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 Raphael's, Inc., a corporation, and its officers, and S. M. Bauer, individually and as an officer of said corporation, and respondents' 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 fur products; or in connection with the sale, advertising, offering for sale, transportation, or distribution of fur products which are 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:

1. Falsely or deceptively invoicing fur products by:

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

2. 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 respondents full and adequate records disclosing the facts upon which such claims and representations are based.

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

HELBROS WATCH COMPANY, INC., ET AL.

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

Docket 6807. Complaint, May 21, 1957—Decision, Dec. 26, 1961

Order requiring New York City distributors of watches to many classes of customers including jobbers, premium users, industrial firms, wholesalers, mail order firms, credit jewelers, and house-to-house canvassers, to cease making such false statements concerning their watches—by means of tags,

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and labels, promotional material, circulars, display sheets, advertising mats supplied to dealers, and otherwise—as "With Lifetime Ruby Jewels", "Water resistant", "Shock protected", and "Each watch is guaranteed to give you a lifetime of true time"; and to cease affixing to each watch or to the plastic container, price tags, and placing in the hands of dealers price lists, bearing fictitious amounts, represented thus as usual retail selling prices.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the corporation and individuals named in the caption hereof and 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 Helbros Watch Company, 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 at 6 West 48th Street, New York, New York. Individual respondents William Helbein, Jack Diamond, Nat Prigozen, Larry Prigozen, Carl Avner, and Jack Nadel are president, vice president, vice president, vice president, treasurer, and secretary, respectively, of the respondent corporation, and have exercised and still exercise a substantial degree of authority and control over the policies, affairs, and activities of respondent corporation. Their offices and principal places of business are also located at 6 West 48th Street, New York, New York.

PAR. 2. Respondents are now, and for more than two years last past have been, engaged in the sale and distribution of watches to many classes of customers, including jobbers, premium users, industrials for give-aways, wholesalers, mail order firms, credit jewelers and house to house canvassers.

PAR. 3. In the course and conduct of their business, respondents cause, and have caused, their watches when sold to be transported from their place of business in the State of New York to purchasers located in various other states of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said watches in commerce between and among the various other states of the United States and District of Columbia.

PAR. 4. In the course and conduct of their business respondents, for the purpose of inducing the sale of their watches, have made and have caused to be made certain statements with respect to said watches

by means of labels, promotional material, circulars, display sheets, advertising mats supplied to dealers, and by other means, all of which were widely circulated and displayed throughout the United States to customers, prospective customers, and the purchasing public. Among and typical of such statements are the following:

With Lifetime Ruby Jewels
Water resistant
Shock protected
Each watch is guaranteed to give you a lifetime of true time

PAR. 5. Through the use of the foregoing statements and others of similar import and meaning not specifically set out herein, respondents represented, directly and by implication, that their watches contained ruby jewels, were shock proof, shock protected, water resistant, and guaranteed for life.

PAR. 6. The foregoing statements were and are false, misleading and deceptive. In truth and in fact, said watches do not contain ruby jewels but contain jewels composed of a synthetic material, not natural rubies; are not shock proof, shock protected, or water resistant; and are not actually guaranteed for life in every respect. The so-called guarantee provides for the payment of a charge for servicing after one year. The terms, conditions, and extent to which such guarantee applies and the manner in which the guarantor will perform thereunder are not disclosed in the advertising material.

PAR. 7. Respondents, before shipping their watches to purchasers thereof affix price tags to each watch. Respondents also place price lists in the hands of their dealers. By means of these tags and price lists, respondents represent that the amounts appearing thereon are the usual and regular retail prices for said watches. Such representations are false, misleading and deceptive. In truth and in fact, such amounts are fictitious and greatly in excess of the prices at which said watches are usually and regularly sold at retail.

PAR. 8. By means of the acts and practices set out in Paragraph Seven, respondents place a means and instrumentality in the hands of retailers and others by and through which the purchasing public may be misled as to the prices at which their watches are usually and regularly sold at retail.

PAR. 9. In the course and conduct of their business respondents were and are now in direct and substantial competition with other corporations, and with firms and individuals engaged in the sale of watches in commerce.

PAR. 10. The use by respondents of the foregoing false and misleading statements and representations had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said state-

ments and representations were true and to induce the purchasing public to purchase substantial quantities of said watches because of such erroneous and mistaken belief. As a consequence thereof, substantial 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 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 and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Mr. Kent P. Kratz supporting the complaint.

Mr. George J. Feldman [1] and *Silver, Saperstein & Barnett*, by *Mr. Isaac M. Barnett*, of New York, N.Y., for respondents.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondents on May 21, 1957, charging them with having engaged in unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of the Federal Trade Commission Act by, (a) representing, contrary to fact, that their watches contained ruby jewels, were shock proof, shock protected, water resistant, and guaranteed for life, and (b) representing, contrary to fact, that the amounts appearing on price tags and in price lists were the usual and regular retail prices for said watches. After being served with said complaint respondents appeared by counsel and subsequently filed their answers thereto denying, in substance, that they had misrepresented the qualities, guarantee or prices of their watches, but alleged that the representations that their watches contained ruby jewels and were shock protected had been discontinued long prior to the issuance of the complaint herein.

Pursuant to notice duly given, hearings were thereafter held before the undersigned hearing examiner, theretofore duly designated by the Commission to hear this proceeding, on various dates between February 25, 1958, and February 25, 1959, in New York, New York; Detroit, Michigan; Louisville, Kentucky; Washington, D.C.; and Cleveland, Ohio. At such hearings testimony and other evidence were offered in support of and in opposition to the allegations of the com-

[1] Attorney Feldman filed answer on behalf of respondents and appeared as co-counsel during the initial hearing, but later withdrew from active participation.

plaint, which testimony and other evidence were duly recorded and filed in the office of the Commission. The record herein consists of 1,028 pages of testimony and 141 exhibits. Both sides were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the close of the evidence in support of the complaint counsel for respondents moved to dismiss the complaint for insufficiency of evidence and, pursuant to leave granted, memoranda were filed in support of and in opposition to said motion. Said motion was denied by order of the undersigned dated October 21, 1958, except as to the individual respondent Jack Nadel, as to whom said order provided that appropriate provision for dismissal would be made in the initial decision to be issued at the conclusion of this proceeding.

Proposed findings of fact, conclusions of law and order, together with supporting briefs or memoranda were filed at the conclusion of all the evidence by counsel supporting the complaint and counsel for respondents, on July 27, 1959. Due to the examiner's engagement in other proceedings, final disposition of this proceeding was unavoidably delayed.

After having carefully reviewed the entire record in this proceeding, and the proposed findings, conclusions and order,[2] and the supporting briefs and memoranda filed by the parties, the hearing examiner finds that this proceeding is in the interest of the public and, based on the entire record and his observation of the witnesses, makes the following:

FINDINGS OF FACT

I. The Business of Respondents, Interstate Commerce and Competition

1. Respondent Helbros Watch Company, Inc., is a corporation organized, existing and going business under and by virtue of the laws of the State of New York with its office and principal place of business located at 6 West 48th Street, New York, New York. The individual respondents, William Helbein, Jack Diamond, Nat Prigozen, Larry Prigozen, Carl Avner and Jack Nadel are president, executive vice president, vice president, vice president, treasurer and secretary, respectively, of the corporate respondent. Their offices and principal places of business are also located at 6 West 48th Street, New York, New York. The individual respondent Helbein, together with his wife, owns almost all of the stock of the corporate respondent. Respondents Nat Prigozen and Diamond each own approximately one percent of the stock of the corporate respondent. The other individ-

[2] Proposed findings not herein adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

uals named in the complaint own no stock in the corporate respondent. All of the individual respondents, except for respondent Jack Nadel, are members of an executive committee which formulates and controls the policies of the company concerning the matters covered by the complaint. Respondent Helbein, the principal owner and president, travels a great deal in connection with the business and while he is away his functions are assumed by respondent Diamond.

