

IN THE MATTER OF  
KAY JEWELRY STORES, INC., ET AL.

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

*Docket 6445. Complaint, Nov. 17, 1955—Decision, Nov. 12, 1957*

Order requiring a corporation furnishing supervision and management services to a chain of approximately 110 retail jewelry stores throughout the United States, and its wholly owned sales subsidiary, with principal place of business in Washington, D.C., to cease falsely representing the usual retail price of their "Lachine" watches, which sold at retail for \$19.75, by affixing to them price tags ranging from \$33.75 to \$125, and by making the same false representations in advertisements in newspapers.

*Frederick McManus, Esq.*, for the Commission.

*Lord, Day & Lord*, by *Charles W. Merritt, Esq.*, of New York City and *Simon Hirshman, Esq.*, of Washington, D.C., for respondents.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

STATEMENT OF THE CASE

On November 17, 1955, the Federal Trade Commission issued its complaint against Kay Jewelry Stores, Inc., Fairfax Distributing Company, Cecil D. Kaufmann,<sup>1</sup> Joel S. Kaufmann,<sup>1</sup> David R. Trattner, Benjamin B. Golding and Simon Hirshman, individually and as officers of said corporations (all hereinafter collectively called respondents), charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint together with a notice of hearing were duly served upon respondents.

The complaint alleges in substance that respondents, by attaching price tags to certain watches, falsely represented that such prices were the usual and regular retail prices when in fact they were not, thereby placing in the hands of retailers a means and instrumentality for deceiving and misleading the purchasing public, and by the dissemination of certain newspaper advertisements containing "original" prices and savings to be effectuated, falsely represented such prices to be the regular and usual retail prices and the savings to be effectuated. Respondents appeared by counsel and filed a

<sup>1</sup> Incorrectly referred to as Kaufman in the caption of the complaint and other documents.

joint answer admitting the corporate, commerce and competition allegations of the complaint, the furnishing of such price tags for said watches, and the dissemination of said advertisements, but denying all alleged violations of the Act.

Pursuant to notice, hearings were thereafter held before the undersigned hearing examiner duly designated by the Commission to hear this proceeding on January 30, May 22, August 13 and 14, September 18, November 19 and December 3, 1956 in Washington, D.C. and Philadelphia, Pennsylvania. All parties were represented by counsel, participated in the hearings, and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record and to file proposed findings of fact, conclusions of law, and orders, together with reasons therefor. At the conclusion of the case-in-chief, counsel for respondents made several motions to dismiss portions of the complaint, which motions were denied. All parties waived oral argument and pursuant to leave granted, thereafter filed proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. All such findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded, are herewith specifically rejected.<sup>2</sup>

Upon the entire record in the case and from his observations of the witnesses, the undersigned makes the following:

#### FINDINGS OF FACT

##### 1. The Business of Respondents

The complaint alleged, respondents admitted, and it is found that Kay Jewelry Stores, Inc. (hereinafter called Kay), is a Delaware corporation engaged in the furnishing of supervision and management services to a chain of approximately 110 retail stores throughout the United States in each of which it is the owner of varying amounts of capital stock. Fairfax Distributing Company (hereinafter called Fairfax), is a Delaware corporation wholly owned and controlled by Kay. The office and principal place of business of both Kay and Fairfax is 702 H Street, N.W., Washington, D.C. Respondents Cecil D. Kaufmann, Joel S. Kaufmann, David R. Trattner, Benjamin B. Golding and Simon Hirshman are officers and directors of Kay and direct, formulate and control its policies, acts and practices. Cecil D. Kaufmann and Joel S. Kaufmann are president and vice president, respectively, of Fairfax and direct, formulate and control its policies, acts and practices. The address of Mr.

<sup>2</sup> 5 U.S.C. §1007(b).

