

Complaint

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IN THE MATTER OF

R. F. KEPPEL & BRO., INCORPORATED

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 1816. Complaint, May 2, 1930—Decision, Sept. 28, 1931

Where a corporation engaged in the manufacture of candy and in the sale thereof to wholesalers, jobbers, and retailers, sold assortments for resale to the ultimate consumer in the so-called "break and take packages," increasingly demanded by school children in preference to the "straight goods" assortments with their offer of greater value to purchasers than the majority secure from the "break and take packages," but lack of latter's gambling or lottery feature, through which chance selection of a certain piece entitles purchaser thereto without charge, to a more favorable price, to additional candy, or to merchandise included with the particular assortment, depending upon color of concealed center, legend or price contained within nontransparent wrapper, concealed presence within the candy of a penny, or such other device as may be utilized to bring about a more favorable result for the fortunate purchaser than that enjoyed by the majority, and supplied display cards for retailers' use, advising prospective purchasers of the nature of the plan employed in the particular "break and take" assortment involved; with the result that (1) competitors refusing to deal in "break and take" packages or assortments, through which children, principal consumers and purchasers thereof, are taught and encouraged to gamble, were injured by diversion of trade from them to it and other competitors using such practice in response to the constant and growing demand from small retailers for candy sold by lot or chance with which to attract the trade of children from their frequently nearby schools, and (2) freedom of fair and legitimate competition in the industry concerned was restrained and deterred:

Held, That such practices, under the circumstances set forth were to the prejudice of the public and competitors and constituted unfair methods of competition.

Mr. G. Ed. Rowland and Mr. Henry C. Lank for the Commission.

Mr. George E. Elliott, of Washington, D. C., and Mr. John A. Coyle, of Lancaster, Pa., for respondent.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent, a Pennsylvania corporation engaged in the manufacture of candies and in the sale and distribution thereof to wholesale dealers and jobbers in various States, and with principal office and place of business in Lancaster, Pa., with using lottery scheme in merchandis-

ing, in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondent corporation, as charged, engaged as above set forth, sells assortments of candies composed of a number of pieces of uniform size, shape, and quality, in which the chance selection by the ultimate purchaser or consumer may entitle such purchaser to one of the larger pieces included with the assortment, or to a piece free, or to a more favorable price than that paid by the majority, depending on the color of the inclosed concealed center, the legend or figure concealed within the individual wrapper, or the presence within a small number of the pieces of a sum of money, and supplies with said assortment display cards for retailers' use, advising prospective purchasers of the nature of the scheme employed in the particular assortment, and thereby places in the hands of others the means of conducting lotteries in the sale of its products in accordance with its sales plans above set forth.

Aforesaid products of respondent, as alleged, "thus tend to and do induce many of the consuming public to purchase respondent's said candies in preference to candies of respondent's said competitors because of (a) the chance of obtaining said larger pieces of candy or articles of merchandise free of charge, or (b) the chance of obtaining one of said pieces of candy free of charge or at the price of 1 cent or 3 cents, or 4 cents, rather than at the maximum price of 5 cents or (c) the chance of obtaining a sum of money as a prize," and said "alleged acts and practices of respondent," as charged, "are all to the prejudice of the public and respondent's competitors, and constitute unfair methods of competition in commerce."

Upon the foregoing complaint, the Commission made the following:

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an act of Congress approved September 26, 1914 (38 Stat. 719), the Federal Trade Commission issued and served a complaint upon the respondent, R. F. Keppel & Bro., Inc., charging it with the use of unfair methods of competition in interstate commerce in violation of the provisions of section 5 of said act.

The respondent having entered its appearance herein and filed its answer to said complaint, hearings were had and evidence was thereupon introduced before an examiner of the Federal Trade Commission duly appointed.