2. Respondents[3] are now, and for more than two years prior to the issuance of the complaint herein were, engaged in the sale and distribution of watches to many classes of customers, including jobbers, premium users, industrial firms, wholesalers, mail order firms, credit jewelers and house-to-house canvassers. In the course and conduct of such business, respondents cause, and have caused their watches, when sold, to be transported from their place of business in the State of New York to purchasers located in various other states of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein, have maintained a substantial course of trade in said watches, in commerce, between and among the various states of the United States and in the District of Columbia.

3. In the course and conduct of their business respondents were, and are now, in direct and substantial competition with other corporations and with firms and individuals engaged in the sale of watches in commerce.

II. The Alleged Illegal Practices

1. In the course and conduct of their business respondents, for the purpose of inducing the sale of their watches, have made, and have caused to be made, certain statements with respect to said watches by means of labels, tags, promotional material, circulars, display sheets, advertising mats supplied to dealers, and by other means, all of which were widely circulated and displayed throughout the United States to customers, prospective customers and the purchasing public. Among and typical of such statements are the following:

With Lifetime Ruby Jewels
Water Resistant
Shock Protected
Each watch is guaranteed to give you a lifetime of true time.

2. Through the use of the above statements and others of similar import respondents represented, directly and by implication, that their watches contained ruby jewels, were shock proof, shock protected and water resistant, and were guaranteed for life. While not conceding the falsity of the representations that their watches contained ruby

[3] The term "respondents" as hereafter used in this decision does not include the individual respondent, Jack Nadel.

jewels and were shock protected, respondents asserted in their answer that these representations had been discontinued prior to the issuance of the complaint herein, and that they had no intention of resuming them. With respect to the representations that their watches are water resistant and are guaranteed for life, respondents contend that such representations are truthful, and are not false and deceptive. Evidence was offered by counsel supporting the complaint purporting to show that all of the above representations made by respondents concerning their watches were false, misleading and deceptive, and that the statements that such watches contained ruby jewels and were shock protected had not been discontinued. The evidence with respect to the issues raised concerning the qualities of respondents' watches and the nature of the guarantee will be hereafter discussed.

3. Respondents, before shipping their watches to purchasers thereof, affix price tags to each watch or to the plastic box or case in which such watches are enclosed for display and sale purposes. Such price tags remain affixed to the watches or to the boxes in which they are enclosed when they are displayed by respondents' customers, for resale purposes, and at the time of such resale. Respondents also place price lists and other descriptive material in the hands of their dealers which contain the word "Retail" in referring to the prices of said watches. The prices identified as "Retail" correspond to the prices specified on the tags affixed to the watches or to the boxes in which they are enclosed. The price lists and descriptive material, or copies thereof prepared by respondents' customers from mats supplied by respondents, are exhibited or supplied to potential and actual purchasers by respondents' customers.

4. The complaint alleges, and respondents admit in their answer, that by means of the price tags and price lists respondents represent that the amounts appearing thereon are the usual and regular retail prices for their said watches. The issue raised concerning the price tags and price lists is whether the amounts appearing thereon were the amounts at which such watches usually and reguarly are sold at retail, or whether they were fictitious. Most of the evidence offered in support of and in opposition to the allegations of the complaint involved the charge that the preticketed prices were fictitious. The examiner turns first to a consideration of this issue, and then to the remaining issues in the proceeding.

A. Preticketing

1. While the primary issue raised with respect to the preticketing of respondents' watches is whether the prices appearing on the tags and price lists are fictitious, respondents in their brief have also raised

a subsidiary issue as to whether their practice in placing price tags on watches or watch cases, and in supplying price lists and other descriptive material, constitutes a representation that the prices appearing thereon are the usual and regular retail prices of their watches. As noted above, respondents admitted in their answer the allegation of the complaint that, by means of the price tags and price lists, respondents represented that the amount appearing thereon are the usual and regular retail prices of their watches. Outside of the price tags and price lists, counsel supporting the complaint offered no evidence as to the public understanding or impression concerning the significance of the information appearing on the price tags and price lists. Despite the admission in their answer, respondents now apparently contend that in the absence of evidence as to what the public understands such price tags and price lists to mean, no finding can be made that they constitute a respresentation as to the usual and regular retail sale prices of their watches. It is further asserted, based on the testimony of several dealer witnesses, that the indicated prices are merely a respresentation as to the "suggested retail" or "list" price of the watches.

2. In view of the admission contained in respondents' answer there was no necessity for counsel supporting the complaint to introduce consumer testimony concerning the understanding by the public of the terms used, and the practices followed, by respondents. Aside from this, however, there is no merit to respondents' position. The meaning and significance of the price tags affixed to the watches and of the price lists identifying the "Retail" prices of the watches are so plainly and unmistakable that it would be sheer redundancy to encumber the record with testimony of consumer or so-called public witnesses. The Commission is sufficiently expert in such matters to determine the tendency and capacity of these terms and practices to deceive the public without conducting a "public opinion" poll.[4] The Commission has already specifically determined that the affixing of a price tag to a product for use in connection with its sale or offer for sale to the public, without more, constitutes a representation as to the regular and usual retail price of the product.[5] It has never been seriously urged that the word "Retail", used as a prefix to the price of a product offered to the public, means anything other than what the plain meaning of the word says. In fact, even such references to price as "regular" or "usually" without the word "retail", have been held to constitute a representation

[4] *Drew* v. *FTC*, 235 F. 2d 1735, 741 (CA 2, 1956).

[5] *The Orloff Company, Inc.*, 52 FTC 709; *Mo-Ro Hosiery Co.*, 53 FTC 862; *Neuville, Inc.*, 53 FTC 436; *Kay Jewelry Stores, Inc.*, 54 FTC 548; *The Berger Watch Co.*, Docket 6894, March 7, 1960; *Sun Gold Industries*, Docket 7414, May 10, 1960; *Branton Watch Co.*, Docket 7617, June 10, 1960; *Clinton Watch Co.*, Docket 7434, July 19, 1960; and *The Baltimore Luggage Company*, Docket 7683, March 15, 1961.

as to the regular and usual retail price of the product being offered for sale.[6] The testimony referred to by respondents as to the understanding of several dealer customers, who themselves did not resell respondents' watches at the preticketed prices, is valueless since the question at issue is not whether those who are experts or are sophisticated in the practices of the industry will be deceived, but whether "the public—that vast multitude which includes the ignorant, the unthinking, and the credulous who in making purchases, did not stop to analyze"—will be misled.[7]

3. It is concluded and found that by affixing price tags to their watches and watch cases, and supplying tags and price lists to their customers, respondents have represented and continue to represent that the amounts appearing thereon were and are the usual and regular retail prices of said watches.

4. The principal issue raised by respondents concerns the prices at which their watches are usually and regularly sold at retail. The allegation of the complaint is that the amounts appearing on the tags and price lists are fictitious and greatly in excess of the prices at which the watches are usually and regularly sold at retail. In the opinion of the examiner such allegation is clearly established by the overwhelming weight of the evidence. This conclusion is based on admissions made by respondent officials, as well as on the testimony of dealers in several different trade areas. The evidence offered by respondents fails to disprove the evidence offered in support of the complaint. A summary of the evidence offered in support of, and in opposition to, the complaint is set forth below.