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Hirshman, Secretary of Kay and a practicing attorney and member of the District of Columbia Bar, is 917 Woodward Building, Washington, D.C. The respective addresses of Benjamin B. Golding and David R. Trattner are 985 Main Street, Hartford, Connecticut, and 510 Commercial Exchange Building, Los Angeles, California. The address of all other individual respondents is the same as that of the corporate respondents.

## II. Interstate Commerce and Competition

The complaint alleged, respondents admitted as hereinafter qualified, and it is found, that they are now and have been for some years engaged in the sale and distribution to retail jewelers of jewelry of all kinds, including watches. Kay does not sell jewelry but furnishes supervisory and management services to the chain of Kay retail stores located throughout the United States and wholly owns Fairfax, which purchases and sells jewelry to such stores throughout the United States.<sup>3</sup> Among the watches sold and distributed by respondents have been watches sold and distributed under the trade name "Lachine." The individual respondents did not personally participate in the sale and distribution of the Lachine watches except in their capacity as officers and directors of Kay and Fairfax. In the regular and usual course and conduct of their business, respondents sold and caused to be transported from their place of business in the District of Columbia said Lachine watches to retail customers located in other states and in the District of Columbia for resale to the purchasing public. Respondents maintain and have maintained a constant and substantial course of trade in watches in commerce among and between the various states of the United States and the District of Columbia. In the course and conduct of their business, respondents have been at all times mentioned herein in substantial competition in commerce with other corporations, firms and individuals likewise engaged in the sale and distribution of watches.

## III. The Unlawful Practices

A. *The Issues*

The principal issues in this case are whether respondents, by affixing various price tags to the Lachine watches before selling them to the public, falsely represented the usual and regular retail prices of

<sup>3</sup> Mr. Taylor, the general merchandising manager of Kay, testified that the managers of the various retail stores took their orders and directions from him. As sole owner of both Fairfax and Advertising Associates, Inc., the corporation which prepared the advertising referred to hereinafter, it cannot be disputed seriously that Kay, as principal, is responsible for their actions.

such watches, and by disseminating certain newspaper advertisements containing claimed original prices of said watches and savings to be effectuated by purchasers, falsely represented the usual and regular prices of said watches and the savings to be effectuated.

*B. The False Representations*

1. The Preticketed Prices

There is no dispute in the record that respondents caused to be affixed to the Lachine watches before they were sold to the public price tags ranging from \$33.75 to \$125.00, which watches were offered for sale at \$19.75, and caused to be disseminated in various newspapers throughout the country advertisements containing, among other things, the following statements:

KAY SAVES YOU \$14 TO \$80  
ON FAMOUS WATCHES. ORIG.  
\$33.75 TO \$100 KAY'S PRICE  
\$19.75

The Famous Maker of These Fine Watches has retired from business. He offered the 90 Kay Jewelry Stores his entire stock of watches at a fraction of their cost.

We promised not to mention this famous maker's name.

Respondents conceded the use of the aforesaid price tags and advertisements but, contrary to the allegations of the complaint, contended that such prices were the usual and regular retail prices and consequently the represented savings were also truthful and factual.

During October 1954, respondents entered into a contract with Samuel Lashoff of Philadelphia under the terms of which they purchased his entire stock of Lachine watches, some 4,900 watches and 766 watch movements. Mr. Lashoff for some years had been engaged in the business of importing Swiss watches imprinted with his own trade name "Lachine" and selling them wholesale to various retail outlets in the Philadelphia area. Mr. Lashoff decided to retire from the business and sold his entire stock to respondents through Fairfax for \$34,750. Included in the sale were a number of boxes and price tags previously used by Mr. Lashoff, with prices ranging from \$27.50 to \$125.00.

