

IN THE MATTER OF
MICHAEL Z. BERGER ET AL. DOING BUSINESS AS
M. Z. BERGER & COMPANY, ETC.

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

Docket 6894. Complaint, Sept. 26, 1957—Decision, Mar. 7, 1960

Order requiring New York City distributors of a variety of merchandise, to cease representing falsely in leaflets, presentation boxes, and on the articles themselves that certain watches were guaranteed for a year, when actually payment of a service charge was required; that fabric coverings of the presentation boxes were "Alligator Grain," "Ostrich Grain," and "Pin Leather Grain"; that greatly exaggerated price figures on tags attached to their merchandise or furnished to their purchasers for attachment were the usual retail prices; that wallets made of split leather with a cardboard filler were "genuine leather"; that rayon linings of tops and trays of presentation boxes were "satin" or "velour"; and that glass insets of necklaces and earrings were "jewel stones"; and to disclose clearly when gold-appearing watch cases were actually base metal treated to simulate gold.

Charges were dismissed that certain pin lever watches were "17 jewel watches," that others containing one jewel were "jeweled watches," and that certain of their merchandise contained "gold" or had a "gold finish."

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

Lewis Singer, Singer & Levittan, of New York, N.Y., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

PRELIMINARY STATEMENT

The complaint in this proceeding alleges that Michael Z. Berger and Joseph Mermelstein, individually and as co-partners doing business as M. Z. Berger & Company and The Berger Watch Company, hereinafter referred to as respondents, have violated the provisions of the Federal Trade Commission Act by misrepresenting the quality, price and guarantees of the merchandise they sell. Respondents deny the violations alleged.

The complaint sets out numerous representations made by respondents in pamphlets, leaflets, on boxes containing merchandise and on some of the merchandise itself which are alleged to be false, misleading and deceptive. Among these are representations that a particular watch is a "17 jewel watch" whereas, the complaint alleges, such watch is not properly described as a "17 jewel watch"

because it does not contain two "jewels" in the pallet or lever. To state it another way, the complaint alleges that, as generally understood in the industry, a watch, even though it may contain 17 "jewels," is not properly described as a "17 jewel" watch unless it contains a jeweled lever. Another count in the complaint charges respondents with representing that certain of their watches containing one jewel are "jeweled" watches, whereas, as generally understood in the industry, a watch, in order to be properly described as a "jeweled" watch, must contain at least 7 jewels, each of which serves a mechanical purpose as a frictional bearing. Other counts in the complaint allege that certain of respondents' watches are guaranteed for one year, whereas, respondents do not guarantee their watches for one year in every respect since their guarantee requires the payment of a service charge which fact is not disclosed in their advertisements; certain of their merchandise contains "gold" or has a "gold finish," whereas they contain no gold; certain of their wallets are made of "genuine leather," whereas such wallets are actually split leather with a cardboard filler; through the use of the terms "Alligator Grain," "Ostrich Grain" and "Pin Leather Grain" as descriptive of the coverings of certain of the boxes containing respondents' products, such coverings are composed of leather made from the hides of alligators, ostriches and seals, respectively, whereas, the coverings of such boxes are not leather but are a fabric material; the linings of the top and the tray of the interior of certain other boxes are "satin" and "velour" or "satin," whereas, the linings of the tops of such boxes are not satin but are rayon and the linings of the trays are not satin or velour but are rayon and treated paper, respectively; and, through the use of the terms "jewel stones" in describing some of respondents' necklaces and earrings, that the insets are precious stones, whereas, the insets of necklaces and earrings are not precious stones but are glass.

The complaint further alleges that respondents attach or cause to be attached to their merchandise, or furnish to their purchasers for attachment to said merchandise, tickets or tags upon which prices are printed, thereby representing, directly and by implication, that such prices are the regular and usual retail prices for said merchandise, whereas, in truth and in fact, said prices are not the regular and usual retail prices but are fictitious and greatly exaggerated prices. It is further alleged that the cases of watches offered for sale and sold by respondents are composed of a base metal which has been treated and processed so as to closely simulate gold or gold alloy in color, feel and appearance, and, since there is nothing on or about said watch cases to indicate that they

are composed of material other than gold or gold alloy, some members of the purchasing public are likely to accept such watch cases as gold or gold alloy.

