert Friedman, individually and as officers of said corporation; and their representatives, agents and employees, directly or through any corporate or other device, in connection with the sale or distribution of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or indirectly:

1. That said corporation has been in existence, or that said corporation or individuals have been in business for any period or length of time that is not in accordance with the facts;

2. That they occupy any portion of buildings depicted that is not in accordance with the facts, or misrepresenting, in any manner, the size or extent of the buildings in which they carry on their business;

3. That Louis watches have been awarded a Gold Medal or any other kind of medal;

4. That the jewels in Louis watches are rubies;

5. That Louis watches are shockproof.

OPINION OF THE COMMISSION

By Dixon, *Commissioner*:

The complaint in this proceeding was issued October 24, 1958. In it the respondents are charged with having made false, misleading and deceptive statements or representations in promotional material in connection with the interstate sale of a wide variety of goods including watches. It is alleged that these practices violate Section 5 of the Federal Trade Commission Act.

After an answer had been filed the respondents changed counsel and upon request were granted permission to file new and somewhat different answers. Issue having been joined the matter proceeded to hearing. After three days of hearings during which the testimony of eight witnesses was heard, the hearing examiner became fatally ill and on July 2, 1959, a substitute hearing examiner was appointed in his stead.

On July 28, 1959, we denied respondents' interlocutory appeal from the order replacing the hearing examiner on the ground that respondents had failed to show that their right to a full and fair hearing had in any manner been prejudiced by the substitution. Hearings in support of and in opposition to the complaint were then held in several cities throughout the country culminating in New York City on June 28, 1960.

The hearing examiner's initial decision partially upholding and partially dismissing the complaint was filed on October 27, 1960. The proceeding is before us on cross-appeals by respondents and counsel supporting the complaint. The appeal of counsel supporting the complaint makes two assignments of error while respondents plead that the hearing examiner erred in nine of his findings and charge further errors in five legal questions.

Respondent Art National Manufacturers Distributing Co., Inc., is a "catalog mail order house" selling a sundry line of hard goods to consumers and occasionally to retailers. This proceeding is almost entirely concerned with alleged false and deceptive representations made in the Art National catalog distributed to more than 400,000 addressees.

Louis Watch Company, Inc., is a manufacturer and distributor of watches. A substantial part of its total sales are made through the medium of Art National. Several of the specific charges against this respondent involve its advertising appearing in the Art National catalog while others deal with practices engaged in while distributing watches through other media.

The two corporate respondents are of a type commonly referred to as "family" corporations. They are completely owned and managed by the Friedman family and three of the members of that family, the father and two sons, are named as party respondents. The evidence clearly indicates interlocking control and management of the two corporations through the medium of common officers.

The respondents admit that respondent Louis Friedman "owns" and "runs" respondent Louis Watch Company, Inc., and that respondent Albert Friedman manages and formulates the policy of respondent Art National Manufacturers Distributing Co., Inc. They

deny that respondent Martin Friedman has any authority or control in either corporation. The evidence shows that Martin Friedman owns 25% of the stock of Art National; that he was its vice-president when it was incorporated, and that his brother Albert was "not too sure" that he was still the vice-president at the time of hearing. These might be rather tenuous grounds for holding Martin Friedman as a party respondent but we do not have to rely on them alone. Mr. Louis Friedman, the father of Albert and Martin, when asked whether he and his two sons owned and ran Art National testified: "Art National, yes. Well, they actually run it, to be more specific." This statement allays any question of Martin Friedman's responsibility for the operation of respondent Art National and with it any doubt concerning his being a proper party to this proceeding.

Several of respondents' assignments of error can be disposed of without extended discussion since they have been met with such frequency in the past that their solution presents no problem for which a clear and controlling precedent has not been established. One such plea is respondents' claim that they have discontinued or abandoned several of the practices indicted by the complaint and have no intention to again engage in them. To resolve such questions we generally look to the timing and circumstances surrounding the alleged discontinuance. In this case it is admitted that the practices were not discontinued until the Commission attorney investigating this matter informed respondents of their questionable nature. Such discontinuance after the commencement of proceedings will not support a conclusion or give assurance that the practices will not be resumed, and under such circumstances we have consistently refused to dismiss complaints. E.g., *Ward Baking Company*, 54 F.T.C. 1919 (1958); *Arnold Constable Corporation*, Docket No. 7657 (January 12, 1961). Respondents here have presented no grounds which would justify our departure from past holdings and we accordingly reject their plea of abandonment.