Among other things, the contract between Lashoff and Fairfax contained a provision permitting Fairfax for a period of one year to purchase additional watches from other sources and use the name Lachine thereon. Pursuant to this provision, respondent purchased approximately 846 watches from the Greygor Watch Company of New York City which were included in the subsequent sale of the Lachine watches to the public. In March 1955 the above-found ad-

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vertisement was run in various newspapers throughout the United States and respondents, through approximately 65 of the Kay retail jewelry stores, engaged in the sale to the public of the Lachine watches, including those purchased from Greygor, at the price of \$19.75 each. Respondents preticketed the watches purchased from Mr. Lashoff with price tags ranging from \$33.75 to \$125.00, and the watches purchased from Greygor with price tags ranging from \$39.75 to \$59.50.

The record establishes that until about 1952 Mr. Lashoff advertised his Lachine watches for sale by retailers at suggested retail prices ranging from \$27.50 to \$100.00, and delivered Lachine watches to his retail customers with price tags affixed thereto ranging from \$27.50 to \$125.00. The lowest suggested retail price of \$27.50 applied to all of the 7-jewel watches sold by Mr. Lashoff. Included among the purchase by respondents were approximately 1,360 7-jewel watches. The remainder of the watches and movements purchased by respondents from Lashoff contained 17 jewels and were preticketed with prices ranging from \$45.00 to \$125.00. The record establishes that certain of the prices tagged and advertised were not the usual and regular retail prices of the Lachine watches. However, even assuming *arguendo* that the usual and regular retail price of the Lachine 7-jewel watches was \$27.50, respondents preticketed and advertised these 7-jewel watches at \$33.75. This of course even under the assumption was not their usual and regular retail price. Respondents contend that because they added to such watches a metal band costing them \$2.00 which had a retail value of \$6.00 or more, and Mr. Lashoff sold these watches with only straps or cords attached thereto, the retail value of the watches was correspondingly increased \$6.00 or more.

The issue of value was inserted in the case by counsel supporting the complaint, who contended that the preticketing not only placed in the hands of retailers a means and instrumentality for deceiving the public as to price but also as to value. The Commission has held recently in affirming the undersigned that the issue of value is irrelevant in a fictitious pricing case.<sup>4</sup> As pointed out therein, the issue of whether respondents have falsely represented the usual and regular *price* of their products has nothing to do with the *value* of such products. Even assuming the value to be equal to the preticketed price casts no light upon the issue of whether or not such prices are the usual and regular prices of the products in question.

<sup>4</sup> *Rudin & Roth*, Docket No. 6419 (1956); *Neuville, Inc.*, Docket No. 6405 (1956), and cases cited therein.

Unfortunately in this proceeding, because the complaint alleged that the fictitious pricing furnished an instrumentality for deception as to value, as well as price, considerable evidence was received from both parties concerning value, which upon reflection and for the reasons stated is found to be irrelevant. No finding is made that respondents falsely represented the value of their watches or furnished an instrumentality for deception of the public as to such value.

However, the record clearly establishes that respondents' preticketed prices were not the usual and regular retail prices of the Lachine watches. While the Lachine 7-jewel watches may have been sold for less, the record establishes beyond question that they were never sold for more than the ticketed price of \$27.50, and therefore respondents' representation that the usual and regular price for such watches was \$33.75 was false. The fact that respondents added a metal band to such watches which may have increased their retail value to \$6.00 or more is no justification or defense for misrepresenting that such watches usually and regularly retail for \$33.75. This contention is typical of the confusion which arises when the issues of price and value are not distinguished. As previously found, value is irrelevant. By preticketing these watches with a price of \$33.75, respondents represented to the public that that was the usual and regular retail price when in truth and in fact such watches had never been sold at retail for more than \$27.50. Although not essential, it is interesting to note that Mr. Lashoff, in a radio commercial,<sup>5</sup> offered Lachine watches for sale from \$27.50 to \$100.00 including "free" a matching watch band, which would negate respondents' argument even if relevant.