Oral hearings have been held and the matter is now before the undersigned hearing examiner for decision upon the complaint, motion to dismiss, reply in opposition thereto, proposed findings of fact, conclusions of law, and order filed by respective counsel. All findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded, are herewith rejected. Accordingly, upon the basis of the entire record, the hearing examiner makes the following findings of fact, conclusions of law therefrom, and order:

FINDINGS OF FACT

1. Respondents Michael Z. Berger and Joseph Mermelstein are individuals and co-partners doing business as M. Z. Berger & Company and The Berger Watch Company, with their office and principal place of business located at 30 W. 22d Street, New York 10, New York. In such business, respondents are now and for more than two years last past, have been engaged in the sale and distribution from their place of business in New York, of merchandise, including men's and ladies' watches, watch sets, pens and pencils, cuff links, tie clasps, money clips, key chains, necklaces, compacts, lipstick containers and wallets, to jobbers and dealers located in various other states of the United States, including the District of Columbia, for resale to the general public. Said trade by respondents with jobbers and dealers in commerce between and among the various states of the United States, including the District of Columbia, has been substantial.

2. We will first pass on the allegations contained in Subparagraphs 1 of Paragraphs Three and Four of the complaint that a watch, even though it may contain 17 jewels, is not properly described as a 17 jewel¹ watch unless it contains a jeweled lever. Considerable testimony was received from expert witnesses on this issue. Most of the expert witnesses offered in support of the complaint testified that, even though a watch may contain 17 jewels, it may not properly be described as a 17 jewel watch unless it contains two jewels in the lever. However, the expert witnesses offered by respondents, including one of the Commission witnesses, testified, in effect, that "you have to call a watch by the number

¹ A preponderance of the evidence shows that the term "jewel" as applied to a watch, is a misnomer. As a matter of fact, it is not a jewel, but is merely a synthetic stone, usually made to resemble a ruby or sapphire.

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of jewels it has. If the watch has 12 jewels, it is a 12 jewel watch. If it has 17, it has to be called a 17 jewel watch." In other words, the expert witnesses offered on behalf of respondents testified that, in the watch industry, the definition of a so-called "jeweled" watch has no relationship whatsoever to the type of escapement² in the watch. In the history of the watch trade, the word "jewel" is synonymous with the function of the "jewel" in the watch rather than the type of movement or escapement.

3. Counsel supporting the complaint has not cited a decision by the Commission in a contested case in support of his contention that, in order to be called a 17 jewel watch, a watch must contain two "jewels" on the lever.³ Nor have we been able to find a decision of the Commission passing on this question. Therefore, we will look solely to the testimony and evidence of record to determine the question. The complaint does not raise any issue as to the quality of respondents' pin lever watch as contrasted to a "jeweled" lever watch. However, some of the witnesses offered by the Commission testified that a "jeweled" lever watch is of higher quality than a pin lever watch. Other Commission and all of respondents' expert witnesses testified that a "jeweled" lever watch is not an absolute assurance of good quality. Other factors must be considered, such as material, workmanship, and the purpose of the manufacturer, whether to produce a high quality and expensive watch for the higher priced market or a reasonably serviceable watch at a cheap price for the lower price market. Therefore, in this decision we will not pass on the quality of respondents' watch but only on the question whether respondents' 17 jewel pin lever watch may properly be called a "17 jewel watch."

4. The evidence shows that the mechanical principle and function of a pin lever and so-called "jewel" lever escapement is the same. Pin lever watches have been manufactured for many years but it has only been since approximately 1939 or 1940 that pin lever watches have been imported and sold in the United States. They are mostly of Swiss manufacture. In recent years they have become

² The "escapement" is the lever in a watch which transfers the power of the main-spring to the balance wheel, whether the watch has a pin lever or jewel lever. The lever is sometimes called the "pallet." The pins or "jewels" in this lever contact the teeth of the escape or balance wheel.

³ However, in support of one of the other charges in the complaint, Subparagraphs 2 of Paragraphs Three and Four, that a watch, in order to be properly described as a "jeweled" watch, must contain 7 jewels in the escapement, two of which must be on the lever. Counsel supporting the complaint cites the following Commission cases: *World Wide Watch Co., Inc., et al*, Docket 7076; *Cimier Watch Corp.*, Docket 6703; *Windsor Pin Corporation*, Docket 6356; and *Edward Roseman, et al*, Docket 6358. The orders issued in each of these cases were based on consent agreements. Consequently, they cannot be considered as legal precedents for the proposition advanced by counsel supporting the complaint.

a strong competitor in sales with so-called "jewel" lever watches, although selling at a lower price than watches with jewel levers. The pin lever watch is better adapted to mass production than the so-called "jewel" lever watch. The lever is blanked out from a band or roll of hard metal or brass on a press tool.⁴ Each lever blanked out by the press tool is of uniform shape, size and thickness. In the same operation, two holes are made in the lever for insertion of the pins. Each hole in each lever is in the same relative position. The pins are made of hardened, tempered, polished steel and are turned out on automatic machines so that they are of uniform diameter, length and size. The pins are then pressed into the holes in the lever by special tools in a semi-automatic production line operation. Thus, the watchmaker, in assembling the watch, cannot change the position of the pins. Their position is controlled by the accurateness and precision of the press tool on which the lever was blanked out.