Thereupon this proceeding came on for final hearing on the briefs of counsel for the Commission and respondent, and the Commission

having duly considered the record and being fully advised in the premises, makes this its findings as to the facts and conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, R. F. Keppel & Bro., Inc., is a corporation organized under the laws of the State of Pennsylvania, having its office and place of business in the city of Lancaster, State of Pennsylvania. Respondent is now, and for more than five years last past has been, engaged in the manufacture of candy in said city and State, and in the sale and distribution of said candy to wholesalers, jobbers, and retailers in the State of Pennsylvania and other States of the United States. It causes the said candy when sold to be shipped or transported from its principal place of business in the State of Pennsylvania to purchasers thereof in States of the United States other than the State of Pennsylvania. In so carrying on said business respondent is and has been engaged in interstate commerce, and is and has been in active competition with other corporations, firms, and partnerships also engaged in the manufacture of candy, and in the sale and distribution of the same in interstate commerce.

PAR. 2. Among the candies manufactured and sold by respondent is an assortment packed 120 pieces to each package labeled "chocolate penny men," Commission's Exhibit 1.¹ Each of the 120 pieces in each of said packages is a chocolate-covered cream candy molded into the shape of a man and retailing for 1 cent each. Among these 120 pieces there are four pieces in which 1 penny is concealed. In each of said packages as sold by the respondent to the wholesaler, jobber, and retailer is placed a card displaying a picture of a schoolboy, and bearing the label, "watch this boy, he has money in his pockets," Commission's Exhibit 2. The purchaser who procures one of said pieces of chocolate cream candy which contains a penny receives his money back, and in fact receives the piece of candy free of charge, and the purchaser who procures one of the 116 pieces of chocolate cream candy which do not contain any money, pays 1 cent for the said piece of candy.

The said pieces of candy in said packages are so manufactured as to make it impossible for the purchaser to ascertain in which piece of candy the coins are placed until after selection has been made and the piece broken. Thus, whether the purchaser pays for the piece of candy, or whether he receives it free of charge, is determined wholly by lot or chance.

PAR. 3. Another package of candy manufactured and sold by the respondent contains peanut bars and is labeled "1, 2, 3, big chief

¹ Exhibits not published.

60s," Commission's Exhibit 4. This candy is packed in boxes containing 60 pieces each, 10 of which retail at 1 cent each, 10 at 2 cents each, and 40 at 3 cents each. Each piece of said candy is uniform in size and quality, and is wrapped in nontransparent paper on which is printed the words "Chocolate covered peanut chew," Commission's Exhibit 6. Inclosed within the wrapper of each piece of said candy is a ticket or card showing the retail price of that particular bar of candy, viz, 1, 2, or 3 cents, Commission's Exhibit 6. Said candies are so packed and wrapped by respondent that when displayed it is impossible for the purchasing public to ascertain the price of the several bars of said candy prior to making a purchase or selection and removing the wrapper. Purchasers of said peanut bars pay the price which is printed on the ticket or card inclosed within the wrapper of the peanut bars, and some purchasers pay 1 cent, some pay 2 cents and some pay 3 cents for identical pieces of candy. Thus, the price which the purchaser pays for a bar of candy is determined wholly by lot or chance. In each of said packages as sold by the respondent is placed a display card bearing the legends "10 bars at 1 cent each, 10 bars at 2 cents each, 40 bars 3 cents each," Commission's Exhibit 5. On the bottom margin of said display card is a direction to the retail dealer to "Display this sales getter in end of box and watch this quality candy go."

PAR. 4. Prior to the manufacture and distribution of the "1, 2, 3 big chief 60s" referred to in paragraph 3 above, the respondent manufactured and distributed a similar package containing 40 bars of candy contained within similar wrappers, and containing a display card bearing the legend "3 big chief bars free, 5 bars at 1 cent each, 5 bars at 3 cents each, 5 bars at 4 cents each, and 22 bars at 5 cents each," Commission's Exhibit 7. Within the wrapper of each of said bars was a ticket showing whether the retail customer obtained the particular bar free, or at a price of 1 cent, or at a price of 3 cents, or at a price of 4 cents, or at a price of 5 cents. As packed by the respondent each piece of candy was uniform in size and quality, and the consuming public was unable to ascertain the price of a particular bar of said candy prior to making a selection and removing the wrapper. Purchasers of said bars of candy paid the price which was printed on the ticket or card inclosed within the wrapper of the bars of candy, and 3 purchasers received the bar of candy free, 5 paid 1 cent, 5 paid 3 cents, 5 paid 4 cents, and 22 paid 5 cents, for identical pieces of candy. Thus, the price which the purchaser paid for a bar of candy, or whether he received it free of charge was determined wholly by lot or chance. Respondent has discontinued the sale of this particular assortment of candy.