Additional evidence was offered that other preticketed prices of the Lachine watches were not the usual and regular prices. One of the exhibits received in evidence was a Lachine watch preticketed by respondents at \$100.00. As previously found, these price tickets had been used by Mr. Lashoff and furnished by him to respondents. The record establishes that while this was one of Mr. Lashoff's suggested retail prices, it was not the usual and regular price at which such watches were sold at retail. Several of Mr. Lashoff's retail customers called as witnesses by counsel supporting the complaint testified that they sold this watch at prices ranging from \$50.00 to \$75.00, but never sold it for \$100.00.

Substantially all of the retail jewelers called in support of the complaint testified that the usual and general practice in this indus-

<sup>5</sup> Commission Exhibit

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try in selling watches, including Lachine, was to use a markup referred to in the trade as "Keystone."<sup>6</sup> Keystone was defined as doubling the price paid by the jeweler to the wholesaler. In other words, if the jeweler paid a wholesaler a price of \$50.00 he normally would retail the watch at \$100.00. The record establishes that the wholesale price of the watch preticketed \$100.00 by respondents and Mr. Lashoff was \$37.50, which would result in a Keystone retail price of \$75.00. Some of the witnesses could not recall the specific prices at which they had sold various Lachine watches, but testified that their usual and regular price was Keystone, or double the amount they paid for the watch. Lashoff himself testified that while he normally did not sell his Lachine watches at retail, upon the occasions when he did so he sold them for 20% to 25% off of his tagged or suggested retail price. With reference to the watch tagged \$100.00, this would result in a price of \$75.00 to \$80.00, or approximately Keystone.

At no point in the record did Mr. Lashoff claim that his tagged prices were the usual and regular retail prices of Lachine watches, or anything more than suggested retail prices.<sup>7</sup> The record establishes with respect to substantially all of the various models of Lachine watches purchased by respondents that, based upon Lashoff's price to his retailers, the preticketed price was substantially in excess of Keystone. Other witnesses called by counsel supporting the complaint who were qualified as experts on retail prices testified that the retail price of the particular watch ticketed \$100.00 would vary from \$50.00 to \$85.00. While their testimony would not establish the usual and regular retail price of Lachine watches, inasmuch as they never handled or sold them, it tends to corroborate the testimony of the retail jewelers who did sell the Lachine watches. The foregoing facts, together with the facts previously found concerning the 7-jewel Lachine watch, as well as the facts hereinafter found concerning the Greygor watches, establish that the preticketed prices used by respondents were not in fact the usual and regular retail prices of said watches. It is well settled that such fictitious pricing constitutes an unfair and deceptive practice and an unfair method of competition which the Commission and the courts repeatedly have held to be unfair and in violation of the Act.<sup>8</sup>

<sup>6</sup> Messrs. Lynn and Taylor, officials of Fairfax and Kay, respectively, and called by respondents as experts, admitted that the customary markup in the trade was Keystone.

<sup>7</sup> The record also reveals that Mr. Lashoff told Mr. Lynn that the prices on the tags were those at which Mr. Lashoff asked his retailers to sell.

<sup>8</sup> *Neuville, Inc.*, Docket No. 6405 (1956); *Rudin & Roth*, Docket No. 6419 (1956); *The Orloff Company, Inc.*, Docket No. 6184 (1956), and cases cited therein.

Counsel supporting the complaint also contended that Lashoff's suggested retail prices were based upon retail prices prevailing in 1951 and the years prior thereto, and that because lower retail prices prevailed in 1955, the use of such price tags by respondents falsely represented the usual and regular retail prices in 1955. Without passing upon the merits of this contention, suffice it to say that the record does not support the factual finding proposed by counsel supporting the complaint. There is little if any substantial evidence in the record concerning this alleged price decline. If anything, the record would support a finding that the price of such watches had not declined.

## 2. The Advertised Prices and Savings

As previously noted, respondents advertised the Lachine watch sale in newspapers throughout the country. This advertisement stated that these "Famous" watches were originally \$33.75 to \$100.00, were being sold at \$19.75, and purchasers saved from \$14.00 to \$80.00. The complaint alleged both representations to be false. The Commission recently has held that an advertisement substantially identical to the words used herein, namely, "Orig. \$33.75 to \$100.00," was a representation that such prices were the usual and regular retail prices of the product in question.<sup>9</sup> For the same reasons set forth above in connection with the preticketed prices, respondents' advertising representations concerning the usual and regular prices of the watches are false.