5. As previously indicated, respondents' watches are distributed through various trade channels. A substantial percentage (estimated by respondent Avner at 40%) is distributed through so-called wholesale distributors, who sell watches, jewelry and a wide variety of other items through the medium of catalogs. A large part of the sales of these catalog houses is made to industrial concerns, who purchase the watches for use as prizes or awards to employees and others. In some instances the employees are permitted to purchase the watches for themselves through the catalogs. Some of the catalog houses make sales to non-industrial customers who purchase for personal use. In addition to the catalog distributors, respondents sell watches to so-called jobbers who resell to retailers and others. Some of the jobbers also sell to the public on a discount basis. These jobbers, it was estimated by respondent Avner, account for approximately 25% of respondents' sales. Another large class of respondents' customers

[6] *The Fair* v. *FTC*, 272 F. 2d 609 (CA 7, 1959); *Bankers Securities Corp.*, Docket 7039, December 1, 1960; and *Main Street Furniture, Inc.*, Docket 7786, November 16, 1960.

[7] *Positive Products Co., Inc.* v. *FTC*, 137 F. 2d 165, 167 (CA 7, 1942).

(estimated by the same respondent as accounting for 30% of respondents' sales) are persons or firms who engage in the house-to-house sale of watches and other items on a long-term credit basis to consumers. The balance of respondents' sales (estimated at about 5%) are made to retail jewelers.

6. Respondents sell different lines of watches, at different prices, to their catalog distributors, to house-to-house canvassers, and to jewelers. The watches all bear the Helbros trade name, but some of them contain additional name designations such as Carla, Aida, Lord Philip, Barnett, etc. Not only are the prices different for each of the lines, but there are different prices within each line.

7. In fixing the retail prices of their products, respondents admittedly have no ideas as to the prices at which the watches actually sell in a particular trade area. The price tags for a particular watch are identical in amount, irrespective of area, although the record does reveal one instance in which a watch with the same name bore two different price tags in the same area, viz, Washington, D.C. The amounts on the price tabs and in the price lists are based on a formula, in which the indicated retail price is computed as a multiple of the cost of the watch to respondents' customer. The prices are determined by a committee of respondents' employees. According to respondent Carl Avner, who is a member of the committee, the price formula used for watches sold to catalog houses is 2½ to 3 times the wholesale cost of the watch, and a similar formula is used for retail jewelers. For house-to-house canvassers the formula is four to five times the cost of the watch.

8. When interviewed by a Commission investigator prior to the issuance of the complaint in this proceeding, respondent Avner admitted on several occasions that in the overwhelming majority of instances the actual retail prices of his company's watches were considerably lower than the prices appearing on the price tags.[8] Respondent Larry Prigozen, who also participated in the interviews with the Commission investigator, likewise admitted that the prices at which respondents' watches were preticketed were substantially higher than the actual retail prices of the watches. Prigozen's justification for respondents' use of the price tags containing such prices was that the industry generally was engaging in a similar practice.

9. In addition to evidence in the nature of admissions made by various respondents (ante litem motam), counsel supporting the complaint offered the testimony of various of respondents' customers in

[8] While not purporting to quote Avner's exact words, the investigator's report of the interviews, made within a matter of days thereafter from notes taken during the interviews, stated that while Avner claimed that "In some instances the watches were actually sold at the suggested retail prices", he "conceded that in the overwhelming majority of instances the actual retail prices were considerably lower than the marked price" (R. 203).

several different trade areas as to the actual retail prices of respondents' watches. One of these was the operator of a jewelry and watch repair business in Newark, New Jersey, who sold at both retail and wholesale. The witness resold respondents' watches at a retail price which was double his cost, and approximately one-half of the price appearing on the price tag. Thus a watch cost him $17.50 was resold by him at $35.00 The retail price tag placed on the watch by respondents contained the price figure $62.50. While this witness considered his markup of 100% somewhat lower than that of some of his competitors in the area, he testified that competitive conditions were such that there would not be many who could get more than a 100% markup.

Counsel supporting the complaint also produced three of respondents' customers in the Detroit, Michigan area. Two of the witnesses were so-called catalog distributors, who resold Helbros watches to industrial accounts through catalogs. A number of their industrial accounts used the watches as prizes and incentive awards. However, the two catalog houses also made sales at retail to employees of their industrial accounts and to other persons. One of these estimated his firm's retail sales as representing at least 50% of its business. Both firms resold their Helbros watches at a markup ranging from 5% to 40% above their cost. The third Detroit witness was a so-called wholesale jeweler, who actually resold 75% of respondents' watches at retail on a discount basis. His company's markup was generally 15% above his cost. None of the three Detroit witnesses sold Helbros watches at anything approaching the amounts appearing on the price tags. So far as appears from the record, respondents' watches are sold in the Detroit area at retail prices substantially below those appearing on the price tags.

A third area from which counsel supporting the complaint called customer witnesses was Louisville, Kentucky, where he adduced testimony from (1) a so-called wholesale catalog distributor purchasing directly from Helbros, (2) a discount store in nearby New Albany, Indiana, who purchased watches from the first witness, and (3) a small jeweler and pawnshop in Louisville. Approximately half of the business of the catalog distributor was with industrial accounts, which used the watches and other products carried by the witness' firm as prizes and gifts. However, the so-called wholesaler also made substantial retail sales to employees of his industrial accounts and to other consumers. His usual price for Helbros watches was 33⅓% above his cost, plus $1.00, with some allowance for larger quantity purchases. His firm never resold the watches at the preticketed price. The discount store in nearby New Albany, Indiana, likewise never sold respondents' watches at the tag price, its markup generally being

between 33% and 50% above its cost (which was about 12½% above the price its supplier paid Helbros). So far as appears from the record, none of respondents' watches sold at the preticketed prices in Louisville or nearby New Albany.

10. The testimony offered by respondents involved mainly house-to-house canvassers and credit jewelers in Washington, D.C. and Cleveland, Ohio, through which respondents established that some of their watches actually were resold at the tagged prices. These witnesses conduct a unique type of retail operation. They generally sell to a low-income clientele. They require little or no downpayment, and accept payment on an installment basis over a relatively long time-period, varying from 12 to 24 months or longer. No additional carrying charge is made for credit, and the retail price frequently includes the 10% Federal excise and state sales taxes, and repair of the watches without charge during the period of repayment. Losses on this type of operation due to bad debts or otherwise are extremely high, running as much as 25%. Operating overhead is likewise high due to collection costs, legal fees and repair costs. In order to be able to absorb all these added costs and operate at a profit, it was claimed to be necessary in this type of operation to sell at a markup of between 400% to 500%. One of the witnesses called in Cleveland was a jeweler who sold for cash, rather than on credit. However, while this witness generally resold respondents' watches at the preticketed prices, his retail prices included the Federal excise and state sales taxes.

11. In the opinion of the examiner the testimony adduced by respondents fails to establish that the prices appearing on the price tags and price lists are the usual and regular retail prices of their watches. The operations of the two groups of witnesses called by respondents in Cleveland and Washington, consisting mainly of house-to-house canvassers and credit jewelers, can hardly be called typical of retail operations generally. Several of the witnesses recognized that their type of operation differed from the ordinary department and jewelry stores which sell for cash or on 30-60-90-days credit terms. One of them acknowledged that watch companies sell a different line of watches, with a much higher price tag, for distribution through such long-term credit outlets, than those sold through the usual retail stores. Thus, according to this witness, the price tag markup on the regular retail line of watches of one watch company from which he bought was twice the cost of the watch, as against three times cost in the case of watches sold through credit jewelers. According to respondent Avner, the corporate respondent's own price tags on watches sold to retail jewelers provide for a 2½ time to three time markup, as compared to four-time markup on watches sold to house-to-house can-

vassers selling on credit. There is evidence in the record that even in the case of house-to-house canvassers, respondents' watches are sold below the ticketed price in somes areas.[9]

12. Respondents argue that the trend in the jewelery business is away from sales through ordinary retail stores selling for cash or on 30-60-90-day credit terms, and in the direction of long-term credit stores and the house-to-house type of operation. The evidence in the record fails to support any such finding. According to the testimony of respondent Avner, only 30% of respondents' sales are to house-to-house canvassers. The greatest portion of respondents' sales are to catalog distributors and discount houses who sell for cash, either to industrial accounts or directly to consumers. In any event, in the mind of the average consumer a price tag appearing on a watch would conjure up an image that this is the price at which the watch sells in a department store or ordinary retail jewelery store. It would hardly occur to him that the amount appearing thereon represents the price charged by long-term credit jewelers or house-to-house canvassers, operating on a 400% to 500% markup.

