

a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF
THEODORE KAGEN CORP. ET AL.

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

Docket 6893. Complaint, Sept. 24, 1957—Decision, Nov. 19, 1959

Order requiring New York City importers, engaged in assembling watches and wholesaling them to watchmakers, to cease selling watch cases incorporating bezels composed of aluminum treated to simulate gold or gold alloy without clearly disclosing that the bezels were composed of base metal. Charges of falsely marking watch cases on the back as "water-resistant" and "water-protected," and with deceptive use of the word "manufacturers" on invoices and letterheads in connection with watch cases that they purchased from others, were dismissed.

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

Noble, Neuman & Moyle, of Washington, D.C., by *Mr. Ben Paul Noble*; and *Hoffman, Buchwald, Nadel, Cohen & Hoffman*, of New York, N.Y., by *Mr. Irving Margolis*, for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges that the respondents have engaged in certain misleading practices in connection with the advertising and sale of their watch cases, in violation of the Federal Trade Commission Act. After the filing of respondents' answer to the complaint, hearings were held at which evidence both in support of and in opposition to the complaint was received. Proposed findings and conclusions have been submitted and the case has been argued orally before the hearing examiner. Any proposed findings and conclusions not included herein have been rejected.

2. Respondent Theodore Kagen Corp., is a corporation organized and doing business under the laws of the State of New York, with its principal place of business at 48 West 48th Street, New York, New York. Respondent Theodore Kagen is president of the corporation and formulates, directs and controls its policies and practices. Respondent Theodore Kagen also does business under the name T. K. Co. Respondents are engaged in the sale of watch cases, the cases being sold to watch makers and to wholesalers of watch makers' supplies.

3. In the sale of their watch cases respondents are engaged in interstate commerce, selling and shipping their cases to purchasers located in various states of the United States other than New York. Respondents are in substantial competition with other corporations and individuals engaged in the sale and distribution of watch cases in such commerce.

4. Insofar as respondents' advertising and sales practices are concerned the complaint raises three issues: (1) whether respondents' representations that their watch cases are "water-protected" and "water-resistant" are true; (2) whether respondents' practice of selling watch cases containing bezels made of aluminum which has been so treated or processed as to have the appearance of gold is misleading to the public; and (3) whether respondents' representation that they are "manufacturers" is true.

5. As indicated above, respondents have represented that certain of their watch cases are "water-protected" or "water-resistant," the legend being stamped upon the back of the case. It should, however, be noted that use of the "water-protected" representation was discontinued by respondents some five years or more ago, and that since that time only the representation "water-resistant" has been used.

6. At the instance of the Commission, tests of some of respondents' cases were made for the purpose of determining whether the cases were as represented. The first of these tests was in April 1956, and the testing was done by I. D. Watch Case Company of Jamaica, Long Island, New York. At that time three cases (Commission Exhibits 1, 2 and 3) were tested. These cases bore the legend "water-protected" and, as under the trade practice rules promulgated by the Commission for the watch case industry (Commission Exhibit 11) the use of this term is tantamount to use of the term "water-proof," the cases in question were subjected to the "water-proof" test prescribed by the rules. This test is more severe than that prescribed by the rules for cases represented only as being "water-resistant." All three of the cases tested leaked, that is, they failed to pass the test.

7. The second test was also in April 1956 and by the same company. Here the three cases tested (Commission Exhibits 13, 17 and 18) were stamped "water-resistant" and the cases were tested in accordance with the standards prescribed by the trade practice rules for cases so designated. As noted above, this test is less severe than that prescribed by the rules for watch cases designated "water-proof" or "water-protected." Two of the cases (Commission Exhibits 17 and 18) passed the test, while the third (Commission Exhibit 13) failed.

8. The last test made at the instance of the Commission was

during the progress of the hearings. On this occasion four cases (Commission Exhibits 26, 27, 28 and 29) marked "water-resistant" were tested and all failed, that is, all four cases leaked. Here again the test prescribed for "water-resistant" watch cases was used rather than that prescribed for "water-proof" cases. The testing was done by Lucius Pitkin, Inc., of New York City, chemists and metallurgists, who also operate a testing laboratory.

9. There is sharp controversy over the adequacy of this test. It appears that actually two tests were made, the first being somewhat preliminary to the second. After the first or preliminary test, the four cases were found to contain water or moisture; however, it was discovered that the backs of the cases were loose and the test was therefore not considered a fair or proper test. The second test was made on the following day, after the cases had been subjected to a current of warm air for the purpose of drying them out, and after the individual performing the test had tightened the backs of the cases, using his hands and a small tool which he had improvised for that purpose. Again, all four cases leaked.

