

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.

IN THE MATTER OF
SHEFFIELD MERCHANDISE, INC., ET AL.

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

Docket 6627. Complaint, Sept. 11, 1956—Decision, Mar. 4, 1960

Order dismissing—because of industry-wide discontinuance of the challenged practices—complaint charging a distributor with falsely advertising and marking one-jewel watches as "jeweled," and failing to disclose limitations of the advertised guarantee.

Mr. Frederick McManus supporting the complaint.

Mr. William Simon, and *Mr. Robert Wald*, of *Howrey & Simon*, of Washington, D.C. and *Mr. Bernard B. Smith* and *Mr. Leonard H. Steibel* of New York, N.Y., for respondents.

INITIAL DECISION OF JOHN B. POINDEXTER, HEARING EXAMINER

PRELIMINARY STATEMENT

The complaint in this proceeding charges that the respondents named in the caption hereof violated the provisions of the Federal Trade Commission Act in operating their businesses of selling and distributing watches to jobbers and dealers for resale to the purchasing public. The complaint was issued on September 11, 1956 and respondents filed an answer on March 5, 1957. Respondents denied some of the allegations of the complaint and also filed a motion to dismiss on the grounds that (1) respondents had voluntarily abandoned the practices complained about in March and April, 1956, respectively, approximately five months prior to the issuance of the complaint, (2) that they have not been resumed, (3) there is no reasonable likelihood that respondents will resume such practices, and (4) everything which could be accomplished by a cease and desist order has already been accomplished by the voluntary action of respondents, under the doctrine announced by the Commission in *Bell & Howell Co.*, (D. 6729), *Argus Cameras, Inc.*, (D. 6199), and *Wildroot Company, Inc.*, (D. 5928). On May 5, 1958, after receiving in evidence an agreed stipulation as to the testimony of the indi-

vidual respondents, the undersigned hearing examiner issued an initial decision dismissing the complaint based upon findings that the practices complained about had been voluntarily discontinued by the voluntary acts of respondents and there was no reasonable likelihood of their resumption. Counsel supporting the complaint did not appeal from this initial decision. However, the Commission, under the authority of Section 3.21(a) 3 of the Rules of Practice for Adjudicative Proceedings, ordered the case placed on its own docket for review. Thereafter, on July 5, 1958, the Commission issued an opinion which reversed the hearing examiner in dismissing the complaint and remanded the case to the hearing examiner for further proceedings.

Further hearings have been held and completed before the undersigned hearing examiner at which oral testimony and documentary evidence were received in support of and in opposition to the allegations of the complaint. Proposed findings of fact, conclusions of law and order have been filed and submitted by respective counsel. All findings of fact and conclusions of law not specifically found or concluded herein are rejected. Upon the basis of the entire record, the hearing examiner makes the following findings of fact, conclusions of law drawn therefrom, and order:

FINDINGS OF FACT

1. The respondent Sheffield Merchandise, Inc., is a corporation, incorporated under the laws of the State of New York, with its office and place of business located at 663-5th Avenue, New York, New York. Henry A. Federman and Else Jedwabnick, individuals, are officers of said corporation and also co-partners trading and doing business under the name of Saxony Watch Company at the same location as that listed above.

2. Each of the respondents named herein are engaged in the sale and distribution of watches to jobbers and retailers for resale to the purchasing public. The watches sold by respondent Sheffield Merchandise, Inc., a corporation, are sold direct to department and retail jewelry stores under the trade name "Sheffield" and are what respondents designate as their "prestige" watches. The watches sold by the individual respondents Henry A. Federman and Else Jedwabnick, doing business as Saxony Watch Company, are sold under the trade name "Saxony" to jobbers, who in turn sell to chain stores, etc.

3. The respondents are engaged in the sale and shipment of Sheffield and Saxony watches in interstate commerce and their activities in connection therewith are subject to the jurisdiction of the Federal