13. Respondents also argue that the evidence adduced by counsel supporting the complaint is not representative of retail establishments, in that it consists mainly of testimony by catalog house distributors and discount houses. Aside from the fact that a number of the witnesses did make a substantial part of their sales at retail, the witnesses called by counsel supporting the complaint were actually typical of respondents' own customers and of the type of establishment carrying respondents' watches. According to respondent Avner, 40% of the company's sales are made through catalog houses and an additional percentage is made through so-called wholesalers, a number of whom actually are discount houses. Approximately one-third of its sales are made to house-to-house canvassers, and only 5% to retail jewelers. Thus, the largest part of respondents' watches are sold to a type of operator who resells them to industrial accounts which give them away, or who resells the watches to the ultimate consumer at so-called discount prices.

14. Respondents, in effect, are seeking to justify a representation as to an unsually high and unrealistic retail price because a portion of their sales (the smaller portion) is made through a typical retail outlets whose unusual operating costs require them to use an unusually high markup. However, as previously indicated, respondents sell a different line of watches through credit establishments than they do through catalog distributors, retail jewelers and other cash establish-

[9] The jeweler called by counsel supporting the complaint from Northern New Jersey resold some of his watches to house-to-house canvassers, who in turn resold the watches at below the ticketed prices.

ments. Consequently, even if credit-type establishments do generally sell respondents' watches at the preticketed prices, this does not establish that the price tags used on watches distributed through cash-type outlets contain genuine retail prices. The evidence offered by counsel supporting the complaint clearly establishes that they do not.

15. Aside from all other considerations, respondents' argument must fail because it overlooks the fact that a price tag appearing on a watch constitutes a representation as to the retail price at which the watch usually and regularly sells in the market area where it is offered for sale. Even if it were to appear, contrary to the facts in the record, that the greater part of respondents' watches were resold nationally at the preticketed prices, this would not justify the use of such price tags in areas where they do not usually sell at the prices appearing on the tags.[10] The uncontroverted evidence adduced by counsel supporting the complaint establishes that in at least three areas, Northern New Jersey, Detroit, and Louisville, Kentucky and the adjacent New Albany, Indiana area, respondents' watches do not usually and regularly sell at retail at the prices appearing on the price tags or in the price lists supplied by respondents.

As previously indicated, respondent Avner conceded that the company had no idea of the prevailing prices in any area when it fixed the amounts appearing on the price tags. Respondents do not enter into any resale price maintenance agreements with their distributors or otherwise attempt to control the prices charged at retail. One of respondents' customers in Cleveland testified that he did not advise respondents what prices he resold the watches for, and that they made no inquiry from him as to the prices he charged. Respondents frequently furnish additional price tags to their dealers and have no idea whether such tags will be used on the watches for which they are intended, or on watches having a so-called higher list price. It seems clear, therefore, that it is pure happenstance that some dealers do in fact resell respondents' watches at the ticketed prices.

16. It is concluded and found that the representations made by respondents on the price tags and in the price lists supplied by them to customers in connection with the sale of their watches were and are false, misleading and deceptive. In truth and in fact the amounts set forth on such price tags and in such price lists were and are greatly

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[10] See *The Baltimore Luggage Company*, Docket 7683, March 15, 1961. In *The Baltimore Luggage* case it was pointed out by respondents that approximately 70% of their retail customers, located in 34 states and representing about 62.5% of their dollar volume of sales, sold their luggage at the preticketed prices. However, this was not considered controlling in view of the fact that respondents' customers in New York, Philadelphia and Washington usually and regularly sold their luggage in those trade areas for less than the price printed on the tags attached to the articles.

in excess of the prices at which respondents' watches are usually and regularly sold at retail in a number of trade areas.

B. Water Resistant

1. The complaint alleges, respondents admit in their answer, and the evidence establishes, that by means of labels, circulars, display and promotional material and other means respondents represent that their watches are "water resistant". The issue raised with respect to this representation is whether it is true. Counsel supporting the complaint offered evidence, through a testing engineer employed by an independent firm of metallurgical chemists which had tested four of respondents' watches, to show that the watches were not water resistant. Respondents offered evidence, through a representative of an independent testing laboratory which had tested seven of their watches, to show that such watches are water resistant. Each side questions the validity of some aspects of the tests conducted for the other. In the opinion of the examiner the allegations of the complaint with respect to lack of water resistancy have been adequately established by the evidence, for the reasons hereafter appearing.

2. Both tests were purportedly conducted in accordance with Rule 2(c) of the Commission's Trade Practice Rules, promulgated April 24, 1947, which provides for two different tests for the testing of watches or watch cases for water resistancy or water repellency. The first of the tests is the so-called "pressure" test, which provides for immersion in water of the watch or watch case for at least three minutes, at a pressure equivalent to a depth of 26 feet of water under normal atmospheric pressure of 15 pounds per square inch. The rule does not describe how the test is to be conducted to achieve this amount of pressure, but states that a watch or case will be deemed to have passed the test if it is subject to the indicated pressure "without admitting, or showing any evidence of capacity to admit, any moisture or water." The second test provided for in the rule is the so-called "vacuum" test. The specification for this test is that the watch or watch case be completely immersed in water "under a vacuum sufficient to be productive of conditions of equivalent or greater severity" than that involved in the pressure test. As in the case of the pressure test, the rule does not describe how the test shall be conducted to achieve the appropriate vacuum conditions.

3. The testing engineer who conducted the test at the instance of counsel supporting the complaint used the so-called vacuum test. He was supplied with four of respondents' watches bearing the names, respectively, Ludlow, Dempsey, Regency, and Sentinel. Each watch had been marked or otherwise labeled by respondents as "water resist-

ant". The watches had previously been purchased by a Commission investigator from a distributor of respondents' watches in Philadelphia. Each of the watches was taken off the shelf by the distributor and was represented as having been purchased from respondents a year and a half to two years prior thereto.[11]

4. Each of the watches was immersed by the tester in water in a beaker within a bell jar, and a vacuum equivalent to a mercury column of 22.95 inches high was drawn in the jar. This created an excess of air pressure within the watch case of 11.26 pounds per square inch, which is equivalent to the pressure caused by being subject to a depth of 26 feet of water under normal atmospheric pressure of 15 pounds per square inch. Although the test provided that the watches should remain immersed for at least three minutes without showing evidence of admitting water, each of the four watches began showing evidence of water leaking within less than a minute. The evidence took the form of air bubbles within the vaccum jar. So far as appears from the record, the tests were properly conducted by a person competent to conduct such tests, and established that the watches tested were not water resistant.

5. Respondents suggest in the brief filed on their behalf that there was some possible infirmity in the test due to the lack of prior experience in testing watches by the testing laboratory used by counsel supporting the complaint. Respondents' counsel also suggested, during the course of cross-examination of the witness, that the vacuum test was less accurate than the pressure test, and that the watches should have been opened up subsequent to the test to determine whether they contained any moisture. It is not clear whether these latter contentions have now been abandoned, since they are not referred to in the proposed findings or brief filed on behalf of respondents. In any event, none of the contentions advanced has any merit.