5. On the other hand, in the "jewel" lever watch, there are two synthetic stones on the lever instead of the two steel pins, as in the pin lever watch. The stones are set in notches in the lever. In assembling the watch at the factory, the watchmaker must check to see if these stones are in correct position on the lever so as to make proper contact with the teeth of the escapement wheel. If they do not, the watchmaker must adjust their position. This operation is called the *afchevaje* and requires a skilled watchmaker. Thus, the cost of assembling a so-called "jewel" lever watch is higher than the cost for assembling a pin lever watch. Therefore, the retail price or cost of the pin lever watch is less than the price or cost of the "jewel" lever watch. The difference in price or cost of the two types of watches is not attributable to the cost of the synthetic stones or "jewels." The evidence shows that the customs duty on "jewel" lever watches is 13½¢ per "jewel" and the customs duty on a 17 jewel pin lever watch is the same as the duty on a 17 jewel lever watch of the same size.

6. As previously stated, the complaint does not bring into issue in this case the comparative quality of respondents' 17 jewel pin lever watch as compared to a 17 jewel watch with a "jewel" lever. However, most of the witnesses who testified in support of the complaint stressed the superior quality of the "jewel" lever watch. In his proposed findings of fact, counsel supporting the complaint argues that the escapement (lever) is the most important part of a

⁴ The evidence shows that the press tool for the pin lever watch is carefully manufactured for accuracy. The press tool is used in many industries, from the heavy automobile industry to the very fine and delicate watch industry.

watch and the "quality" is determined by this part of the watch. He argues as follows: "Jewels are placed in the movement of a watch for the purpose of reducing friction; the escapement is the most important part of a watch and, since there are no "jewels" on the lever of a pin lever watch, respondents' 17 jewel pin lever watch cannot properly be called a "17 jewel watch." There is no factual nor legal basis in this record for such a contention. A preponderance of the reliable, probative and substantial evidence establishes the fact that the watch industry does not associate a watch marked "17 jewels" with any particular type of escapement.

7. Counsel supporting the complaint contends that respondents have added two "extra" jewels, one cap "jewel" on the top of the escape wheel and one hole "jewel" on the bottom of the center wheel, and, with no "jewels" on the lever, respondents are misrepresenting their 17 jewel pin lever watches as "17 jewel watches." There is no legal nor factual basis for such a contention. The evidence is undisputed that each of the 17 "jewels" in respondents' 17 jewel pin lever watch serves a mechanical purpose as a frictional bearing. Even counsel supporting the complaint does not dispute this fact. The evidence establishes that the fact that the watch does not have "jewels" in the lever does not rob it of its character as a 17 jewel watch.

8. Counsel supporting the complaint also contends that the definition of a "17 jewel watch" as understood by the American consumer has crystallized as a quality mark for a type of movement and this definition has been developed by the advertising practices of manufacturers of "jewel" lever watches. On the contrary, a preponderance of the evidence shows that the American consumer does not associate a watch marked "17 jewels" with any particular type of escapement. The evidence further shows that the American consumer is not aware of any distinction between a pin lever and a jewel lever watch. Furthermore, the question of "quality" of watches is not in issue in this case. In this connection, counsel supporting the complaint refers to the testimony of Mr. Van Busch, a witness for the Commission, and Rose Bock, a witness for respondents, as demonstrating the inferior quality of respondents' 17 jewel pin lever watches and their deceptiveness. This hearing examiner does not consider the testimony of Mr. Van Busch worthy of belief. At a hearing held on April 23, 1959, in New York, Mr. Busch appeared as a witness for the Commission, and Mr. Van Busch testified, among other things, on both direct and cross examination, that his 54 retail jewelry stores had not ever imported, bought, sold, carried nor stocked 17 jewel pin lever watches. Re-