Trade Commission. The complaint alleges two violations of the Federal Trade Commission Act. The first concerns respondents' admitted former use of the word "jeweled" imprinted on the faces of their Sheffield and Saxony one-jewel watches, it being alleged that, as generally understood in the *industry*, [emphasis supplied] a jeweled watch is one which contains at least 7 jewels, each of which serves a mechanical purpose as a frictional bearing. In support of this allegation counsel supporting the complaint offered the testimony of four District of Columbia watchmakers or watch repairmen, Messrs. Burk, Kahn, Lisenbee, and Myerson. This examiner has carefully considered their testimony and demeanor while testifying. Upon the basis of their testimony as a whole, this examiner is not able, in good conscience, to make a finding of fact that, as generally understood in the industry, a jeweled watch is one which contains at least 7 jewels, each of which serves a mechanical purpose as a frictional bearing. These witnesses did not testify as to what the understanding in the watch industry a "jeweled" watch is. Mr. Kahn was frank enough to say he did not know, but he, together with the other three witnesses mentioned above, testified that they personally preferred a watch with seven or more functioning jewels. This preference is based on economics. They do not repair watches with less than 7 jewels. It would not be profitable to repair watches with less than 7 jewels. The retail selling price of a one-jewel watch ranges from approximately \$5.00 to \$6.00. The watchmaker or repairman cannot afford to charge the usual price of \$5.00 to \$10.00 for repairing a watch which originally cost only \$5.00 or \$6.00 because the customer would be outraged. On the other hand, the watchmaker or repairman would lose money if he charged less than the usual price of \$5.00 to \$10.00 for repairing the one-jewel watch. Consequently, they do not repair one-jewel watches. Generally, the greater the number of jewels the watch contains, the higher the original cost of the watch; the higher the original cost of the watch, the higher the charge the watchmaker or repairman may demand for repairing the watch.

4. To rebut the testimony of these four witnesses, respondents offered the testimony of two witnesses, Messrs. Paul and Balmages, both watchmakers by trade. Mr. Paul testified that any watch which contains a functional bearing jewel may properly be called a "jeweled" watch; he had never heard of any understanding in the watch industry that a "jeweled" watch must contain at least 7 jewels. The other witness, Mr. Balmages, is the United States Customs Examiner of watches at the Port of New York, a graduate of the Elgin Watchmaker's College and watchmaker for many years

prior to entering Government service. Mr. Balmages has been employed by the United States Government as an expert in the appraising of watches in the Bureau of Customs for approximately 18 years. In the opinion of this examiner, Mr. Balmages was free from any taint of prejudice or bias in his testimony. Mr. Balmages testified that, during the course of his duties, he has observed one, two, three, four, five, six, seven or more jewel watches imported into the United States and that, in his opinion, any watch with one jewel or more which serves as a frictional bearing may properly be designated as "jeweled." This opinion comports with reason and logic. This examiner gives considerable weight to the testimony of Mr. Balmages. He is a disinterested witness and unlike the four witnesses who testified in support of the complaint, was candid and forthright in his testimony. Counsel supporting the complaint has the burden of proof in establishing the allegations of the complaint by a preponderance of the reliable, probative, and substantial evidence. Certainly this burden has not been met. It is found, therefore, that the allegation of the complaint with respect to the understanding in the watch industry as to what may properly be called a jeweled watch has not been met.

5. The second violation of the Act alleged in the complaint concerns respondents' representation in advertisements that their "Saxony" watches were guaranteed for one year without disclosing the terms, conditions and limitations of the guarantee. The evidence shows, and respondents admit that, prior to April, 1956, respondents advertised on counter cards in stores that their Saxony watches were "guaranteed for one year," whereas such advertising did not disclose that respondents made a \$1.00 charge for servicing said watches. (Sheffield has never advertised any guarantee and has not used counter display cards.) It is found, therefore, that the allegations of the complaint with respect to respondents' guarantee of their Saxony watches have been established.

6. (a) The respondents have renewed their motion to dismiss the complaint on the grounds set forth in their original motion. As stated by then Chairman Gwynne, speaking for the Commission in *Argus Cameras, Inc., supra*, it is not the usual procedure for the Commission to dismiss a complaint and should not be done unless there is a clear showing of unusual circumstances which in the interest of justice require it. What are the unusual circumstances, if any, present in this case? With respect to respondents' abandonment of the practices complained about, whether they have been resumed, the likelihood of their being resumed, and the unusual circumstances, if any, which exist in this case, the examiner finds as follows:

(b) During the entire period of the Commission's investigation of this matter from September, 1953 to September, 1956, the only question raised by the Commission with respect to the use of the word "jeweled" by respondents occurred in an exchange of letters between the Commission's Division of Trade Practice Conferences and respondent Federman in the latter part of 1953. In a letter from the Trade Practice Conferences dated February 15, 1953, respondent Federman was questioned concerning a number of practices then prevalent in the watch industry. Among those was a request to advise the Commission as to whether respondents' "jeweled" watches contained only one jewel. On October 20, 1953, Federman replied, pointing out that with the exception of the use of the word "jeweled," none of the practices were followed by respondents. On October 28, 1953, the Division of Trade Practice Conferences acknowledged that respondents did not engage in the bulk of the practices listed in its original letter and again noted respondents' use of the word "jeweled," suggesting that the designation of one-jewel watches "may lead the purchasing public to believe that these watches have the conventional number of jewels, i.e., seven or more." On November 9, 1953, Federman replied, pointing out that the use of the term "jeweled" was an industry-wide practice and that his views were, if its use was to be eliminated, it ought to be approached on an industry-wide basis.