PAR. 5. Another package of candy manufactured and distributed by respondent is labeled "school days 200," Commission's Exhibit 8. This package contains 200 small chocolate cream candies, and also contains 8 chocolate-covered pieces of candy molded into the shape of a boy, 8 chocolate-covered pieces of candy molded into the shape of a girl, and 4 double pieces of chocolate-covered candy called "twins". The package also contains a "school companion," that is, a container in which are placed five lead pencils, a pen and penholder, a 6-inch ruler, and two erasers. In each of said packages the respondent places a display card bearing the legends "1 piece of cream with white center, 1 cent; 1 piece of cream with pink center and school boy or girl, 1 cent; 1 piece of cream with chocolate center and set of twins, 1 cent; the last piece of cream and school companion 1 cent," Commission's Exhibit 9. The 200 chocolate cream candies contained in said package are uniform in size and shape, 16 of the said chocolate cream candies having pink centers, 4 of the said chocolate cream candies having chocolate centers, and the remaining 180 pieces of chocolate cream candies having white centers. The purchaser who procures a piece of chocolate cream candy which has a pink center, receives in addition to the piece of candy, one of the chocolate boys or girls; if he procures a piece of chocolate candy having a chocolate center, he receives in addition to the piece of candy, one of the chocolate "twins"; if he purchases the last piece of chocolate cream candy, he receives in addition to the piece of candy, the "school companion;" if he procures one of the 180 pieces of chocolate cream candy having white centers, or does not purchase the last piece of chocolate cream candy, he receives only the piece of chocolate cream candy for his penny, without any additional prize or premium.

The said chocolate cream candies contained in said package are so manufactured by the respondent as to effectually conceal from the public the color of the center of the several chocolate cream candies until after the purchaser has made a selection and broken the particular piece selected. Thus, whether the purchaser receives a prize or premium of a larger piece of candy, or an article of merchandise, in addition to the piece of candy which he purchases, is determined wholly by lot or chance.

PAR. 6. The lottery or prize packages described in paragraphs 2, 3, 4, and 5 above, are generally referred to in the candy trade or industry as "break and take" packages. The packages or assortments of candy without the gaming, prize or lottery features in connection with their resale to the public are generally referred to in

the candy trade or industry as "straight goods." These terms will be used hereafter in these findings to describe these respective types of candy.

PAR. 7. Numerous retail dealers purchase the packages described in paragraphs 2, 3, 4, and 5 above either from respondent or from wholesale dealers or jobbers who in turn have purchased said packages from respondent, and such retail dealers display said packages for sale to the public as packed by the respondent, and with the display card furnished by the respondent, and the candy contained in said packages is sold and distributed to the consuming public in the manner suggested by respondent.

PAR. 8. All sales made by respondent, whether to wholesalers and jobbers, or to retail dealers, are absolute sales, and respondent retains no control in any manner over the goods after they are delivered to the wholesale dealer or jobber, or retail dealer. The packages are assembled and packed in such manner that they can be displayed by the retail dealer for sale and distribution to the purchasing public as suggested by the display card inclosed in each package without alteration or rearrangement. An examination of the packages or assortments of candy described in paragraphs 2, 3, 4, and 5 herein, as packed, assembled, and sold by respondent shows that said packages or assortments can not be resold to the public by the retail dealers except as a lottery or gaming device, unless said retail dealers unwrap, unpack, disassemble, or rearrange the said packages or assortments.