called at a subsequent hearing on June 9, 1959, in New York City, for further cross examination by respondents under a subpoena *duces tecum* and confronted with copies of purchase invoices for 17 jewel pin lever watches by Busch Jewelry Stores. Mr. Van Busch repudiated his testimony given at the former hearing and testified that his stores do buy, import, stock and sell 17 jewel pin lever watches and that as far back as 1944 his company stocked and sold 1 jewel, 7 jewel and 15 jewel pin lever watches; and as far back as 1948 has sold 17 jewel pin lever watches which they advertised as "17 jewel watches." He further testified that, for about ten years, his company has been selling 17 jewel pin lever and also 17 jewel lever watches under the designation "17 jewels." With respect to the testimony of Mrs. Rose Bock, respondents' employee and a witness for respondents, counsel supporting the complaint contends that her testimony supports his contention of the deceptiveness and inferior quality of respondents' 17 jewel pin lever watches. Even if the quality of respondents' watches were in issue, Mrs. Bock's testimony does not support the interpretation suggested by counsel supporting the complaint. Mrs. Bock testified concerning her purchase of a particular model 17 jewel pin lever watch at a Busch Jewelry Store on 14th Street in New York City on June 3, 1959. Mrs. Bock's employer, Mr. Berger, one of the respondents, had instructed her to attempt the purchase of a particular model 17 jewel pin lever watch at one of the stores of Busch Jewelry Company. Mrs. Bock testified that she went to the Busch Jewelry Store on 14th Street and pointed out the particular watch which was in the window to the clerk, the store clerk asked her why she did not apply the purchase price she was paying for that particular watch⁵ and apply it on a higher priced watch, but that finally the salesman "reluctantly" sold her the watch which she had been instructed to purchase. In other words, the clerk attempted to induce her to purchase a higher priced watch.

9. Finally, counsel supporting the complaint states that Mr. John Ciana, an expert watch technician from Switzerland who testified for respondents was prejudiced, made contradictory statements, was guilty of hedging, and refused to make forthright replies, as shown by "the very speech habits he uses." The last criticism is explainable due to the fact that Mr. Ciana does not speak English fluently. Mr. Ciana testified that his native language is French and he has some difficulty with English. This examiner carefully observed

⁵ One of Mrs. Bock's employers, the respondent Berger, had shown her a watch (which was a 17 jewel pin lever watch) and instructed her to attempt the purchase of an identical watch from the Busch Jewelry Store.

Mr. Ciana during his testimony, as well as every other witness who testified, and this examiner was favorably impressed with the apparent forthrightness, candor, integrity, knowledge of watches, and independence of Mr. Ciana. The circumstance that Mr. Ciana was present in the hearing room during several days of testimony by other witnesses is no reason for disqualifying his testimony. If Mr. Ciana should be disqualified for this reason, then the testimony of practically all of the witnesses who testified for the Commission would likewise be disqualified because, like Mr. Ciana, many of them were present in the hearing room during the testimony of other witnesses. Counsel also criticizes Mr. Ciana for his testimony that the oscillatory system, which he characterized as the balance wheel and hairspring, are the most important part of a watch, and, in drawing a distinction between the balance wheel and the escapement.⁶ There is no merit in this contention. Mr. Ciana was not alone in his testimony that the balance wheel and hairspring are the most important parts of a watch. Other witnesses for the respondents corroborated Mr. Ciana's testimony in this respect. Experts do not always agree on all technical matters. It does not follow that because Mr. Ciana did not agree with Mr. Chaipis that the escapement is the most important part of a watch, Mr. Ciana was thereby attempting to discredit Mr. Chaipis' testimony. These are not valid nor legal grounds on which to disqualify the witness Ciana. Accordingly, the examiner finds that the allegations contained in subparagraphs 1 of paragraphs 3 and 4 of the complaint have not been sustained by a preponderance of the reliable, probative, and substantial evidence.

10. We will now pass to the allegations contained in subparagraphs 2 of paragraphs 3 and 4 of the Complaint where it is alleged that respondents have represented that certain of their watches containing one jewel are "jeweled watches," whereas, as generally understood in the industry, a watch, in order to be properly described as a "jeweled" watch, must contain at least 7 jewels, each of which serves a mechanical purpose as a frictional bearing and, therefore, respondents' watches containing one jewel cannot properly be described as "jeweled." As stated in paragraph 3 hereof, the cases cited by counsel supporting the complaint in his proposed findings of fact as supporting this contention are *World Wide Watch Co., Inc., et al, Cimier Watch Corp., Windsor Pen Corporation,* and *Edward Roseman, supra*, all issued on the basis of consent agree-

⁶ Counsel supporting the complaint argues that, in drawing a distinction between the balance wheel and the escapement (lever), Mr. Ciana was attempting to discredit Mr. Chaipis, a watchmaker who testified as a witness for the Commission. Mr. Chaipis testified that the escapement is the most important part of a watch.