In addition, as previously found, the watches included in this promotion were not only those purchased from Mr. Lashoff but included some 846 additional watches purchased from Greygor but labelled with the Lachine name. The price representations are also false with respect to these watches purchased from Greygor. Respondents' defense with respect to this group of watches has even less merit than with respect to those purchased from Lashoff. With respect to Greygor watches, respondents could not even argue that the prices were those usually and regularly charged for Lachine watches, because they had never been handled by Lashoff or sold by his retailers at any price. Respondents could only offer proof that the Greygor watches were comparable in quality and value to some of the watches in the Lachine line but, as previously found, quality and value are irrelevant to a representation concerning the usual and regular retail price.

<sup>9</sup> *American Broadloom Carpet Company*, Docket No. 6271 (1956).

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The above-quoted advertisement of respondents which was received in evidence as Commission Exhibit 1 contains a representation which, while not alleged in the complaint, was patently false in view of the undisputed facts in the case. The advertisement refers to all of the watches on sale as "Famous Watches" and also states, "The Famous Maker of these fine watches has retired from business. We promised not to mention this Famous Maker's name. Don't confuse these with ordinary watches. They are one of the finest makes in the world today!" The foregoing statements are obviously untrue with respect to the Greygor watches which were stamped with the Lachine name and mingled with the rest of the watches included in the sale. The statements that they were famous watches secured at a fraction of their cost from a famous maker who had retired from business, whose name had been promised not to be mentioned, and that they were not ordinary watches but one of the finest makes in the world, were uniformly untrue and false. As previously found, respondents had secured permission from Mr. Lashoff to purchase and label additional watches with the Lachine name. This, however, does not make the foregoing representation any less false. These representations, for reasons not explained in the record, were not alleged in the complaint nor litigated at the hearings and accordingly are not in issue herein and are not included in the order hereinafter. However, they unquestionably establish the falseness of respondents' representation as to the usual and regular price of these watches and the savings to be effectuated by the purchasers. Inasmuch as neither Mr. Lashoff nor respondents had ever sold these particular watches before, any representation concerning their usual and regular retail price must of necessity be false.

The reference in the advertisement to the original price of these "famous watches, one of the finest makes in the world," obviously could only refer to those watches acquired from the "famous maker who had retired from business," and could not by any stretch of the imagination be truthful representations with respect to watches acquired from other sources. The record establishes that respondents affixed price tags ranging from \$39.75 to \$59.50 to these so-called Lachine watches purchased from Greygor. A witness from the Greygor Company called by respondents testified that Greygor had never sold these particular styles to Fairfax before or since. Experts called by counsel supporting the complaint testified that one of these Greygor watches received in evidence as an exhibit would regularly at retail prices ranging from \$19.95 to \$28.50. Regardless

of at what price Greygor watches would normally retail, respondents' representation that the usual and regular retail prices of these watches were from \$39.75 to \$59.50 was false.<sup>10</sup>

The same conclusions apply with respect to respondents' representations concerning the savings to be effectuated, namely, \$14.00 to \$80.00 per watch, which merely computes for the customer the arithmetical differences between the claimed original prices and the sale price. Inasmuch as the prices represented as the usual and regular prices have been found to be false, it follows that the represented savings based thereon must also be false. The same facts which establish the falseness of the representation of the usual and regular retail price of the Lachine watches establish the claimed savings to be false, and the same facts which establish the falseness of the representation of prices with respect to the Greygor watches equally disprove the claimed savings thereon. Normally, of course, representations concerning regular and usual prices refer to those prices at which a respondent's products are regularly and usually sold at retail. Here, however, because respondents had never previously sold Lachine watches, and because they had acquired these watches from the former wholesaler thereof, as made clear by their advertising, the original usual and regular prices referred to must of necessity have been those of Mr. Lashoff. With respect to the Greygor watches, the representation was doubly false in that it falsely represented the source as well as the usual and regular retail prices.