In the sale and distribution to jobbers and wholesale dealers, for resale to retail dealers, and to retail dealers direct of packages and assortments of candy assembled and packed as described in paragraphs 2, 3, 4, and 5 herein, respondent has knowledge that said candy will be resold to the purchasing public by retail dealers by lot or chance, and it packs and assembles such candy in the way and manner described, so that it may and shall be resold to the public by lot or chance by said retail dealers.

PAR. 9. The sale and distribution of candy by the retailers by the methods described in the findings as to the facts herein is a sale and distribution of candy by lot or chance, and constitutes a lottery or gaming device.

Competitors of respondent appeared as witnesses in this proceeding and testified, and the Commission finds as a fact, that many competitors regard such method of sale and distribution as morally bad and encouraging gambling, especially among children; as injurious to the candy industry, because it results in the merchandising of a chance or lottery instead of candy; and as providing retail merchants with the means of violating the laws of the several States. Because of these reasons some competitors of respondent refuse to sell

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candy so packed and assembled that it can be resold to the public by lot or chance. These competitors are thereby put to a disadvantage in competing. The retailers finding that they can dispose of more candy by the "break and take" method, buy from respondent, and others employing the same methods of sale, and thereby trade is diverted to respondent, and others using similar methods, from said competitors. Said competitors can compete on even terms only by giving the same or similar devices to retailers. This they are unwilling to do, and their sales of "straight goods" candy show a continued decrease.

The sale and distribution of candy by lot or chance provides an easy means of disposing of such products. There is a constant and growing demand for candy which is sold by lot or chance, and in order to meet the competition of manufacturers who sell and distribute candy which is sold by such methods, some competitors of respondent have begun the sale and distribution of candy for resale to the public by lot or chance. The use of such methods by respondent in the sale and distribution of its candy is prejudicial and injurious to the public and its competitors, and has resulted in the diversion of trade to respondent from its said competitors, and is a restraint upon and a detriment to the freedom of fair and legitimate competition in the candy industry.

PAR. 10. The principal demand in the trade for the "break and take" candy comes from the small retailers. The stores of these small retailers are in many instances located near schools, and attract the trade of the school children. The consumers or purchasers of the lottery or prize package candy are principally children, and because of the lottery or gaming feature connected with the "break and take" package, and the possibility of winning a prize or premium, it has been observed that the children purchase them in preference to the "straight goods" candy when the two types of packages are displayed side by side.

Witnesses from several branches of the candy industry testified in this proceeding to the effect that children prefer to purchase the lottery or prize package candy because of the gambling feature connected with its sale. It has been found that in many instances children purchase a piece of candy, break it open, and if the center is not of the prize-winning color, throw it away and purchase other pieces of candy until a prize is obtained or their money gone; in other instances that children who win a prize or premium give it away to other children, and continue to purchase pieces of candy. The sale and distribution of "break and take" packages or assortments of candy or of candy which has connected with its sale to the

public the means or opportunity of obtaining a prize or premium by lot or chance, teaches and encourages gambling among children, who comprise by far the largest class of purchasers and consumers of this type of candy.

PAR. 11. There are in the United States a large number of manufacturers of candy, who are manufacturing and selling "break and take" candy. The lottery or prize package product of each of these manufacturers is of the same general character as that produced by the respondent, and all of these lottery or prize packages are in direct competition with "straight goods" of the same general character; that is, the "break and take" goods usually appear in the form sold at retail at 1 cent each, or in the form of bar goods sold at 3 cents or 5 cents each, and these "break and take" goods are sold in direct competition with "straight" penny goods and 5 cent bars.

The pieces of candy in the "break and take" packages of all manufacturers of that type of candy are either smaller in size than the corresponding pieces of "straight goods" candy, or the quality of the candy in the "break and take" packages is poorer than that in the "straight goods" assortments. It is necessary to make this difference between either the size of the individual pieces of candy or the quality of the candy in order to compensate for the value of the prizes or premiums which are distributed with the "break and take" goods.