10. There is testimony on behalf of respondents that watch cases which contain water or moisture cannot be fully dried out by subjecting them to a current of warm air; that in order to thoroughly dry them the cases should be disassembled and new washers inserted. And particularly is there testimony that watch cases cannot be adequately tightened by hand, even though use be made of a tool such as that used here. The testimony is that in order to tighten a watch case adequately a vise and block (such as respondents Exhibits 6 and 7) must be used. This is what is known as "factory tightening" a case, and appears to be the method in common use in the industry.

11. At the instance of respondents, a test of twelve of their watch cases (respondents Exhibit 1A-L) was made by the United States Testing Company, Inc., of Hoboken, New Jersey, on May 19, 1958. All of these cases were marked "water-resistant" and the test appears to have been the appropriate one for cases so described. None of the twelve cases leaked, all passing the test. All of the twelve cases had been "factory tightened" by respondents in the manner described above before they were delivered to the Testing Company.

12. In this connection respondents Theodore Kagen testified that ordinarily their cases are not "factory tightened" before leaving respondents' place of business; that the reason for this is that the cases must be opened anyway by the purchaser (watch maker) in order that the works may be inserted and that the purchaser therefore prefers that the backs be left relatively loose; that if the case is "factory tightened" it is that much harder to open. After the watch

has been completed the watch manufacturer then proceeds to "factory tighten" the case.

13. Upon consideration of all of the evidence on the present issue, it is concluded that the charge in the complaint has not been sustained. The results of the first test made for the Commission by the I. D. Watch Case Company are largely academic, as the cases tested were marked "water-protected" and that designation was discontinued by respondents at least five years ago. The test here used was for "water-proof" cases, which is a more rigid and severe test than that for cases marked "water-resistant."

In the second test made by the I. D. Watch Case Company, this being a "water-resistant" test, two of the three cases tested passed the test satisfactorily.

As to the tests made by Lucius Pitkin, Inc., their probative value is weakened by two factors: first, the doubt which exists as to whether the cases were thoroughly dried out following the preliminary test in which the backs of the cases admittedly were too loose; and second, and more importantly, the doubt that the cases were adequately tightened before the final test. While the individual performing the tests unquestionably is well qualified in his own field, that of chemistry and metallurgy, he is not a watch maker and claims no special competency in that field.

Also, speaking generally regarding the Commission's tests, it appears questionable whether in any of the tests a sufficiently large number of cases were used. Only three cases were used in the first I. D. test, three in the second, and four in the Lucius Pitkin test. None of these would seem to be a sufficiently large number of cases to obtain fully reliable results.

It must also be remembered that twelve cases tested by the United States Testing Company at respondents' instance passed the test. This appears to be the only test in connection with which there is satisfactory evidence that the cases had been thoroughly tightened prior to the test.

14. Many of respondents' cases have backs made of stainless steel and bezels made of aluminum which has been so treated or processed that it has the appearance of gold. The backs are stamped "stainless steel back" but there is no marking on the bezels or elsewhere on the case indicating the true metal content of the bezels.

15. The sale and distribution of watch cases having bezels made of a base metal which has been so treated as to have the appearance of a precious metal, without disclosing the actual composition of such bezels, clearly has the tendency and capacity to mislead the purchasing public as to the content of the bezels. The practice serves also

Order

56 F.T.C.

to place in the hands of watch manufacturers and dealers, particularly retail dealers, an instrumentality whereby they may mislead or contribute to the misleading of the public.

16. In connection with the use of the name of the corporate respondent on their letterheads and invoices, respondents use also the legend "Manufacturers—Designers—Importers of Watch Cases—Dials—Hands." The complaint challenges the use of the word "manufacturers," charging that respondents are not in fact manufacturers but merely purchase their products from others.

17. Respondents' place of business comprises some 800 square feet of floor space, and their equipment includes presses, air machines, a friction press for inserting crystals, smaller crystal presses, printing machines, tools and dies, jigs for the manufacture of dials, a Swiss curving machine, a French printing machine, an air-compressing machine, and drills. Most of respondents' cases are imported in parts and assembled by respondents. Respondents at least manufacture crowns and dials. While the matter is not free from doubt, it is concluded that respondents' reference to themselves as manufacturers probably is not unwarranted.

CONCLUSIONS

The practice of respondents described in Paragraphs 14 and 15 is to the prejudice of the public and of respondents' competitors, and constitutes an unfair and deceptive act or practice and an unfair method of competition in commerce in violation of the Federal Trade Commission Act. The proceeding is in the public interest.

The other charges in the complaint have not been sustained.

ORDER

It is ordered. That the respondents, Theodore Kagen Corp., a corporation, and its officers, and Theodore Kagen, individually and as an officer of said corporation and doing business as T. K. Co., and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of watch cases in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Offering for sale or selling watch cases composed in whole or in part of base metal which has been treated to simulate precious metal, without clearly disclosing on such cases the true metal composition of such treated cases or parts.