### *C. Respondents' Contentions and Defenses*

In addition to denying the false representations previously found, respondents also contend that no order should be issued because the proceeding is moot, inasmuch as all of the Lachine watches have now been sold. This contention is without merit. It is well established that even the discontinuance and abandonment of the manufacture and sale of a product does not deprive the Commission of its discretion to issue a cease and desist order against future violations of the Act, especially in the absence of a strong showing that

<sup>10</sup> Even assuming, contrary to the decisional law, the propriety of the price tags attached by respondents to the Greygor watches, their own evidence reveals, at least in one instance, that such prices were in excess of the "usual and regular" prices or retail values contended for by respondents. One of the Greygor watches cost respondents \$13.05. It was undisputed, including evidence from respondents' witnesses, that the customary mark-up was 50% by the wholesalers and 100% by the retailer, plus in some cases an additional 10% to cover either taxes or trade-in allowances. Applying this to the \$13.05 results in a net of \$42.00, yet respondents placed a \$55.00 price tag on that Greygor watch.

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the practices are not likely to be resumed.<sup>11</sup> Here, respondents have not discontinued the business of selling watches, and the mere fact that in all probability they will not again sell Lachine watches would not in any way prevent them from engaging in the same type of representations with respect to other watches, now handled or subsequently acquired.

Respondents also contend that because counsel supporting the complaint offered no proof of participation by the individual respondents in the conduct complained of other than their status as officers and directors of Kay and Fairfax, any order issued should not be against such individual respondents. The complaint alleged and the answer admitted that the individual respondents are officers and directors of the corporations and direct, formulate and control their policies, acts and practices. It is well settled that under such circumstances the Commission properly may include such individuals in its cease and desist orders.<sup>12</sup>

*D. Concluding Findings*

A preponderance of the reliable, substantial and probative evidence in the entire record convinces the undersigned and accordingly it is found that respondents, by affixing price tags to the Lachine and Greygor watches in the course and conduct of their business in commerce, represented that such prices were the usual and regular retail prices when in truth and in fact such representations were false, misleading and deceptive, and by means of such practices, placed in the hands of retailers a means and instrumentality whereby they might deceive and mislead the purchasing public as to the usual and customary retail prices of respondents' products. It is further concluded and found that respondents, by disseminating in the course and conduct of their business in commerce newspaper advertisements containing original prices and savings to be effectuated, represented that such prices were the usual and regular retail prices and that such savings were available to purchasers, when in truth and in fact such representations were false, misleading and deceptive.

<sup>11</sup> *F.T.C. v. Goodyear Tire & Rubber Co.*, 304 U.S. 257 (1938); *F.T.C. v. Wallace*, 75 F. 2d 733 (C.A. 8, 1935); *Perma-Maid Co. v. F.T.C.*, 121 F. 2d 282 (C.A. 6, 1941); *Philip R. Park v. F.T.C.*, 136 F. 2d 428 (C.A. 9, 1943); *Gelb v. F.T.C.*, 144 F. 2d 580 (C.A. 2, 1944); *Deer v. F.T.C.*, 152 F. 2d 65 (C.A. 2, 1945); *Marlene's Inc. v. F.T.C.*, 216 F. 2d 556 (C.A. 7, 1954).

<sup>12</sup> *Standard Education Society v. F.T.C.*, 302 U.S. 12 (1937); *Standard Distributors v. F.T.C.*, 211 F. 2d 7 (C.A. 2, 1954).

*E. The Effect of the Unlawful Practices*

The acts and practices of respondents as hereinabove found have had and now have the tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to the usual and regular retail prices of respondents' watches and thereby induce the purchase of substantial quantities thereof. As a result, substantial trade in commerce has been and is being unfairly diverted to respondents from their competitors, and substantial injury has been and is being done to competition in commerce.