PAR. 12. Respondent manufactures and sells a chocolate cream candy with which no gaming, prize, or lottery feature is connected. This candy is packed 120 pieces to the box, and retails at 1 cent per piece, as does the chocolate cream candy described in paragraph 5 above. Each individual piece of this "straight goods" penny candy manufactured and sold by respondent is larger than those in the prize or lottery packages, but the quality of the candy in the two packages is the same. The pieces of candy in the "break and take" packages are made smaller than those in the "straight goods" packages in order to compensate the manufacturer for the value and weight of the prizes or premiums which are distributed with the "break and take" packages. The purchaser of a piece of candy from a "break and take" package does not receive the same value for his money that he would if he purchased a piece of candy from a "straight goods" package, unless he received with the latter purchase one of the prizes or premiums, in addition to the piece of candy purchased. In the latter event he receives a value greatly in excess of the value he would receive if he purchased a piece of "straight goods" candy.

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PAR. 13. There are in the United States many manufacturers of candy who do not manufacture and sell lottery or prize packages or assortments of candy, and who sell their "straight goods" candy in interstate commerce in competition with the "break and take" packages or assortments of respondent and other manufacturers of similar candy. The sale of candy without a lottery or gaming feature in connection therewith is adversely affected by the sale of "break and take" candy, and manufacturers of the former type of candy have noted a marked decrease in the sales of their products whenever and wherever the lottery or prize candy has appeared in their markets. This decrease in sales of "straight goods" candy is principally due to the gambling or lottery feature connected with the "break and take" candy.

The purchasers and consumers of these two types of candy are principally children, and the children almost without exception purchase the candy which offers a chance to win a prize or premium rather than candy which does not have a lottery or gaming feature in connection with its sale, irrespective of the difference in size of the pieces, or the difference in quality of the two types of candy.

PAR. 14. Respondent manufactured and sold "break and take" packages or assortments of candy prior to the year 1925. In that year respondent discontinued the sale of this type of candy, and manufactured and sold only "straight goods" for a time. During this period its business showed a decided decrease in volume and profits, and it resumed the sale of "break and take" packages or assortments. Since its resumption of the manufacture and sale of this type of candy the sales of respondent have shown a continuously increased volume, each year, and at the present time 60 per cent of the sales of respondent consist of candy with a lottery or gaming feature in connection therewith. During the time respondent was not manufacturing and selling "break and take" candy, many of its competitors were continuing the sale of that type of candy, and in order to meet the competition of those manufacturers, and to make a profit in its business, respondent considered it necessary to resume the manufacture and sale of "break and take" candy.

PAR. 15. Respondent manufactures candy which it sells to wholesalers, jobbers, and retailers without any prizes or premiums, and without any lottery or gaming feature. In addition to said business, respondent conducts a jobbing department through which it distributes to retail dealers, in interstate commerce, the products of other candy manufacturers. The entire manufacturing business of the respondent for the year ending June 30, 1930, amounted to approximately \$391,000.

PAR. 16. The sale and distribution of candy by lot or chance is against the public policy of many of the several States of the United States, and some of said States have laws making lotteries and gaming devices penal offenses.

CONCLUSION

The aforesaid acts and practices of respondent, R. F. Keppel & Bro., Inc., under the conditions and circumstances set forth in the foregoing findings of fact, are all to the prejudice of the public and respondent's competitors, and constitute unfair methods of competition in commerce, and constitute a violation of section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, and the testimony taken and briefs filed herein, and the Commission having made its findings as to the facts and conclusion that the respondent has violated the provisions of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,"

It is now ordered, That the respondent, R. F. Keppel & Bro., Inc., its officers, agents, representatives, and employees, in the manufacture, sale, and distribution in interstate commerce of candy and candy products, do cease and desist from:

(1) Selling and distributing to jobbers and wholesale dealers for resale to retail dealers, or to retail dealers direct, candy so packed and assembled that sales of such candy to the general public are by means of a lottery, gaming device, or gift enterprise.