It is further ordered. That as to all other issues the complaint be, and it hereby is, dismissed.

OPINION OF THE COMMISSION

By KERN, *Commissioner*:

Respondents are engaged in the interstate sale and distribution of watch cases. In his initial decision, the hearing examiner found that the allegations of the complaint charging misrepresentation by respondents by designating the corporate respondent as a manufacturer on invoices and letterheads and through marking their watch cases as "water-resistant" or "water-protected" were not sustained by the evidence. Counsel supporting the complaint appeal from the latter ruling dismissing the charges concerning the capacity of the cases to resist moisture and water.

The hearing examiner further held that the record supported the complaint's additional charges of deception by failure to disclose the metal composition of the bezels of certain watch cases. The order contained in the initial decision would require respondents to cease and desist from offering for sale or selling in commerce any watch case composed in whole or in part of base metal which has been treated to simulate precious metal unless marked to clearly disclose the base metal content of such treated case or part. Respondents have appealed from that holding and order.

A substantial portion of respondents' watch cases are sold to watch assemblers and others who, after placing watch movements in them, distribute the watches to the purchasing public through retailers or otherwise. The major components of a watch case include the back and the front, or bezel, which contains the crystal. The backs are stainless steel and stamped as "Stainless Steel Back." It is undisputed that the bezels used on one category of respondents' cases are composed of aluminum which has been subjected to an anodizing process resulting in a yellow color. Such bezels do not contain any appreciable amount of precious metal. No marking appears on the bezels or elsewhere on the cases which identifies the bezels as composed of base metal.

Respondents contend that the initial decision's finding that their failure to reveal that the bezels are composed of base metal has had the tendency and capacity to mislead the purchasing public into the belief that the bezels are precious metal is contrary to the weight of the evidence. Respondents' brief emphasizes that a witness called by counsel supporting the complaint testified that the bezels did not look like gold to him and that another trade witness identified the bezels merely as yellow in color without, however, describing them to be gold in color. The testimony of these witnesses taken as a whole, however, does not detract from the hearing examiner's conclusions

that such bezels have the appearance of being composed of precious metal. The first witness referred to, namely, the one conceding that the bezel of the watch case exhibit did not look like gold to him, added in effect that he was able to distinguish it from gold due to his training and experience in fields of watch manufacturing and designing. Moreover, he elsewhere stated in his testimony that the bezels were colored to look like gold.

The witness who identified the bezels as yellow in color without expressly stating that they were gold in color, further testified that he thought when he purchased such cases from respondents that they were rolled gold plate; and he was under the impression that rolled gold bezels could be imported at the price which he was paying. Moreover, respondent Theodore Kagen identified certain of his bezels as having the color of gold and testified that another composed of base metal plated with chrome looked like silver. Hence, instead of establishing appearance dissimilarities, the testimony clearly supports the conclusions that the bezel components used in various of respondents' watch cases have the appearance of being precious metal.

In further support of their contentions that the burden of proof has not been met, respondents stress that no evidence of consumer deception was received. They also argue that because the backs of the cases are truthfully marked as composed of base metal, namely, stainless steel, and because no markings of weight or fineness indicative of precious metal content are used on the cases, all possibilities of deception resulting from the appearance of the bezels are foreclosed. It is not controlling, however, that no evidence was introduced relating to specific watch transactions in which purchases were made under erroneous impressions that respondents' bezels were made of precious metal. Where the exhibits themselves sufficiently demonstrate their capacity to deceive, neither customers who have actually been misled nor experts need be called to testify. *Zenith Radio Corporation v. Federal Trade Commission*, 143 F. 2d 29 (7 Cir., 1944); *Royal Oil Corporation v. Federal Trade Commission*, 262 F. 2d 741 (4 Cir., 1959).

Representative samples of respondents' watch cases were received into the record. The bezel is a prominent component of the case and of the finished watch. Our own examination of those exhibits confirms that the bezels of many of respondents' watch cases are to all appearances composed of precious metal. We have no doubt that a substantial segment of the watch buying public would find it impossible to distinguish such bezels from those made of precious metals. In these circumstances, the fact that the backs are disclosed as being base metal or that no karat markings appear on the cases is immaterial.