## CONCLUSIONS OF LAW

1. Respondents are engaged in commerce, and engaged in the above-found acts and practices in the course and conduct of their business in commerce, as "commerce" is defined in the Act.

2. The acts and practices of respondents hereinabove found are all to the prejudice and injury of the public and of their competitors and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Act.

3. As a result of the above-found acts and practices of respondents, substantial injury has been done to competition in commerce.

4. This proceeding is in the public interest and an order to cease and desist the above-found unlawful practices should issue against respondents.

## ORDER

*It is ordered,* That respondents, Kay Jewelry Stores, Inc., a corporation, and its officers, and Cecil D. Kaufmann, Joel S. Kaufmann, David R. Trattner, Benjamin B. Golding and Simon Hirsham, as officers of said corporation, and Fairfax Distributing Company, a corporation, and its officers, and Cecil D. Kaufmann and Joel S. Kaufmann, as officers thereof, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of watches or other merchandise in commerce, as "commerce" is defined in the Act, do forthwith cease and desist from:

1. Representing in any manner that certain amounts are the regular and usual retail prices of merchandise when such amounts are in excess of the prices at which such merchandise is usually and regularly sold at retail; and

2. Representing directly or by implication the savings to be effectuated by purchasers by means of prices represented as the usual

and regular retail prices of merchandise which are in excess of the prices at which such merchandise is usually and regularly sold at retail, or representing directly or by implication that any savings are afforded to purchasers of respondents' merchandise in excess of those actually afforded.

ON APPEAL FROM INITIAL DECISION

Per Curiam:

The issues raised on this appeal are essentially the same as those which were before the Hearing Examiner and considered by him in his initial decision. We are of the opinion that there is no error in his holding that the practices in question constitute a violation of Section 5 of the Federal Trade Commission Act and that an order to cease and desist should issue.

Illustrative of misrepresentation of usual and regular price and savings to purchasers, for instance, is the matter concerning 7-jewel watches. From the record it seems clear that many of the watches involved, namely, those which bore retail price tags of \$33.75 and were advertised by respondents as originally selling at that price, had never sold for more than a retail price of \$27.50. As emphasized by the Hearing Examiner in this connection, the basic issue presented relates to the "usual and regular price" of the products rather than to their value. Assuming that the addition of metal bracelets by respondents would increase the retail value of these watches, it is still apparent that the watches had not been sold by respondents or any one else for more than a previously preticketed price of \$27.50, and that there had been established no original or usual and regular price of \$33.75.<sup>1</sup>

The order of the Hearing Examiner does require modification, however, insofar as it is directed at named respondents in their individual capacities as distinguished from their capacities as officers of the corporate respondents. The Hearing Examiner based his conclusion of individual liability upon the fact that the complaint alleged and the answer admitted that the individual respondents are officers and directors of the corporations, and that said individuals formulate, direct and control the policies, acts and practices of the corporate respondents. The record is devoid of any other evidence or showing of circumstances to support a conclusion that individual liability should attach.

We do not consider the foregoing facts alone sufficient justification in this instance for including the officer respondents as re-

<sup>1</sup> Cf. In the Matter of American Broadloom Carpet Company, et al., Docket No. 6271 (1956).

spondents in their individual capacities. The Commission has wide discretion in determining the necessity of attaching individual liability to insure the full effectiveness of an order to cease and desist. But where there is no record evidence showing justification and where "no other circumstances appear pointing to the necessity of directing the order against these parties in their individual as distinguished from their official capacities,"<sup>2</sup> their inclusion as individuals should not be approved.<sup>3</sup>

As modified in accordance with this opinion, the initial decision is adopted as the decision of the Commission. An appropriate order will be entered.