Another of respondents' pleas which appears to fly in the face of established precedent is the contention that the substitution of hearing examiners during the course of the hearing had the effect of denying them a fair trial. They urge that the replacement hearing examiner did not hear the testimony of all witnesses and may not make findings which are to any extent based upon testimony not offered in his presence. Respondents cite no legal precedent for this proposition, for indeed there is none. A leading case on this point is *Gamble-Skogmo, Inc.* v. *Federal Trade Commission*, 211 F.2d 106 [5 S.&D. 603]

(8th Cir. 1954). In that case a substitute hearing examiner was appointed when his predecessor became unavailable after all testimony had been received and briefs and oral argument received and heard. On appeal from the Commission's order to cease and desist the court of appeals made a rather detailed analysis of the evidence and concluded that the initial decision of the substitute hearing examiner was: "* * * based in controlling measure upon the credibility evaluation which he made between the opposing witnesses in their irreconcilable testimony." (Id. at 117–118) The court set aside the order of the Commission holding that the Commission had not complied with the provisions of Section 5(c) of the Administrative Procedure Act (5 U.S.C.A. § 1004(c)), which provides in part:

> The same officers who preside at the reception of evidence * * * shall make the recommended decision or initial decision * * * except where such officers become unavailable to the agency.

In ruling against the Commission, the court decided that even when a hearing examiner had become "unavailable" a substitute hearing examiner could not decide the case unless:

> * * * it fairly could be said that credibility evaluation from hearing and seeing the witnesses testify was unnecessary, in the sense that a direct choice in personal credibility as between them would not have to be made or would not from the nature of the situation be capable of being of material assistance, in the attempt of the substitute examiner to arrive at the controlling facts. (Id. at 115)

To bring themselves within the rule of the *Gamble-Skogmo* case respondents would have to show that the hearing examiner based his findings upon the contradicted testimony of witnesses which he had not observed testifying. While it is true that the substitute hearing examiner did not hear the testimony of eight witnesses (including two of the individual respondents) respondents do not challenge the credibility of these witnesses or point to any irreconcilable conflict between their testimony and other evidence. A further defect in respondents' plea is the failure to show that the findings and decision of the hearing examiner were based to any extent upon the testimony of the unobserved witnesses. Thus, we conclude that respondents have totally failed to show that the substitution of hearing examiners in any way prejudiced their right to a fair trial.

Both corporate respondents are charged with misrepresenting the time they have been in business. Louis Watch Company advertised that it has been in business since 1904 and there doesn't appear to be any question but that this representation is completely false.

The situation with Art National is different. This company represented in its 1956–57 catalog as follows:

For 32 years ART NATIONAL has been the choice of progressive dealers * * *.

The complaint alleged that this statement was false and that respondent "* * * was not incorporated until 1951."

The hearing examiner ordered respondent Art National to cease representing that it had been in business for any period of time "* * * that is not in accordance with the facts; * * *." Let us briefly examine just what the record facts are with respect to this charge.

The respondent in its answer freely admitted that it had represented that Art National had been in business for thirty-two years and also admitted that it was not incorporated until 1951. It specifically denied that its representations as to the length of time which it had been in business were false. Absolutely the only evidence adduced in support of the complaint on this point consists of the testimony of the principal officer and founder of Art National, Mr. Louis Friedman. This witness testified as follows:

I formed Art Watch Company in 1927 and Art National was reincorporated, I believe, in '51 under the Art National Manufacturing and Distributing Company.

There can be no doubt that the above-quoted testimony and the admissions in the respondents' answer are an insufficient basis upon which to predicate a finding that this respondent has not been in business for thirty-two years. Findings of fact must be supported by "reliable, probative, and substantial evidence." (Section 7(c), Administrative Procedure Act.) The evidence on this point does not fulfill any of these requirements. The burden was on complaint counsel to prove that this respondent had not been "in business" for 32 years. And this burden is not satisfied by a showing of incorporation (or "reincorporation") in 1951. Therefore, on this point we find that the hearing examiner's finding and order are not supported by the record and must be vacated.

The complaint charges and the examiner found that respondent Louis Watch Company, Inc., represented that its watches carried a "full years written guarantee" without disclosing in the advertisements or in the guarantee certificate furnished to purchasers the manner in which the guarantor would perform. But the hearing examiner, after having made the finding, failed to include a prohibition of the practice within his order to cease and desist. Our examination of the record indicates that the finding is based upon substantial evidence and we can only conclude that the omission of an appropriate prohibition in the order was an unintentional over-

sight. Thus the appeal of complaint counsel on this point should be granted and an appropriate order will issue.

Although neither party has raised the point, it appears that numbered paragraph three of the order against Art National and its officers is unsupported by a factual finding. This deficiency is not the result of a failure of proof since the amended answer of Art National admits making the representation that Louis watches are shockproof. The proposed findings submitted on behalf of all respondents admit that the watches are, in fact, not shockproof. Thus it appears that here also the absence of an appropriate finding in the initial decision with respect to Art National is the result of an oversight. Therefore the initial decision will be modified by adding a finding that Art National has falsely represented that Louis watches are shockproof.

The hearing examiner refused to find that the suggested retail prices with which respondent Louis Watch Company preticketed its watches were fictitious and higher than the prices at which the watches were usually sold at retail. As he points out, the evidence on this point is conflicting but we do not agree with his further conclusion that the evidence as a whole does not permit a determination that the preticketed prices were fictitious.