(c) On December 3, 1953, the Division of Trade Practice Conferences acknowledged Federman's letter and advised that the matter would receive the Commission's *further consideration*. [Emphasis supplied.] From that date until the issuance of the complaint herein no further inquiry was ever made by a representative of the Commission with reference to respondents' use of the term "jeweled" nor was such practice at any time thereafter questioned, although, from time to time, during the next two and one-half years, a representative of the Federal Trade Commission sought and obtained additional information.

(d) During the latter part of 1955 watch trade journals reported that the Federal Trade Commission had questioned the use of the term "jeweled" in connection with the sale of one-jewel watches and advertisements containing the words "one year guarantee" or "fully guaranteed" without revealing the limitations upon such guarantees. Since respondents' use of the term "jeweled" had been the subject of correspondence with the Division of Trade Practice Conferences and the use of the words "guaranteed for one year" had been the subject matter of an affidavit by respondents' attorney and conferences in Washington with representatives of the Commission,

respondents instructed their attorney to ascertain whether respondents should seek further conferences with representatives of the Commission as to their use of the terms. Respondents' attorney then advised respondents that he had conferred with a representative of the Commission on January 3, 1956, as to whether conferences with representatives of the Commission in Washington would be appropriate but said representative informed respondents' attorney that such a conference was not necessary and nothing further should be done unless respondents received further word from the Commission. During January, 1956, respondents received several communications from their suppliers in Switzerland advising respondents that the Federal Trade Commission had disapproved the use of the term "jeweled" on one-jewel watches. Accordingly, in February, 1956, respondents decided to abandon and, in March 1956, completely abandoned the use of the words "jeweled" on their one-jewel watches and instructed their Swiss manufacturers to discontinue such designations. Respondents' Swiss manufacturers complied with such instructions. In April, 1956, respondents also eliminated the words "one year guarantee," "fully guaranteed," or similar terms from all of their advertising and printed material, including counter display cards. To summarize, it is undisputed that respondents unqualifiedly abandoned the practice of designating the word "jeweled" on the faces of their one-jewel watches in March, 1956, and discontinued advertising their guarantee in the manner complained about in April, 1956, approximately six and five months, respectively, prior to the issuance of the complaint herein. The record contains the affidavits of the individual respondents Federman and Jedwabnick, officers of the corporate respondent Sheffield and partners in Saxony attesting to the facts found above and giving their respective promises that the practices complained about will not be resumed in the future. At the hearings, counsel supporting the complaint did not dispute the facts which have been found in Paragraph 6 herein nor the facts stated in said affidavits.

7. In the opinion issued by the Commission on July 7, 1958, reversing the hearing examiner in dismissing the complaint, the following reasons were listed for reversing the examiner:

(a) "The respondents have never unequivocally receded from their position that use of the practices involved did not result in deception of confiding buyers."

(b) There is no assurance other than respondents' promise, even though made in good faith, that they will not resume the practices complained about in the future for competitive reasons, because of the "continued existence in the industry of the practices that led

respondents initially to employ the questioned representations. In such setting, respondents for compelling competitive reasons would be free again to adopt the same or similar practices, absent some effective legal restraint."

At hearings held subsequent to the remand, the respondents also offered undisputed testimony that the practices complained about do not now exist in the industry and have not existed for the past two years. With respect to the first reason given by the Commission for reversing the examiner, quoted above, that "respondents have never unequivocally receded from their position that use of the practices involved did not result in deception of confiding buyers," respondents contend that (1) they could not recede from the position since they never assumed such a position, having, in their answer, neither admitted nor denied that the representations resulted in deception of the purchasing public, stating that they had no knowledge of fact or information sufficient to form a belief as to the effect of the practices alleged, and up to that time, the question of the lawfulness of the practices had not been litigated, and (2), such a standard is contrary to the decision of the Court of Appeals for the Seventh Circuit in *Stokely-VanCamp v. F.T.C.*, 246 F. 2d 458 (1957), where the court held that the unwillingness of a respondent to concede illegality was, as a matter of law, irrelevant, and that to penalize a respondent for such a stand would be a policy abhorrent to our sense of justice.