## 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 determined, for the reasons appearing in the accompanying opinion, that respondents' appeal should be denied and that the order contained in the initial decision should be modified:

*It is ordered*, That, except to the extent indicated in the opinion, the appeal of respondents be, and it hereby is, denied.

*It is further ordered*, That the order contained in the initial decision be, and it hereby is, modified to read as follows:

"*It is ordered*, That respondents, Kay Jewelry Stores, Inc., a corporation, and its officers, and Cecil D. Kaufmann, Joel S. Kaufmann, David R. Trattner, Benjamin B. Golding and Simon Hirsham, as officers of said corporation, and Fairfax Distributing Company, a corporation, and its officers, and Cecil D. Kaufmann and Joel S. Kaufmann, as officers thereof, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of watches or other merchandise in commerce, as 'commerce' is defined in the Act, do forthwith cease and desist from:

"1. Representing in any manner that certain amounts are the regular and usual retail prices of merchandise when such amounts are in excess of the prices at which such merchandise is usually and regularly sold at retail; and

"2. Representing directly or by implication the savings to be effectuated by purchasers by means of prices represented as the usual

<sup>2</sup> In the Matter of Wilson Tobacco Board of Trade, Inc., et al., Docket No. 6262 (1956).

<sup>3</sup> Cf. In the Matter of Neuville, Inc., et al., Docket No. 6405 (1956); In the Matter of Maryland Baking Company, et al., Docket No. 6327 (1956).

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and regular retail prices of merchandise which are in excess of the prices at which such merchandise is usually and regularly sold at retail, or representing directly or by implication that any savings are afforded to purchasers of respondents' merchandise in excess of those actually afforded."

*It is further ordered*, That the findings, conclusion and order, as modified, contained in the initial decision be, and they hereby are, adopted as those of the Commission.

*It is further ordered*, That respondents, Kay Jewelry Stores, Inc., a corporation, and Cecil D. Kaufmann, Joel S. Kaufmann, David R. Trattner, Benjamin B. Golding and Simon Hirsham, as officers of said corporation, and Fairfax Distributing Company, a corporation, and Cecil D. Kaufmann and Joel S. Kaufmann, as officers of said corporation, 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, as modified.

## Complaint

IN THE MATTER OF  
THE BORDEN COMPANY ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF  
SEC. 2 (a) OF THE CLAYTON ACT

*Docket 6737. Complaint, Mar. 8, 1957—Decision, Nov. 13, 1957*

Consent order requiring a manufacturer and processor of fluid milk and other dairy products and two of its subsidiaries—one the successor of the other in handling such products in the areas concerned and with an annual business therein of approximately \$14,000,000—to cease discriminating in price in violation of Sec. 2(a) of the Clayton Act through charging customers in Wilmington, Del., for fluid milk prices substantially lower than those charged customers in Pennsylvania and New Jersey, and also through giving favored customers cash purchase discounts of 2%.

Before *Mr. Frank Hier*, hearing examiner.

*Mr. Lewis F. Depro* for the Commission.

*Mr. Cecil I. Crouse* and *Dewey, Ballantine, Bushby, Palmer & Wood*, by *Mr. John E. F. Wood*, of New York City, for The Borden Co.

*Fox, Rothschild, O'Brien & Frankel*, by *Mr. Daniel Lowenthal*, of Philadelphia, Pa., for Sylvan Seal Milk, Inc. and 612 Corporation.

## COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and more particularly designated and described hereinafter, have violated and are now violating the provisions of Section 2(a) of the Clayton Act (U.S.C. Title 15, Sec. 13) as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent The Borden Company, sometimes hereinafter referred to as respondent Borden, is a corporation organized and existing under the laws of the State of New Jersey, with its principal office and place of business located at 350 Madison Avenue, New York, New York.

Respondent Sylvan Seal Milk, Inc., sometimes hereinafter referred to as respondent Pennsylvania corporation, is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office and place of business located at 612 South 24th Street, Philadelphia, Pennsylvania. Said respondent was incorporated on April 13, 1956.