That respondents' bezels, due to their appearance, constitute a deceptive instrumentality and have the capacity to engender impressions that they are composed of precious metal in the absence of clear disclosure to the contrary, is thus clearly established by the oral testimony and by the mute testimony afforded by the exhibits. Precious metals are held in high esteem for use in watch cases. The record also contains evidence that cases so composed are more serviceable than base metal ones and better withstand the corrosive effects of body acids and salts. When the appearance of a product is such that the consuming public is unable to distinguish it from competing merchandise which is the subject of marked consumer preference, or finds it difficult to make such distinctions, the public interest requires that such simulative wares be properly labeled by producers to prevent distributors from exercising deception in their resale. *Mary Muffet, Inc. v. Federal Trade Commission*, 194 F. 2d 504 (2 Cir., 1952). Respondents' contentions of failure of proof are rejected.

Respondents also request dismissal of this proceeding on grounds that it is a common and accepted practice in the watch and watch case industry to designate the backs as composed of base metal but to omit any markings in reference to other parts similarly made of base metal. Assuming but not however finding that this situation prevails, a method patently unfair or deceptive to the public does not cease to be so merely because those engaged in competitive and related businesses may not be deceived or adversely affected by the misleading practices. *Federal Trade Commission v. Winsted Hosiery Company*, 258 U.S. 483 (1922); *Ford Motor Company v. Federal Trade Commission*, 120 F. 2d 175 (6 Cir., 1941).

The remaining contentions of error which are argued by respondents in the brief have been considered. Inasmuch as they are kindred in vein to those discussed above, such additional contentions are likewise rejected.

Our disposition of respondents' appeal warrants brief reference to our prior decision of July 24, 1959, in the matter of *Swiss Watch Case Corporation, et al.*, Docket No. 7040. There, we dismissed without prejudice charges of deceptive practices in the sale of watch cases. The bezels involved included those coated with chrome which counsel supporting the complaint contended simulated silver and stainless steel and those flashed with yellow coloring which he contended simulated gold. The watch case exhibit on which counsel centered and focused his appeal from the hearing examiner's ruling in reference to the gold colored bezels was marked "stainless steel back" and other inscriptions elsewhere on the back included the words "base

metal." In recognition of such added disclosure of base metal composition and other record matters, we rejected arguments that there was adequate showing of likelihood of the bezels being passed off as composed of gold.

Our rejection in the *Swiss Watch* case of counsel's companion contentions of adequate showing of statutory violation through failure to mark the chrome plated bezels likewise was based upon the record. We additionally expressed grave doubts that the language of the complaint in that case adequately raised issues relating to the unlawful passing off of the bezels as composed of precious metals or to deception through failure to mark the watch cases as to their foreign origin. The latter matter also was treated as an issue in the initial decision, but was ruled on adversely to the respondents in that proceeding. In the light of the foregoing, we dismissed the complaint without prejudice. In so doing, however, we were confronted with a difficult problem both as to the sufficiency of the pleadings and as to the quantum of evidence to support the allegations pertaining to that issue, even if we decided that it was properly raised. In that connection we noted in the opinion:

Doubts can be reasonably entertained if * * * [issues] relating to passing off of the bezels as gold or silver were adequately raised by the pleadings. We have power to amend complaints when warranted and to remand proceedings to hearing examiners for reception of such additional evidence as may be necessary to provide adequate bases for informed determinations of questions presented for review. This is a costly and time-consuming procedure, however. Moreover, there is no express showing here that the scope of respondents' commercial activities is such that continuation of these proceedings would serve the public interest. In the situation thus presented, the case is being dismissed without prejudice to the right of the Commission to institute further proceedings or take such further action in the future as may be warranted by then existing circumstances.

Here, in contrast to the *Swiss Watch* matter, the issue of deception by failure to mark the bezels is squarely raised by the pleadings. Moreover, in addition to the physical exhibits relied upon exclusively by the hearing examiner in the *Swiss Watch* case, there is here a much more comprehensive record including collateral testimony by a skilled member of the industry that he was deceived by respondents' bezels. Our determinations there and here have been made with due regard to the records in the respective cases and no conflict of legal principles is presented by the differing dispositions of the two cases.

As mentioned before, the appeal of counsel supporting the complaint excepts to the hearing examiner's dismissal of the charges in this proceeding pertaining to misuse of the terms "water-resistant" and "water-protected." Evidence relating to several groups of tests

514

Syllabus

was introduced by counsel supporting the complaint and respondents also presented evidence respecting tests conducted by an independent laboratory. A detailed discussion of the factual issues inhering in the test procedures would unduly lengthen this opinion. We think, however, that the hearing examiner's conclusions of failure of proof have sound basis in the record and that the dismissal of these charges of the complaint was proper.

The cross-appeals are denied and the initial decision is adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon the cross-appeals filed by the respondents and by counsel supporting the complaint from the initial decision of the hearing examiner; and the Commission having rendered its decision denying said cross-appeals and adopting the initial decision as the decision of the Commission:

It is ordered, That the respondents named in the caption hereof 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.