As pointed out above a substantial number of Louis watches are sold to consumers through the medium of the Art National catalog. Louis Friedman, the president of both Art National and Louis Watch Company testified with respect to the Louis watches handled by Art National: "Sure. They handle the same thing as any other customer." He further testified with respect to the manner in which he, as president of Louis Watch Company, dealt with Art National:

Q. It is the only catalog distributor that Louis Watch sells to at the present time?
A. Right.
Q. And you do not furnish them with a separate price list?
A. They are the same as anybody else.
Q. Do they carry the same price tags as the watches that are distributed to the—
A. Yes. Everything is the same. Everything is uniform, no different.
Q. They establish their own coded price?
A. Yes.

The record clearly shows that the price lists furnished to Art National and others by Louis Watch Company contain suggested retail prices; that these suggested prices correspond with the prices on the tickets attached to the watches and to the "retail" prices listed in the Art National catalog.

The evidence is uncontroverted that the prices charged consumers by Art National (the "coded" price referred to in the quote above) were substantially below the suggested retail list, and corresponding ticket, price fixed by Louis Watch Company. In some cases the price regularly charged was equal to less than 25% of the suggested retail or preticketed price.

Under the circumstances of this matter, where one family owns and controls the entire operation, respondents are in a poor position to deny that Louis watches are not preticketed with fictitious prices when they themselves regularly sell the watches to all comers at prices which are only a fraction of said preticketed prices. Thus, we find that the hearing examiner's refusal to order all respondents to cease this practice was in error.

On our review of the entire record we find that respondents have been afforded a fair hearing and the findings of the hearing examiner except as vacated by this opinion are supported by reliable and substantial evidence. An appropriate order to cease and desist, modified to conform with this opinion, will issue.

Commissioner Elman did not participate in the decision of this matter.

FINAL ORDER

This matter having been heard by the Commission on cross-appeals by respondents and counsel supporting the complaint; and the Commission having rendered its decision denying in part and granting in part both appeals and having determined, for the reasons stated in the accompanying opinion, that the initial decision should be modified:

It is ordered, That the initial decision of the hearing examiner be modified by striking therefrom findings 6, 12 and 14, and by substituting in place of the stricken findings 12 and 14 the following:

12. Art National and Louis Watch Company represented that certain Louis watches were shockproof, but they were not shockproof.

14. All respondents have cooperated in the practice of misrepresenting by preticketing and by other means that the regular retail prices of Louis watches are substantially higher than they in fact are.

It is further ordered, That the following order be substituted for the order contained in the initial decision:

It is ordered, That respondent Art National Manufacturers Distributing Co., Inc., a corporation, and respondents Louis Friedman, Martin Friedman and Albert Friedman, individually and as

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

(a) Representing, directly or indirectly:

1. That respondents occupy any portion of buildings depicted that is not in accordance with the facts, or misrepresenting, in any manner, the size or extent of the buildings in which they carry on their business;

2. That respondent Art National Manufacturers Distributing Co., Inc., sells its merchandise at America's lowest prices, or misrepresenting in any other manner its prices as compared to those of its competitors;

3. That Louis watches are shockproof.

(b) Representing by means of prices on tickets attached to or accompanying merchandise, or by any other means, that any price is the retail price of merchandise when it is in excess of the price at which said merchandise is usually and customarily sold at retail.

(c) Furnishing means and instrumentalities to dealers or others by and through which they may misrepresent the usual and customary retail prices of respondents' merchandise.

It is further ordered, That respondent Louis Watch Company, Inc., a corporation, and respondents Louis Friedman and Albert Friedman, individually and as officers of said corporation, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the sale or distribution of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(a) Representing directly or indirectly:

1. That said corporation has been in existence, or that said corporation or individuals have been in business for any period or length of time that is not in accordance with the facts;

2. That they occupy any portion of buildings depicted that is not in accordance with the facts, or misrepresenting, in any manner, the size or extent of the buildings in which they carry on their business;

3. That Louis watches have been awarded a Gold Medal or any other kind of medal;

4. That the jewels in Louis watches are rubies;

5. That Louis watches are shockproof;

6. That Louis watches are guaranteed unless the nature and extent of the guarantee and the manner in which the guarantors will perform are clearly set forth.

(b) Representing by means of prices on tickets attached to or accompanying merchandise, or by any other means, that any price is the retail price of merchandise when it is in excess of the price at which said merchandise is usually and customarily sold at retail.

(c) Furnishing means and instrumentalities to dealers or others by and through which they may misrepresent the usual and customary retail prices of respondents' merchandise.

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

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

Commissioner Elman not participating.

IN THE MATTER OF

HOFFMANN AIRCRAFT COMPANY ET AL.

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

Docket 8136. Complaint, Oct. 7, 1960—Decision, May 15, 1961

Consent order requiring sellers of home study courses in Overland Park, Kans., to cease using false employment offers and other deception to sell their correspondence courses on jet-gas turbine and turbo-prop engine mechanics, as in the order below set out.

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 Hoffmann Aircraft Company, a corporation, and George R. Hoffmann, Royce George Hoffmann and Emma F. Hoffmann, 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 Hoffmann Aircraft Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas, with its principal office and place of business located at 8201 Craig, Overland Park, Kansas.