ments. Therefore, the orders issued in these cases cannot be considered as legal precedents for the proposition advanced. However, there is evidence in the record to sustain the allegation that, as generally understood in the industry, a watch, in order to be properly described as a "jeweled" watch, must contain at least 7 jewels, each of which serves a mechanical purpose as a frictional bearing. However, the only evidence offered in support of this allegation is a one jewel Rosskoff watch, (Commission Ex. 10A), and a box (Commission Ex. 10B) containing the watch, which were obtained by Mr. Needelman, attorney-investigator for the Commission, from a showcase in respondents' place of business in April, 1957. The evidence further shows that at the time the attorney-investigator obtained this watch and the box from the showcase, the watch, a one jewel Rosskoff, had been in the showcase for some two years and was no longer being imported or sold by respondents. Respondents further contend that, since they had discontinued the sale of one jewel watches for more than two years prior to issuance of the complaint and did not intend to resume their sale in the future, there is no public interest in continuing this allegation of the complaint. Upon consideration of the entire record, the examiner finds that respondents had discontinued the importation and sale of one jewel watches more than two years prior to the filing of the complaint herein and respondents do not intend to resume their sale at any time in the future. Furthermore, the record shows that the Swiss watch manufacturers have discontinued labeling any watch as a "jeweled" watch which contains less than 7 jewels. Accordingly, the hearing examiner finds that the public interest does not require the further prosecution of the complaint with respect to Subparagraphs 2 of Paragraphs Three and Four of the complaint.

11. The hearing examiner finds that the allegations contained in subparagraphs 3 of paragraphs 3 and 4 of the Complaint to the effect that respondents guarantee certain of their watches for one year whereas respondents do not guarantee their watches in every respect as their guarantee requires the payment of a service charge which fact is not disclosed in their advertisements have been established by a preponderance of the reliable, probative, and substantial evidence. The evidence shows that the guarantee requires that the purchaser pay the sum of \$1.00 if the repair is requested within one year from date of purchase and \$2.00 if more than one year and less than two years.

12. Subparagraphs 4 of paragraphs 3 and 4 of the complaint allege that certain of respondents' merchandise contains "gold" or has a "gold finish," whereas the articles described as "gold" and

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"gold finish" contain no gold. The only evidence offered to support this allegation are Commission's Exhibit No. 6, which is a photostatic copy of an invoice from George Grodin Pens, Inc. to respondents, dated August 31, 1956, for the purchase of pens and pencils; Commission Exhibit No. 7, which is a photostatic copy of an advertisement by respondents in Life Magazine, which advertised, among other things, "gold finish" retractable ball point pens; Commission Exhibits Nos. 2A-F, which are, respectively, a box, watch, money clip, tie bar, and a set of men's cuff links. Mr. Mitchell Lachow, a ball point pen manufacturer identified Commission Ex. No. 6 as being an invoice issued to cover shipment of metal ball pens and pencils of polished brass to respondents, but did not identify such pens and pencils as being the "gold finish" retractable ball point pens described in Commission Exhibit No. 7, the photostatic copy of the Life Magazine advertisement. Accordingly, the hearing examiner finds that the allegations contained in subparagraphs 4 of paragraphs 3 and 4 of the complaint have not been established.

13. Subparagraphs 5 of paragraphs 3 and 4 of the complaint allege that certain of respondents' wallets are made of "genuine leather" whereas they are actually split leather with a cardboard filler. In support of this allegation, counsel supporting the complaint offered the testimony of Irving R. Glass, executive vice-president of the Tanner's Council of America, which is the national trade association of the leather industry. Mr. Glass qualified as an expert on leather and leather goods. One of respondents' wallets, with the gold letters "Genuine Leather" stamped thereon, (Commission Exhibit No. 8) was exhibited to Mr. Glass. With a knife, Mr. Glass cut into the surface of the wallet. After examining the wallet, Mr. Glass testified that the material in the wallet is technically known as split leather with a hair cell plate; a finish imprinted on the split leather to simulate the characteristic hair cell appearance of top grain cowhide leather. The partition in the wallet he described as pigmented or coated paper or some other cellulose material held together with a binder to simulate cowhide. The hearing examiner finds, therefore, that the allegations contained in subparagraphs 5 of paragraphs 3 and 4 of the complaint have been established.

14. Subparagraphs 6 of paragraphs 3 and 4 of the complaint allege that respondents have represented, through the use of the terms "Alligator Grain," "Ostrich Grain" and "Pin Leather Grain" as descriptive of the coverings of certain presentation boxes, that such coverings are composed of leather made from the hides of

alligators, ostriches and seals, respectively, whereas they are not leather of any kind but are a fabric material. In support of these allegations, counsel supporting the complaint offered the testimony of Mr. Glass, who testified that Commission Exhibit No. 9 (a box) has a covering of fabric with some kind of impregnated finish printed simulated grain, imitating seal or walrus. Mr. Glass also testified that the material on the outside of the box, Commission Exhibit No. 10B, is a printed fabric, coated with pyroxilin mixture printed to resemble alligator lizard and may not properly be called "Alligator grain," as referred to by respondents in their advertising. Accordingly, the allegations made in subparagraphs 6 of paragraphs 3 and 4 of the complaint have been established with respect to respondents' use of the terms "Alligator Grain."