The person who conducted the test on behalf of counsel supporting the complaint had a B.S. degree in Metallurgy and had had 25 years experience in the testing of metals. While he had not previously tested watches, he had performed similar tests on vacuum tubes and other products to determine their water resistancy. He impressed the examiner as being highly competent and knowledgeable in the field. As far as comparative experience of the two experts is concerned, it may be noted that the sole prior experience in testing watches by respondents' expert involved a single occasion some six years prior to the tests in question. On that occasion he too had used the vacuum test, the tests conducted for respondents involving his

[11] The investigator had been instructed to obtain, for testing, watches which had been sold by respondents prior to the issuance of the complaint herein.

first use of the pressure test. With respect to the suggestion that the pressure test is more reliable than the vacuum test, it may be noted that respondents' expert conceded that, if properly conducted, the vacuum test was as accurate as the pressure test. While Rule 2 does not contain any specifications or details as to how the vacuum test should be conducted, a fact also adverted to by counsel for respondents during his cross-examination of the Government's expert, the same thing is true of the pressure test. In either case, the proper conducting of the test depends on the scientific knowhow and competency of the tester.

Counsel for respondents have also suggested that possibly there was something wrong with the watches tested because they were a year-and-a-half or two-years old at the time. However, there is nothing in the record to justify any inference that the watches had been subjected to any abuse or rough handling while they were in the establishment of the dealer from whom they were purchased by a Commission investigator, so as to cause an impairment of any water resistant qualities which they may otherwise have had when they were sold by respondents to the dealer. Certainly there is nothing to suggest that the watches were given any rougher treatment than they would have been subjected to if they had been given a year-and-a-half or two-years normal wear by a consumer who had purchased and worn them. Respondents' representation as to the water resistancy of their watches contains no limitation as to the time period within which they will retain this quality.[12]

6. The test conducted by respondents' expert was just the reverse of that conducted by the laboratory which had done the testing on behalf of counsel supporting the complaint. The watches were immersed in a sealed cylinder, but instead of the tester creating a vacuum by removing air pressure within the cylinder and allowing the normal pressure inside the watch to exert an outward flow, he built up an equivalent amount of pressure in the cylinder so as to force water into the watch case if there were any apertures in it. After being subjected to the appropriate pressure for three minutes, the watches were removed and placed in a refrigerated box under a temperature of minus 65 degrees. They were then placed in a laboratory oven under a temperature of 115 degrees. After being removed from the oven they were placed face upwards to see if there was any condensation of moisture on the watch crystals. According to respondents' expert he concluded the watches were water resistant because there was no moisture condensation on the crystals. Like the expert who conducted the test

[12] Under Rule 2(b) of the rules referred to above, if the water-resistant quality of a watch is likely to be impaired by being opened for repairs or by "customary use or wear of the watch", these facts are required to be revealed.

for counsel supporting the complaint, respondents' expert did not open the watches to examine them for moisture on the inside.

7. In evaluating the relative competence of the two experts and the manner in which the tests were conducted, it may be noted that respondents' expert has a B.S. degree in Chemical Engineering, while the expert used by counsel supporting the complaint has a B.S. degree in Metallurgy. The latter has had considerably longer experience in testing than the former (25 as compared to 10 years), and his experience has been concentrated in the field of metallurgy, whereas the expert used by respondents has had more generalized experience in the testing of products. While the expert used by counsel supporting the complaint had never previously tested watches for water resistancy, he had tested similar products and seemed thoroughly familiar with the techniques to be used and the scientific principles on which they were based. Respondents' expert, on the other hand, while he had previously conducted a test on watches, had actually used the vacuum test on the prior occasion, and did not appear to be too certain of all of the techniques used in the pressure test, nor as to the scientific basis of some of them. He himself had not actually conducted the test, but it had been performed under his general supervision. He was uncertain, for example, why the watches had to be placed in a cold box prior to being placed in the laboratory oven. While claiming that this was a "standard procedure which we have picked up from knowing the trade", it appears that this technique was suggested to him by the technician who actually conducted the test. The testimony of one of respondents' own officials indicates that the industry itself does not use this technique in testing watches for water resistancy, but merely places the watches in a hot oven after water immersion.

Respondents' expert conceded that validity of his tests depended on the assumption that the crystal of the watch cooled faster than the rest of the watch, so as cause condensation on it of any water which may have seeped into the watch. If there were no such difference in the rate of cooling, condensation would not occur on the crystal and it would not be possible to determine whether there was any moisture in the watch, except by opening it and examining the case and watch movements. While suggesting that condensation would be assured by the prior cold-box treatment, the witness was uncertain of the scientific basis for this assertion.[13] The test used by the expert called by counsel supporting the complaint, on the other hand, if properly

[13] When asked how the placing of the watches in a cold box prior to putting them in the oven would, as he claimed, "accentuate the action of the condensation in the oven", the witness gave the following illuminating explanation: "Well, you have got a good point there when you saw 'How.' The theory behind that, I believe, is to—by golly, you have got me there, now" [R. 684].

conducted, would give visible evidence of the lack of water resistancy in the watch by the emergence of air bubbles from the watch as it lay submerged under vacuum conditions.

Another element of doubt with respect to respondents' tests is the fact that all of the watches tested had been assembled only 24 to 48 hours prior thereto. They were thus in an optimum condition, insofar as water repellancy is concerned, having never been subjected to normal wear and tear, or movement of any kind. Some, at least, of the watches had previously been pretested for water resistancy in respondents' own place of business. Furthermore, most of the watches tested did not bear the same names as those that had previously been tested on behalf of counsel supporting the complaint.

8. As indicated above, there are a number of questions raised with respect to the tests conducted on behalf of respondents which create some doubt in the mind of the examiner whether the watches were properly tested for water resistancy, and whether the tests were conducted on watches which were similar to those tested by counsel supporting the complaint. The examiner finds it unnecessary, however, to reach any final conclusions in this regard. In order to sustain the allegations of the complaint that respondents have falsely represented their watches to be water resistant, it is not necessary to find that all or even a majority of their watches are not water resistant. If a group of watches selected at random are tested and are found not to be water resistant, the charge in the complaint has been established, even though other groups of watches may be found to be water resistant. Respondents have undertaken to make an affirmative representation concerning their watches and must bear the responsibility if this representation is not true with respect to "some" portion of the watches.[14]

9. Respondents argue that they have taken reasonable measures to insure that their watches are water resistant. Thus respondent Jack Diamond testified that the company spot-tested between 25% to 33⅓% of the watch cases for water resistancy after they were received, and that it was their practice to reject an entire lot of cases if any portion of those tested leaked. The same witness also testified that about 10% of the watches were tested for water resistancy after they had been assembled. In the opinion of the examiner, respondents cannot escape their responsibility to the public under the Federal Trade Commission Act merely because they have spot-tested a portion of their watches before they were offered for sale. If respondents wish to make an affirmative representation concerning the water-resistant qualities of their watches, they must test whatever percentage, or take whatever

[14] Compare *Prima Products Inc. v. FTC*, 209 F. 2d 405, 409 (C.A. 2, 1954).

other steps are necessary, to assure that they are making a truthful representation to the purchaser of their watches. It may be noted, in this connection, that the Trade Practice Rules under which respondents purported to test their watches contain no provision for so-called spot testing. They permit the use of the terms "Water Resistant" and "Water Repellant" in connection with a watch or watchcase "when, before being placed upon the market * * *, *the watch and the case have undergone such test*" (emphasis supplied).

10. It is concluded and found that the statements made by respondents on certain of their watches that said watches are water resistant are false, deceptive and misleading. In truth and in fact, some of said watches sold in the regular course of business are not water resistant.

11. It may be further noted that while the complaint charges misrepresentation only with respect to water resistancy, respondents have also represented their watches to be "waterproof". This representation appears on the back of some of the watches, and on tags and advertising literature used by respondents. Under the Trade Practice Rules previously discussed, "waterproof" implies a higher degree of imperviousness to water than does "water resistant". A watch marked as "waterproof" must be able to withstand a pressure of at least 35 pounds per square inch for at least 5 minutes, after complete immersion for a prior period of 5 minutes under atmospheric pressure of 15 pounds per square inch. Presumably respondents' watches which were unable to pass the test for water resistancy would be unable to pass the waterproof test.