8. The examiner will not discuss in detail the evidence which shows that the practices complained about do not continue in the watch industry. Suffice it to say that the Commission has obtained cease and desist orders or stipulations against most of respondents' competitors with respect to one or both of the practices complained about. In July, 1956, the members of the Roskopf Association, which consists of all Swiss manufacturers of one-jewel watches, discontinued the practice of imprinting the word "jeweled" on the faces of all watches containing less than 7 jewels manufactured by members of said Association, and respondents purchase all of their one-jewel watches from members of said Association. The practice of advertising the guarantee complained about was discontinued by the watch industry approximately two years ago. Accordingly, the examiner finds that the practices complained about have not been engaged in by the watch industry for approximately two years and there is no reason, competitive or otherwise, for respondents to resume such practices.

9. To recapitulate, the examiner finds (1) that respondents voluntarily abandoned the practices complained about in March and April,

1956, respectively, some five or six months prior to the issuance of the complaint herein on September 11, 1956, and they have not been resumed during such three year period, (2) that there is no reasonable likelihood that respondents will resume such practices, and (3) that everything which could be accomplished by a cease and desist order has already been accomplished by the voluntary act of respondents.

CONCLUSIONS

The examiner concludes that the facts and unusual circumstances of this case bring it within the doctrine pronounced by the Commission in *Argus Cameras*, supra, *Wildroot Company, Inc.*, supra, and *Bell & Howell*, supra, of dismissing complaints where the practice has been voluntarily discontinued by the act of respondent and there is no reasonable likelihood of its resumption. This also comports with the latest decision of the U.S. Court of Appeals for the Seventh Circuit on the subject, *Stokely Van-Camp, Inc., et al, v. F.T.C.*, supra. Everything which could reasonably be accomplished by a cease and desist order has already been accomplished by the voluntary act of respondents. Accordingly,

It is ordered, That the complaint herein be, and the same hereby is, dismissed, without prejudice to the right of the Commission to take such action in the future as the facts and circumstances may warrant.

OPINION OF THE COMMISSION

By the Commission:

This matter is before the Commission upon appeal of counsel supporting the complaint from the hearing examiner's initial decision. The complaint which issued September 11, 1956, charges respondents with misrepresentation through the use of the word "jeweled" in the marking and advertising of one-jewel watches and with deception through failure to adequately disclose the full terms, conditions and limitations of the advertised guarantee on these watches. Appeal is taken from the order dismissing both allegations on the ground of abandonment and from the finding that the evidence fails to sustain the allegation with respect to the use of the word "jeweled."

We have previously considered an appeal from the hearing examiner's action granting respondents' motion to dismiss on the ground of abandonment. Although we had written assurances by the respondents that the practices had been discontinued, we were not satisfied from the record then before us that the practices would

not be resumed. One of the points mentioned in our decision to remand was the absence of a showing that industry-wide business conditions had so changed as to warrant a conclusion that respondents for competitive reasons would not engage again in the alleged practices. We think the record now fully supports such a conclusion. Of particular significance is the evidence before us that members of a Swiss association of watch manufacturers make the only one-jewel watch movements sold in this country and that in July, 1956, all members of this organization discontinued their practice of marking the word "jeweled" on such watches. This is supported by the testimony of a United States Customs examiner of watches who testified in January, 1959, that it had been over two years since the word "jeweled" had appeared on these imported one-jeweled watches.

Also of importance is the testimony of the manager of the merchandising division of a trade organization representing a substantial number of department and specialty stores throughout the nation. He stated that he is familiar with the merchandising practices and with the stock of these stores and that he has not seen one-jewel watches marked or advertised as "jeweled" in the last several years. He further testified that he has not seen any unqualified advertising of guarantees in the watch industry for a corresponding period of time.

This evidence as to existing conditions in the watch industry is uncontradicted. Considering this evidence together with the other facts of record as to respondents' discontinuance of the practices, we conclude that the appeal of counsel supporting the complaint from the hearing examiner's order must be denied. In reaching this conclusion, we make no determination on the merits of this case.

The order in the initial decision and those findings and conclusions on which the order is based are adopted as the decision of the Commission. An appropriate order will be entered.

ORDER DISMISSING COMPLAINT

This matter having come before the Commission upon the appeal of counsel in support of the complaint from the hearing examiner's initial decision dismissing the complaint; and

The Commission, for the reasons stated in the accompanying opinion, having denied the aforesaid appeal:

It is ordered, That the complaint in this proceeding be, and it hereby is, dismissed, without prejudice, however, to the right of the Commission to issue a new complaint or to take such further or other action against the respondents at any time in the future as may be warranted by the then existing circumstances.

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

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

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

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

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

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

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

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

PRELIMINARY STATEMENT

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

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