15. Subparagraphs 7 of paragraphs 3 and 4 of the complaint allege that respondents represented that the linings of the top and tray of the interior of certain presentation boxes are "satin" and "velour" or "satin" respectively, whereas the linings of the tops of said boxes are not satin but are rayon and the linings of the trays are not satin or velour but are rayon and treated paper, respectively. Mr. Leon Levinstein, operator of Drema Manufacturing Company and Alma Box Company, New York, New York, testified that the bottom lining of the box identified as Commission Exhibit No. 9 is paper, called velour. It may be called a velour, rayon coated paper. He further testified that the lining in the top of the box is an acetate rayon, known in the trade as satin. Accordingly, it is found that the allegations contained in subparagraphs 7 of paragraphs 3 and 4 of the complaint have been established.

16. Subparagraphs 8 of paragraphs 3 and 4 of the complaint allege that the respondents represented, through use of the terms "jewel stones" in describing some of their necklaces and earrings, that the insets are precious stones, whereas such insets are not precious stones but are glass. Mr. George Robert Crowningshield, who is associated with the Gemological Institute of America, an educational organization for the study of precious stones, examined and testified concerning the material in Commission Exhibits No. 5A, B, and C, which is a necklace, earring, and matching earring, respectively. Mr. Crowningshield examined the exhibits under a gem microscope and testified that the so-called center stone in the necklace was plastic with metallic foil to give it sparkle and the other stones appeared to be of glass. In other words, the drop in the necklace is an imitation pearl and the insets appeared to be foil-backed glass cemented into their settings. He testified that Exhibit No. 5B is an earring with a yellow metal ear screw and an ornament

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consisting of a center cabochon of plastic with a metal insert and a pink and purple stone inset of cut glass, foil backed, cemented into their settings. Exhibit No. 5C is a matching earring similar to Exhibit No. 5B, of plastic and glass. He testified that they are not precious stones. He testified that the term "precious stone" refers to a naturally occurring material used for ornamental purposes. He further testified that the exhibits are not synthetic in the strict gemological sense because a synthetic has to reproduce precisely the chemical, optical and physical properties of the stone it imitates. The exhibits in evidence merely reproduce the color so they are considered imitation. Upon the basis of this testimony, it is found that the allegations set out in subparagraphs 8 of paragraphs 3 and 4 of the complaint have been established.

17. Paragraph 5 of the complaint alleges that respondents attach to their merchandise or furnish to their purchasers for attachment to said merchandise, tickets or tags upon which prices are printed, thereby representing, directly and by implication, that such prices are the regular and usual retail prices for said merchandise, whereas said price figures are not the regular and retail prices but are fictitious and greatly exaggerated prices. A preponderance of the evidence shows and it is found, that the prices shown on such tags were not the regular and usual retail prices for said merchandise but were in excess of the usual and regular retail prices. The evidence shows that, prior to August, 1956, respondents pre-ticketed the merchandise which they sold. After August, 1956, respondents did not pre-tag any merchandise and furnished price tags only upon the request of their customers. This practice continued until about April, 1957, when after a conference with Mr. Needelman, attorney-investigator for the Commission, respondents discontinued supplying price tags to their customers, even though such customers might have requested price tags. It is found, therefore, that respondents discontinued the furnishing of price tags to their customers for merchandise purchased on and after April 1957.

18. Paragraph 6 of the complaint alleges: That respondents' watch cases are composed of a base metal which has been treated so as to simulate gold or gold alloy and there is nothing on the case to indicate they are not gold or gold alloy; many members of the purchasing public are unable to distinguish between such base metal watch cases and cases which are composed of gold or gold alloy; consequently, such base metal cases are likely to be accepted by some of the purchasing public as gold or gold alloy; watch cases composed of gold or gold alloy are superior to base metal in value, quality and durability, and are preferred by the public over base

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metal watch cases. Mr. Charles A. Jedlicka, Chief Spectrochemist with Lucius Pitkin, Inc., consulting chemists, New York, New York, testified that he had made an analysis of the surface of the case of respondents' watch, Commission Exhibit No. 25B and found it to be anodized aluminum, and contained no gold whatsoever.

CONCLUSIONS

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

2. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices has had and now has the tendency to induce members of the purchasing public into the erroneous and mistaken belief that all of such statements, representations, acts and practices are true and proper and into the purchase of a substantial number of products as a result of such erroneous and mistaken belief. As a consequence thereof substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been done to competition in commerce.

3. The aforesaid acts and practices of respondents 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.

ORDER

It is ordered, That respondents Michael Z. Berger and Joseph Mermelstein, individually and as co-partners doing business as M. Z. Berger & Company and The Berger Watch Company, or under any other name, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of 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:

(a) that merchandise is 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 an article containing no leather is composed of leather, or otherwise misrepresenting the leather content of any article;

(c) that certain amounts are the usual or regular retail prices of

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merchandise, when such amounts are in excess of the prices at which such merchandise is usually and regularly sold at retail.