C. Shock Proof and Shock Protected

1. The complaint alleges that respondents represented their watches to be "shock proof" and "shock protected". Respondents, in their answer, admit having used the term "shock protected" in connection with their watches, but allege that they discontinued use of the term "long prior" to the isuance of the complaint in this proceeding. It is not clear whether this admission also applies to the term "shock proof". In any event, the record discloses that the terms "shock proof" and "shock protected" have both been imprinted on the back of a number of respondents' watches, and also that the term "shock resistant" appears on tags which accompany many of respondents' watches. Contrary to the contention of respondents, all of these terms have continued to be used subsequent to the issuance of the complaint herein. For example, the record discloses that watches so marked were being sold by respondents' customers subsequent to May 21, 1957, the date of the issuance of the complaint in this proceeding, and that as late as November 1958 respondents were assembling watches for sale which

were marked as "shock proof" or "shock protected".[15] It is clear, therefore, that respondents have represented and continue to represent their watches to be shock proof, shock protected and shock resistant.

2. Aside from their claim of discontinuance, respondents also contend that their watches are, in fact, "shock protected" because they meet the requirements of Rule 3(c) of the Commission's Trade Practice Rules of April 24, 1947, previously referred to. The rule, it should be noted, does not authorize use of the term "shock protected". It does, however, permit the use of the terms "shock resistant" and "shock absorbing", in connection with watches containing a mechanical or other device or type of construction by reason of which "both balance pivots in such watch or watch movement are protected from shocks, concussions, jolts, or accidental blows of at least that degree of damaging potentialities as would be sustained by the balance pivots in the watch or watch movement when falling in an unprotected condition upon a level solid hardwood floor in any position from a height of three feet". Many of respondents' watches do contain a device for protecting the balance pivots, as provided in Rule 3(c). There is no evidence in the record that this device will not protect the balance pivots from such damage as is provided for in the rule.

3. In support of his contention that respondents falsely represented their watches to be "shock proof" and "shock protected", counsel supporting the complaint relies on the testimony of a jeweler who repairs watches and who purported to be familiar with the public's undersetanding of such terms. According to this witness, some of his customers believe that such terms mean the entire watch (not merely the balance pivots) is protected from shock, and that the watch will be able to withstand any type or amount of shock. The witness did indicate, however, that the average consumer would not expect a watch to withstand unusual or abnormal shocks or pressure.

4. Respondents characterize as "fantastic" the testimony of the witness called by counsel supporting the complaint, to the effect that some members of the purchasing public expect a watch represented as "shock proof" or "shock protected" to be able to withstand any shock, no matter how violent. Since there is no evidence that the watches will not withstand the type of shock specified under Rule 3(c) of the Commission's Trade Practice Rules, it is contended by respondents that the allegation of misrepresentation with respect to this charge has not been established.

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[15] Respondents' Exhibits 2, 3, 5, 6, 7 and 8, which were furnished to the New York Laboratory by respondents for testing for water resistancy, contain these representations. According to respondent Diamond, these watches had been selected at random from watches assembled during the preceding 24–48-hour period, prior to their being offered for sale.

5. In the opinion of the examiner, to the extent that the representations made by respondents are permissible under the Commission's Trade Practice Rules, it would not be in the public interest to hold that respondents have engaged in a practice in violation of the Federal Trade Commission Act. The examiner is aware that the Commission has held the trade practice rules "were not intended to be regarded and recognized as substantive rules of law, or as factual conclusions which might be cited or accepted in an adjudicative proceeding as a substitute for evidence", and that such rules were merely "designed to be helpful guides to the various industries for which they have been promulgated".[16] However, while the rules are not substantive rules of law and cannot be used as a substitute for evidence, they certainly were not intended to ensnare members of the industry for which they were promulgated and which have relied thereon. To the extent that respondents' representations concerning the ability of their watches to withstand shock comply with the rules, the examiner does not consider them to involve a misrepresentation, even though the witness called by counsel supporting the complaint testified that there are members of the public which expect watches labeled as having shock-resistant qualities to be able to withstand any amount of shock.

6. However, as previously indicated, the representations made by respondents extend beyond those which are permissible under the Trade Practice Rules. Rule 3(c) permits only the use of the terms "Shock Resistant" and "Shock Absorbing", to the extent the watches contain a device or are constructed to protect the balance pivots from a shock equivalent to that involved in dropping the watch on a hardwood floor from a height of three feet. Respondents' watches are labeled and branded not merely as "shock resistant", which is permissible under Rule 3(c), but also as "shock proof" and "shock protected". Under Rule 3(a) of the same Trade Practice Rules, the latter terms are specified as constituting an unfair trade practice and are not authorized under any circumstances.

7. Since respondents' watches are constructed or contain devices only to protect the balance pivots, and such construction or devices will not protect other portions of the watch, and since the watches are not able to withstand unlimited shocks, it is concluded and found that the representations that the watches are "shock proof" or "shock protected" are false, misleading and deceptive inasmuch as such watches are not, in truth and in fact, shock proof or shock protected. While respondents may regard as "fantastic" the testimony that some members of the purchasing public expect watches so labeled to withstand any type of shock, the testimony of the witness who so testified is not inherently incredible and there is no countervailing evidence in

[16] *Lifetime Cutlery Corp.*, Doc. 7292, October 30, 1959.

the record to justify disregarding such testimony. It is no more fantastic to believe that there are some persons who regard a watch labeled as "shock proof" to be able to withstand any type of shock, than it is to believe that there are some persons who might expect a masonry structure treated by a product labeled as "waterproof" will "remain absolutely dry under any and all conditions of water pressure from without." [17]

8. In connection with respondents' contention that they abandoned the term "shock protected" long prior to the issuance of the complaint, it may be noted that both in 1952 and 1955, respondents were advised in writing by the Commission that the use of the terms "shock protenced" and "shock proof" was in violation of the Trade Practice Rules. On both occasions respondents assured the Commission that these terms had been or would be discontinued. Despite these assurances, respondents continued to use them. It seems evident, therefore, that only a cease and desist order will assure effective discontinuance of these terms.

D. Ruby Jewels

1. The complaint alleges, and the answer admits, that respondents represent their watches as containing "Lifetime Ruby Jewels". However, in their answer respondents aver that this representation was discontinued "long prior" to the issuance of the complaint and that they have no intention of resuming it. The evidence establishes that the representation was not abandoned "long prior" to the issuance of the complaint, but that it continued to be made at least until July 1957 (the complaint herein having been issued May 21, 1957).

2. The matter of respondents' use of the term "Ruby Jewels" in connection with their watches was first called to respondents' attention by the Commission in a letter dated July 22, 1955, advising respondents, among other things, of the Commission's understanding that "genuine ruby jewels are not currently being used in [your] watches, but that instead jewels are composed of synthetic rubies" (CX 35–A). By letter dated August 1, 1955, respondent Avner replying on behalf of the corporate respondent, stated that "immediate steps" would be taken to remedy this practice, among the others referred to in the Commission's letter. A letter from the Commission dated August 11, 1955, requesting copies of respondents' revised advertising material was met with the response by respondent Avner that, "the word 'ruby' has been deleted from all of our advertising material" (CX 40–A). Despite these assurances, respondents continued using the term "ruby jewels" in their advertising material until at least July 1, 1957.

[17] See *Prima Products, Inc.* v. *FTC*, supra.

Advertising material which was placed in the plastic cases containing respondents' watches, until at least July 1, 1957, contained the statement: "The ruby jewels in each Helbros movement are guaranteed, without qualification for the life of the watch."

