It is ordered, That the respondent's appeal be, and the same hereby is, denied.

BENRUS WATCH COMPANY ET AL.

Docket 7352. Order, June 9, 1961

Interlocutory order granting respondents' motion to dismiss paragraph 7 of the complaint of Jan. 8, 1959, and denying motion to dismiss other allegations.

Respondents move to dismiss the Commission's complaint after counsel in support of the complaint has rested his case.

As stated by counsel for respondents, the complaint should be dismissed for the following reasons:

1. A prima facie case has not been established with regard to Paragraph Four of the complaint since counsel in support of the complaint has failed to prove that the respondents' pre-ticketed prices are fictitious and are not regularly and customarily charged in consumer sales.

2. A prima facie case has not been established with regard to Paragraph Five of the complaint since counsel in support of the complaint has failed to prove that the trade-in of a watch does not result in a saving to the consumer and that the pre-ticketed price is not usually and regularly charged absent a trade-in.

3. A prima facie case has not been established with regard to Paragraph Six of the complaint since counsel in support of the complaint has failed to prove that the presentation of an allowance certificate did not effect an actual saving to the customer and the pre-ticketed price was usually and regularly charged without the presentation of such a certificate.

4. A prima face case has not been established with regard to Paragraph Seven of the complaint since counsel in support of the complaint has failed to prove that certain low-priced models of respondents' products were not available for purchase and that consumers believed such models were available.

5. A prima facie case has not been established with regard to Paragraph Eight of the complaint since counsel in support of the complaint has failed to prove that respondents have not honored their guarantees in accordance with their terms.

6. A prima facie case has not been established with regard to Paragraph Nine of the complaint since counsel in support of the complaint has failed to prove that respondents have represented, except in one instance, that their watches are shock proof or that such representation, if made, was misleading in the circumstances of this case.

7. A prima facie case has not been established with regard to Paragraph Ten of the complaint since counsel in support of the

complaint has failed to prove that respondents' watches do not contain gold or gold alloy or that any watch composed solely of base metal has been considered by consumers to consist of gold or gold alloy.

8. A prima facie case has not been established with regard to Paragraph Eleven of the complaint since counsel in support of the complaint has failed to prove the metal composition of respondents' chrome top cases or that consumers are mislead by the appearance of such cases.

The crux of the charges alleged in the complaint appears to be those set forth in Paragraph Four thereof which are as follows:

Respondents, for the purpose of inducing the purchase of their products, have engaged in the practice of attaching or causing to be attached price tickets to their said products upon which certain amounts are printed. Respondents have also disseminated, or caused to be disseminated, price lists, catalogs, brochures, leaflets, newspaper and magazine advertisements, and other forms of advertising, in which certain amounts are shown as the retail prices of respondents' products. Respondents thereby represent, directly or by implication, that said amounts are the usual and regular retail prices of said products. In truth and in fact said amounts are fictitious and in excess of the usual and regular retail prices of said products.

As to Paragraph 4 above, the evidence adduced by counsel supporting the complaint appears in some measure to establish, in the absence of rebuttal evidence, that some retail sales of Benrus watches were made at the manufacturer's ticketed price and other retail sales, equally substantial, were made at prices less than the manufacturer's ticketed price. The general retail price structure appears to have no uniformity except that some retailers having a discount policy consistently sell at prices less than the manufacturer's ticketed price, whereas other retail merchants sell at the best obtainable price not exceeding the manufacturer's ticketed price, or consistently sell at the ticketed price. It is unnecessary for counsel supporting the complaint to establish that Benrus watches were predominantly sold at less than the ticketed price. It is sufficient if it may be inferred from the evidence adduced that a substantial number of retailers of Benrus watches sell at prices less than the price ticketed by Benrus. In order to establish a prima facie case in this respect, it is sufficient if the sales as evidenced indicate a pattern that such a practice exists even though there may be evidence of the fact that Benrus watches are sold not infrequently at the ticketed price.

The foregoing proof appears to establish prima facie evidence of the fact that the manufacturer's ticketed price is not the usual

and regular price in the sense that the price pattern as evidenced indicates the nonexistence of a usual and regular price. Under these circumstances, unless explained by the respondents in going forward with the evidence, it would appear that the price tickets provided by the respondents are meaningless and if so, fictitious. This inference is nonetheless reasonable because there is a growing number of discount houses in the market place which sell at less than the manufacturer's ticketed price. The effect of this increasingly competitive market for goods that appear to be sold at reduced prices, which is a matter of common public knowledge, may in and of itself have caused manufacturer's pre-ticketing at a specified price to be misrepresentative of a regular and usual price. However, the intention of the manufacturer is not an essential issue. The real issue would seem to be whether or not the manufacturer's indicated price is a misrepresentation in substantial segments of the market where it is usually and regularly not the adopted retail price. See *Household Sewing Machine Company*, Docket 6148, 52 FTC 250; *The Orloff Company, Inc.*, Docket 6184, 52 FTC 709; *The Clinton Watch Company*, Docket 7434, order issued July 10, 1960; *The Baltimore Luggage Company*, Docket 7683, Initial Decision issued September 28, 1960. See also Sec. VIII of the Commission's Guides Against Deceptive Price, adopted October 2, 1958.

As regards paragraphs of the complaint numbered five, six, eight, nine, ten and eleven, it appears there is some evidence from which it can reasonably be inferred under the circumstances as evidenced that a prima facie case has been established to an extent requiring the respondents to go forward with the evidence.

As regards Paragraphs Seven of the complaint, there appears to be no evidence sufficient to establish a prima facie case.

A full opinion evaluating the evidence in more detail than herein set forth will be included in the Initial Decision following the conclusion of the hearings in the instant case. Accordingly, it is

Ordered, That respondents' motion to dismiss Paragraph Seven of the complaint is herein and hereby granted, and it is further

Ordered, That respondents' motion to otherwise dismiss the complaint, or allegations of the complaint, is herein and hereby denied without prejudice to the renewal of motion to dismiss the complaint upon the conclusion of the respondents' case.

THE PROCTER & GAMBLE COMPANY

Docket 6901. Order and opinion, June 15, 1961

Order remanding case to hearing examiner for further evidence concerning the competitive effects of the challenged conglomerate acquisition of Clorox Chemical Co., the dominant concern in the liquid bleach field, including market share data in specified geographical regions.

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