2. Requiring the payment of a service charge in connection with a guarantee unless the fact that a service charge is required and the amount thereof is clearly disclosed.

3. Using the word "leather" alone or in connection with other words to designate, describe or refer to articles made of split leather unless such fact is clearly disclosed.

4. Using the word "satin" to describe or refer to rayon and satin or velour to refer to treated paper or otherwise misrepresenting the composition of the materials used in connection with or as a part of their merchandise.

5. Using the words "jewel stones" or any other words of similar import to designate or describe insets made of glass or materials other than precious stones.

6. Putting into operation any plan whereby retailers or others may misrepresent the regular and usual retail price of merchandise.

7. Offering for sale or selling watches, the cases of which are composed of base metal manufactured or otherwise processed to simulate or have the appearance of precious metal, without marking such cases so as to disclose clearly the true metal composition thereof.

It is further ordered, That the allegations contained in subparagraphs 1, 2, and 4 of paragraphs 3 and 4 of the complaint be, and the same hereby are, dismissed.

OPINION OF THE COMMISSION

By KINTNER, *Chairman*:

The complaint in this matter charges respondents with violation of Section 5 of the Federal Trade Commission Act. Counsel supporting the complaint has appealed from the hearing examiner's ruling dismissing two of the allegations of the complaint and from the findings and conclusions upon which these rulings were based.

The first point raised on this appeal concerns the hearing examiner's dismissal of the allegation that respondents falsely and deceptively represented their pin lever watches as "17 Jewel Watches." The complaint states in this connection that, as generally understood in the industry, a watch, even though it may contain 17 jewels, is not properly described as a 17 jewel watch unless it contains a jeweled lever. Although respondents' watch contains 17 jewels, each of which serves a mechanical purpose as a frictional bearing, it contains a pin lever escapement, as distinguished from a jeweled lever escapement. The hearing examiner held that the evidence failed

to show that the industry associates the term "17 Jewel" with a particular type of movement or escapement and dismissed the allegation. Counsel supporting the complaint has taken exception to this ruling.

The sole issue presented on this part of the appeal is whether the record establishes that in trade usage the term "17 Jewel" refers only to a 17 jewel watch having a jeweled lever escapement. It is unnecessary to describe in detail the mechanisms of the jeweled lever watch and the pin lever watch since there is no dispute that respondents' watch does not have a jeweled lever escapement. Nor is it necessary to consider the argument of counsel supporting the complaint with respect to the comparative quality of the jeweled lever and pin lever watches since this issue is not raised by the aforementioned allegation.

The evidence offered in support of and in opposition to the allegation in question consists almost entirely of testimony of persons engaged in the manufacture, repair or distribution of watches and others closely connected with the watch industry.

Certain of these witnesses testified that the term "17 Jewel" as used in the watch trade, always has reference to a jeweled lever escapement. There is also testimony to the effect that certain watch manufacturers have used the term "17 Jewel" in advertising over a period of many years to designate jeweled lever watches. It is principally upon this evidence that counsel supporting the complaint relies to support his argument that the term "17 Jewel" has become a "term of art applying to 17 jewel watches with jeweled levers, and not pin levers."

The witnesses called by respondents were at least as well qualified by experience and training to testify on this subject as those called by counsel supporting the complaint. All of them testified to the effect that the term "17 Jewel," as used in the trade, denotes only the number of functioning jewels in a watch and does not indicate a type of movement or escapement. Of particular significance is the testimony of two completely disinterested and impartial witnesses, a United States Customs Examiner and an Assistant to the United States Appraiser at the Port of New York. Both of these men testified categorically that the term "17 Jewel" can properly be used to designate a 17 jewel pin lever watch.

An examination of the testimony of certain of the witnesses who appeared in behalf of the complaint discloses certain statements which are not entirely consistent with the position advocated by counsel supporting the complaint. Mr. John Chaipis was shown

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one of respondents' pin lever watches marked "Lord Nelson 17 Jewels" and was asked whether he would classify the watch as a true 17 jewel watch. He testified as follows:

The WITNESS. May I think this over for a second, your Honor?

Hearing EXAMINER. Can you answer that question yes or no?

The WITNESS. That's what I was trying to figure out. I don't believe that question can be answered with a yes or no. * * *

He then stated that there is a difference between a watch containing a pin lever and one containing a jeweled lever but did not state that the 17 jewel pin lever is not a true 17 jewel watch.