3. It is not disputed that respondents' watches do not contain genuine ruby jewels. It is therefore concluded and found that respondents' representations that their watches contain ruby jewels are false, misleading and deceptive since in truth and in fact they do not contain ruby jewels, but contain jewels composed of synthetic material. Respondents contend that since the term was abandoned around July 1, 1957, no order to cease and desist with respect to this practice should issue. In view of the prior assurances given and not fulfilled by respondents in this and other respects, it is clear that only by placing respondents under an express prohibition in a cease and desist order will compliance with their reponsibility to the public be assured.

E. Guarantee

1. It is not disputed that in catalog pages, circulars and other advertising literature respondents use the phrase: "Each watch is fully guaranteed to give you a lifetime of true time". In addition to this statement appearing in their advertising literature, respondents also insert a purported form of guarantee in each watch box entitled "Helbros Watch Guarantee". The form used up to about July 1, 1957, read as follows:

> This Helbros watch is fully guaranteed as to original material and workmanship. It has been timed, tested and adjusted by the Helbros Watch Co., Inc.

The form of guarantee which has been used since July 1957 is as follows:

> The Helbros Watch Company certifies that this watch has been carefully tested and regulated and is fully guaranteed against original mechanical defects.

2. Counsel supporting the complaint contends that respondents' statement in advertising material that their watches are "fully guaranteed to give a lifetime of true time" is a representation that the watches are unconditionally guaranteed for life. Respondents contend that such representation should be interpreted as being coextensive with the more recent written guarantee contained in the watch box, that the watch is guaranteed "against original mechanical defects". It is argued that a guarantee of a "lifetime of true time" does not necessarily mean that the watch is guaranteed to give good time no matter how it is abused.

3. Respondents do not, in practice, guarantee their watches unconditionally. Watches which do not work are repaired by respondents without cost only for a period of one year, and then only for

defects considered to be the result of original mechanical defects. After a year, respondents usually charge a fee for repairing a watch since they consider that any defect occurring after that time is due to "ordinary wear and tear * * * which we can't control". The charge varies with the work involved. While characterizing such charges as "nominal", respondent Avner indicated that a charge of $4.85 or $5.85 would customarily be made for cleaning and oiling a watch.

4. It is the conclusion and finding of the examiner that the representation made by respondents that their watches are "fully guaranteed" is false, misleading and deceptive. The statement appearing in respondents' advertising material that the watches are "fully guaranteed" to give a "lifetime of true time" would undoubtedly lead some members of the public to believe that the watches are unconditionally guaranteed, and will be repaired without charge for their lifetime. This does not necessarily mean that the public would understand or expect the watches to be repaired free of charge, without regard to the amount of abuse to which they were subjected, as respondents suggest, but at least there would be an expectation that the watch would be repaired free for failures resulting from ordinary wear and tear.

5. Having created the original impression that their watches are unconditionally guaranteed, respondents cannot seek refuge in the wording of the form of guarantee which accompanies the watch.[18] Furthermore, even the forms of guarantee themselves are misleading. The earlier form, stating that the watch is "fully guaranteed as to original material and workmanship", is certainly subject to the interpretation that the watch will be repaired without charge for some indefinite period of time. There is nothing in the guarantee form to suggest that there is only a one-year time period within which the guarantee operates. The same is true of the present form which states that the watch is "fully guaranteed against original mechanical defects". Both of the guarantees are vague as to the nature and extent of the guarantee, and the manner in which they will be performed.

F. Individual Liability

1. It is the contention of counsel for respondents that the individual respondents, other than Helbein, should not be held liable in their individual capacities under any order which may issue in this proceeding, since they do not have a substantial stock interest in the

[18] As stated in *Carter Products Inc.* v. *FTC*, 186 F. 2d 821 (CA 7, 1951), at 824: "The law is violated if the first contact or interview is secured by deception (*FTC* v. *Standard Education Society et al.*, 302 U.S. 112, 115), even though the true facts are made known to the buyer before he enters into the contract or purchase" (*Progressive Tailoring Co.* v. *FTC*, 7 Cir., 153 F. 2d 103, 104, 105).

company and are merely salaried employees. While it is true that the respondents other than Helbein do not have any substantial stock interest in the company, they are more than ordinary salaried employees. Each is an officer of the company and is in charge of a particular phase of the corporate respondent's operations. More importantly, each is a member of the policy committee which determines the general policies pursuant to which the company operates and, particularly, the policies which gave rise to the practices that are the subject of the complaint in this proceeding. The policy committee has an important role in conducting the affairs of the business, especially since President Helbein is frequently away on business. Each of the individual respondents appears to have an intimate knowledge of the company's operations and plays an active role insofar as the practices at issue are concerned. All were consulted by, and gave information with respect thereto to, the Commission's investigator. Respondents Avner and Diamond were present during substantial portions of the hearings in an advisory capacity to counsel for respondents. Respondent Avner undertook to speak on behalf of the company when its activities first came under investigation in 1952 and 1955, and gave assurances concerning the manner in which its practices would be changed. Such assurances, as above indicated, were in a number of respects not fulfilled.

2. It is the opinion and finding of the examiner that, in view of the active role played by the individual respondents in the formulation and direction of the company's operating policies, including the matters which are challenged by the complaint, and the past history of evasion of the undertakings made on behalf of the company, the order to be issued in this proceeding should run against the respondents in their individual, as well as their corporate, capacities in order to insure full compliance and prevent evasion.

G. Summary and Concluding Findings

On the record as a whole, including the evidence discussed above, it is concluded and found as follows:

1. In the course and conduct of their business, respondents, for the purpose of inducing the sale of their watches, have, through statements appearing in promotional materials, labels and by other means, all of which were circulated and displayed throughout the United States to customers, prospective customers and the purchasing public, represented, directly and by implication, that their watches contained ruby jewels, were shock proof, shock protected and water resistant, and were guaranteed for life.

2. Such statements were and are false, misleading and deceptive since in truth and in fact said watches do not contain ruby jewels

but contain jewels composed of synthetic materials; are not shock proof, shock protected or water resistant; and are not actually guaranteed for life, and the terms, conditions and extent to which such guarantee applies, and the manner in which the guarantor will perform, are not disclosed.

3. Respondents, before shipping their watches to purchasers, affix price tags thereto and also place in the hands of dealers price lists and other price material, by which respondents represent that the amounts appearing thereon are the usual and regular retail prices for said watches. Such representations are false, misleading and deceptive since in truth and in fact such amounts are fictitious and greatly in excess of the prices at which said watches are usually and regularly sold at retail.

4. By means of the acts and practices found in Paragraph 3 hereof respondents have placed a means and instrumentality in the hands of retailers and others by and through which the purchasing public may be misled as to the prices at which their watches are usually and regularly sold at retail.

III. The Effect of the Illegal Practices

The use by respondents of the false and misleading statements and representations hereinabove found had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were true and to induce the purchasing public to purchase substantial quantities of said watches because of such erroneous and mistaken belief. As a consequence thereof, it may reasonably be inferred that substantial trade in commerce has been unfairly diverted to respondents from their competitors and injury has thereby been done to competition in commerce.

CONCLUSION OF LAW

The acts and practices of respondents, as hereinabove found, 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.

ORDER

It is ordered, That respondent Helbros Watch Company, Inc., a corporation, and its officers, and individual respondents William Helbein, Jack Diamond, Nat Prigozen, Larry Prigozen and Carl Avner, individually and as officers of said corporation, their agents, represen-

tatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of watches or 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:

(a) That their watches contain ruby jewels;

(b) That their watches are water resistant or otherwise resistant or impervious to water, unless such is the fact, or are shockproof or shock protected;

(c) 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;

(d) That their watches are guaranteed when a service charge is imposed, unless the fact that such service charge is imposed and the amount thereof is clearly and conspicuously disclosed;

(e) That certain amounts are the usual and regular retail prices of respondents' merchandise when such amounts are in excess of the prices at which such merchandise is usually and regularly sold at retail, by the class of retailers selling such merchandise, in the trade area or areas where the representation is made.