(2) Supplying to or placing in the hands of wholesale dealers and jobbers, or retail dealers, packages or assortments of candy which are used, without alteration or rearrangement of the contents of such packages or assortments, to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of the candy or candy products contained in said package or assortment to the public.

(3) Selling and distributing pieces of candy containing coins or pieces of money, which said pieces of candy are packed and assembled in packages or assortments with other pieces of candy of similar size, shape, and quality not containing coins or pieces of money, for resale to the public by retail dealers.

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(4) Packing or assembling in the same package or assortment of candy, for sale to the public at retail, pieces of candy of uniform size, shape, and quality containing within their wrappers tickets bearing different prices, or bearing the word "free," or phrases containing said word.

(5) Packing or assembling in the same package or assortment of candy, for sale to the public at retail, pieces of chocolate-covered candy of uniform size, shape, and quality, having centers of different color, together with larger pieces of candy, or articles of merchandise, which said larger pieces of candy, or articles of merchandise, are to be given as prizes to the purchaser procuring a piece of candy with a center of a particular color.

(6) Furnishing to wholesale dealers, jobbers, and retail dealers, display cards, either with packages or assortments of candy or candy products, or separately, bearing a legend, or legends, or statements, informing the purchaser that the candy or candy products are being sold to the public by lot or chance, or in accordance with a sales plan which constitutes a lottery, gaming device, or gift enterprise.

(7) Furnishing to wholesale dealers, jobbers, and retail dealers display cards or other printed matter for use in connection with the sale of its candy or candy products, which said advertising literature informs the purchasers and purchasing public:

(a) That certain pieces of candy in a package or assortment contain coins or pieces of money which are given as prizes to the purchaser of the particular piece of candy.

(b) That certain bars of candy of uniform size, weight, and quality may be obtained, free of charge, or for a price of 1 cent, 2 cents, 3 cents, 4 cents, or 5 cents, depending upon the price tag inclosed in the wrapper of the piece of candy selected by the purchaser.

(c) That upon the obtaining by the ultimate purchaser of a piece of candy with a particular colored center, that a larger piece of candy, or other article of merchandise will be given free to said purchaser.

(d) That upon purchasing the last piece of candy in the package or assortment, a larger piece of candy, or an article of merchandise will be given as a prize.

It is further ordered, That the respondent, above-named, within 60 days after the service upon it of this order, shall file with the Commission a report in writing setting forth in detail the manner in which this order has been complied with and conformed to.

Complaint

IN THE MATTER OF
KNICKERBOCKER WATCH COMPANY

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 1960. Complaint, June 17, 1931—Decision, Sept. 28, 1931

Where a corporation engaged in the purchase of watchcases and watch movements in the United States and in Europe, and in the sale thereof to jewelry wholesalers and jobbers in various States for resale to retailers and ultimate purchasers, sold watchcases labeled "Goldcraft", notwithstanding the fact that said products were neither made of gold nor gold plated; with the tendency and capacity to deceive ultimate purchasers as to the composition of said watchcases and to divert trade to it from competitors dealing in such articles truthfully branded or labeled, and otherwise injure such competitors, and with the result of placing in the hands of retail dealers therein the means of committing a fraud upon aforesaid purchasers:

Held, That such practices, under the circumstances set forth, were to the injury and prejudice of the public and constituted unfair methods of competition.

Mr. E. J. Hornibrook for the Commission.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent, a New York corporation engaged for more than one year last past in buying in the United States and in Europe watchcases and watch movements, and in selling the same to jewelry wholesalers and jobbers located in various States throughout the several States, and with principal office and place of business in New York City, with misbranding or mislabeling, in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondent, as charged, engaged as above set forth has for more than one year last past caused to be stamped, branded, and labeled watchcases, neither made of gold, nor gold plated, with the term and designation "Warwick Watch Co.—Goldcraft"; and said watchcases are and have been for more than one year last past resold to the public by said retailers, stamped, branded, or labeled with said term and designation.