Mr. Jean Louis Roehrich, a watchmaker and jeweler, stated on cross-examination "I just repeat, you have to call the watch by the number of jewels it has. You can't call it anything else. If there is 12 jewels, it is a 12 jewel watch. If it is 17, you have to say it is 17." He also gave the following testimony:

Q. I hand you Commission's Exhibit No. 3B and request that you open it and describe the works in that watch.

A. This is a wrist watch movement with a non-jewel escapement called a pin pallet escapement.

* * * * *

Q. Do you find it confusing that the label on the face of that watch refers to 17 jewels?

A. I don't find it confusing because it is marked on the movement, it is marked on the dial. I don't find it confusing.

Mr. Jean R. Graef, president of John R. Graef, Inc., a watch importer, testified that if he opened a watch having the legend "17 Jewel" on the dial, he would expect to find either a jeweled lever escapement or a detent escapement.

While it is apparently true that most of the jeweled watches (having at least 7 jewels) sold in this country during the past 50 years have contained jeweled levers, it does not necessarily follow that the industry associates the term "17 Jewel" with this particular type of escapement. There is testimony by witnesses on both sides that during the same period 17 jewel watches containing other types of escapements have been manufactured, imported and sold in this country. Considering all of the testimony, we are not convinced that the term "17 Jewel" is understood by the industry to mean only watches having 17 functioning jewels, two of which are on the lever.

Moreover, there has been no showing that the public associates the term "17 Jewel" with this particular type of movement. Counsel supporting the complaint contends, in this connection, that the advertising of the 17 jewel, jeweled lever watch in this country over a period of years has caused the public to associate the term

"17 Jewel" with watches having this specific type of movement. While the evidence may tend to establish that the public would expect certain brands of watches so advertised to have a particular type of movement, it does not constitute proof that the public would believe that all watches designated "17 Jewel" would be similarly constructed. Counsel supporting the complaint apparently concedes and the record shows that 17 jewel pin lever watches have been imported and sold in this country for many years. The evidence also shows that these watches have been marked and advertised as "17 Jewel."

We are of the opinion, therefore, that the evidence fails to sustain the allegation pertaining to respondents' use of the term "17 Jewel." For this reason, the appeal of counsel supporting the complaint from the hearing examiner's ruling dismissing this allegation is denied.

The second point presented for our consideration is whether the hearing examiner erred in dismissing on the ground of abandonment the allegation that respondents have misrepresented as "jeweled" certain watches containing only one jewel. The complaint alleges in substance that respondents' use of the term "jeweled" to describe watches containing only one jewel is false and deceptive in that a "jeweled" watch, as generally understood in the industry, is one which contains at least seven jewels, each of which serves a mechanical purpose as a frictional bearing. Although the hearing examiner found that this allegation had been sustained by the evidence, he further held that respondents had discontinued the importation and sale of one-jewel watches more than two years prior to the filing of the complaint and that they did not intend to resume the sale of such watches in the future. He ruled, therefore, that the public interest does not require the further prosecution of the complaint with respect to this particular allegation.

There is no evidence in the record that respondents have sold one-jewel watches during the two-year period prior to the issuance of the complaint and counsel supporting the complaint does not take issue with the finding that the sale of these watches by respondents had been discontinued. He contends, however, that there is no reason to believe that respondents will not resume the practice of selling one-jewel watches as "jeweled."

In arriving at the conclusion that there had been an abandonment of the practice, the hearing examiner was influenced by evidence that Swiss watchmakers had discontinued labeling watches containing less than seven jewels as "jeweled" watches.

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We have considered this same point in another case, In the Matter of *Sheffield Merchandise, Inc., et al.*, Docket 6627, wherein the respondents raised the defense of abandonment. According to the record in that proceeding, members of a Swiss association of watch manufacturers make the only one-jewel watch movements sold in this country and in July, 1956, all of these manufacturers discontinued the practice of marking the word "jeweled" on such watches. There is also testimony in that case to the effect that no one-jewel watches, designated as "jeweled," have been imported into this country within the past several years. This information indicates not only a change in competitive conditions in the industry insofar as the practice in question is concerned but also an abandonment of the practice at its source.

We believe that the public interest will best be served by allowing the hearing examiner's ruling on this question to go undisturbed and by maintaining a close scrutiny of respondents' future operations. In so deciding, we do not reach the merits of the charge challenging respondents' use of the word "jeweled" to designate one-jewel watches and, consequently, we do not adopt as the decision of the Commission the hearing examiner's holding that this allegation has been sustained by the evidence.

The appeal of counsel supporting the complaint is denied and the initial decision, as modified, will be adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision; and the Commission, for the reasons stated in the accompanying opinion, having denied the appeal, and having modified the initial decision in part:

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

It is further ordered, That the respondents, Michael Z. Berger and Joseph Mermelstein, 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.