2. Engaging in any practice or plan which will provide retailers of their merchandise with the means of misrepresenting the usual and regular retail prices of such merchandise.

It is further ordered, That the complaint herein be, and the same hereby is dismissed as to respondent Jack Nadel, without prejudice.

DECISION OF THE COMMISSION AS TO RESPONDENT WILLIAM HELBEIN

It appearing from the certified copy of death certificate, which is hereby received and filed, that the respondent William Helbein departed this life on July 12, 1960, and the Commission having placed this case on its own docket to formally terminate this proceeding solely as to him:

It is ordered, That the allegations of the complaint be, and they hereby are, dismissed as to respondent William Helbein, deceased.

June 8, 1961

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner:*

The complaint in this matter charges respondents with violation of the Federal Trade Commission Act. The hearing examiner in his initial decision held that the allegations of the complaint were sustained by the evidence and ordered respondents (except for an indi-

vidual respondent against whom the complaint was dismissed) to cease and desist from the practices found to be unlawful. Respondents have appealed from this decision.

In substance, the complaint charges respondents with misrepresenting the usual and regular retail prices of watches sold by them to retailers and other distributors and further alleges that respondents falsely represented that their watches contained ruby jewels, were shock proof, shock protected, water resistant and guaranteed for life.

Respondents argue on appeal that none of these allegations were sustained by the evidence and request that the complaint be dismissed. They further contend that certain of the practices have been abandoned and that the hearing examiner erred in failing to so find.

We will consider first the argument that the record does not support the holding in the initial decision that the amounts set forth on tickets affixed to respondents' watches and appearing in price lists supplied by respondents to their customers are in excess of the prices at which such watches are usually and regularly sold at retail. This holding is based in part upon a showing by counsel supporting the complaint that certain dealers or distributors in three market areas regularly sell respondents' watches at prices substantially below the amounts appearing on respondents' price tickets and price lists. Respondents point out that all but one of these dealers or distributors were catalog or discount houses. They then argue that sales by a discount house are made at a discount from retail prices; that such sales are therefore not retail sales and consequently do not tend to prove that the preticketed prices are not the usual and regular prices of respondents' watches. This argument is wholly without merit and must be rejected. The fact that a dealer sells at a lower markup than that used by his supplier in arriving at preticketed prices does not mean that the dealer is not selling at retail nor does it mean that the dealer is selling at a discount from an established price. The aforementioned catalog and discount houses were selling respondents' watches to the ultimate consumer and were, therefore, selling at retail. The evidence establishing that these concerns regularly sold respondents' watches at prices substantially less than the preticketed prices of such watches fully supports the hearing examiner's conclusion that the preticketed prices were not the usual and regular prices of respondents' watches in the trade areas under consideration.

Respondents further contend that the evidence adduced in their defense shows that certain distributors, accounting for approximately 30% of respondents' total sales, sell at the preticketed prices and that

the inference should be drawn from this showing that most of respondents' watches are resold at such prices. The record discloses in this connection that certain firms engaged in the sale of merchandise on a long term credit basis, including house-to-house canvassers and credit jewelers, do, for the most part, sell at the preticketed prices. It appears, however, that the sale of merchandise by these distributors is an entirely different type of operation from that conducted by retailers selling for cash or on a short term credit basis. According to the testimony of respondents' witnesses, the operating costs of the house-to-house canvasser and credit jeweler are so much greater than that of the conventional retailer that it is necessary for such a distributor to sell at a higher markup in order to make a profit. It is respondents' practice, therefore, to apply a higher markup (400% to 500%) in computing the preticketed prices of watches sold through the house-to-house canvasser and credit jeweler than that (250% to 300%) used in arriving at the preticketed prices of watches sold through other distributors. The record also discloses that respondents sell a different line of watches through the house-to-house canvasser and credit jeweler than that sold through other dealers. Consequently, we are of the opinion that the evidence presented by respondents that house-to-house canvassers and credit jewelers adhere to preticketed prices does not indicate that a different class of retailers selling a different line of watches adhere to preticketed prices computed on the basis of a different markup.

Respondents also contend that the hearing examiner erred in finding that certain of their watches were not "water resistant". This finding is based upon the testimony of a witness who had tested several of respondents' watches and found that they did not meet the standards for water resistance specified in trade practice rules promulgated by the Commission.[1] Respondents do not question the reasonableness of the testing standards specified in the rules and, in fact, concede that they have been generally adopted by the industry. They have challenged the qualifications of the witness who conducted the tests, however, and also suggest that the watches had been damaged in some manner prior to testing. The hearing examiner carefully considered both of these points in his decision, and we find nothing in the evidence or in respondents' brief to indicate that the tests had not been properly conducted by a competent person or that the watches tested had been impaired in some manner prior to testing.

The principal objection to this finding is that the hearing examiner failed to give proper weight to the testimony of an expert who had

[1] Trade Practice Rules Respecting the Terms "Water-Proof," "Shockproof," "Nonmagnetic," and Related Designations, as Applied to Watches, Watchcases, and Watch Movements, promulgated April 24, 1947.

conducted tests of other watches made by respondent and found them to be water resistant. Respondents claim that this testimony completely rebuts the evidence adduced by counsel supporting the complaint. The hearing examiner deemed it unnecessary, however, to determine whether respondents' expert had properly tested respondents' watches for water resistancy, holding that 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 find no error in this ruling and agree with the hearing examiner 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.

Other arguments presented in the appeal challenge the sufficiency of the evidence presented in support of the allegations concerning respondents' use of the terms "ruby jewels"; "shockproof" and "shock protected" and the representation that respondents' watches are fully guaranteed. We are convinced from our examination of the record that these allegations have also been sustained and that the hearing examiner's findings with respect thereto are correct. The arguments on these points are therefore rejected. Respondents' further argument that the practices covered by the aforementioned allegations have been abandoned is without substance and is also rejected. The fact that on another occasion respondents had failed to discontinue certain practices, after having assured the Commission that they would do so, is sufficient reason in itself for rejecting the present plea of abandonment.

Subsequent to the filing of the initial decision in this proceeding, the Commission upon receiving notification of the death of respondent William Helbein, by order of June 8, 1961, dismissed the complaint as to that individual. The order to cease and desist contained in the initial decision will, therefore, be modified in conformity with such order.

Respondents' appeal is denied and the initial decision, modified to conform with this opinion, will be adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and directing modification of the initial decision:

It is ordered, That the initial decision be modified by deleting from the preamble of the order to cease and desist contained therein the name William Helbein, and by striking the last paragraph of the initial decision and substituting therefor the following:

"*It is further ordered*, That the complaint be, and the same hereby is, dismissed as to respondent William Helbein." [deceased]

It is further ordered, That as modified the initial decision herein 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 contained in the initial decision.

By the Commission, Chairman Dixon and Commissioner MacIntyre not participating in the issuance of the order at this time.

IN THE MATTER OF

OXWALL TOOL COMPANY, LTD., ET AL.

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

Docket 7491. Complaint, May 15, 1959—Decision, Dec. 26, 1961

Order requiring New York City distributors of hand tools imported from Japan and Germany—some packaged for sale in kits, some in kits containing other tools of domestic manufacture, and some sold separately—to cease selling such imported tools with markings of their country of origin so small and indistinct as not to constitute adequate notice of their foreign source to buyers, or with no such markings at all, or packaged or assembled so as to conceal the markings.

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 Oxwall Tool Company, Ltd., a corporation, and Harry Greenberg, Max J. Blum, and Sidney Blum, 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 Oxwall Tool Company, Ltd. is a corporation organized, existing and doing business under and by virtue